Response of ILPA and PLP to the Ministry of Justice's Consultation

Immigration Legal Aid: A consultation on new fees for new services

Background

The Immigration Law Practitioners' Association ('ILPA') is a professional association and registered charity, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

Public Law Project ('PLP') is an independent national legal charity. We are researchers, lawyers, trainers and public law policy experts. The aim of all of our work is to make sure that state decision-making is fair and lawful and that anyone can hold the state to account. For over 30 years we have represented and supported people marginalised through poverty, discrimination or disadvantage when they have been affected by unlawful state decision-making. Public Law Project responds to consultations, policy proposals and legislation which have implications for public law remedies, access to justice and the rule of law. We provide evidence to inquiries, reviews, statutory bodies and parliamentary committees, and we publish independent research and guides to increase understanding of public law.

To assist us to prepare this response, ILPA held a Legal Aid Working Group meeting with ILPA members; PLP and Young Legal Aid Lawyers ('YLAL') ran a focus group; PLP and ILPA took part in the MoJ's roundtable(s); and ILPA circulated a survey.

Introduction

1. This is a response to the Consultation[1] by the Ministry of Justice ('MoJ') in relation to the following proposals, detailed at paragraph 4 of the Executive summary of the Consultation:

> 'a) The introduction of new fixed fees for online system appeals at the First-tier Tribunal which do not reach a hearing; we are proposing a fee of £669 for asylum cases and £628 for non-asylum cases.
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> b) The introduction of new fixed fees for online system appeals at the First-tier Tribunal which do go to hearing; we are proposing a fee of £1,009 for asylum cases and £855 for non-asylum cases.
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> c) The introduction of a new escape threshold for online system appeals, set at twice the value of the relevant fixed fee.
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> d) To remunerate advice provided to recipients of the new Priority Removal Notice at hourly rates.
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> e) The introduction of a new bolt-on fixed fee for advice on referral into the National Referral Mechanism of £75.
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> f) To remunerate new age assessment appeals work at the existing hourly rate payable for Licensed Work in the First-tier Tribunal.
>
> g) To remunerate work on the rebuttal mechanism introduced through the Home Office's new asylum differentiation process at hourly rates and gather data to inform a future fixed fee for this work.'

2. We also provide responses to Questions 13 to 16 relating to the impact and equalities assessments.

3. Our responses to Questions 1 to 3 of the Consultation should be read in conjunction with the responses of ILPA[2] and PLP[3] to the MoJ's Call for Evidence on Immigration Legal Aid Fees and the Online System in December 2021.

4. Provision of legal aid to individuals who seek redress is not simply a matter of compassion, it is a key component in ensuring the constitutional right of access to justice, itself inherent in the rule

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[1] Ministry of Justice, 'Immigration Legal Aid: A consultation on new fees for new services' (13 June 2022) <https://www.gov.uk/government/consultations/immigration-legal-aid-a-consultation-on-new-fees-for-new-services> accessed 2 August 2022 (hereinafter 'Consultation').

[2] ILPA, 'ILPA's Response to MoJ Call for Evidence: Immigration legal aid fees and the online system' (2 December 2021) <https://ilpa.org.uk/ilpas-response-to-moj-call-for-evidence-immigration-legal-aid-fees-and-the-online-system-2-december-2021/> accessed 2 August 2022.

[3] Public Law Project, 'Public Law Project Response: Immigration legal aid fees and the online system: Call for Evidence' (December 2021) <https://publiclawproject.org.uk/content/uploads/2022/08/220804_LA-Consultation-for-website.docx> accessed 4 August 2022.

of law.[4] The courts have repeatedly upheld the principle that a failure to provide legal aid can amount to a breach of fundamental rights.[5] We welcome the laudable commitment and intention expressed by Tom Pursglove MP in the foreword of the Consultation, to 'ensure legal aid practitioners are adequately remunerated for the immigration and asylum work they do' and to 'ensure fair and equitable payment and continued access to this important service'.[6] However, our concern lies with whether those commitments will be ensured, in practice. We are concerned that some of the proposals may negatively affect, and that not enough is being done to address, the financial viability and sustainability of the legal aid market in immigration and asylum law. If the system is not sustainable, there will not be providers of 'this vital support'; lay persons will be without legal representatives to bring 'claims as early as possible, driving efficiency and ensuring fairness and certainty'; and thus the failure to adequately reform the legal aid system may impact access to justice.[7]

5. It is notable that the Consultation is entirely silent on a number of matters needed to secure the sustainability of the sector, which must be urgently considered by the MoJ to ensure Tom Pursglove MP's commitments are carried out:

- expanding the scope of legal aid, to new areas other than those prescribed in the Nationality and Borders Act 2022, such as to bring back within the scope of legal aid human rights immigration cases based on the right to respect for private and family life under Article 8 of the European Convention on Human Rights;

- raising hourly rates, which were introduced on 1 October 2007[8] and have not risen, but were further cut in 2011,[9] which in practice means that their value has decreased and this fall will be exacerbated by the increase in inflation and the cost of living crisis;

- reforming the legal help system: in today's money the fixed legal help rate is £263 for asylum and £149 for non-asylum immigration.[10] Consideration should be given to remunerating legal help at hourly rates to provide a clear singular method of remuneration for Stages 1 and 2. Alternatively, or in the interim, there should be parity between the legal help and the controlled legal representation escape fee threshold: it should be set at the same lowered and mathematically justified multiplier;

- accommodating the move towards remote working;

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[4] Echoing the words of Lord Reed in *R (Unison) v Lord Chancellor* [2017] UKSC 51 at §66.
[5] *R (oao Gudanaviciene & Others) v Director of Legal Aid Casework and Lord Chancellor* [2014] EWCA Civ 1622; 'Spending of the Ministry of Justice on legal aid' House of Commons Library briefing, (October 2020) <https://researchbriefings.files.parliament.uk/documents/CDP-2020-0115/CDP-2020-0115.pdf> accessed 2 August 2022, [1.2].
[6] Consultation, 2.
[7] ibid.
[8] The Community Legal Service (Funding) Order 2007.
[9] The Community Legal Service (Funding) (Amendment No.2) Order 2011 reduced the fees and rates payable in the 2007 Order by 10%. The Civil Legal Aid (Remuneration) Regulations 2013 parallel the fees in the 2011 Order.
[10] The fixed fee is £413 for asylum and £234 for non-asylum immigration. It was set in 2007 at £450 and reduced in 2011 to £413. £450 in 2007 is now worth £613.76. There has been a 36.39% increase in prices. Using the Bank of England, 'Inflation Calculator' <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator> accessed 4 August 2022.

- reforming Exceptional Case Funding (ECF): extensive research demonstrates the extent to which the ECF scheme creates an unnecessary and harmful barrier to justice for individuals within the immigration system; contributes to making the legal aid scheme for providers unviable as a whole; and, that it cannot be justified in economic terms when grant rates for immigration are so high;[11]

- addressing advice deserts in England and Wales, to ensure there is surplus capacity to meet demand in new areas;[12]

- addressing limited capacity of immigration and asylum legal aid providers, including in areas which are not advice deserts; and

- addressing cash flow problems of providers created by the rigid structure of the legal aid system, by including more billing stages so that providers can claim their profit costs at regular intervals and do not suffer as a consequence of the 'glacial pace of decision-making' by the Home Office.[13]

6. Legal aid rates have only decreased since they were set nearly 15 years ago, despite £1 in 2007 costing £1.36 in 2021,[14] and according to the Bank of England, consumer price inflation is at

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[11] Kristen Hudak and Dr Emma Marshall, 'The case for broadening the scope for immigration legal aid' (Public Law Project 2021) <https://publiclawproject.org.uk/content/uploads/2021/04/Legal-aid-briefing.pdf> accessed 3 August 2022, 5.

[12] Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) <https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf> (accessed 9 August 2022); J. Wilding, M. Mguni, T. Van Isacker, *A Huge Gulf: Demand and Supply for Immigration Legal Advice in London* (2021) <https://www.phf.org.uk/publications/a-huge-gulf-demand-and-supply-forimmigration-legal-advice-in-london/> (accessed 9 August 2022); Jo Wilding, *The Legal Aid Market* (2021, Bristol University Press); Jo Wilding, *No access to justice: How legal advice deserts fail refugees, migrants and our communities* (2022, Refugee Action) <https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/628f50a1917c740a7f1539c1_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf> accessed 5 August 2022.

[13] House of Commons Home Affairs Committee, 'Channel crossings, migration and asylum: first report of session 2022-23' *HC 199* (12 July 2022) <https://committees.parliament.uk/publications/23102/documents/169178/default/> accessed 3 August 2022, 5. The ICIBI reported that adult asylum claimants who received an initial decision in 2020 waited an average of 449 days for that decision, and unaccompanied asylum-seeking children waited 550 days. ICIBI, 'An inspection of asylum casework (August 2020-May 2021)' (November 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034012/An_inspection_of_asylum_casework_August_2020_to_May_2021.pdf> accessed 3 August 2022, [3.2]. In ILPA's Call for Evidence in December 2021, it recommended the LAA and MoJ 'permit providers to make an 'early claim', similar to that under legal help, following the respondent's review. At this point, it will be clear whether the respondent intends to defend the appeal. If she does, it may be many weeks or months before the appeal is heard and decided. Under the current system, providers cannot claim profit costs, unlike disbursements, until the appeal has concluded. Therefore, it may be a long time before providers are paid, yet they are expected to pay counsel's fees, which are part of their profit costs save for the fixed fee for advocacy, and invoices for disbursements such as experts. As an additional recommendation, disbursements could be billed once cases reach a particular stage in addition to the specific timeframes stipulated in the Standard Civil Contract Immigration Specification.'

[14] Bank of England, 'Inflation Calculator'< https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator> accessed 4 August 2022.

9.4%[15] and is likely to increase to 11%[16] by autumn of this year. In practice this means that legal aid lawyers are experiencing yet another cut in funding. Legal aid rates have always been very low. However, the disparity between the rates of a private high street practitioner and legal aid practitioner is increasing. The effect of this is unduly stringent for legal aid practitioners and should not be ignored. It is reducing the availability of publicly funded advice, as publicly funded work is becoming less sustainable. The most experienced advisors find that to remain financially viable they must focus on private and judicial review work. The less well paid, but often complex, work often falls to the junior end of legal aid practitioners, and this may be inappropriate if they do not have the knowledge, skills, experience, expertise or support to handle complex cases involving vulnerable individuals. Moreover, it may be unaffordable for any practitioner, particularly a junior practitioner who is not independently wealthy and who may be paying off student debt, to live based on pay received for legal aid work.

7. We may not see strikes, as we now see with respect to criminal legal aid, but rather immigration and asylum legal aid provision may wither away, with vulnerable persons who cannot afford private representation going without any legal representation due to practitioners refocusing their practices on higher paying work. ILPA has consistently heard from referrers of the lack of capacity of legal aid providers (both firms and charities) to take referrals for simple initial asylum claims, and, of course, this has been a longstanding issue for fresh claims and complex human rights cases. Loss of expertise in these complex areas of law will take years to restore and rebuild, as practitioners are unlikely to return to a poorly paid field, and many existing practitioners cannot afford to recruit, train or retain junior practitioners. Accordingly, failure to act now will have long term consequences.

8. It must be acknowledged by the MoJ that legal and policy changes of the government, in its hostile environment, withdrawal from the EU, continuous changes to the Immigration Rules, and recent changes to the asylum system, such as the inadmissibility regime and the UK-Rwanda Asylum Partnership Agreement, are increasing work and litigation for stretched practitioners. The proposals in this Consultation, such as responses to PRNs, age assessment appeals, and rebuttals to argue for full refugee status, only address some of the additional work created by the Nationality and Borders Act 2022 in asylum and modern slavery cases. These systemic changes create a clear case for the MoJ supporting the legal sector, not just to survive but to grow to accommodate the increasing work and declining capacity of existing providers.

9. This Consultation, which is an attempt to improve the legal aid system in a piecemeal fashion, will not correct these fundamental issues because it fails to address many current difficulties with the system, and instead further complicates it. Promises of future reviews are insufficient, particularly with the rising cost of living crisis, as it is easy to ignore a failing system once it is in place.

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[15] Bank of England, 'What is inflation?' (last updated 17 June 2022) <https://www.bankofengland.co.uk/knowledgebank/what-is-inflation> accessed 3 August 2022.

[16] Graeme Wearden, 'Bank of England says inflation will hit 11% after raising interest rates to 13-year high – as it happened' *The Guardian* (16 June 2022) <https://www.theguardian.com/business/live/2022/jun/16/bank-of-england-interest-rate-decision-markets-pound-ftse-business-live> accessed 3 August 2022.

10. The Lord Chancellor has powers to make arrangements for civil legal services under section 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), to ensure fulfilment of the duty in section 1. We recommend that the Lord Chancellor urgently use those powers to make arrangements to secure the availability of legal aid in immigration and asylum across England and Wales. The proposals within this consultation are insufficient to do so. Financial support for both provision of new immigration and asylum legal aid and training and recruitment of practitioners is urgently needed to address the deficit in supply.

11. ILPA and PLP have focussed in this response on questions to which they have sufficient knowledge, expertise and data to reply. The lack of response to any specific questions should not be taken as indicating that no issues arise in relation to the matter.

Section 1: Remuneration for immigration and asylum appeals in the First-tier Tribunal

Question 1: Do you agree with our proposals for new fixed fees for asylum and non-asylum appeals? If no, please explain why and suggest an alternative.

12. No. We disagree with your proposals.

13. ILPA warned of the effect of introducing a fixed fee regime in the December 2021 Call for Evidence:

> *'Legal aid practitioners must be adequately remunerated if they are to fearlessly represent the best interests of their clients without allowing financial pressures to compromise the level of preparation, representation, and client care that they can provide in the reasonable time allotted by the fee. Due to the increased front-loaded work in the new system, if the same number of representatives have conduct of the same number of cases, they would have less time to devote to each case, which can result in poorer quality work, missed deadlines, and decreased client care. It is in the interests of justice that higher quality work is produced, and there is better representation before the tribunals. The legal aid system cannot be built on an expectation that practitioners are willing to work pro bono, and supplement their loss-making legal aid work with other higher paying (likely, privately funded) work. Insufficient remuneration lead to an increase in unrepresented appellants, due to providers' inability to afford carrying out the work, or due to providers' lowered capacity through taking on other work.*
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> *The Secretary of State for the Home Department, Priti Patel, has been critical of the appellate system and recently stated that the asylum system was a 'complete merry-go-round'[17] that has been exploited and 'a whole sort of professional legal services industry has based itself on rights of appeal, going to the courts day-in day-out at the expense of the taxpayers through legal aid'.[18] This is denied. However, the real implications of a fixed fee delimiting the work that can be done will certainly create a merry-go-round: if appeals are not prepared well in the First-tier Tribunal, the more likely it will be that there will be a point of law by either side to appeal to the Upper Tribunal, who may need to remit to the First-tier once more. The way to avoid ever entering the 'merry-go-round' is through ensuring there is high quality preparation and representation, which must be adequately remunerated, from the outset.*
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> *Our position has been that the only equitable approach is to apply hourly rates to remunerate practitioners for all cases started under the only system.'*

[17] Vikram Dodd, Rajeev Syal and Harriet Sherwood, 'UK-born extremists pose main threat, says top counter-terrorism officer' *The Guardian,* 17 November 2021, <https://www.theguardian.com/uk-news/2021/nov/17/priti-patel-criticised-for-asylum-merry-go-round-claim-about-liverpool-suspect> (accessed 27 November 2021).

[18] Aletha Adu, 'Research says Priti Patel is wrong over attack on asylum system "merry-go-round"' *Mirror,* 17 November 2021 <https://www.mirror.co.uk/news/politics/priti-patel-attack-asylum-merry-25479334> (accessed 27 November 2021).

14. This was echoed by PLP whose response was primarily drawn on 43 interviews which were conducted between April and June 2020 to explore the ways in which the online appeals process was impacting professional and lay court users:

> '*A number of key concerns need to be tackled for the online system to fulfil the potential that many interviewees saw in it. These concerns related primarily to the legal aid funding arrangements, the nature of the ASA, and poor Home Office engagement with the respondent review process. As a frontloaded process, sufficient resourcing of the early stages in the online system was perceived to be vital in addressing these concerns.*
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> *For example, interviewees felt that to do a 'good job' of drafting an ASA would take a substantial amount of time and represented a significant amount of extra work. They suggested that the number of hours taken varied significantly depending on a range of factors, including the complexity of the case and the resources available to the legal firm. The commercial viability of immigration legal aid providers and the difficulties they faced in terms of financial sustainability were raised by a number of interviewees.'*

15. Participants in the aforementioned focus group discussion with 13 members and associated stakeholders of YLAL agreed that reform of the legal aid regime is necessary but did not agree with the introduction of new fixed fees for asylum and non-asylum appeals as proposed in this Consultation. In response to Question 1 they explained:

> *'The proposed fixed fee is set at an unsustainable rate and makes legally aided work financially unviable for much of the sector, including our members. We are concerned that the data set this is based on is not representative and has not taken into account the responses from the previous call for evidence on Immigration Legal Aid Fees and the Online System conducted in 2021. For example, in ILPA's response to the previous call for evidence, they noted that in complex cases it can regularly take at least ten hours and up to 30 hours to prepare an ASA and yet this current proposal suggests in asylum cases the ASA will take only four hours to prepare. Our members felt that the proposals could disincentive counsel from being instructed at an early stage, as if a case did not go beyond the escape threshold, the fixed fee would offer very little payment for counsel to work on the ASA. This runs counter to the aims of the online system and the front-loading of work and so would make the new system less able to meet its aims of bringing parties together at an earlier stage.*
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> *In practice, legal aid providers do not receive an equal range of cases in terms of complexity and in fact some specialise in particularly complex cases and others less complex cases. Therefore, the premise of the fixed fee as a form of 'average' in a legal aid provider's caseload is not borne out in practice and means the mechanism is not fit for its purpose.'*

16. Accordingly, our alternative is that you maintain remuneration based on hourly rates. Moreover, we recommend that the hourly rates for controlled work are urgently reviewed, increased, and index linked. The current rates are woefully inadequate, and have not been increased since 2007.[19] On the implementation of the 2018 Standard Civil Contract, legal representation for proceedings in the Immigration and Asylum Chamber of the Upper Tribunal, in relation to an appeal or review from the Immigration and Asylum Chamber of the First-tier Tribunal, became certificated work for matters started on or after 1 September 2018. It results in much higher

[19] The Civil Legal Aid (Remuneration) Regulations 2013, Schedule 1, Part 2 'Hourly rates - Controlled Work').

rates of pay for licensed work, than for controlled work. As it makes First-tier Tribunal work less attractive for practitioners, a review of the rates is needed with a view to addressing the sustainability and capacity of the sector to undertake immigration and asylum appeals.

17. Furthermore, we recommend that the Legal Aid Agency ('LAA') and MoJ consider what can be done to reduce the administrative burden on the LAA and legal aid providers in hourly rate cases. We would be happy to work with the LAA on this matter, but we would welcome more information as to why the 'assessment of fixed fees [is] likely to be a saving compared to hourly rates'.[20] It is noteworthy that unlike the hourly rate system for online appeals, for Priority Removal Notices, the '[i]mplementation and ongoing processing costs to the Legal Aid Agency are expected to be negligible' without suggestion that hourly rates would involve greater costs than remuneration based on fixed fees.[21]

18. Some providers have noted that hourly rate cases can be more administratively burdensome than escape fee cases. The reason for this is the potential risk of claw back as a consequence of a much later assessment on audit. If a more trusting approach were taken by the LAA, and providers' claims were not subjected to minute analysis, years after the event, using the benefit of hindsight, the system would be less burdensome for both the LAA and providers, and providers would have more financial certainty. We understand the importance of showing value for money for the taxpayer, but there are multiple mechanisms already in place to assess quality of providers' work, including the peer review system, the LAA Specialist Quality Mark, and the Law Society's Lexcel Practice Management standard ('Lexcel'). To ensure there is good quality legal aid advice available, the system must be operated and funded in a way that supports good quality legal aid providers to stay in the market and grow, and attracts good quality new entrants. Therefore, we also make recommendations as to how the system could be better operated.

19. We understand that the CW3 self-grant scheme for Asylum and Immigration Controlled Work was introduced by the LAA to simplify the process of obtaining extensions to incur profit costs and disbursements above the standard limits currently permitted by the Immigration and Asylum Specification within the Standard Civil Contract. It is unclear whether the self-grant scheme is only available to certain selected providers, as there appears to be no application process to access it. Our view is that it should be extended to all providers for profit costs, as well as disbursements. This would be fair and a low administration cost for the LAA. We understand that under the Scheme, in cases that meet the self-grant criteria, the decision to grant is passed to providers, and removes the need for providers to complete the CW3 form and the LAA to process the cost extension requests.

20. However, we understand that under the self-grant scheme the risk lies with the provider, with negative ramifications if the LAA assesses the client to be ineligible or considers the cost extension to have been unreasonably made. Therefore, to reduce the administrative burden and

[20] Ministry of Justice, 'Impact Assessment for Immigration Legal Aid: A consultation on new fees for new services' (3 May 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1081511/immigration-legal-aid-fees-impact-assessment-signed.pdf> accessed 2 August 2022 (hereinafter 'Impact Assessment') page 2.
[21] Impact Assessment, 3.

the need for filing CW3 forms, the self-grant scheme should be extended to all providers and improved, including by:

i. Expanding the scope of the self-grant scheme; for example, we understand out of scope work is ineligible unless the case is mixed in which case a provider can self-grant a disbursement relating to both the in scope and out of scope aspects of the case;

ii. Raising the self-grant profit costs limit of £3,000, by reviewing the claims for hourly rate cases and using these to inform the setting of the thresholds after further consultation, both public and with providers;

iii. Raising disbursement limits under the self-grant scheme, including considering raising the 12-hour limit;

iv. Separating the limits for legal help and controlled legal representation, and for cases remitted to the First-tier Tribunal from the Upper Tribunal, even if they are the same matter start;

v. Lighter touch auditing to reduce the risks of claw-back in assessment and audit, so that providers are not as concerned that they may be penalised in an audit and discouraged from doing legal aid work; and

vi. Only requesting hourly rates files to be checked, in audits by Contract Managers, where the fees would exceed a certain fee.

21. We do not propose an increased fixed fee, as it will be more difficult for providers to exceed the escape fee threshold. While we appreciate that fixed fees often result in a quicker turnaround in payment, we are concerned that fixed fees discourage some practitioners from carrying out all the work needed to fully prepare a case, but instead to focus on working within the limits of the fixed fee to ensure they are paid for all of their work, and thus avoid the risk of failing to exceed the escape threshold.

22. The proposals in the Consultation fall short of their stated aims and do not appear to take on board the Call for Evidence responses to which the Consultation refers, which are helpfully summarised at paragraph 25 of the Consultation. The only rationale for the fixed fee structure, other than possible savings for the LAA, is provided in the Impact Assessment, which states that 'a fixed fee scheme would give additional certainty to providers on what their income will be'.[22] However, there will be no certainty for legal aid providers that they will hit the escape fee threshold, if they exceed the fixed fee. In cases which escape, as is currently the case, providers will be paid at hourly rates with no more certainty than the current system provides. We note the modelled impact of the proposals is that it 'balances cases which are under-remunerated and those which are over-remunerated, and will result in more cases being paid closer to their reported case costs'.[23] However, rather than paying 'closer' to reported case costs, a fair and

[22] Impact Assessment [44].
[23] Consultation [42].

equitable system would be to simply pay the case costs to 'ensure they can be delivered sustainably into the future'.[24]

23. YLAL members' experiences are that the new fixed fee system creates a difficult working environment for legal aid practitioners, as in very many cases they work in the potentially 'at risk' zone between the fixed fee and the escape threshold. This produces an unhelpful disincentive to work beyond the fixed fee hours if it is unclear that a case will go beyond the escape threshold and adds to the financial precarity of running a legal aid practice. Furthermore, the foundational premise of a fixed fee mechanism is that legal aid providers each get a roughly equal number of cases that go under the fixed fee level as those that run over the fixed fee level but do not meet the escape threshold, and as a result are able to balance the costs of undertaking effectively unpaid work in the 'at risk' zone between the fixed fee and escape threshold.

24. Legal aid practitioners, both providers and external counsel, would prefer to be paid for the work they have done. This, combined with an easily navigable system imposing low administrative burdens, and adequate and appropriate hourly rates, is the only way for the system to be sustainable.

25. The change from the hourly rate system to the new fixed fee system is expected by the MoJ to be 'cost neutral'.[25] However, we anticipate that the change will not be neutral for immigration and asylum law practitioners; it will be negative:

    i. It will encourage some providers, who take the view that the fixed fee amount is set to determine how much work should be done on each case, for whom escape fee cases constitute an additional administrative burden,[26] or who would fear they would not exceed even the reduced escape fee threshold, to work within the fixed fee. They will be discouraged from doing the work that is needed, without regard to the fixed fee and the hours of work it constitutes at the current hourly rates. Accordingly, it is likely to reduce the quality of legal aid work and may mean appeals are not fully and/or properly prepared. This has serious implications for appellants, and may result in further or late applications. Accordingly, it is contrary to the stated objective in the Consultation of ensuring that 'individuals are supported to bring claims as early as possible, driving efficiency and ensuring fairness and certainty'.[27] Moving to a fixed fee system appears irrational against the approach in the Consultation to funding work for priority removal notices at hourly rates, with the 'aim of attracting high-quality providers to deliver this important new work, and that providers are properly incentivised'.[28]

[24] ibid.
[25] Impact Assessment, 2.
[26] We understand escape fee claims are time consuming to prepare, and have detailed feedback on escape fee claims from our survey in paragraphs 58 to 59 below.
[27] Consultation, 2.
[28] Consultation, 15.

ii. It shifts the administrative burden attached to seeking payment, so that, rather than seeking profit cost extensions throughout an hourly rate case, a provider must prepare the application for an escape fee claim at the end of the case and have it assessed by the LAA. This can result in delay in making payment to external counsel, which can place counsel in financial difficulty. There are advantages and disadvantages to the different processes, but there is consensus that, ultimately, practitioners want a fair system in which they are paid for all the legal work they do.

iii. For cases which do not exceed the 'escape fee' threshold, but exceed the fixed fee, a legal aid practitioner will go unpaid for some of their time and/or work. We believe it is inevitable that there will be cases in which even the new lowered escape threshold will not be met. While we agree that 'changes to the escape mechanism would reduce the chance that providers would be underpaid for their work on each case',[29] it will not reduce the chance to zero. In fact, the Impact Assessment estimates providers 'losing' in 25% of cases, although it does not detail how great a loss they will suffer or if a specific set of providers are more likely to lose.[30] Before any fixed fee regime is imposed, we would respectfully request the statistics as to the number of cases in which providers would not exceed the fixed fee or escape fee threshold based on their hours (at the 2013 hourly controlled work rates). For certain respondents to our survey, detailed at paragraphs 57 to 60 below, in a large percentage of online system appeals they would exceed the fixed fee, but not the escape fee threshold.

iv. For cases which do not escape, it will place in tension the relationship between instructing legal aid providers and external counsel, which is based on goodwill, trust and mutual professional respect. For cases that do not escape, nearly 17% of respondents to our survey said they would not be able to pay their counsel. One third of respondents said they would need to reach a specific arrangement with counsel to share the fixed fee, but as one organisation put it, "[t]his would mean that neither those instructing nor counsel would get paid fairly for the work they do. This is a non-sustainable model." Another respondent feared many Counsel will opt out of doing these cases. Accordingly, under the proposed model an instructing caseworker or solicitor will have to decide between one of three choices:
    i. paying counsel and going without pay, placing their own financial viability as a legal provider in jeopardy; or
    ii. failing to pay external counsel for their preparatory work and time, possibly damaging relations between the provider and the barrister/Chambers and resulting in an immigration and asylum legal aid practice being unaffordable for a junior barrister; or
    iii. coming to an agreement as to the apportionment of loss between external counsel and those instructing them.

[29] Impact Assessment [44].
[30] Impact Assessment [A8], with 'losing' defined in [A5] as 'being paid less than 10% below their reported costs by the fixed fee scheme'.

External Counsel

26. However, if our recommendation of maintaining hourly rates is rejected, we must stress that, before putting into place the proposed fixed fee regime, the MoJ must consult on new proposals for how any external counsel instructed in an appeal will be adequately and appropriately remunerated for their time. While we recognise that many providers may conduct in-house advocacy for cases, many providers may also wish to engage external counsel. As ILPA explained in its response to the December 2021 Call for Evidence:

> *'Different practitioners prepare appeals in different ways. This can vary due to the types of cases they take and the weight of their caseload. Not every organisation will instruct external counsel. Where they do not, a caseworker may feel pressured to prepare an Appeal Skeleton Argument ('ASA') even though this task may be one for which they would have previously instructed counsel shortly before the hearing.*
>
> *However, we have noted that where external counsel is instructed, due to the earlier directions for producing an appellant's bundle and the new ASA, counsel is often instructed earlier in the appeal preparation process than they were under the paper-based system. This can be positive and result in greater engagement of counsel with those instructing them, in consulting on the issues, presentation of the case, and compilation of evidence, in addition to the drafting of the ASA by counsel.'*

27. ILPA members have relayed the importance of having external counsel involved at an early stage in cases, and the assistance a well-drafted Appeal Skeleton Argument ('ASA') can have in resulting in the withdrawal of a Home Office decision under the online appeal system. In fact, this is the purpose of the Home Office's review process in the online system: to narrow the issues in an appeal and allow for withdrawals and reconsiderations of decisions in advance of substantive hearings. By proposing fixed fee remuneration, the Consultation proposals fail to recognise the value that external counsel can add to the preparation of an appeal, and that a better drafted ASA can result in a withdrawal of the decision being appealed, preventing an appeal from going to a hearing, and thus saving the public purse in numerous ways (higher legal aid fees payable for appeals that go to a hearing, Tribunal resources, and fees to pay the Home Office Presenting Officer or counsel for the Home Secretary to prepare and attend the hearing).

28. If the controlled legal representation fee does not escape, the proposals provide no clear method for ensuring that external counsel will be paid for their involvement in preparation of an appeal, including conference(s), advising on witness and expert evidence, and drafting an ASA.

29. As ILPA detailed in its response to the Call for Evidence, it is often the case that the Home Secretary does not concede the case until very shortly before the substantive hearing. By that point, much of the preparation for the hearing has already been conducted. ILPA explained in its December 2021 evidence that 'under the online system, advocate members note that they must often prepare for an appeal multiple times':

> *'They may have an initial conference with an instructing solicitor and/or appellant. They then prepare when drafting an ASA. Many months or even a year may elapse between the service of the ASA and the appeal hearing. Before the appeal hearing, an advocate must refresh their*

memory. If significant time has passed, this will require the advocate to re-read the bundles in their entirety, which - in the case of large bundles - can take several hours. It is the circumstances at the date of the hearing which are relevant to the determination of the issues in the appeal. If, due to the passage of time since the appellant's bundle and ASA were served, circumstances have changed, these must be addressed through the provision of further evidence, potentially an updated Witness Statement and medico-legal, expert, or other reports, and, if necessary, an addendum skeleton argument. There may also be a change in circumstances in the country of origin, with Afghanistan being a clear and recent example of this. Uploading evidence results in a new consolidated bundle with new page references, to which judges often expect the ASAs and counsel to refer. Cross referencing page references from the original bundle served with the ASA is time consuming.'

30. The Consultation is not clear as to whether the additional 'Tribunal preparation time' (7.2 hours for asylum, and 7.8 hours for non-asylum)[31] would be paid if a case does not go to a substantive hearing following HMCTS successfully reviewing the submitted case, such as if it is conceded before the day of the substantive hearing. Based on the London 2013 hourly rates for preparation, attendance and advocacy (£51.62 per hour), it would appear the fixed fee of £669 for asylum appeals that do not reach a hearing and £628 for non-asylum appeals that do not reach a hearing is based on 12.9 and 12.1 hours of work respectively. The fixed fee of £1,009 for asylum appeals that do go to a hearing accounts for 19.5 hours of work, and £855 for non-asylum appeals that do reach a hearing accounts for 16.5 hours of work. Notably, 19.5 hours for asylum appeals is fewer than 20.2 hours recorded in the survey results. However, the overarching concern is that the fixed fees—for appeals which do not go to a hearing—fail to account for time taken to prepare for a tribunal hearing that does not in fact proceed (including due to a late concession by the Home Secretary).

31. Furthermore, the Consultation makes no mention of Case Management Review Hearings, or how they are to be remunerated.

32. It is noteworthy that external counsel were not surveyed by the MoJ, nor is there any indication of the number of cases in which external counsel was instructed in the survey data of the 17 offices, particularly in determining the time taken to prepare the ASA as 4.2 or 3.9 hours.

33. Two respondents to our survey,[32] who are counsel, detailed the large percentage of appeals, in the past two years, in which their own work would account for some or all of the fixed fee and exceed or assist with exceeding the escape fee threshold. For the first respondent, in ~50% of asylum and non-asylum appeals that did not go to a hearing, they would exceed the proposed fixed fee, and in a small portion, their work would even exceed the proposed escape fee

[31] Consultation [28]. We understand the survey sent to the 60 offices contained the following definition: 'Tribunal preparation time - This is work done after HMCTS has successfully reviewed your submitted case but before the day of the tribunal. Where counsel is instructed to do any part of this then include time spent by them too.' We understand the definition was based on guidance produced by HMCTS. HMCTS, 'Make an immigration and asylum appeal using MyHMCTS' (updated 31 March 2021) <https://www.gov.uk/government/publications/myhmcts-how-to-use-online-immigration-and-asylum-appeal-services/make-an-immigration-and-asylum-appeal-using-myhmcts> accessed 4 August 2022. The online HMCTS guidance makes clear that 'You can submit additional evidence after submitting your case. This could be in response to the Home Office review or additional information provided by the client.'

[32] See paragraph 57 below, for further detail.

threshold. In all asylum and ~99% of non-asylum appeals that went to a hearing, their work would exceed the proposed fixed fee, and in a small percentage it would exceed the proposed escape fee threshold. For the second respondent in ~75% of all asylum and non-asylum appeals, both that do and do not go to a hearing, they would exceed the proposed fixed fee, and in a large proportion (~26%-75% depending on the type of appeal, and whether it went to a hearing) they would also exceed the proposed escape fee threshold. Therefore, based on this small but detailed data, it would appear that the proposed system constitutes a very large potential loss of income for external counsel. The second respondent indicated that under the proposed system they "would try to work within the fixed fee", as otherwise they would "do lots of hours of work for no pay".

34. The proposed fixed fee system is perverse in incentivising practitioners, including external counsel, to do less until they are sure the appeal will go to a hearing, or that the case has escaped two times the fixed fee. That is contrary to the front-loaded nature of the online appeal system and what the First-tier Tribunal requires of immigration representatives.

35. The fixed bolt-on fee for advocacy in a substantive hearing (£302 for asylum and £237 for immigration matters) is insufficient payment for all of the preparation entailed in an appeal and representation of the appellant on the day of the hearing.[33] If external counsel, involved in preparation of the appeal and drafting the ASA, is not instructed to represent the appellant at their hearing, counsel will not receive remuneration from the bolt-on fee for advocacy. Accordingly, we are concerned that the proposals contain no mechanism for ensuring that external counsel is paid fairly or at all.

36. In ILPA's survey regarding this consultation, it was asked, 'If you did not reach the escape threshold, how would you pay external counsel (if used), for their time? (e.g. for drafting an appeal skeleton argument)'. 16.67% of respondents stated they would not be able to pay external counsel, and 16.67% stated they would pay external counsel regardless. The remaining 66.67%, chose 'other', and their explanations included:

    i. "There would have to be a prior agreement entered into with counsel that would mean that they would get paid a fixed amount out of the relevant fixed fee. This would mean that neither those instructing nor counsel would get paid fairly for the work they do. This is a non-sustainable model."

    ii. "We would not use counsel to draft the ASA under this system. Counsel would only be used for the full hearing and paid the fixed counsel fee."

[33] In any case, the fixed advocacy fees, which have remained at that rate for many years, are inadequate. In ILPA's response to the MoJ's Call for Evidence in December 2021, ILPA joined the General Council of the Bar of England and Wales in recommending that the Lord Chancellor consider remunerating advocacy on an hourly-rates basis, by permitting it to escape the standard fees for advocacy: 'As an example of the failure of adequate remuneration, two lengthy days of advocacy in a complex asylum appeal would result in a payment of £463, and in an immigration appeal only £398, if the hearing is adjourned to a third day it will only attract a payment of £161. These fees are the same regardless of how long the hearing lasts on the day, how far they must travel or wait before they are heard, and how long they spend preparing for the hearing itself. This will particularly and adversely affect junior members of the Bar who are not independently wealthy.'

iii. "I am counsel and I would see my fees reduced to derisory amounts meaning I will do less publicly funded work".

iv. "Realistically Counsel and the provider would have to share the risk and share the [fixed fee], or we would have to come to an arrangement. This is not an issue that has come up in our practice, as the vast majority of our cases escape the [fixed fee]. We would recommend that there should be an additional bolt-on fee for the drafting of an ASA. That way, even if the escape fee threshold isn't met, both Counsel and the provider will be paid at [fixed fee] rates at least."

v. "I would pay them the work covered by fixed fees, ensuring we take proportionate share of any loss".

vi. "We would have to reach a specific agreement in advance as to a minimal fee. I fear many Counsel will opt out of doing these cases before the FTT."

37. In ILPA's response to the MoJ's Call for Evidence, ILPA stated, 'Our position has been that the only equitable approach is to apply hourly rates to remunerate practitioners for all cases started under the online system. In the absence of an hourly rate, we recommended a new bolt on fee for the ASA, akin to the present bolt on for the substantive hearing.'[34] Despite this evidence, the Consultation fails to have considered an ASA bolt-on fee as an option, to ensure that, if instructed, external counsel receive some remuneration for drafting an ASA. While it would be inferior to hourly rates if it were capped, as practitioners would remain unpaid for work exceeding the fixed fee, it would ensure there was some clear form of remuneration for an ASA. The ASA, is of course, a key component of the online system.

38. An ASA bolt-on would not resolve the matter of remunerating external counsel instructed for other preparatory work, and thus may still give rise to the negative chain impacts we have indicated above: tension in the legal professions between those instructed and those instructing them, an inability to pay external counsel, the sharing of losses or minimal fees, and external counsel not being instructed in future cases or reducing their publicly funded practice.

39. We would respectfully remind the Lord Chancellor of his duties under LASPO. It is not sufficient for the MoJ to exempt themselves from consideration of the issue of payment of external counsel, on the basis that instruction of external counsel is a matter for providers.

Distinction between Asylum and Non-Asylum Appeals

40. We do not agree there should be any distinction between asylum and non-asylum appeals. It is unreflective of the work that must be carried out, which can be equally challenging and complex in these cases, and we have seen no proper basis for this distinction. We maintain what is stated in response to Questions 7 and 8 of ILPA's Response to the Call for Evidence in December 2021:

[34] ILPA, 'ILPA's statement on the new immigration and asylum legal aid fixed fee' 18 May 2020, <https://ilpa.org.uk/ilpa-statement-re-new-legal-aid-immigration-and-asylum-fixed-fee/> (accessed 27 November 2021).

'It is not useful in our opinion to draw an artificial distinction between asylum and non-asylum immigration cases. They differ on a case by case basis. This broad stroke distinction between types of cases is not helpful in explaining any differences in their length, complexity, or the time it would take to draft an ASA.

Certain asylum cases *may* involve less quoted law than non-asylum immigration cases, but they may need to make extensive references to the evidence including from the country of origin. However, this is to be attributed to the complexity and evolving nature of human rights case law and does not mean that one skeleton argument which may be more evidentially heavy and one which may be more legally complex is deserving of a higher or lower fee. Furthermore, many asylum cases additionally raise non-asylum human rights grounds for appeal, and cases that were initially 'non-asylum' may subsequently raise protection grounds; thus, the distinction between the two can clearly be eroded.

[...]

We reiterate our answer in relation to Question 7 regarding the unhelpful and arbitrary distinction which is sought to be drawn between asylum and non-asylum immigration cases. The preparation of an ASA is entirely case specific, and the length of time it would take to prepare an ASA depends on a range of factors including:

- size of the appellant and respondent's bundles, including whether there is expert country or medical evidence, other medical reports or extensive country evidence;
- the procedural history of the case (for example, whether it is a fresh claim and whether there were any previous determinations or decisions);
- the complexity and novelty of the legal argument;
- the number of issues in dispute;
- the factual complexity;
- the experience of the representative preparing the ASA;
- the country of origin, including whether there is extant and up-to-date Country Guidance case law as well as Home Office CPINs; and
- the extent to which the person drafting the ASA was previously involved in preparation of the appeal, such as in a client conference or advising on the evidence in the appellant's bundle.

41. We understand that in the data collected from the survey of 17 offices, not all had conducted both asylum and non-asylum immigration appeals. Therefore, we are concerned that the figures in the table in paragraph 28 of the Consultation are unrepresentative. For example, in ILPA's response to the Call for Evidence, ILPA noted it had 'received anecdotal evidence of non-complex cases ranging from four to ten hours of preparation, and complex cases regularly taking at least ten hours and up to 30 hours'. In the Bar Council's joint response to the Call for Evidence submitted with One Pump Court, their evidence was that 'it could take between 3 hours (for unusually simple cases) and 30 hours (for unusually complex ones)'.[35] Based on that evidence, the time taken to prepare an appeal skeleton argument in the survey data (4.2 hours for asylum,

[35] Bar Council and One Pump Court, 'Joint response to the Ministry of Justice Call for Evidence into Immigration legal aid fees for the online system' (December 2021) https://www.barcouncil.org.uk/uploads/assets/3deafdcd-4835-417c-912c63587590a967/Immigration-legal-aid-fees-and-the-online-system-call-for-evidence-Bar-Council-and-One-Pump-Court-response.pdf accessed 4 August 2022.

and 3.9 hours for non-asylum),[36] would appear to be based on unusually simple or non-complex cases.

Evidence Base

42. The proposals are based on an inadequate and unrepresentative evidence base.

43. The Impact Assessment states, 'We have based our fee increase on the results of a survey of legal aid providers, which accords with other management information the LAA holds. Modelling of the escape case changes is based on a forecasted caseload based on 2019-20 data. The true impact of the fixed fee will depend on future caseload and the way that the online system works in practice'.[37]

44. The online system and the new legal aid fees were introduced during the COVID-19 pandemic, with a paper-based system still running for 'legacy cases' brought prior to the introduction of the online system and for cases which it was not reasonably practicable to commence on MyHMCTS. Practitioners faced numerous difficulties in navigating the new system, together with the prior system, whilst working remotely during a global pandemic. The Tribunal, Home Office, and practitioners were often under-staffed, which only added to the teething issues surrounding the introduction of the system. The new review process for the Home Office, the imposition of the requirement to provide ASAs, and the introduction of the online system placed stress on a new and fragile system. The very practical effect that this has on this Consultation, and the MoJ's prior Call for Evidence, is that it is simply too soon to examine the efficacy of the system.

45. In our opinion, the period from 22 June 2020, when the online system was introduced by the First-tier Tribunal in Presidential Practice Statement No 2 of 2020: Arrangements during the COVID-19 Pandemic,[38] to the survey in October 2021,[39] or to the LAA data from 'old procedure in 2019-20 and 2020-21 for initial asylum claims',[40] or even to the extended deadline for the Consultation we received to 12 August 2022, is not an appropriate or sufficiently lengthy period over which to collect the sample of data to assess the adequacy of the online system or legal aid remuneration. Using only the sample data from this period runs the risk of relying on an unrepresentative set of data, which would be an inaccurate basis on which to form and introduce a new system of legal aid fees.

46. Due to the MoJ's reliance on an old and inadequate dataset, the Consultation fails to account for changes to the work required in First-tier Tribunal appeals. For example, on 13 May 2022, Sir Keith Lindblom, Senior President of Tribunals, issued a Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal with the agreement of the Lord Chancellor under

[36] Consultation [28].
[37] Impact Assessment, 2.
[38] First-tier Tribunal (Immigration and Asylum Chamber) Judge Michael Clements, President, *Presidential Practice Statement No 2 of 2020: Arrangements during the COVID-19 Pandemic*, 11 June 2020 <https://www.judiciary.uk/wp-content/uploads/2020/06/PRESIDENTIAL-PRACTICE-STATEMENT-No-2-2020-FINAL-11-June-2020-1.pdf> accessed 30 November 2021.
[39] Consultation [24].
[40] ibid [30].

section 23 of the Tribunals, Courts and Enforcement Act 2007.[41] This imposes much more stringent requirements for drafting witness statements:

> *5.2 A witness statement may be added to by the provision of a supplementary statement provided that the supplementary statement is filed and served in accordance with any directions given in the appeal.*
>
> *5.3 Only in exceptional circumstances and with the leave of the Tribunal, will a witness be permitted to provide additional evidence in chief. [...]*
>
> *5.5 The witness statement must, if practicable, be in the intended witness's own words and must in any event be drafted in a language they understand. [...]*
>
> *5.10 A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence. It must include a statement by the intended witness in their own language that they believe the facts in it are true.*
>
> *5.11 To verify a witness statement the statement of truth is as follows: 'I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.'*
>
> *5.12 Where a witness statement is in a language other than English— (a) the party wishing to rely on it must— (i) have it translated; and (ii) file the translation and the foreign language witness statement with the tribunal; and (b) the translator must sign the original statement and must certify that the translation is accurate*

47. Witness Statements drafted both at legal help (if to be relied upon in any appeal) and controlled legal representation stages will need to be prepared with a view to meeting these requirements in the Practice Direction. Practitioners will spend more time on the process, requesting funding for translation and interpretation. It makes these cases more complex, and the inadequate legal aid funding for them even less attractive.

48. Similarly, other than the rebuttal mechanism, it appears that there is no assessment of the impact of numerous changes to the law and Rules to be applied in asylum *appeals*, following sections of the Nationality and Borders Act 2022 coming into force. These create a new and more complex asylum law framework, which did not exist at the time most, if not all, data was collected by the MoJ. Accordingly, the data may be skewed in favour of fewer hours, as practitioners were able to rely on their deep understanding of the prior legal framework and precedents/templates based on that framework.

49. Moreover, we note the Impact Assessment only relies on data of 2019-20 initial asylum cases concluded prior to the introduction of the online system to forecast the escape fee changes, with an 'additional amount of cost equal to the average increase in work done as gathered by the

[41] Senior President of Tribunals, *Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal* (13 May 2022) <https://www.judiciary.uk/wp-content/uploads/2022/05/20220513-Practice-Direction-FtT-IAC.pdf> accessed 5 August 2022.

survey'.[42] It is noteworthy that no data from non-asylum cases, and no data from fresh claims, has been used to model the effect of the escape mechanism.

50. In relation to the survey, according to paragraph 26 of the Consultation, only 60 legal aid provider offices, each of whom had completed at least five cases on the online system, were invited to complete the survey. Only 17 responded, but not all 17 'offices conducted both asylum and non-asylum work, so not all respondents to the survey were able to answer every question'.[43] We do not believe that the MoJ can justify reliance on such a small sample size, to 'fill the evidence gap from LAA administrative data'.[44] This belief is shared by YLAL, who note, 'a much larger data set from a significantly longer period of time (at least a year) would be necessary if a fixed fee that reflected the realities of legal aid practice were to be set.' Furthermore, it remains unclear how the data collected from the survey could 'accord'[45] or be 'consistent'[46] with an 'evidence gap'.

51. There is no evidence to prove that the survey of 17 offices is a representative dataset. No information has been provided of which firms were sampled; whether those firms instructed external counsel; the impact of delays in the asylum system on the sampled cases; or the complexity of the cases. Specifically, it is unclear whether any analysis has been conducted to determine whether the data is skewed towards less complex cases, which were resolved more quickly (given that the surveyed cases were only those completed, and with due regard given to the delays in the appeal system throughout the pandemic). All of these matters could distort the dataset, particularly such a small dataset.

52. We understand that in the survey, the MoJ stated that it was 'interested in work you have completed under Controlled Legal Representation at stage 2 (both under fixed fees and the interim hourly rate), and in cases which did not (or would not) escape - for this purpose please consider cases which took under around 40 hours of work in total (you do not need to perform the escape calculation exactly). We are asking you to consider the last five cases you have completed (i.e. which have come to the point where you could submit a final bill to the LAA).'

53. Therefore, the Consultation and Impact Assessment fail to mention that the surveyed cases were only based on the last five cases completed by the 17 offices, i.e. 85 appeals in total. This can be compared to the 42,293 immigration and asylum appeals in the First Tier Tribunal (Immigration and Asylum Chamber) from April 2019 to March 2020, 26,211 appeals from April 2020 to March 2021, and 39,486 from April 2021 to March 2022.[47]

54. There was consensus among YLAL, ILPA members and other practitioners for the full provider survey responses to be published to assist the legal aid sector in responding to this and future consultations. At the MoJ roundtable on 19 July 2022, ILPA requested, and the MoJ committed

[42] Impact Assessment, 2 and 21 [A2].
[43] Consultation [26]
[44] Consultation [26].
[45] ibid.
[46] Impact Assessment [39].
[47] Ministry of Justice, 'Justice Data: Tribunals' <https://data.justice.gov.uk/courts/tribunals> accessed 4 August 2022.

to provide, the results of this survey to all attendees of the roundtable in sufficient time for them to analyse the results prior to the deadline for Consultation responses at 11:59pm on 8 August 2022. On 29 July 2022, the MoJ informed ILPA that the MoJ was 'awaiting further guidance as we must follow our internal processes before any information is able to be released'. Accordingly, the MoJ has defaulted on its commitment to transparently provide, sufficiently in advance of the consultation deadline, the survey data upon which the fixed fee rates are based. This has impaired the ability of respondents to properly analyse and address the fixed fee rate system being consulted upon.

55. Similarly, in response to the MoJ's previous Call for Evidence, ILPA respectfully requested that the MoJ and LAA proffer specifically requested data, to enable ILPA to assess the system on the basis of this evidence for the purpose of responding to this Consultation:

> *'In relation to the questions below, where relevant, we request that MoJ make the relevant enquiries with the Secretary of State for data that she holds. Since the introduction of the new online system:*
>
> 1. *How many appeals have been lodged:*
>   a. *under the online system?*
>   b. *under the paper-based system?*
> 2. *How many appeals have been substantively heard under the new online procedure?*
> 3. *What percentage of appeals were reviewed by the Respondent under the online system?*
> 4. *What percentage of appeals were reconsidered by the Respondent under the paper-based system?*
> 5. *What percentage of appeals reviewed were withdrawn by the Respondent:*
>   a. *under the online system?*
>   b. *under the paper-based system?*
> 6. *At what stage in the appeal process were the appeals withdrawn:*
>   a. *under the online system?*
>   b. *under the paper-based system?*
>
>   *(Please provide a breakdown of the percentages for each stage, e.g. prior to service of the Respondent's bundle, prior to the ASA, during the Respondent's review, following the review but prior to the substantive hearing date (including at a case management review hearing), on the day of the substantive hearing).*
> 7. *What is the percentage of appeals in which the Respondent complied with directions:*
>   a. *under the online system?*
>   b. *under the paper-based system?*
> 8. *What is the percentage of appeals in which the Appellant complied with directions:*
>   a. *under the online system?*
>   b. *under the paper-based system?*
> 9. *Of those decided, what is the percentage of cases in which an Appellant was successful following withdrawal:*
>   a. *under the online system?*
>   b. *under the paper-based system?*
> 10. *Of those decided, what is the percentage of cases in which an Appellant was refused following withdrawal:*
>   a. *under the online system?*
>   b. *under the paper-based system?*
> 11. *What is the median, mean, and range of time waited by appellants to receive a grant following withdrawal:*

a. *under the online system?*
b. *under the paper-based system?*

12. *What is the median, mean, and range of time waited by appellants to receive a refusal following withdrawal:*
    a. *under the online system?*
    b. *under the paper-based system?*
13. *What, if any, evidence has the MoJ collated from Appellants on the online system and whether it is better or worse for them. We understand the Home Office has conducted research with its 'asylum customers'. Please disclose this evidence to the public.*

Similarly, we respectfully request that the Legal Aid Agency ('LAA') provide the following data:

1. *How many providers have billed legal aid fees under the online system?*
2. *What is the median, mean, and range of fees billed for asylum cases?*
3. *What is the average median, mean, and range of fees billed for non-asylum immigration cases?*

For all of the above questions to the MoJ and to the LAA, please provide a breakdown of figures for the different tribunal centres.'

56. The MoJ and LAA never provided the requested data. Accordingly, we are of the firm view that there is insufficient data available to set any fixed fees for the online appeal system. We would reiterate that due to the importance of these fees to the sustainability of the legal aid sector, and thus for access to justice, it is our view that the MoJ should monitor the system and collect evidence over a much lengthier period before considering whether to set any fixed fees.

ILPA Survey

57. ILPA conducted a survey and asked whether respondents preferred the hourly rate system or the system of new fixed fees and escape fee threshold for First-tier Tribunal online system appeals. 83.33% of respondents preferred hourly rates, and only 16.67% preferred the new proposed system.

58. The reasons those provided by those who preferred hourly rates included:

    i. *"You get paid for the work you actually do on a case".* This respondent preferred hourly rates in spite of the fact they are more administratively burdensome due to the risk of claw back on assessment.

    ii. *"I just think it's fairer to pay these at hourly rates for the amount of work actually done.*" This respondent noted that '[e]scape claims are always more burdensome as we have another procedure to go through in order to obtain payment', and this in spite of the fact they file CW3 forms (which are ordinarily more administratively burdensome) rather than using the self-grant scheme for hourly rate cases.

    iii. *"In my view hourly rates provide for fairer remuneration - they properly reflect the work that has been done on a case*." The respondent, a barrister, noted that with regard to their own fees, in the past two years:

i. in ~50% of asylum appeals that do not go to a hearing, they exceed the proposed fixed fee of £669, and in ~2% they exceed the proposed escape fee threshold;
ii. in ~50% of non-asylum appeals that do not go to a hearing they exceed the proposed fixed fee £628, and in ~5% they exceed the proposed escape fee threshold;
iii. in ~100% of asylum appeals that do go to a hearing they exceed the proposed fixed fee £1,009, and in ~10% they exceed the proposed escape fee threshold;
iv. in ~99% of non-asylum appeals that do go to a hearing they exceed the proposed fixed fee £855, and in ~3% they exceed the proposed escape fee threshold.

iv. Escape fee cases take so much time to prepare, and when escape fee claims are constantly rejected or returned for minor things that delays payment. Under the new fixed fee system, the respondent indicated they would try to do the best for their clients but they noted it will affect the viability of the firm. Although the respondent files the CW3 form, rather than using the self-grant scheme, the respondent nevertheless finds escape fee cases to be more administratively burdensome.

v. *"These fixe[d] fees are unrealistic given that most cases go to court and are conducted by counsel who do a skeleton argument case preparation and present the case at court. As counsel my work alone would hit those fees"*. The respondent mentioned in escape fee cases the administrative burden is having "to justify the fees to LAA" such that counsel regularly provide pro bono advice in funding. They mentioned under the new system they would try to work within the fixed fee, "[o]therwise you would do lots of hours of work for no pay." With regard to their own fees, they note that in the past two years:

i. in ~75% of asylum appeals that do not go to a hearing, they exceed the proposed fixed fee of £669 and they exceed the proposed escape fee threshold;
ii. in ~75% of non-asylum appeals that do not go to a hearing they exceed the proposed fixed fee £628, and in ~50% they exceed the proposed escape fee threshold;
iii. in ~75% of asylum appeals that do go to a hearing they exceed the proposed fixed fee £1,009, and in ~26% they exceed the proposed escape fee threshold;
iv. in ~76% of non-asylum appeals that do go to a hearing they exceed the proposed fixed fee £855, and in ~50% they exceed the proposed escape fee threshold.

vi. *"Don't see why and how the additional stress of needing to ensure that all of our work is remunerated is justified.*" They noted under the proposed system they would "[t]ry to do everything that is needed and escape the fixed fee threshold - appeal

work is complex and the stakes are high. Clients deserve good work and fixed fee regime restricts this. I don't see any justification for this approach… Appeal work has been so much better at hourly rates". In the last two years, in ~100% of appeals, both asylum and non-asylum, and those that do and do not go to a hearing, this respondent noted they exceeded both the proposed fixed fee and escape fee threshold. They too found the escape fee cases more "cumbersome having to bill fixed fee only and then escape separately". They stated the escape fee system "[c]reates delays in firms being paid and unnecessary hoops to jump through" and that the "LAA should change the procedure to mirror hourly rate billing".

vii. *"Certainty of not having to do large amount[s] of completely unpaid work. All my cases exceed [the] fixed fee, so I do not gain anything from the fixed fee, but do often lose out where cases do not pass [the] escape threshold".* This respondent noted that under the new system they would act in the best interests of their client and do what is needed in the case, without trying to limit work to the fixed fee. The respondent also noted escape fee cases to be more administratively burdensome, because they cannot recoup costs until the end of the case, and even then escape fee processing can take another month after submission of the initial fixed fee claim. In the past two years:

   i. in ~96% of asylum appeals that do not go to a hearing, they exceed the proposed fixed fee of £669, but in only ~63% they exceed the proposed escape fee threshold;
   ii. in ~89% of non-asylum appeals that do not go to a hearing they exceed the proposed fixed fee £628, but in only ~46% they exceed the proposed escape fee threshold;
   iii. in ~100% of asylum appeals that do go to a hearing they exceed the proposed fixed fee £1,009, but in only ~72% they exceed the proposed escape fee threshold;
   iv. in ~100% of non-asylum appeals that do go to a hearing they exceed the proposed fixed fee £855, but in only ~67% they exceed the proposed escape fee threshold.

viii. *"Online system appeals front load the evidence. There is a large amount of work in the majority of cases, even if they do not reach a hearing. We should not have to do this at risk of not getting paid the full amount for the exact work done. The current proposed fixed fees are too low and the risks of not escaping the fee too large for many firms. I fear many will want to leave this area of representation and this has sadly been a growing trend due to the low pay and legal aid risks providers are expected to work under."* This respondent noted that in the past two years in ~100% of asylum appeals (both that do and do not go to a hearing) they exceeded the proposed fixed fee, but only in ~60% would they exceed the proposed escape fee thresholds. Therefore, in ~40% of asylum appeals their work above the fixed fee would not be remunerated. This is particularly likely as the respondent stated that they, "don't feel it is ethical to allow the fixed fee to dictate how I exercise my professional duty to act in the best interests of my client. It is a duty I follow above

everything else, but in doing so there is sadly a huge risk that my firm cannot make enough profit to continue at all under the current low paid immigration legal aid system." The change to a fixed fee system is likely to be particularly negative as the respondent finds escape fee cases to be more administratively burdensome: "Due to the need to justify the overall work done on the file as being required due to the complexity, and in addition to every individual item of work being evidenced and justified in detailed notes. Also going back and forward with the LAA/IFA process to explain work done."

ix. *"It is transparent and predictable; those involved can estimate their profit costs/fees and can expect to receive these, subject to funding being granted/self-granted. It avoids unnecessary administrative burden on providers and the LAA, resulting from escape billing. With the diminishing number of legal aid providers, it is both sensible and necessary to keep those with relevant experience and expertise working in the sector, where the demand for quality advice and representation greatly outweighs supply."* In approximately 100% of cases in the last two years, for both asylum and non-asylum that do not go to a hearing, and asylum cases that do go to a hearing, the respondent exceeded the new proposed fixed and escape fee. In 100% of non-asylum cases that do go to a hearing the respondent exceeded the fixed fee, but only in approximately 90% of non-asylum cases that do go to a hearing did the respondent exceed the escape fee. Therefore, in 10% of non-asylum cases that do go to a hearing, that respondent have been underpaid for work for which they would have been remunerated under the hourly rate system. This respondent found escape fee cases to be more administratively burdensome, noting that they are "[a]dministratively onerous, putting additional and avoidable costs on legal aid providers who have to make limited resources available to prepare files for escape billing and any follow-up action". Notably, the respondent uses the self-grant scheme for hourly rate cases.

x. Another respondent who preferred hourly rates and uses the self-grant scheme noted escape fee cases are more administratively burdensome. They responded that in the last two years:
    i. in ~90% of asylum appeals that do not go to a hearing, they exceed the proposed fixed fee of £669, but in only ~30% they exceed the proposed escape fee threshold;
    ii. in ~90% of non-asylum appeals that do not go to a hearing, they exceed the proposed fixed fee £628, but in only ~30% they exceed the proposed escape fee threshold;
    iii. in ~85% of asylum appeals that do go to a hearing they exceed the proposed fixed fee £1,009, but in only ~35% they exceed the proposed escape fee threshold;
    iv. in ~100% of non-asylum appeals that do go to a hearing they exceed the proposed fixed fee £855, but in only ~30% they exceed the proposed escape fee threshold.

59. Those who preferred the new fixed fee system, preferred it due to:

    i. *"Ease of management compared to mix of different systems (standard fee & hourly rates)".* They found hourly rate cases to be more of an administrative burden, and that the burden "lies in training and monitoring staff to understand a legal aid scheme which is now more complicated that the area of law we practice". The respondent notes that they file CW3 forms rather than using the self-grant scheme.

    ii. *"The majority of our cases are escape fee cases and we prefer the safety of having gone through an LAA assessment, whereas in [hourly rate] cases the likely first contact with the LAA is at an audit stage. The administrative side of applying for extensions on [hourly rate] cases creates additional burdens. However, we strongly believe that rates (whether [hourly rate] or [fixed fee]) should be adjusted upwards to account for inflation. Further, it is not clear why the [legal help] threshold for [fixed fees] is not also being adjusted and we would request that a uniform threshold of x2 is adopted for all controlled work*." In the last two years, in ~90% of appeals, both asylum and non-asylum, and those that do and do not go to a hearing, this respondent noted they exceeded both the proposed fixed fee and escape fee threshold. This respondent found hourly rate cases more administratively burdensome due to the "higher number of CW3 requests and also at the billing stage", and noted they have to use both the self-grant and CW3 forms "because we do a large volume of out of scope work for which the self-grant scheme does not apply, unless the case is 'mixed' in which case we can self-grant if a disbursement relates to both the in scope and out of scope aspects of the case. Even in cases on which we can self-grant we routinely have to make extension requests to the LAA, e.g. because experts often require more than the set 12hrs or because we have exceeded the £3k ceiling." Although this respondent preferred the fixed fee system, they noted "significant concerns about the impact on good quality advice if providers are working within the fixed fee for costs reasons. As a provider delivering outreach advice, for us, the lack of good quality work is immediately apparent where there has been an attempt to stay within the fixed fee."

60. In light of the two responses we received, preferring the new fixed fee system over hourly rates, we recommend an urgent increase and index linking for hourly rates to account for inflation, reform of legal help rates, parity between legal help and controlled legal representation, and that consideration is given to what can be done to reduce the administrative burden in hourly rate cases (including adjustments to extensions of upper cost limit and the self-grant scheme).

Question 2: Do you agree with our proposal to change the escape fee threshold? If no, please explain why and suggest an alternative.

61. Yes. Although we disagree with the proposal to reintroduce fixed fees, if you do not accept our alternative of maintaining hourly rates, we agree with the proposal to reduce the escape fee threshold. It will reduce the likelihood that practitioners will be left unpaid for work that exceeds the fixed fee, but fails to escape the threshold.

62. We would welcome the MoJ to explain how it calculated that the multiplier should be set at two times, rather than one and a half times, or any other reduced multiplier. Given the deep concern we have regarding unpaid work of legal aid practitioners who exceed the fixed fee, but do not exceed even the reduced escape threshold of two times the fixed fee, we would recommend that consideration is given to setting the multiplier at a mathematically justified figure that ensures practitioners are paid for the work they do.

63. However, we and YLAL members also recommend reducing the escape fee multiplier for Stage 1 (legal help) from three times the value of the fixed fee, to two times the value of the fixed fee. There must be parity, and this is urgently needed given the lack of increase in legal help fixed fee rates. We remain concerned that a significant amount of time and work of providers will go unpaid, if they are just under the three times multiplier for legal help. Furthermore, it may result in perverse outcomes, as it may encourage people to do the bare minimum at the stage of legal help, resulting in more cases going to appeal, for which there will be a lower escape fee multiplier for controlled legal representation. Therefore, whilst we appreciate that a current piece of work is being carried out on a wider review of civil legal aid, the impact of a change to one part of the immigration and asylum legal aid system must be considered on the system as a whole.

Question 3: Do you agree with our proposal to change the escape fee mechanism? If no, please explain why and suggest an alternative.

64. Yes. We agree with the proposal to decouple the escape fee mechanisms, such that Stage 1 (legal help) and Stage 2 (controlled legal representation) claims escape on their own and Stage 1 can be paid earlier. We support any reforms that improve cash flow for legal aid providers, and thus the sustainability and viability of the market. However, decoupling is particularly important when Home Office decision-making and the Tribunal appeal process can be delayed for months or even years. This was also a welcome proposal for YLAL members who felt that the coupling system is particularly unsustainable for smaller legal aid providers as they do not have the administrative support to take on complex cases that are coupled. In addition, decoupling the two stages assists to some degree with cash flow which is a significant issue, particularly for smaller providers, especially in the context of the current backlogs.

Section 2: Immigration legal aid changes within the Nationality and Borders Act

Proposal one: remuneration for the Priority Removal Notice

Question 4: Do you agree with our proposed approach to remunerating the maximum of seven hours of advice on receipt of a PRN? If not, please explain why and suggest an alternative.

65. No, we do not agree with your *entire* proposed approach to remunerating the maximum of seven hours of advice on receipt of a priority removal notice ('PRN'). As general feedback, we query the logic of paying hourly rates for this service (seven hours of advice on receipt of a PRN) as a way of 'attracting high-quality providers'[48] but not paying hourly rates across all immigration and asylum legally aided work. If, as we suggest and this Consultation implies, hourly rates improve the quality of work by allowing providers to be paid for all of the work that they do, then it would be beneficial to extend hourly rates across legally aided work.

66. First, while we welcome that the seven hours of legal advice and assistance to comply with the PRN is non-means and non-merits tested, that the advice and follow-on work is remunerated at hourly rates, and that payments for travel time,[49] waiting time, travel costs, and interpreter fees will be claimable in addition to the advice, we have real concerns about the sufficiency of 2007 rates, reduced in 2011,[50] in 2022 (or even 2023, by the time these changes are implemented). As above, given the current cost of living crisis, if we are to have sustainable legal aid provision, the hourly rates must be urgently revised.

67. Second, we recommend that the administrative burden for this new work is kept as low as possible for providers. We understand that all providers with an immigration contract can tender for this new contract. It will not be limited to DDA Providers. However, we would urge the MoJ and LAA to put in place mechanisms for monitoring the quality of legal aid advice provided. We are concerned there may be repetition of many of the problems we and others, including the High Court, have identified in the past: in particular, difficulties in accessing legal advice, a lack of expertise, and poor standards of service.[51] We understand that the MoJ is mindful of not

[48] Consultation [54].

[49] Given that those served with priority removal notices may be in detention centres which require travel of lengthy distances for providers, we welcome the payment of travel costs. However, we would reiterate our concern for the MoJ to convey to the Home Office that accommodating individuals in remote centres is likely to be a disincentive to undertaking and bidding for this work. Furthermore, given the limited capacity of legal aid providers, their time is best spent on legal work rather than travelling lengthy distances. For example, in *R (On the Application Of SPM & Anor) v Secretary of State for the Home Department* [2022] EWHC 2007 (Admin), the High Court detailed at [36]: 'The estimated car travel times to Derwentside from these solicitors' offices are as follows: Bradford - 2 hours 13 minutes; Coventry - 3 hours 28 minutes; Hounslow - 5 hours 28 minutes.'

[50] The Consultation proposes to use the rates set out in Table 7(d) of the Civil Legal Aid (Remuneration) Regulations 2013, which were set in Table 7(d) of the Community Legal Service (Funding) (Amendment No.2) Order 2011, and reduced from the Immigration hourly rates in Table 7(a) of the Community Legal Service (Funding) Order 2007.

[51] *R (SM) v Lord Chancellor* [2021] EWHC 418 (Admin). See also CJ McKinney, 'Legal aid advice in detention centres "generally poor"' *Free Movement* (6 February 2020)

increasing the administrative burden on legal aid providers, which we fully support. We would welcome the opportunity to further engage with you on the setting and monitoring of standards for advice and assistance for PRNs. We are firmly of the view that one of the best ways to ensure good quality legal aid work is available for recipients of PRNs is to support quality legal aid providers to remain in the market, and grow, and attract new entrants who can meet the same high quality standards.

68. Third, we are concerned that at the end of the seven hours of advice, providers must make a determination as to whether the PRN recipient qualifies for legal aid funding that is in scope or through the exceptional case funding ('ECF') scheme. If the latter, providers must make an ECF application if they wish to undertake the follow-on work. Considering that the PRN requires work to be done at speed, and the ECF application may be a barrier to providers taking on the work, and cause delays, we would urge the MoJ to consider, in order of our preference, whether:
    i. the follow-on work can be brought in scope;
    ii. alternatively, a streamlined ECF application process with a presumption that follow-on work should qualify for ECF can be introduced, with consideration to delegating decisions to providers or a commitment from the LAA to make decisions within an extremely short timeframe given the urgency of the cases.

69. If, contrary to our first recommendation, ECF applications are to be required, we would welcome confirmation that time preparing the ECF application can be remunerated under the seven hours of advice, as ECF applications are extremely time consuming claims for providers to make. In ILPA's survey, responses as to the ordinary length of time taken to prepare an ECF claim ranged from 1 hour to 3 hours.[52] One respondent stated that they typically do not make ECF claims as they are "not financially viable": "We only take on cases infrequently, and usually when we do so, we take referrals from refugee support organisations who have already done the ECF application. The fixed fees for the ECF were from [the] payment system before LASPO, which was on the basis of 'win some, lose some' with regard to profits. With ECF cases, you can only really lose (given they are more complicated than the average case) and therefore the fee was not set at the appropriate rate. We do not want to have to make an escape fee applications to get paid". Accordingly, the MoJ must consider what can be done to remunerate providers for the time spent preparing ECF claims under the current and proposed arrangements.

70. We join the Legal Aid Practitioners Group ('LAPG') in seeking clarification as to whether a PRN recipient can seek a second opinion if they have not exhausted the seven hours of advice. If they can, we seek clarification as to whether there will be any consequences to providers who

<https://www.freemovement.org.uk/legal-aid-advice-in-detention-centres-generally-poor/> accessed 5 August 2022; and Nicholas Reed Langen, 'Growing concerns about 'incompetent' legal advice for immigration detainees' *The Justice Gap* (30 May 2019) <https://www.thejusticegap.com/growing-concerns-about-incompetent-legal-advice-for-immigrationdetainees/> accessed 5 August 2022.

[52] In ILPA's survey on the consultation, it was asked 'Approximately how many hours do you ordinarily spend preparing an application to the ECF scheme to the Legal Aid Agency?'. Of the responses to that question, the answers ranged from one to three hours. Three respondents stated one or "about" one hour, one respondent stated 1.5 hours, one respondent stated 2 hours "including gathering of evidence of means and taking instructions", one respondent stated "2-3 hours", one respondent stated "[u]p to 3hrs depending on the complexity of the case", another stated "a few hours", and another respondent stated "3" hours.

provide seven hours of advice and assistance, unaware that a PRN recipient has previously received advice from a different provider. It is crucial that the LAA puts in place a system to ensure that no adverse penalties are suffered by legal aid providers who carry out this fundamental work. We also seek clarification as to what would happen if, after seven hours of advice had been provided, a provider rejects the PRN recipient for follow-on work on the basis there is no merit, but a second provider considers there to be merit. Would the second provider be able to provide the seven hours of advice and assistance, and then open a file for the PRN follow-on work at hourly rates? As we detail in relation to Question 5 below, if the intention is to ensure providers are able and willing to carry on the important follow-on work, the system must be designed and implemented with this aim in mind. Thus, a second provider should be enabled rather than discouraged from taking on this case it considers to be meritorious.

71. We formally note that a fundamental problem with responding to this consultation and to remuneration of advice for PRN recipients is the lack of information from the Home Office that would enable respondents to properly address the questions relating to remuneration of PRN advice. The PRN will require individuals to provide, before a specified date, a statement, information or evidence in support of their claim to remain in the UK. Accordingly, legal aid providers may have to respond to a PRN at speed. If they fail to meet the PRN cut-off date, it can damage the credibility of their client and result in expedition of the relevant human rights or protection appeal and joined related appeals.[53]

72. Without understanding the exact time frames to which providers would need to work, it is difficult to respond to the Consultation regarding the capacity and willingness of providers to undertake the work at the proposed remuneration, and the extent to which they would need to sacrifice possibly higher paying work in order to respond to a PRN at speed. Moreover, it is difficult to comment on the assumptions on which the costs are based.[54]

73. In our survey, nearly 42% of respondents said that they are unlikely to take on priority removals notice cases if the current fee proposals are introduced. The reasons provided were mainly related to lack of capacity, particularly to deal with urgent cases where significant work is needed, a lack of resources, too many existing commitments with partner organisations or current legal aid cases, that it would be too complicated to manage, and that the pay is too poor. One respondent stated, “If I’m not going to get paid for the work I’m just not going to do it. After 23 years in this field I simply cannot keep going as I am struggling to survive”.

Question 5: Do you agree with our proposed approach to remunerating follow on work after the maximum of seven hours of advice? If not, please explain why and suggest an alternative.

74. Yes, we agree with the approach to remuneration of follow-on work on an hourly rate basis but consider this a basis for extending hourly rates beyond this service.

[53] Nationality and Borders Act 2022, ss 22 to 24.

[54] We note that the Impact Assessment states at [47] that ‘[t]he cost is based on cases claiming an average of 5 hours of advice plus 75% of cases claiming 4 hours of interpretation and the same proportion claiming 1 hour of travel. For the purposes of creating a unit cost, we have assumed 80% of the work is billed through London offices giving an average cost per case of £369.’

75. However, as above, we do not agree that the rates set out in Table 7(d) of the Civil Legal Aid (Remuneration) Regulations 2013 are appropriate. They are woefully inadequate.

76. We would welcome confirmation that where a matter is already open, for an individual who subsequently receives a PRN, and a provider is working at a fixed fee for that matter, that:

    i. additionally, the provider can claim seven hours of advice and assistance at hourly rates;

    ii. if they continue to act, after the seven hours of advice, they may continue to claim at hourly rates.

77. Additionally, we are concerned that the Consultation does not explain what will happen to providers who provide the (up to) seven hours of advice and assistance, but do not have capacity to undertake the follow-on work. We recommend that it is made clear by the MoJ and LAA, both of whom committed to take away and discuss the matter following the roundtable on 14 July 2022, that there is no form of sanction to providers, and that it will not adversely affect providers or their KPIs in any way if they do not take on the follow-on work.

78. The MoJ and LAA will be well aware that there are very real issues in relation to capacity amongst immigration and asylum legal aid providers to carry out existing work. Many providers must also take on private and judicial review work to sustain themselves. It may be unclear whether a provider will have capacity to take on this additional follow-on work, which may need to be carried out at significant speed, at the point the provider commits to providing up to seven hours of advice.

79. We note in the Impact Assessment it is assumed that '11,000 people per year would receive a PRN and take up legal aid funded advice. In practice, the number of PRNs is likely to be initially lower before ramping up to full capacity and may also depend on external international events.'[55] As the Consultation notes, the Nationality and Borders Act 2022 introduces additional work for a legal aid sector already facing a crisis of capacity. To make the best use of the available legal capacity in the sector, follow-on work should be available to be carried out by a different provider, at hourly rates, to incentivise them to take on the important work, once the maximum of seven hours of advice has been provided and determination is made that they qualify for legal aid funding. It will become an access to justice issue if a PRN recipient cannot find a representative willing to take on their case following the seven hours of advice and assistance. Furthermore, to increase capacity and sustainability in the sector, we urge the Lord Chancellor and MoJ to consider our recommendations at paragraph 5 above.

[55] Impact Assessment [46].

Proposal two: remuneration for advice on the National Referral Mechanism

Question 6: Do you agree with our proposed fee of £75 for advice on referral into the NRM? If no, please explain why and suggest an alternative.

80. No. We do not agree that the fee should be a "bolt-on" fixed fee of £75.

81. Our recommendations are as follows, listed in order of preference:

    i. We recommend that advice on referral into the NRM is remunerated at hourly rates as part of the substantive matter, which we also recommended is funded at hourly rates, and that the hourly rates in Table 7(d) are urgently revised. Separating out pre-NRM advice from the substantive matter is complicated and will increase the administration required for providers when files are audited and billed. As set out elsewhere in this response, we also recommend that the administrative burden for hourly rate cases is reduced, including in relation to cost extensions/self-grant scheme, and that payments on account are made available on a regular basis as in certificated cases.[56]

    ii. We recommend that the bolt-on fee is brought in scope and remunerated as part of the fixed fee, but we reiterate our recommendation that the escape fee thresholds for both legal help and controlled legal representation should be reduced to two times the fixed fee, if a lower escape fee, such as one and a half times the fixed fee, is not justified.

    iii. If neither of our above two recommendations is accepted, we seek assurances from the MoJ and LAA that time spent providing advice, which goes beyond one and a half hours of advice, can be counted towards the escape fee on the individual's existing immigration matter. The advice they have provided should not be assessed by Contract Managers, or any other person in the LAA or MoJ to determine whether it is 'procedural' and to have that time deducted if it exceeds one and half hours. Providers must be supported to provide advice on these complicated cases, not discouraged.

82. Accordingly, we do not agree that it should be remunerated through a "bolt-on". Furthermore, we do not recommend that there is a separate escape fee mechanism for this advice, as it will add further complexity to submit an escape claim for such a small sum.

83. While we welcome recognition of the importance of people receiving non-means tested legal advice regarding referral into the National Referral Mechanism ('NRM'), we do not think the time or funds allocated are at all appropriate to carry out the proposed work. Along with YLAL, we

[56] In certificated cases, profit costs can be claimed after three months and four times in a 12 month period starting with when the first profit costs payment is authorised. Legal Aid Agency, 'Civil Finance Electronic Handbook' (version 3.2.1, 22 February 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1058499/Civil_Finance_Electronic_Handbook_V3.2.1.pdf> accessed 9 August 2022, [15.2].

feel this is a 'very small amount of money for a very significant piece of work', not least because it assumed that advice on referral into the NRM is procedural advice which can be delivered in a one-off one and a half hour appointment:

'A factual explanation of the NRM

- *The process, including what the Reasonable Grounds and Conclusive Grounds decisions are*
- *The different outcomes at each stage*
- *A sense of timelines of each stage.*

An explanation of support surrounding the NRM

- *Broadly what support is available after each stage (e.g. a positive Reasonable Grounds decision)*
- *And the type of support (e.g. legal advice, housing, counselling).*

An explanation of how the NRM interacts with the immigration system

- *The potential impacts of entering the NRM on their immigration case.*

An explanation of the referral process itself

- *Explanation of consent (for adult victims)*
- *Broadly what a victim is likely to be asked in order to be referred (i.e. details of their exploitation).'*[57]

84. The issue with this proposal stems from the misconception that this advice can be ring-fenced from an individual's immigration case, and that it is merely procedural. No account is given in the Consultation to a trauma-informed approach to the nature of the material to be discussed, the vulnerability or needs of the individual, particularly children or disabled people, and the importance of building trust and confidence with the individual being advised. YLAL members' experience is that advice on referral into the NRM forms an important part of a much wider dialogue with a client as part of their substantive case, in which rapport and trust is established and the legal aid provider can notice important indicators from a client's broader immigration or asylum case. Advice on referral into the NRM is not a ring-fenced piece of advice in practice. In fact, one member highlighted how in most of the claims that they take on, trafficking has been missed by others involved in the client's case in the past, demonstrating that advising on an NRM referral is an ongoing process requiring significant trust from the client.

85. YLAL members expressed a deep concern that the proposal fails to allow for reasonable adjustments, and fear that such strictures will cause discrimination. Expanding on this point, in their experience clients, particularly those with mental health difficulties, which many of those who may benefit from advice on referral into the NRM will have, are likely to need multiple appointments to discuss a possible referral and to give them an opportunity to consider if it is something they would want to pursue.

86. Whilst the Consultation states that 'NRM advice is likely to be largely factual and procedural in nature, focusing on what the NRM process is and the support it can offer, and is therefore

[57] Consultation, table on pages 18-19.

unlikely to require specific tailoring to an individual', the scope of the work expected to be conducted is of significant breadth, and includes providing advice about '[w]hat the possible outcomes are for an individual being referred', so that adults are able to provide informed consent.[58] Furthermore, advice regarding 'potential impacts of entering the NRM on their immigration case' and 'what a victim is likely to be asked in order to be referred (i.e. details of their exploitation)' must be specifically tailored to the individual.[59] Questions an individual will be asked on referral, and the impact on their case, will be specifically tailored to that individual and related to their trafficking indicators. Assessing the indicators, and whether they meet the trafficking test, is necessary to understand and advise as to the potential impacts of entering the NRM on an individual's immigration case. However, the Consultation states that '[i]dentifying whether the individual is showing trafficking indicators' is not part of the NRM advice.[60]

87. Therefore, while we agree that this information is important to 'contribute to the ability of the individual to make an informed decision as to whether to enter the NRM',[61] we do not consider the proposals to be based on the lived experience of providing or receiving this advice. In practice, we are concerned the proposals will add complexity to an already incredibly difficult billing and file management process. In a single appointment, practitioners will have to record time under two different codes/rates. In an assessment of the escape fee claim for the main immigration matter, we are concerned the main claim may be reduced on the basis a practitioner has charged work at an hourly rate, when it should have been encompassed in the £75 bolt-on.

88. There appears to be no evidential basis for the supposition that the scope of the advice to be given, laid out in the Consultation, will take one and a half hours.[62] The NRM is a complicated process, particularly insofar as it relates to how it will affect an individual's immigration matter. How long it will take to provide the advice is based on numerous factors including:

    i. how well the individual understands their own immigration/asylum matter;

    ii. how well they understand concepts of trafficking and modern slavery;

    iii. the complexity of their immigration or asylum matter;

    iv. their ability to comprehend advice, based on their age, education level, language abilities, and vulnerability.

89. Many of the cases on which advice is required for consent for referral into the NRM will necessarily be complex cases in which a practitioner is already providing advice on an immigration and/or asylum judicial review, bail, rights to enter and remain, immigration, citizenship and nationality matters for separated children, and legality of removal under section 6 of the Human Rights Act 1998.[63] Recognising the complexity surrounding NRM referrals, in

[58] Consultation [58(c)].
[59] Consultation, table on pages 18-19.
[60] Consultation, table on pages 18-19.
[61] Consultation [61].
[62] Consultation [61].
[63] Consultation [60].

2017, the Home Office announced that 'Government-funded 'places of safety'' were to be created so that adult victims leaving immediate situations of exploitation could be given assistance and advice for up to 3 days before deciding on whether to enter the NRM.[64] To date this provision is yet to be implemented, but other proposals have been implemented since the commencement of the Nationality and Borders Act 2022.

90. One change that increases the complexity of trafficking cases further is the Slavery and Human Trafficking (Definition of Victim) Regulations 2022 arising under section 69(2) of the 2022 Act. The Regulations significantly narrow the definition of trafficking in relation to identifying victims, with practitioners describing them as 'highly complex', reducing the 'the scope that victims will be identified'.[65] The expectation that legal aid providers can identify potential victims under this new, narrow, and yet to be tested definition contributes to our position that NRM cases are complex. Neither the proposals for this question, nor the Impact Assessment consider the impact of the Regulations.

91. We are also concerned about the future elevation of the reasonable grounds threshold in section 49 of the Modern Slavery Act 2015. Section 60 of the Nationality and Borders Act 2022 raises the standard of proof to the balance of probabilities, placing a greater evidential burden on legal providers to help potential victims show they meet the threshold. To limit the advice to be given to victims at the outset of the pre-referral process would impose further challenges. It is regrettable that this Consultation and the accompanying Impact Assessment have missed the opportunity to recognise the complexity and changing legislative and policy framework associated with NRM referrals. Under these proposals, there will be little chance or opportunity for exploration of the advantages and disadvantages of the NRM. Practitioners have evidence that this is particularly prevalent in cases in which individuals, who are seeking asylum, disclose an experience of trafficking or exploitation:

> *'Service users tend to only gain a full understanding of their rights and access to legal advice after their referral into the NRM. We have seen that during initial contact, referrals into the NRM can be accelerated due to the perception that the person is at immediate risk. In these instances, often there is limited consideration of alternative options, and we have found that service users haven't been fully informed of their options, leading to confusion about why they have been referred into the NRM. Sometimes, access to the NRM takes precedence over a service user being informed of their rights."*[66]

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[64] Home Office, Press Release 'Modern slavery victims to receive longer period of support' (October 2017) <https://www.gov.uk/government/news/modern-slavery-victims-to-receive-longer-period-of-support> accessed 5 August 2022.

[65] ATLEU, ECPAT UK, Helen Bamber Foundation, Hope for Justice, and FLEX, 'Joint Briefing for the Sixth Delegated Legislative Committee debate: The draft Slavery and Human Trafficking (Definition of Victim) Regulations 2022' (June 2022) <https://drive.google.com/file/d/138dvWkWtm5iQXHoMk0nWsGa7A6F3zPfR/view> accessed 5 August 2022, 1 and 3.

[66] The Anti-Trafficking Monitoring Group, 'Joint Submission to the Group of Experts on Action against Trafficking in Human Beings Response to the Third Evaluation Round of the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings: Access to justice and effective remedies for victims of trafficking in human beings in the United Kingdom' (February 2020) <https://www.antislavery.org/wp-content/uploads/2020/03/GRETA_submission_Final-Feb20.pdf> accessed 5 August 2022, 7.

92. A recent joint report by the British Red Cross and the United Nations High Commissioner for Refugees indicates that the onus was on potential victims of trafficking to self-identify. At 2.1.2, the report states:

> *'"…in the early stages of identification, there's still a significant over-reliance on people to self identify rather than frontline professionals looking at other indicators and beginning to gently try to find out what's happened to someone."* (Focus group participant, Scotland)
>
> Focus group participants emphasized the time it takes for people to feel safe enough to disclose, and stressed how essential it is to build trust and rapport.
>
> *"I'd be hard pressed to think of one person within our organization who has come and said, 'I think I am being exploited'. That's just not a thing that happens. What happens is gentle questioning and the building up of trust"*. (Focus group participant, North-East)
>
> Throughout the research, concerns were raised by participants about people who do not recognize they are being exploited and do not have the capacity to advocate for themselves. This was understood to be the result of barriers to disclosure, such as fear, anxieties and trauma, or because of victims continuing to be under the direct or indirect control of traffickers.'[67]

93. The Home Office's own statutory guidance recognises that:

> *'**Victims of modern slavery have been through traumatic events** and therefore any professional interaction with victims should be treated as an opportunity to help them progress towards longterm stability.*
>
> ***Victims may be reluctant to, or unable to, self-identify**. Some groups are more susceptible to becoming victims of modern slavery, particularly children, former victims, people who are homeless or people with drug and alcohol dependency issues.*
>
> *Victims may experience post-traumatic stress disorder and **anyone interviewing a potential victim should be aware of the impact of trauma** on the interviewee, for example difficulty recalling facts.'*[68]

94. Accordingly, a client who is in need of this very advice, is likely to be vulnerable. This means the advice may need to be given across numerous advice sessions and in follow-up written work, and the individual may need to go away, reflect on the advice, and return with follow-up questions for further advice, before the individual can make a decision of whether to provide informed consent. Representatives may need to liaise with organisations who can refer cases to the NRM.

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[67] UNHCR and British Red Cross, *At risk: exploitation and the UK asylum system* (August 2022) <https://www.unhcr.org/62ea90d2bc> accessed 5 August 2022. Notably, the same report concludes and recommends at [4.4] that 'The Ministry of Justice should seek amendments to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 so that potential victims of modern slavery are eligible for legal advice funded by civil legal aid prior to entering the NRM'.

[68] Home Office, 'Modern slavery: how to identify and support victims' (updated 1 July 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1087550/Modern_Slavery_Statutory_Guidance__EW__Non-Statutory_Guidance__SNI__v2.10__FINAL_.pdf> accessed 5 August 2022, 55.

95. Furthermore, the individual may require an interpreter, which can significantly slow the time needed for advice. Whilst we understand from the MoJ roundtable on 14 July 2022 that interpreter fees are covered in addition to the bolt-on fee, they do not appear to have been factored into the time needed to give advice. The experience of attendees of the Focus Group run by YLAL and PLP was that client conversations through an interpreter take at least twice as long as those without one. In order to communicate fully and, therefore, work effectively with potential victims and providers, it is important that interpreters:

> *'appreciate the importance of interpreting word by word questions or explanation and any answer or information that survivors give. Interpreters should use appropriate eye contact, presentation and linguistic skills - including speaking the right dialect and language and signing (for the deaf and those with hearing disabilities)'.*[69]

96. Interpreters play a vital role in helping to explain the NRM, and enable an individual to make a decision on whether to consent to entering the mechanism. What is expected of interpreters and the time required to perform their role is set out in the Trafficking Survivor Care Standards, which were adopted by Government in 2017 for use in NRM victim care contracts to provide a blueprint for UK-wide service providers offering support to adult survivors of modern slavery, including trafficking.

97. We asked in our survey, 'Approximately how many hours do you ordinarily spend providing advice to help a potential victim of modern slavery or human trafficking understand what the NRM does, what support could be available to them, the referral process, and potential impacts of entering the NRM on their immigration case?'. The most common response was that practitioners *ordinarily* spend in the range of approximately 4 to 5 hours, with a response of up to approximately 6 hours. According to one respondent to our survey, the amount of time spent on this advice "is very difficult to quantify because the work is so interwoven with the advice on the substantive case, be that asylum or immigration. Because the issues are often so closely linked, it can be difficult to separate out the advice. It's an artificial delineating, similar to the way in which Art 3 and Art 8 advice has been forced apart through LASPO, e.g. on medical cases."

98. The demarcation of the length of the advice, as an hour and a half, without any in-built flexibility for reasonable adjustments for vulnerable clients is concerning and contrary to the Bar Standards Board's *Vulnerability Good Practice Guide: Immigration Clients* and the Law Society's practice note on 'Meeting the needs of vulnerable clients'.[70] Moreover, it runs against the grain of other detailed approaches for the legal system adapting to vulnerable persons including in the

[69] Human Trafficking Foundation, 'The Slavery and Trafficking Survivor Care Standards (October 2018) <https://www.antislaverycommissioner.co.uk/media/1235/slavery-and-trafficking-survivor-care-standards.pdf> accessed 5 August 2022, [1.6].

[70] For example, see: Bar Standards Board, *Vulnerability Good Practice Guide: Immigration Clients* (April 2018) <https://www.barstandardsboard.org.uk/uploads/assets/196ca72c-464d-4b59-9d3f95ef4569b233/immigrationvulnerabilityguidance2018.pdf> accessed 5 August 2022; Law Society, 'Meeting the needs of vulnerable clients' (January 2020) <https://www.lawsociety.org.uk/topics/client-care/meeting-the-needs-of-vulnerable-clients> accessed 5 August 2022;

Council of the Inns of Court toolkit,[71] the Equal Treatment Bench Book[72] that notes that '[p]atience as well as sensitivity will be required'[73] for interactions with potential victims of modern slavery; Presidential Guidance Note No. 2 of 2010 on Child, Vulnerable Adult and Sensitive Appellants and the Senior President's Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses, and case law.[74]

99. We fear that setting that time restriction will set a standard of an hour and a half of advice, and that those who go beyond it will be directly or indirectly penalised. The fixed bolt-on fee of £75 will not only level down the quality and scope of legal advice that some practitioners provide so that it fits into that period of time, it will also fail to remunerate practitioners adequately who go beyond the hour and a half. The common view we have seen amongst practitioners is that the proposed additional sum of £75 is insufficient. According to one legal aid provider, who responded to our survey, "the additional amount is derisory".

100. For all of the above reasons, we fundamentally disagree with the assessment of the value of that advice as £75. As above, we recommend that any work relating to advice regarding referral to the NRM should be treated as part of the substantive matter: our primary recommendation is that it is paid at an hourly rate on that matter; our secondary recommendation is that it counts towards the escape fee threshold for any fixed fees payable for the substantive matter.

Question 7: Do you agree with our proposal to allow the bolt-on NRM fee to be claimed irrespective of whether an individual enters the NRM? If no, please explain why and suggest an alternative.

101. Yes. We agree that the fee for the advice should be able to be claimed irrespective of whether an individual enters the NRM. Providers should not be required to carry out this work at risk, as it is valuable in and of itself. They cannot be accountable for their client's decision of whether to enter the NRM. It would be harmful to incentivise NRM referrals, if it is not in fact beneficial for a particular individual. Furthermore, if this advice must again be provided, in the future, by a different practitioner, in relation to a further referral for the same individual, this should be accommodated under the system as the individual's circumstances and their interrelationship with any extant immigration matter may have changed.

102. However, as above, we do not agree the fee should be a bolt-on, fixed at £75.

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[71] The Advocate's Gateway, *Identifying vulnerability in witness and parties and making adjustments: Toolkit 10* (20 March 2017) <https://www.theadvocatesgateway.org/_files/ugd/1074f0_bc65d21318414ba8a622a99723fdb2a0.pdf> accessed 5 August 2022.

[72] Judicial College, *Equal Treatment Bench Book* (February 2021 edition, July 2022 revision) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Equal-Treatment-Bench-Book.pdf> accessed 5 August 2022, 205 to 206.

[73] Ibid, 160.

[74] See, for example, *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123.

Proposal three: remuneration for age assessment appeals

Question 8: Do you agree with our proposal to have age assessment appeals sit within immigration, public and community care categories of law? If no, please explain why and suggest an alternative.

103. We are not in a position to agree or disagree with this proposal, as there are advantages and disadvantages to the proposal, and there is insufficient information in the Consultation to explain how the MoJ would address the apparent disadvantages.

104. We are concerned about this major change to age assessment challenges and how it is to be remunerated. There appear to be 41 providers listed on the Directory of legal aid providers[75] who have both an immigration contract and a community care or public law contract. However, we are strongly of the view that the MoJ should ensure that public law and community care providers, many of whom do not have an immigration contract, who usually undertake age assessment challenges, have been consulted and are facilitated to respond to the Consultation proposals. They must be specifically consulted on how to increase the likelihood that they will continue to take on this work under the new statutory appeal framework, given their expertise and specialist knowledge.

105. However, we also have serious concerns as to how the sector will deal with demand if it is not extended to immigration contract-holders. In the last year, the Home Office's approach in policy has reverted to treating someone as adult 'because their physical appearance and demeanour very strongly suggests that they are significantly over 18 years of age and there is little or no supporting evidence for their claimed age',[76] following the Supreme Court's decision in *BF (Eritrea)*.[77] That approach, combined with the introduction of "scientific" age assessment methods, a standard of proof of the 'balance of probabilities',[78] and other stringent provisions of the Nationality and Borders Act 2022,[79] mean more age assessments are likely to be challenged on the basis the person was incorrectly assessed to be an adult.

106. We are concerned that the MoJ's 'data on which to base the impact of this option is limited', as the MoJ acknowledges it 'cannot distinguish existing age assessment judicial review work funded by legal aid from other judicial reviews in our data and we do not know whether having appeal rights to the First-tier Tribunal would change overall volumes.'[80] We understand for 'illustrative purposes, based on 2019 figures' it is anticipated 'a baseline of around 800 appealable decisions

[75] Legal Aid Agency, 'Directory of legal aid providers' (last updated 28 July 2022) <https://www.gov.uk/government/publications/directory-of-legal-aid-providers> accessed 5 August 2022.
[76] Home Office, 'Assessing age' (version 5.0, 14 January 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1045849/Assessing_age.pdf> accessed 4 August 2022.
[77] *R (BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38.
[78] Nationality and Borders Act 2022, s. 50(6).
[79] Nationality and Borders Act 2022, s. 52.
[80] Impact Assessment [57].

generated per year will take up legal aid.'[81] However, the 'Age disputes' statistics for the year ending March 2022[82] show there were 2,761 cases in which age disputes were raised, and 2,315 cases in which they were resolved with 814 resolved positively:

Sum of Age disputes	Column Labels																
Row Labels	2018 Q1	2018 Q2	2018 Q3	2018 Q4	2019 Q1	2019 Q2	2019 Q3	2019 Q4	2020 Q1	2020 Q2	2020 Q3	2020 Q4	2021 Q1	2021 Q2	2021 Q3	2021 Q4	2022 Q1
Raised	**188**	**157**	**240**	**290**	**291**	**148**	**170**	**189**	**130**	**131**	**343**	**249**	**184**	**528**	**904**	**901**	**428**
Asylum application raised in quarter	168	143	222	269	251	126	147	170	107	122	329	218	160	506	883	849	376
Existing asylum application	20	14	18	21	40	22	23	19	23	9	14	31	24	22	21	52	52
Resolved	**193**	**178**	**205**	**219**	**229**	**149**	**211**	**209**	**115**	**114**	**247**	**225**	**205**	**475**	**791**	**794**	**255**
18+	91	82	105	150	101	54	65	84	53	43	140	128	125	319	546	510	126
Less than 18	102	96	100	69	128	95	146	125	62	71	107	97	80	156	245	284	129

107. While we appreciate that advice, assistance, and representation in the First-tier Tribunal appeals will be subject to means and merits testing, we anticipate there may be far more than 800 appealable decisions generated per year in which appellants take up legal aid. As recognised in the Consultation, removal of the permission stage, which exists for judicial review challenges, 'may increase the number of age assessment appeals'.[83]

108. Accordingly, this is an area of work likely to need a massive expansion in capacity of providers, and capacity in the community care and public law providers is unlikely to be sufficient to meet the demand. For example, we understand that in the Wales procurement area there are three community care providers each with 100 matter starts, and four public law providers each with 30 matter starts. If age assessment challenges are not expanded to immigration providers, how will the MoJ ensure there is sufficient capacity within community care and public law providers?

109. This proposal is described as a 'benefit'[84] to immigration practitioners, presumably on the basis that any further area of work is beneficial. Many immigration practitioners may need to offer to provide services in relation to this work, if it comes in scope, to provide a complete service to clients. We also appreciate that there may be overlap between the asylum and age dispute work in an asylum case for an age disputed young person, and thus it may be efficient to involve immigration practitioners. However, there appears to have been no assessment in this Consultation as to the capacity of immigration practitioners to take on this additional work, and the consequences of doing so.

[81] Impact Assessment [60].
[82] Home Office, 'Asylum and resettlement datasets: Asy_D05: Age disputes raised and outcomes of age disputes' (updated 26 May 2022) <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets> accessed 4 August 2022.
[83] Consultation [77].
[84] Impact Assessment, 5 and [63].

110. We are concerned that, as raised throughout this Consultation response, immigration legal aid providers have limited capacity to take on further work. One respondent to our survey responded that they would not take on this work, as they have "no capacity".

111. Some immigration practitioners have expressed concerns that undertaking age assessment challenges could have a detrimental impact on their relationship with social and support workers, with whom they often have to liaise for attending and arranging appointments, and for evidence as to the best interests of a young person. There may be a tension in challenging the opinion of the same social or support worker in their assessment of a young person's age. Such adversarial positions in litigation may conflict with the need for social and support workers to work closely with immigration practitioners to serve the young person's best interests in their asylum and/or immigration claim.

112. Furthermore, age disputed children are among the most vulnerable clients in the asylum system. We would be concerned if providers who do not have requisite child-centred and age dispute expertise take on these cases, the consequences of which are far-reaching and serious for the clients and their overall immigration cases. Age assessment is crucial in determining the support children receive, their access to education, and how their asylum claim is processed including whether it may be found to be inadmissible and whether they may be removed to Rwanda. Incorrectly assessed children may be placed in immigration detention or in accommodation with adults.

113. While nearly 64% of respondents to our survey said they would like to be able to take on age assessment appeal cases, a sizeable 25% of respondents strongly disagreed with the statement 'I have the relevant skills and knowledge to conduct age assessment appeal cases'; 25% neither agreed nor disagreed; 16.67% agreed; and 33.33% strongly agreed. Multiple respondents to the survey highlighted a training need:
    i. "Many immigration providers would benefit from additional training to equip them with necessary skills to conduct such appeals effectively, especially as they would not be considered and decided as part and parcel of the overall substantive credibility assessment."
    ii. "[O]bviously a new tribunal jurisdiction will mean training for everyone including ourselves".

114. One respondent to our survey was of the view that "[t]he shift of this work means that in order to have the expertise to meet clients' needs and work holistically it would be necessary for immigration providers to be able to bid for community care contracts; even if the age assessment appeals work can be done under the Immigration Specification we would be concerned that it would not be possible to attract and retain a qualified practitioner to join an immigration practice if the only work they can take on is age assessments. Age assessment work is a different skill set and there is a potential risk that the expertise built up since the judgment in *Merton*… will be lost."

115. A different respondent stated, "Conducting asylum applications and appeals means I have an extensive knowledge of the client's factual background which is necessary for the fact finding

age assessment appeal. Having done UASC claims for years I have a good understanding of Merton compliance. Due to my asylum work I have detailed knowledge of the country context and background that often informs the information a client gives about their age and the impact of trauma, which affects how they give that information. My JR experience gives me overall expertise in negotiation and litigation." Other respondents said they would need to explore it further, or that it is an "area [they] would be able to develop".

116. It also remains unclear whether the appeals will be in the Immigration and Asylum Chamber ('IAC') of the First-tier Tribunal. The minutes of the Tribunal Procedure Committee ('TPC') meeting on 5 May 2022 note that Mrs Justice Joanna Smith 'queried the appropriateness of the question posed in the paper by the MoJ to the TPC, namely whether the TPC agreed that the [age assessment appeals] would fall within the remit of the IAC' and asked for clarification in relation to whether 'the Senior President of Tribunals and the President of the (IAC-First-tier Tribunal (FtT)) had approved the designation' of these appeals to the IAC of the First-tier Tribunal.[85] In the June minutes of the TPC, we note that discussion of age assessments is under the 'Immigration & Asylum Chambers Sub-group'.[86]

117. If it is the case the appeals are to be heard in the IAC, there appears to be no impact assessment as to the additional time it would take for public law and community care providers who are not ordinarily instructed in appeals before the IAC to become sufficiently knowledgeable with the rules, directions and guidance of the Chamber. This appears to be a continuation of the issue noted in ILPA's briefing before the Nationality and Borders Bill received Royal Assent, that 'there has been no consultation as to forum, suitability, or resource implications' before shoe-horning age disputes into the First-tier Tribunal:

> *'Age assessment hearings are – for all practical purposes – trials where both sides call witnesses of fact (social workers, adult carers, etc.) and expert witnesses; trials that may last for a day or more. They are not like the ordinary matters heard by the First-tier Tribunal (IAC): relatively brief immigration appeals that may last a couple of hours, where only the person appealing calls witness evidence.*
>
> *The First-tier Tribunal (IAC) currently suffers from a significant backlog. If age assessment appeals 15 are added to it, there would need to be provision to ensure they were prioritised to avoid unduly delaying the processing of asylum claims. Additionally, consideration would need to be given to the appeal deadline. Under the current regime, a judicial review may be lodged within three months of an age assessment decision, while an appeal has only a 14 day deadline, a very short time for a traumatised young person to seek legal advice, and lodge an in-time appeal,*

[85] Tribunal Procedure Committee, 'Meeting Minutes: Thursday 05 May 2022' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1082581/tpc-mins-5-may-2022.pdf> accessed 8 August 2022.

[86] Tribunal Procedure Committee, 'Meeting Minutes: Thursday 09 June 2022' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091570/tpc-mins-9-jun-2022.pdf> accessed 8 August 2022.

particularly if it is concurrent with being dispersed into accommodation in a different area in the UK. There appears to be no consideration of any of these matters in the Bill.'[87]

118. Accordingly, we have three questions. First, how will LAA and/or MoJ ensure and monitor that there is *quality* legal advice for age assessment appeals? Second, how will providers be supported to upskill under the new statutory framework? Third, what is being done to ensure that there is sufficient capacity among legal aid providers to conduct the great number of statutory appeals we anticipate may be brought?

Question 9: Do you agree with our proposed approach to remunerating age assessment appeals? If not, please explain why and suggest an alternative.

119. We agree that the work should be paid at hourly rates. However, we are concerned that the hourly rates proposed for remunerating age assessment appeals, set out in Table 10(c) of the Civil Legal Aid (Remuneration) Regulations 2013, are too low to incentivise practitioners with the relevant expertise to undertake this work. We are concerned that providers and external counsel who have developed expertise in age assessment judicial reviews will be unwilling to undertake the statutory age assessment appeals at the significantly lower rates payable in the First-tier Tribunal. This is particularly the case as there is no suggestion in the proposals of recovery of *inter partes* fees from the National Age Assessment Board if the appellant is successful.

120. For example, practitioners in London will have their preparation and attendance rate drop from £71.55 per hour to £55.08 per hour, with practitioners out of London seeing a similar drop from £67.50 per hour to £51.53 per hour.[88] This constitutes an approximate 23% reduction in their base rate. For advocacy, the base rates will drop by 7.2% from £67.50 to £62.64 per hour. The rates for routine letters, attendance at tribunal/court or conference with counsel, and travelling and waiting time will also decrease. Importantly, under the proposals the current enhancements of up to 100% will not be available.[89]

121. Public law and community care providers, and counsel, with expertise in these important challenges, will see a loss in income under the proposals. To the detriment of young people in need of such specialist representation, practitioners may choose not to undertake age assessment appeals in the First-tier Tribunal, or refocus their practices in other areas of community care and/or public law that remain better remunerated at standard and enhanced legal aid hourly rates.

122. If age assessment appeals are not an *inter partes* cost jurisdiction, then an uplift of the hourly rates is required. We recommend that the proposals are revised to ensure that providers are not at a financial detriment when the decisions are challengeable by appeal rather than judicial review and to sufficiently incentivise providers that only hold immigration contracts to take up

[87] ILPA, 'ILPA's Briefing for the House of Lords Committee Stage for the Nationality and Borders Bill – Part 4: Age Assessments Amendments' <https://ilpa.org.uk/wp-content/uploads/2022/01/ILPA-Briefing-Part-4-Age-Assessments-Amendments.pdf> accessed 8 August 2022, 7.
[88] Table 10(a) as compared to Table 10(c) in Schedule 1 to The Civil Legal Aid (Remuneration) Regulations 2013.
[89] The Civil Legal Aid (Remuneration) Regulations 2013, regulation 6(3)(a).

this new work and upskill. Furthermore, for counsel, we join the Bar Council in recommending that the rates match the legal aid rates paid to barristers in High Court and Upper Tribunal cases contained in Schedule 2 of the Civil Legal Aid (Remuneration) Regulations 2013 to reflect the specialist nature of the work. The rates proposed must be urgently amended to ensure that there is access to justice for young persons disputing age assessments of the National Age Assessment Board.

123. We are also concerned that the proposal to remunerate work under a certificate, as licensed work, has drawbacks. That system does not benefit from the self-grant scheme which applies to Controlled Legal Representation in the First-tier Tribunal, and thus problems and delays with seeking amendments to scope and costs limits may arise. The LAA and MoJ must consider what can be done to reduce these administrative delays. Furthermore, to avoid a disparity in payment between age assessment appeals in the First-tier Tribunal, proposed to be paid at an hourly rate, and immigration and asylum appeals in the First-tier Tribunal, proposed to be paid at a fixed rate, we reiterate our recommendation in relation to Question 1. The MoJ should maintain and raise hourly rates, so that no one set of First-tier Tribunal appellate work related to a person's immigration case is more favourable than another.

124. We would also welcome consideration being given to providing young people with legal help at the point of becoming age disputed, without needing to wait for a decision to be made. This would assist with their understanding of the process, and may result in evidence being provided earlier and reduce the number of decisions needing to be appealed.

Proposal four: remuneration for differential treatment of refugees

Question 10: Do you agree with our proposed approach to remunerating work on the rebuttal mechanism? If not, please explain why and suggest an alternative.

125. We agree it should be paid at hourly rates, but we believe there is a fundamental mistake at the core of your proposal.

126. The rebuttal mechanism cannot be conceived as a 'separate Matter Start',[90] separate to the preparation of the asylum claim. It is not an add-on standalone piece of work, like an asylum interview. Rather, it is something that runs through the life of a case. From the outset providers must consider, and take instructions on, matters relevant to rebutting any allegation by the Home Office that the person is a Group 2 rather than a Group 1 refugee. It will run through every piece of evidence: from witness statements to medical and other expert reports. Considering the rebuttal as the end of the process does not accord with the approach of practitioners or the Home Office.

127. The Home Office Guidance is clear that the 'decision-maker may utilise the screening interview, substantive interview (where one has been conducted), and any other information available - for example case notes from Border Force or a Preliminary Interview Questionnaire - to determine which group a refugee falls into'.[91]

128. The way the proposal is set out would perversely encourage a practitioner to only think of 'rebutting' any allegation that a person may be a Group 2 refugee, at the end of an asylum claim. They will be incentivised to do the bulk of the work when they would be paid for it at hourly rates rather than under the fixed fee arrangements for legal help.

129. As stated by one respondent to our survey, the Home Office "will make that decision (to send you notice) based on what the client says in interview and their evidence before the asylum decision. As such it would [be] negligent not to include [representations] about this before the asylum decision/notice of intention to treat as category 2. This work only being paid for after the Notice risks providers feeling they won't be paid for the work which should actually be done in advance of the notice".

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[90] Legal Aid Agency, *2018 Standard Civil Contract Specification Category Specific Rules: Immigration and Asylum* (July 2022) <https://ilpa.org.uk/wp-content/uploads/2022/06/2018_Standard_Civil_Contract_Catergory_Specific_Rules_Immigration_and_Asylum_July_2022.pdf> accessed 8 August 2022, [8.26]-[8.27].

[91] Home Office, 'Permission to stay on a protection route for asylum claims lodged on or after 28 June 2022' (version 1.0, 28 June 2022) <https://www.gov.uk/government/publications/permission-to-stay-on-a-protection-route-caseworker-guidance/permission-to-stay-on-a-protection-route-for-asylum-claims-lodged-on-or-after-28-june-2022-accessible> accessed 5 August 2022.

130. It is right that this new and additional work is remunerated at hourly rates. The scale of the people to be affected is extensive,[92] and cannot be predicted on the basis of 2019-2020 figures, when neither the current inadmissibility process, nor the current statutory framework introducing the concept of a 'Group 2 refugee', existed. This work is also inordinately important, as a person considered a Group 2 rather than a Group 1 refugee has vastly different entitlements:

    i. they only receive initial temporary refugee permission to stay normally lasting 30 months (rather than 5 years of permission to stay);

    ii. they must apply for further permission to stay after 30 months, and as part of consideration of each application for further permission to stay, the Home Office will assess whether there is a continuing need for protection in the UK via a safe return review;

    iii. they have a lengthier route to settlement with stricter requirements, as they are only eligible to apply for settlement after 10 years lawful residence in the UK under paragraph 276B of the Immigration Rules (rather than able to apply under Appendix Settlement Protection after 5 years of refugee permission); and

    iv. they have 'no entitlement to family reunion unless it would be a breach of our international obligations'[93] under Article 8 of the European Convention on Human Rights.

131. The problem with the proposal does not lie with remunerating this work at hourly rates, it lies with the outdated and inconsistent fixed fee rates for legal help. In order to create a fair system, the entirety of asylum legal help would need to be paid at hourly rates. That is the only way to 'ensure providers are paid fairly for work done under the new process.'[94]

132. Additionally, we are concerned that making the rebuttal mechanism a separate Matter Start is not only an inappropriate way of envisaging the process, it creates more administrative work for practitioners. They will be required to record their work separately. Given that it is a separate Matter Start, the interaction of this with the ability of a practitioner to exceed the legal help escape fee threshold is unclear. We would welcome clarity in relation to this, as the separation of this work from the asylum claim should not negatively impact the ability of practitioners to exceed the escape fee threshold.

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[92] Section 12 of the Nationality and Borders Act 2022 defines any person, who has not come to the United Kingdom directly from a country or territory where their life or freedom was threatened (in the sense of Article 1 of the Refugee Convention), and presented themselves without delay to the authorities', with reference to section 37 of that Act, as a Group 2 refugee. The Home Office's factsheet notes that '[t]here were 48,540 asylum applications (main applicants only) in the UK in 2021, 63% more than the previous year… More than 60% of claims in the year ending September 2019 were from people who are thought to have entered the UK irregularly'. Home Office, 'Nationality and Borders Bill: A differentiated approach factsheet' (updated 2 March 2022) <https://www.gov.uk/government/publications/nationality-and-borders-bill-differentiation-factsheet/nationality-and-borders-bill-differentiation-factsheet> accessed 9 August 2022.

[93] Home Office, 'Family reunion: for refugees and those with humanitarian protection' (version 7.0, 29 July 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1094740/Family_Reunion_Guidance.pdf> accessed 5 August 2022, 20.

[94] Consultation [85].

133. The assumption in the Consultation appears to be that disbursements will operate in the same way as they currently do, irrespective of the underlying nature of funding (i.e. hourly rates and then a future fixed fee once sufficient data is gathered by the LAA). If the proposals are implemented, and the rebuttal is only addressed at the end of the claim, at the point when the Home Office recognises the person is a refugee but is minded to place a refugee in Group 2, then confirmation will be needed of how disbursements will operate. If it is to be a separate Matter Start, then expansion of the self-grant scheme (with the amendments to that scheme, which we have proposed in paragraph 20) would be the most sensible option in this instance. This suggestion is all the more impactful given the scale of applicants we anticipate will be affected.

134. Finally, as stated throughout this Consultation response, we do not agree that the hourly rates set out in Table 7(d) of the Civil Legal Aid (Remuneration) Regulations 2013 are adequate, and we believe the MoJ and LAA must reduce the administrative burden involved in hourly rate cases.

Question 11: Do you agree with our proposal to use data gathered by hourly rates to inform future legal aid fixed fees? If not, please explain why.

135. No, we disagree.

136. We understand that the remuneration for differential treatment, at hourly rates, has already been introduced through a temporary contractual amendment to the existing immigration and asylum specification.[95] This was done on 1 July 2022, without any opportunity for prior public consultation, and before this consultation closed. We understand this was due to the coming into force of the differential treatment regime on 28 June 2022,[96] and we recognise the need to ensure that there was a mechanism for publicly funding the work entailed. However, we are concerned that the collection of data for these purposes has begun before those responding to the consultation could respond to this Question.

137. First and foremost, for the reasons provided in relation to Question 10, we disagree with your thought that 'work on the rebuttal mechanism could be payable by a fixed fee in the future, similar to the additional fixed fee for the UKVI interview'.[97] It misconceives the nature of rebutting any allegation before a provisional decision is made that a person is a Group 2 refugee. While not every person seeking asylum may receive such a provisional decision from the Home Office, for those who do, there will be additional time spent making representations. Accordingly, if all legal help for the asylum claim was paid at (revised) hourly rates, practitioners would be paid for the exact amount of time spent throughout the claim rebutting the proposition, and, if/when a notice is received, any further work conducted to respond to the

[95] Legal Aid Agency, *2018 Standard Civil Contract Specification Category Specific Rules: Immigration and Asylum* (July 2022) <https://ilpa.org.uk/wp-content/uploads/2022/06/2018_Standard_Civil_Contract_Catergory_Specific_Rules_Immigration_and_Asylum_July_2022.pdf> accessed 8 August 2022, [8.26]-[8.27] and [8.86(q)].
[96] The Nationality and Borders Act 2022 (Commencement No. 1, Transitional and Saving Provisions) Regulations 2022.
[97] Consultation [85].

notice. To remunerate the work done throughout the process, on any given case, would be fair, equitable, ensure sustainability, and provide value for money for the taxpayer.

138. Second, we are deeply concerned that a fixed fee (with all of the disadvantages of that system, detailed throughout this response), is likely to have the opposite effect: it is likely to fail to remunerate and instead disincentivise practitioners.

139. Third, for the reasons provided in relation to our responses regarding the online appeal system, we would disagree that '[c]ollecting data like this has worked well in calculating new fixed fees for the online system'.[98] The data collected by the LAA/MoJ appears to contain an evidence gap, which was filled with a survey completed by 17 provider offices in relation to 85 appeals. Without enough representative data, collected over a significant time period we will continue to have no clear sense of how the rebuttal mechanism will be operated by the Home Office, as is currently the case. If data is to be collected and used, it would need to be collected over a significantly lengthy period of time and until the MoJ could be certain it is a representative dataset. The data collected would need to be published and made accessible to the public to review and analyse, and any supplementary data collected from surveys would also need to be openly published, to enable the public, providers and stakeholders to respond to a further public consultation regarding the introduction of a fixed fee.

Question 12: Do you agree with our proposal that remuneration for the rebuttal mechanism will be part of the new immigration contract?

140. For the reasons given in our response to Question 10, we do not agree with your proposal for remuneration for the rebuttal mechanism. Therefore, we would recommend that the MoJ reconsider its approach to remuneration of the rebuttal mechanism, in any future immigration contract, in light of that response.

141. We strongly disagree with any introduction of a fixed fee for the rebuttal mechanism, in the new immigration contract, for the reasons given in our response to Question 11. There is not a sufficient period of time between now and August 2023, when the current extended contracts end, to collect sufficient evidence to impose a fixed fee.

142. Given our concerns about the additional administrative burden it creates, and its interrelationship with practitioners exceeding the escape fee threshold for their fixed fee legal help claim, we would welcome reconsideration of whether '[a]n application to rebut a provisional decision to recognise an individual as a Group 2 Refugee by the Home Office made prior to a final decision on the asylum application' should constitute a separate Matter Start to the original asylum application, and whether a separate claim should be submitted for the work, as is the case under paragraphs 8.26 and 8.27 of the recently revised 2018 Standard Civil Contract Category Specific Rules for Immigration and Asylum.[99]

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[98] Consultation [85].

[99] Legal Aid Agency, '2018 Standard Civil Contract Specification Category Specific Rules: Immigration and Asylum' (July 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1085217/2018_Standard_Civil_Contract_Catergory_Specific_Rules_Immigration_and_Asylum_July_2022.pdf> accessed 5 August 2022.

Impact Assessment

Question 13: Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please provide any empirical evidence relating to the proposals in this paper.

Question 14: From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research, or other types of evidence that support your views.

Question 15: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please provide data and reasons.

143. In responding to MoJ projections about the impact of these proposals**,** we submit the following response to Questions 13 to 15. We begin our answer by noting that it is disappointing that the collection of evidence as to the equalities impact of these proposals is being outsourced to civil society, academia and respondents to this Consultation. The government has a pattern of refusing to collect, publish and analyse data as to the equalities impacts of important policies.[100] In January 2022, for instance, the Independent Chief Inspector of Borders and Immigration expressed regret that the Home Office had declined to collect and use data on protected characteristics in the operation of the EU Settlement Scheme.[101] It is regrettable that this reticence is continuing.

144. YLAL members felt that some of the assumptions in the Impact Assessment were inaccurate and did not reflect the current state of the legal aid market. In particular they expressed concern that the proposals and the Impact Assessment were based on the assumption that the immigration and asylum legal aid sector had sufficient capacity and flexibility to absorb these new work streams. In their members' experience, which is also reflected in Jo Wilding's recent empirical research, the legal aid sector is extremely stretched and has a serious recruitment and retention crisis.[102]

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[100] House of Commons Women and Equalities Committee, 'Unequal impact? Coronavirus and the gendered economic impact' (January 2021) <https://publications.parliament.uk/pa/cm5801/cmselect/cmwomeq/385/385.pdf> accessed 4 August 2022, [121].

[101] Independent Chief Inspector of Borders and Immigration, 'A further inspection of the EU Settlement Scheme: July 2020 to March 2021' (January 2022). <https://www.gov.uk/government/publications/a-further-inspection-of-the-eu-settlement-scheme-july-2020-march-2021> accessed 4 August 2022, [3.1]

[102] Jo Wilding, 'The Legal Aid Market' (September 2021) Bristol University Press.

145. Prior to proceeding with its proposals, the MoJ should carry out its own detailed equality impact assessment and publish that assessment. Indeed, the most useful and important data for answering these three questions will be uniquely accessible by the Ministry rather than non-government respondents to this Consultation.

146. Beyond that, an obvious place to begin to assess the equalities impacts of this policy is examining the previously published academic and Parliamentary evidence related to the sustainability of legal aid. Given that many of the government's proposals contained within this Consultation would weaken the ability of legal aid practitioners to support vulnerable claimants, it is worth reflecting on how the proposals in this Consultation will impact legal practitioners and vulnerable claimants, both in specific cases and systemically.

147. As set out above, in response to a number of Consultation questions, some of the assumptions in the Impact Assessment are inaccurate and do not reflect the current state of the legal aid market or available statistics. In particular, the proposals and the Impact Assessment are based on the assumption that the immigration and asylum legal aid sector have sufficient capacity and flexibility to absorb these new work streams. The Impact Assessment itself recognises that it is based on 'limited information on legal aid providers'[103] and the conclusions with regard to the immigration and asylum legal aid sector and its characteristics are based on data from a 2015 survey conducted by the LAA.

148. As the LAA does not routinely publish data on sector capacity, the most up-to-date data we have on the current legal aid landscape is from Jo Wilding's recent empirical research.[104] This suggests that the legal aid sector is extremely stretched and has a serious recruitment and retention crisis:

> *'In every part of England and Wales, there is a deficit between the need for immigration and asylum legal advice and the provision available. There is not enough legal aid provision to meet even the need which is clearly eligible for legal aid (without an application for exceptional funding). The North West of England has numerically the largest deficit, despite having the second-highest amount of legal aid provision. Across England and Wales as a whole, there is a deficit of at least 6,000 for asylum applications alone – which is just one of the reasons why remote advice is not an adequate solution to the supply problems.'*[105]

149. We also understand the Law Society has analysed data to find that 'across England and Wales, 65% of the population do not have access to a immigration and asylum legal aid provider' and

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[103] Impact Assessment, 29.

[104] Jo Wilding, *The Legal Aid Market* (September 2021, Bristol University Press); Jo Wilding, 'No access to justice: How legal advice deserts fail refugees, migrants and our communities' (June 2022, Refugee Action) <https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/628f50a1917c740a7f1539c1_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf> accessed 5 August 2022.

[105] Jo Wilding, 'No access to justice: How legal advice deserts fail refugees, migrants and our communities' (June 2022, Refugee Action) <https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/628f50a1917c740a7f1539c1_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf> accessed 5 August 2022.

that 'due to the Home Office's dispersal policy, there can often be a mismatch between supply and demand, with those at need of support housed in areas without legal aid provision'.[106] Concerns in relation to supply are all the more pressing with the National Transfer Scheme recently becoming mandatory for all local authorities.

150. This Impact Assessment needs a much more detailed and up to date basis for its assumptions of the capacity of the legal aid sector and the impact of these new fees for new services. To understand the impact of these new services on the wider immigration and asylum legal aid sector it will be imperative for the LAA to collect and publish data on how many cases are going through each new service, as well as billing figures for practitioners that take on this work. This is data that the LAA is best-placed to collect and would be vital for future impact assessments.

151. As we have previously stated, we are particularly concerned about the sustainability and viability of the legal aid sector, at the current rates. We are concerned that the proposals, which will increase the amount of unpaid work, will particularly and adversely affect junior and legal aid practitioners who are not from privileged socio-economic backgrounds and who may be paying off significant student debt. It may particularly affect practitioners of certain genders and ethnic minority backgrounds who earn less than their counterparts. For example, in ILPA's Call for Evidence in December 2021, we noted that the Bar Council's recent November 2021 report detailed the comparative difficulty that individuals from ethnic minority backgrounds and women find in earning potential and in pursuit of careers at the Bar: 'Data in the report categorically and definitively evidences, in quantitative and qualitative terms, that barristers from all ethnic minority backgrounds, and especially Black and Asian women, face systemic obstacles to building and progressing a sustainable and rewarding career at the Bar'.[107] This in turn affects social mobility in legal professions, and has a knock on impact on the constituent members and diversity of the judiciary. It also has a clear impact on legal capacity in the sector, as inadequate stagnant legal aid fees, with costs of living and inflation rising, are an impediment to the entry and continued practice of practitioners in this crucial area of the law.

152. We also have concerns regarding the impact that the changes may have on legal aid funded persons. Many people seeking asylum, young people challenging age assessments, people needing advice regarding referral into the NRM, PRN recipients, and appellants in immigration and asylum cases are particularly vulnerable, suffer from mental health issues, have complex needs, and have differing cultural backgrounds, levels of education, and language ability. If they cannot find legal aid providers, and cannot afford private representation, this places increasing pressure on the third sector to assist them to navigate this complex legal landscape, and it may well impede their access to justice.

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[106] Law Society, 'Immigration and asylum – legal aid deserts' (7 June 2022) <https://www.lawsociety.org.uk/campaigns/legal-aid-deserts/immigration-and-asylum> accessed 5 August 2022.

[107] The Bar Council, *Race at the Bar: A Snapshot Report* (November 2021) <https://www.barcouncil.org.uk/uploads/assets/d821c952-ec38-41b2-a41ebeea362b28e5/Race-at-the-Bar-Report-2021.pdf> accessed 27 November 2021, 2.

Question 16: What do you consider to be the impacts on families of these proposals? Are there any mitigations the Government should consider? Please provide data and reasons.

153. Various proposals in this Consultation will affect families: in particular those relating to immigration and asylum appeals, and the rebuttal mechanism as Group 2 refugees have diminished family reunion rights. The proposals will impact the ability of appellants and persons seeking asylum to find high quality legal aid advice and representation.

154. Families were detrimentally impacted by the LASPO legal aid cuts. Thus, we repeat our recommendation in paragraph 5, for the Government to urgently reform ECF and consider the matters in scope of legal aid, to ensure that there is greater access to legal representation for claims brought on the basis of the right to respect for family life under Article 8 of the European Convention Human Rights.[108]

155. Moreover, we recommend that the Government accept all the recommendations we have proposed in this Consultation response to mitigate the risk that individuals will have insufficient access to legal representation and justice, and will, therefore, remain separated from their families. Without adequate and appropriate remuneration, immigration and asylum sector legal aid practitioners cannot represent all the families and all the applicants and appellants whose families may be impacted by the proposals in this Consultation.

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[108] Kristen Hudak and Dr Emma Marshall, 'The case for broadening the scope for immigration legal aid' (Public Law Project 2021) <https://publiclawproject.org.uk/content/uploads/2021/04/Legal-aid-briefing.pdf> accessed 3 August 2022, 5.