



# Association of **Lawyers for Children**

Promoting justice for children and young people

## **RESPONSE OF THE ALC**

### **TO THE LEGAL SERVICE COMMISSION'S CONSULTATION:**

### **CIVIL BID ROUNDS FOR 2010 CONTRACTS**

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## **A. INTRODUCTION**

The ALC is a national association of lawyers working primarily in the area of public child care law. It has over 1200 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Associate members include legal practitioners, students and academics, Children's Guardians, social workers and other professionals such as medical experts. Its Executive Committee members are drawn from a wide range of experienced practitioners practising in different areas of England and Wales, including London, Birmingham, Manchester and Leeds, as well as in shire counties and small rural areas. Several leading members are specialists who have over 20 years experience in child law, including local government legal services, and several hold judicial office.

The Association is not an organisation representing children's lawyers or arguing for the interests of lawyers, but an organisation of lawyers representing children. It exists to promote access to justice for children and young people within the legal system in England and Wales. Within that framework, its aim is to develop and improve the practice of lawyers in meeting the needs of children who become involved in legal processes by promoting standards of best practice and interdisciplinary training.

## **B. GENERAL OBSERVATIONS ON THE CONSULTATION**

1. This document sets out the response of the Association of Lawyers of Children to the Civil Bid Rounds for 2010 contracts Consultation published by the Legal Services Commission. Our comments and responses must be considered in the light of our specialist area of interest namely the representation of children and young people involved in family court proceedings. We have, therefore, focused our responses on the parts of the document which deal specifically with family category work although, having spoken with other niche and specialist areas, as civil Legal Aid providers we believe that our observations will be of equal weight in relation to those areas.

2. We fully understand that the Legal Services Commission's principal concern is to ensure that public money is spent in a rational and proportionate way: ensuring value for money and quality representation for the general public seeking access to legal advice and the Court system. However, we are extremely concerned that the effect of the Legal Services Commission's proposals is entirely the opposite. By seeking to simplify the provision of services and move away from the specialist supplier base the Commission is

almost inevitably accepting a downgrading in the quality of advice available to clients, as many areas of advice will fall to be provided by unqualified and poorly supervised staff. It goes without saying that the quality of representation then available to clients will suffer.

3. We note that the Legal Service Commission's wish is to continue to seek to achieve more integrated services that better reflect the multiple problems that clients are likely to experience and to enable access to services without the need for referral (paragraph 2.8). Whilst that might sound like an ideal principle it fails to take into account that the majority of referrals in the family law category come about because of the specific need of the individual client. Whilst some parents involved in family proceedings may have additional difficulties in respect of general social welfare issues such as debt, housing and welfare benefits those areas of advice can more than adequately be provided (as they are now) by referral to equally specialist local services. It is of concern to us that the many years of hard work by specialist child panel practitioners up and down the country to achieve specialist knowledge will be wholly undermined by finding themselves in an environment where niche practices specialising in the representation of children and young people have no place in the Legal Services Commission framework. This will inevitably lead to the loss of these specialist providers since they will simply not be able to survive within a market which is pressing towards an ever greater degree of generalism. The Legal Services Commission's belief that it is open to such practitioners to merge or enter into consortia with other providers simply fails to acknowledge the level of specialism required to provide advice to children and young people. Once lost, that skills base can never be replaced.

4. Whilst we have no issue with the Legal Services Commission's wish to ensure that an individual client is able to receive advice from an individual supplier from Legal Help through to representation level we fail to see how that seamless service can be assured in the long term by a move towards civil contracting in the way expounded in the consultation document. We are concerned that despite suggestions setting a minimum ratio of supervisors to case workers the financial realities of the civil contract procedure will inevitably mean that many cases are handed by a lower level of fee earner. Ultimately quality providers simply won't exist.

5. We have previously expressed grave concern that the consequences for the long term provision of suitably experienced and qualified lawyers in the area of children law will inevitably be undermined by disincentivising any younger member of the profession from seeking to specialise and learn the additional skills necessary to be a good and effective

Children Panel lawyer. The Legal Services Commission fail to take into account that by downgrading the level and remuneration for work they are inevitably reducing the incentives to work in publicly funded areas of law. The Consultation takes no account of the initiatives within, either, the Public Law Outline or those being considered in the private law arena. The success of these initiatives depends on the availability of specialist and qualified representation for people involved in the Family Justice System. It is of great concern to us that whilst it is accepted by the Judiciary and others involved in the Public Law Outline initiative and other similar initiatives depend entirely upon the availability of experienced lawyers the Legal Services Commission has taken no account of that in its proposals.

6. We deal with those matters of consultation which are of particular concern to our members but wish to respond in detail to the Consultations objectives as set out in paragraph 3.14 as we do not believe that the proposals will in any way achieve the objectives the Commission states as being their aim.

7. The Commission's first stated objective is to ensure integrated services to clients by increasing the proportion of providers offering the full range and breadth of advice including both public and private family work. We fail to see how it is in the interests of children and young people, let alone their parents, to be advised in extremely complex distressing and emotional proceedings by lawyers who have little experience of this area of work. Whilst it might seem attractive to be able to consult a family lawyer on any family issue, the reality is that the complexity of the legal framework in which the family justice system is now placed means that any such client will be receiving a very poor service indeed. Given current public opinion and lack of confidence in the Family Justice System we are extremely concerned that misconceptions about the family justice system and levels of complaints and concerns of poor representation will inevitably be increased by giving the client no option but to instruct a general family practice with no stated or established specialism. If the Commission truly wish to ensure quality ( and save money) they need to maintain a framework were cases are conducted by people who know what they are doing.

8. The second objective is to ensure clients are able to reach an appropriate service either locally or through reasonable travel. Practitioners working in the area of children and young persons representation have long stated that geographical restrictions on representation are of little or no meaning. Many clients will be referred from a significant distance. It is the general practice of most Child Panel practitioners to adopt a method of

taking instructions and advising which is suitable to that individual client. This can involve the use of technology such as email and telephone or meeting clients at distances from an office in an environment where they feel comfortable. By seeking to limit contracting to defined geographical areas it again seems to us that this is a simplistic mechanism by the Legal Services Commission to reduce the number of suppliers within any given area, without taking into account the reality and complexity of the provision of advice for children and young people. Of particular concern is the effect on the NYAS service.

9. The Commission's third stated objective is to award contracts only to providers meeting quality thresholds, to help safeguard the quality of advice clients receive. We are extremely concerned that the consultation will achieve the exact opposite. We fail to see how it will be possible to maintain quality thresholds in large departments with a heavy emphasis on unqualified staff and a high ratio of new matter starts to individual fee earners and a lower ratio of supervision. The combination of this consultation and the effects of decreasing fixed fees for areas of work will inevitably mean that the commercial reality for many law firms is that publicly funded work could only be done by unqualified individuals. This is a move that we deplore and one which as an Association we have challenged. Our Association has long expounded the need for quality representation particularly in the field of children and young persons representation, but also for their parents and extended family members involved in public law and complex private law proceedings. The Consultation makes no allowance for this.

10. The fourth stated objective is to ensure that providers are able to bid for a sufficient volume of work to enable delivery of a full breadth of services that are regularly available and accessible to clients. It is extremely difficult in a specialist area such as public law children work to state a level of matter starts which accurately reflects the reality of the case load that most of our members carry. Many of our member practices spread throughout the country are small niche providers with perhaps one or two key legal personnel. Under their existing contracts they may have only a very small number of matter starts. From the Legal Services Commission's assessment approach it would appear that they fall well below what is seen as a "sufficient volume of work". The reality is quite different, as they are providing specialist advice to a clearly defined client group. By moving to bigger "factory farm" type environments the Legal Services Commission is effectively forcing those niche and specialists practices out of business.

11. The fifth stated aim is to ensure that the CLS funding is distributed within the budget available, something which we of course accept. That appropriate access is

achieved and focused in procurement areas and categories of law where client priorities are identified. We have already stated our concern that the effect of procurement areas will be quite damaging for niche and specialist practices. Potentially, in large urban areas, committed Children Panel lawyers may lose out to larger “factory farm” general family practices. The representation of children and young people, and the involvement of specialist lawyers in complex private law cases where issues of domestic violence, sex abuse or intractable contact issues have been identified as key Government priority areas. We therefore fail to see why the Legal Services Commission has not recognised that specialist representation for these client groups is most likely to achieve positive and safe outcomes for them and their children.

12. The remaining three objectives deal with the administrative process of the bidding procedure and the contract provisions. These are matters which we feel are best commented on by other representative bodies but would again state the consequence of a complex and lengthy procurement procedure is that the smaller specialist provider will face a hard challenge in mounting a bid against the larger, more “Tesco law” type bidder. From the Legal Services Commission’s perspective, these larger bidders may appear to offer simplicity, a broad range of services and a single supplier contract. However, we believe that they will wholly fail to provide quality of representation, safe guard the interests of children and young people and engage in the legal process in a personal and reflective way as is demanded by the often intimate and very personal nature of the proceedings in which our members are involved.

13. We therefore state very clearly our concern that by offering family category work on a generalist level the existing quality provider base will be reduced and ultimately it will be the individual clients and indeed the public purse which will suffer from the likely increase in ongoing protracted and distressing proceedings before the Court. A reduction in the experienced supplier base will also mean that the initiatives in the Public Law Outline and other moves to harmonise and increase the quality of the Family Justice System will fail. Accordingly, whilst the Legal Services Commission may have balanced its books and managed its money, it will not have managed the needs of its clients.

## RESPONSE TO CONSULTATION QUESTIONS

### **Q.6 Are the minimum new matter starts required set at the right level in each category? If not, why – for example, is there a case for setting lower new matter start sizes in rural areas?**

- 6.1 In terms of public law work, the figures of 5 NMS (except children only providers) and 10 certificates seems reasonable to us, bearing in mind the need to strike a balance between doing sufficient work to gain and maintain appropriate experience, and the need to ensure a sufficient number of providers are available in each area.
- 6.2 However, in terms of private law work the figure of 100 NMS is likely to be unachievable by:
- Sole practitioners in category A or B areas who do not wish to limit themselves to doing children work only;
  - Many smaller firms in category B areas;
  - Some of the smaller firms in category A areas.
- 6.3 The mere fact of doing large number of legal help matters is not a proxy for delivery of a quality service. That depends mainly on the quality and experience of the fee earners delivering the service. A small firm might have only 40 NMS, e.g. being dealt with by a legal executive who also assisted a solicitor with case preparation of public law cases. Is it the intention to prevent service delivery in such a way, or by sole practitioners, so that contracts can go to large firms with high gearing and minimum supervision levels?

### **Q.7 Is the minimum supervisor to case worker ratio set at the correct level? Are there, for example, some categories where processes are simpler, and, as such require less supervision?**

- 7.1 We think that the setting of a minimum ratio across all categories is altogether too blunt an instrument to achieve the desired result.
- 7.2 In paragraph 4.38 you acknowledge that the relevant experience of caseworkers and supervisors is a factor, but this is not reflected in the proposals.
- 7.3 The minimum casework hours to qualify as a family supervisor in fact only equates to about one day per week, given the average hours which family solicitors work, so there is also going to be a considerable difference, depending on active caseload, in the number of persons who might be effectively supervised.
- 7.4 If a single minimum standard is to be adopted, we would prefer to see it set at a lower ratio than a higher (i.e. 1:4 rather than 1:8). This would hopefully discourage a “factory” approach in which large numbers of relatively inexperienced paralegals are employed, with minimum levels of supervision.

### **Q.12 Do you agree that specifying referral to family support services for family contracts is the best way of addressing the support needs of family clients?**

- 12.1 It is clearly helpful and important for providers to have available as much information as possible about the various support services to which are available in the particular client's geographical area.
- 12.2 We would support any proposals which led to useful information of this sort being readily available to providers, and being regularly updated.

**Q.18 Does the type of presence proposed in a procurement area for family and social welfare law advice achieve the right balance of ensuring client access to service whilst being practical for providers.**

- 18.1 We do not agree with the proposals, set out in paragraphs 5.31 and 5.32 whereby providers will be expected to have a permanent presence in each procurement area which they bid for. This is notwithstanding the clarification given by the LSC in contract meetings that a provider can accept referral from out of area.
- 18.2 There are, as we observe in answering question 25 below, both small and large providers whose reputation results in their having referrals either across a conurbation, regionally or (e.g. NYAS) nationally.
- 18.3 If clients choose to go "out of procurement area" this might be because the journey, due to the vagaries of geography and transportation available, is an easier one than going to someone practising in the procurement area within which they reside. If they choose to go "out of procurement area" because they wish to be represented by a particular provider (e.g. a specialist referral) then the principle of ensuring client access to service is not engaged at all – in that particular client's eyes the relative ease of access to a provider has been overridden as a factor by other considerations.
- 18.4 However, although we understand that a provider can accept referral from outside a procurement area, this concession is meaningless if the amount of work that a provider can do overall is governed by the bid quantity available in a particular procurement area, to be shared out among all successful providers within that area.

**Q.25 Do you agree with our proposed approach to setting certificated matter starts in family?**

- 25.1 We agree that it is appropriate to set a *minimum* number of public law Certificated Work matter starts in each year (paragraph 5.64), but would be concerned if this were to be regarded as a contractual term, rather than a matter for monitoring and provision of appropriate explanations. The number of certificated matter starts in a given area depends on the policy of the local authority towards issue of proceedings. Such policies are, as is well known, subject to considerable and marked fluctuations.
- 25.2 In respect of setting *maximum* numbers we do have concerns around the stated intention in paragraph 5.64 to exercise such powers where "firms have very high proportions of expensive cases". This seems to us to be yet another indication that the LSC are only interested in dealing with, and fostering providers who fit a profile based on mathematical averages. This takes no account of:

- Small providers who, because they are known for their experience and competence, are requested whether by the court or by CAFCASS to take on particularly complex work;
- Larger providers who are similarly well known in their region and may have a number of experienced panel solicitors, or indeed, as with NYAS are known on a national basis, and so attract “heavy-end” cases.

**Q.36 Do you agree that the LSC needs to guard against bids to deliver services that will not have the capacity to do the work bid for? To you think that applying a maximum number of matter starts bid per FTE will assist in that?**

36.1 Yes, we do think the LSC needs to guard against such bids.

36.2 We do not know how the number of 150 matters per FTE has been calculated in Family Private matters. It would help to have some explanation of this. Presumably the LSC has profiled various sizes of firm in different locations in order to be in a position to test bids from current providers as suggested in paragraph 6.34.

**Q.38 Do you think the proposed selection criteria for each category are the best way to differentiate between bids?**

38.1 We understand from information provided at consultation events for service providers that suppliers who are able to offer both family and social welfare categories would be preferred in a tie-break situation.

38.2 We would strongly disagree with such an approach. It would enable experienced and specialist providers to be outflanked in bidding by providers whose approach to delivery of services and quality we have already referred to in answering questions 6,7, and 36 above.

**Q.40 Do you agree with the proposal to remove experts’ cancellation and administrative fees from the scope of legal aid funding in all civil cases and to cap rates for experts’ travel and waiting time?**

40.1 We agree with the proposals set out in paragraph 7.7 which we regard as long overdue. The pressure on the time of competent expert witnesses, as with lawyers, is so great that we find it difficult to believe that such persons are not readily able to fill the space arising from cancellations with other work. In frustration at the current situation, some of our members have indeed taken, where practicable, to requiring an expert to sit in their waiting room or outside court if they insist on claiming a short-notice cancellation fee – anecdotally we understand that this approach is highly effective!

40.2 We acknowledge of course that it will be important to consider the responses of the community of expert witnesses to these proposals. We would be interested to understand the reasons for any objection to such proposals.

40.3 It will also be important to ensure that such changes are understood within the community of expert witnesses, if they are to be implemented.

40.4 However, we would be concerned if the LSC were proposing to go beyond these modest improvements. In what ways do the extent of these changes, which seem perfectly clear as they stand, require to be further defined? (*"We shall define the extent of these changes ..."* paragraph 7.8)

**Q.41 Do you agree that change of name work should be made available only by telephone?**

41.1 We do not agree with this.

41.2 We do not accept the assertion in paragraph 7.14 that *"changes of name rarely present legal issues"*. There is extensive caselaw, and these issues frequently arise in cases which are already proceeding under public funding certificates.

41.3 Has the LSC analysed the relevant files to see what percentage of level 1 cases involved name changes with the consent of all persons with parental responsibility? Name changes effected without such consent lead to all sorts of difficulties subsequently, with the potential for further and expensive litigation.

41.4 We would see more merit in a proposal to restrict face to face level 1 work to cases where the assisted person was unable to obtain consent from some one with parental responsibility, but the corollary of that ought to be that telephone advice should **not** be available where it appears that the assisted person seeks to change a child's name without the consent of a person having parental responsibility, and that such persons should immediately be referred to a face to face supplier.

**Q.44 Do you agree that these proposals allowing providers to apply for extra new matter starts without going through a bid round gives a reasonable amount of flexibility for providers while maintaining the principle of open competition for new work?**

44.1 Self-evidently.

44.2 We would prefer to see flexibility built into the contract itself, as well as a proposed degree of flexibility exercisable in the way proposed, e.g.

- in the figures as agreed in the first instance with each provider, i.e. a *minimum of x* starts and a *maximum of y* starts;
- longer contracting periods to allow providers to build up the teams required to deliver services in a particular field, and to offer continuity, stability, and a proper opportunity for business planning;
- different minima and maxima from year to year within the contract period, to reflect progress in building up the required teams.

**Q.45 Do you agree that contractual KPIs focusing on delivery of quality of work, value for money and access to clients are appropriate?**

45.1 Self-evidently there needs to be some mechanisms in place for ensuring that legal services are delivered to a reasonable standard, that the LSC is not being overcharged, and that services are available for the clients who need those services.

- 45.2 However, our acknowledgement of that is not being taken, in any way, as an endorsement of any particular KPIs. So much depends on what these are, how they are defined (witness the considerable problems which have arisen over outcome codes), and what sanction regime is proposed.
- 45.3 Some aspects of service delivery and access for clients are, we would suggest, areas where the LSC itself needs to consider carefully its own performance and own KPIs. We have already drawn attention to the lamentable performance record of the LSC in relation to handling applications from providers, and the consequences of delays on the delivery of good quality work and indeed outcomes for children. Data now published on the LSC's own website indicates that the backlog in processing applications, claims and correspondence submitted by providers is of the order of 1,000 working days. We do not think that the contracting proposals are going to improve the availability of service in the family law field unless and until the LSC gets its own house in order.

**Q 50 Do you consider that the impacts on experts are justifiable in ensuring sustainable access to legal services for clients?**

- 50.1 Yes, so far as they are set out in paragraph 7.7.
- 50.2 No, insofar as the LSC may be contemplating removing certain disbursements, such as independent social work fees, from scope.

**Q.51 Do you have any comments on any prospective impacts of these proposals on clients or providers?**

- 51.1 We consider that these proposals will, for the most part have a negative impact on both clients and providers.
- 51.2 Clients will find it more difficult to obtain access to legal advice and representation. We think it likely that waiting times to see a solicitor will grow. We think it almost inevitable that problems of conflict of interest, coupled with a reduced number of local firms offering a public law service, will mean that many clients will have to seek legal representation out of area.
- 51.3 In place of the reasonable mix of different types of provider (by size and specialism) which has grown organically over the 17 years since the Children Act 1989 came into force, these changes will drive good providers out of the marketplace and leave only those providers who are prepared to adapt to the LSC's vision of large organisations, using high gearing under minimum levels of supervision.
- 51.4 On the specific issues raised as to limiting payments on account, and the effect on rural communities, please see the answers to questions 53 and 57 below.

**Q.53 Do you have any comments on any prospective impacts on providers resulting from the introduction of a limit on the amounts of payments on account that organisations may have?**

- 53.1 We are unclear as to the reasons behind the proposals set out in paragraph 8.23, nor how the figure of 120% has been arrived at. There are perfectly valid reasons why claim levels in certificated work can vary from year to year, and the variances are likely to be greater if the provider is a sole practitioner or small firm. E.g.
- The work in a relevant area might have expanded (and this is likely to be a significant factor under the proposals being considered in this consultation);
  - Last year's claims might have been depressed, by reference to work in progress, due to delays in the assessment and payment of substantial bills (generally wholly outside the provider's control).
- 53.2 Surely account managers can confidently be left to seek explanations where necessary?
- 53.3 Such a system is likely to have a serious impact on providers' cash flow.
- 53.4 Such a system, which looks at the overall figures across a particular provider, would also wreak havoc with the provider's internal assessment of its fee earners' performance. Such performance is assessed by reference both to work in progress and money received. If the money is not coming in, it is going to be extremely time consuming and difficult to gauge whether this is due to a problem with the performance of the fee earner, or due to the capping procedures.

**Q.56 Do you have any comments on any prospective impacts of these proposals on small firms?**

See the answer to question 53 above.

**Q.57 Do you consider there to be any adverse impacts on clients or providers in rural communities in the proposals outlined in the consultation paper? Is there anything more that you suggest the LSC does to take account of this group?**

- 57.1 To the extent that providers in rural communities are likely to be worse affected by these proposals, and accordingly more likely to cease to provide publicly funded services, both providers and clients in rural communities will be adversely affected.