ILPA/ PLP joint statement on the government's response to the recent consultation on immigration legal aid fees

Summary

The Government published its response to the consultation on immigration legal aid fees and laid The Civil Legal Aid (Immigration Interviews (Exceptions) and Remuneration) (Amendment) Regulations 2022 on 20 December 2022. We are glad to see the Government has taken on our feedback on two matters: lowering the escape fee threshold (to double rather than triple the fixed fee) for legal help cases, and the inadequacy of the proposed £75 of remuneration for advice on referral to the National Referral Mechanism, which the Government has doubled.

However, we are concerned that the Government intends to proceed with proposals which could negatively impact the sustainability of the immigration legal aid sector and make it harder for individuals to obtain the legal representation they need. This includes the use of fixed fees for some legal aid services. In our response, we expressed concerns that the proposed fixed fees would result in practitioners not being adequately remunerated for their work. This would place practitioners under pressure to compromise the level of preparation, representation and client care they provide, and would ultimately make taking on legally aided work unviable. The consultation also fails to address the fundamental issues with the sustainability of the immigration legal aid sector.

Detailed response

In its response, the Government stated that it will be taking forward the following proposals without change:

- ***The introduction of new fixed fees for online system appeals in the First-tier Tribunal which do not reach a hearing; £669 for asylum cases and £628 for non-asylum cases.***
- ***The introduction of new fixed fees for online system appeals in the First-tier Tribunal which do go to hearing; £1,009 for asylum cases and £855 for non-asylum cases.***
- ***The introduction of a new escape threshold for appeals set at twice the value of the relevant fixed fee and the "decoupling" of the escape mechanism.***
- ***To remunerate advice provided to recipients of the new Priority Removal Notice at the existing immigration and asylum hourly rate of £51.62 per hour in London and £47.30 per hour outside of London.***
- ***To remunerate work on age assessment appeals at the existing First-tier Tribunal hourly rate of £55.08 per hour in London and £51.53 per hour outside of London.***
- ***To remunerate work on the rebuttal mechanism against the Home Office's process for differential treatment of refugees at the existing immigration and asylum hourly rate (in (d) above) and gather data to inform a fixed fee in the future.***

In addition, in light of feedback from the consultation, the Government intends to make the following two changes to the original proposal:

- ***To double the bolt-on fixed fee for advice on referral into the National Referral Mechanism (NRM) from £75 to £150.***
- ***To reduce the escape threshold for legal help (advice and assistance) cases to match the proposed new escape threshold for online system appeals, set at twice the value of the relevant fixed fee.***

Proposal 1: Fixed Fees for Appeals

The Government intends to proceed with implementing this proposal as consulted on.

The fixed fees for online system appeals at the First-tier Tribunal will be as follows:

- ***£669 for asylum cases and £628 for non-asylum cases that do not reach a hearing;***
- ***£1,009 for asylum cases and £855 for non-asylum cases that have a substantive hearing.***

We maintain our opposition to the introduction of the fixed fee regime for immigration and asylum appeals. It will fail to adequately remunerate and places too great of a risk on legal providers who do not reach the escape fee threshold. Moreover, we continue to be concerned regarding the inadequacy of the data and evidence on which the proposal is based.

While hourly rates may have been a temporary measure, due to the grave error made in previously introducing inadequate fixed fees, our position is that the temporary measure was superior to this proposal. We continue to be of the view that hourly rates should be maintained for controlled work, and should be urgently increased and index linked, with a view to addressing the sustainability and capacity of the sector to undertake immigration and asylum appeals in the First-tier Tribunal (IAC). The current rates are woefully inadequate. They were introduced in 2007 and have not risen with inflation or in the cost of living crisis, but instead were further cut in 2011.

Fixed fees are advantageous in the simplicity of their administration, the certainty of payment they provide and how their usage is helpful for budget planning and financial forecasting.

We cannot comment on whether fixed fees are advantageous for the simplicity of their administration. If they are, we reiterate our willingness to work with the Legal Aid Agency (LAA) to consider what can be done to reduce the administrative burden on the LAA and legal aid providers in hourly rate cases.

However, it is only a partial truth to state that fixed fees provide certainty. There is no certainty that work between the fixed fee and the escape fee threshold will be remunerated. Therefore, there is great financial risk and uncertainty for legal aid providers. Our response to the consultation was based on a simple principle: practitioners should be paid for the work they do. That is a fair and equitable payment model.

Furthermore, we warned in our response that, '[w]hile 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.'

Accordingly, we disagree with the opinion expressed in the Government's response that ***'these proposals help to ensure sustainability of delivery of legal aid services for providers as well as value for money for the taxpayer.'*** As we stated in our consultation response, '[l]egal 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.'

Finally, one would imagine that budgeting or forecasting would still require the Government to forecast the number of appeals which would exceed the escape fee threshold. How can the Ministry of Justice (MoJ) be certain whether an appeal will or will not exceed the escape fee, and thus be payable at hourly rates once more?

The Government remains of the view that fixed fees are a core part of the payment model for the average case, and the escape fee mechanism provides a way for providers to claim their actual costs when the fixed fee would be inappropriate., [sic]

In our opinion, it is "inappropriate" to pay only the fixed fee, when work done exceeds the fixed fee.

The Government's response presumes that a practitioner will receive an equal number of cases that are under the fixed fee level and that run over the fixed fee level but do not meet the escape threshold. It fails to envisage, for example, a practitioner with a caseload of appeals of only medium complexity that will exceed the fixed fee but fail to reach the escape fee threshold.

In our response we stated, '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, [...] in a large percentage of online system appeals they would exceed the fixed fee, but not the escape fee threshold'.

We note the Government's response states only, ***'[p]rior to the introduction of interim hourly rates, less than 5% of immigration claims exceeded the escape threshold to earn an escape fee.'***

Accordingly, we would again request the number of cases which, for example, in the past year, have (a) not exceeded the proposed fixed fee; and (b) exceeded the proposed fixed fee, but failed to reach the proposed escape fee threshold. This data must be available to the MoJ and LAA, and would provide a more accurate basis for the forecasted impact of this proposal on the sustainability of providers.

The Government recognises the value that counsel can add to proceedings and is clear that it is the decision of individual providers as to whether they instruct counsel. It is not the Government's position to dictate how a legal aid provider should conduct their case. No changes to the additional payments for advocacy services as set out in table 4(c) of Schedule 1, Part 1 of the Remuneration Regulations were proposed as part of this consultation.

We continue to be concerned by the position of the Government in relation to the instruction of external counsel. We agree, it is not for the Government to dictate how a legal aid provider should conduct their case. However, if a legal aid provider wishes to instruct a barrister in their case, the system should ensure adequate and appropriate remuneration.

We are disappointed to see that no consultation has been conducted into this matter. As we noted in our consultation response, 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 appeal skeleton argument.

Therefore, as stated in our consultation response, '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.'

As part of the Civil Legal Aid Review, we urge the MoJ to urgently reconsider the proposal given the important role of external counsel in publicly funded work, particularly in the Immigration and Asylum Chamber of the First-tier Tribunal.

This remit of this consultation was limited to the proposals on individual fees. As a result, points made about fees more generally, the scope of the immigration legal aid scheme or the immigration or tribunal systems were not part of this consultation. These comments have, however, been passed onto the respective teams within the Government. Operational concerns raised have been passed to the LAA.

We would welcome engagement on our wider points at paragraph 5 of our consultation response, about fees more generally and the scope of the immigration legal aid scheme, as part of the Civil Legal Aid Review. We understand the Terms of Reference for the review are expected to be published imminently.

Moreover, we would welcome engagement from the LAA on the operational concerns we raised in our response.

The suggestion of interim billing is a matter for the LAA.

We would also welcome engagement from the LAA on the matter of interim billing. One of our recommendations at paragraph 5 of our consultation response was to address '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'.

As a result, the Government will also be decreasing the legal help (stage 1) threshold to 2x the fixed fee, meaning the escape fee threshold for both stage 1 and stage 2 will be the same. We hope this consistency in thresholds will be welcomed by legal aid providers and contribute to a fairer and more sustainable payment model.

We welcome the consistency in thresholds.

Proposal 2: Provision of seven hours of non-means tested and non-merits tested advice paid at hourly rates for recipients of Priority Removal Notices

The Government intends to implement this proposal as consulted on, which is that the initial PRN advice of up to a maximum of seven hours will be remunerated at the hourly rates for Legal Help in table 7(d) of the Remuneration Regulations (Schedule 1, Part 1). Travel and waiting time will also be remunerated separately at the rates in table 7(d), and travel costs and fees for interpreters will be claimable separately too.

[...]

The suggestion to increase the hourly rate is also beyond the remit of this consultation and therefore will not be taken forward at this time.

We remain concerned regarding the inadequacy of hourly rates. As detailed in our consultation response, hourly rates have fallen significantly in real terms since 2007. They require urgent review, adjustment for inflation, and increases. This is not a matter which can wait until the implementation of any findings and recommendations of the Civil Legal Aid Review, in 2024 or beyond. Urgent interim measures are required to secure the sustainability of the immigration legal aid market.

The LAA will shortly be commencing the contractual consultation, which will seek to address the queries mentioned above that relate to how the proposal will work in practice.

We look forward to the LAA's engagement with us on this matter. Once more, we would welcome confirmation from the LAA 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. We are also awaiting confirmation as to whether a Priority Removal Notice (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 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? A second provider should be enabled rather than discouraged from taking on a case it considers to be meritorious.

We maintain that the system must be designed and implemented with the aim of ensuring that providers are able and willing to carry out this important work. In ILPA's survey, referenced in our response to the consultation, nearly 42% of respondents indicated they were unlikely to take on these cases on the basis of these proposals. 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.

We would direct the MoJ and LAA to our responses to the Tribunal Procedure Committee on proposals to amend the Tribunal Procedure Rules, including in relation to our concerns regarding the availability of representation and timeframes proposed for expedited appeals.[1]

The Government's view is that this approach of paying hourly rates after an initial consultation has worked well in other areas of immigration advice, such as matters opened following an initial 30-minute appointment under the Detained Duty Advice Scheme.

We note that this approach has not worked as well, in other areas of immigration advice, for the cohort to be affected by PRNs. According to HM Chief Inspector of Prisons, "Foreign National

[1] Public Law Project (2023) Response to Consultation on possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules arising from Nationality and Borders Act 2022, <https://publiclawproject.org.uk/content/uploads/2023/01/190123-TPC-NBA-Consultation-Public-Law-Project-submitted.pdf> accessed 26 January 2023; and ILPA, 'ILPA's response to the TPC's Consultation on Possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules arising from Nationality and Borders Act 2022 (19 January 2023)' < https://ilpa.org.uk/ilpas-response-to-the-tpcs-consultation-on-possible-changes-to-the-first-tier-tribunal-immigration-and-asylum-chamber-rules-and-the-upper-tribunal-rules-arising-from-nationality-and-borders/> accessed 26 January 2023.

Offenders", who we understand to be the only cohort the Home Secretary's intends to serve PRNs, 'routinely' encounter difficulty in obtaining legal representatives to provide 30 minutes of free advice.[2] Accordingly, we remain concerned that they may not be able to find a legal representative willing to offer seven hours of legal advice or subsequently take on the case and respond to the PRN before the cut-off date (with the timeframe for such cut-off dates still unknown). It is worth noting that the Tribunal Procedure Committee in 2019 considered it inevitable that a substantial proportion of appeals would have to be transferred out of the fast track, in part due to the practical challenges faced by appellants and their representatives in preparing and participating in an appeal process with a fixed 28 working day timeframe.[3]

Furthermore, we note that there are significant issues with the operation of the Detained Duty Advice Scheme (DDAS) that will be important to address in the provision of advice for recipients of PRNs.

There is no peer review of the advice given in the DDAS surgeries themselves. As a result, if a firm refuses to act for a person after the surgery, then there is no way of assessing the quality or merit of that advice. We consider that it is particularly important in cases where the representative refuses to act for the client after the seven hours of advice, that those files are subject to a peer review process to ensure that the advice given is competent.

There have been DDAS firms that have been found to be incompetent (rating 4) who have been permitted to remain on the DDAS rota and conduct surgeries. This indicates that quality standards are not being properly enforced. It is critical that PRN work is conducted competently. Firms that are assessed as incompetent (rating 4: "below competence" or rating 5: "failure in performance") should be suspended from providing PRN work (and DDAS work). If they continue to perform immigration contract work then the suspension should only be lifted once they are assessed to be at least competent (ratings 1 – 3).

We suggest that the LAA monitor the numbers of people seen for the seven hours of advice and the proportion of those people who are then taken on as clients after the seven hours of advice. If firms take on very few cases and turn away too many clients then this should result in an investigation of the reasons for this to ensure compliance with the contract, including quality standards. If those standards are not being met then appropriate action should be taken including suspending firms from conducting PRN work.

The Government acknowledges the value of the feedback received on the ECF scheme and is grateful to respondents for their helpful suggestions to make applying for ECF as PRN follow-on work as

[2] HM Chief Inspector of Prisons, *The experience of immigration detainees in prisons* (September 2022) 5, at §2 <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2022/10/The-experience-of-immigration-detainees-in-prisons-web-2022.pdf> accessed 17 January 2023. Additionally, the report states at page 5: 'Obtaining adequate legal advice was a problem. Most establishments could provide a list of legal representatives, but many detainees said they had difficulties in contacting them and had struggled to find a representative who would take on their case. Detainees' access to new policy initiatives – such as an additional allowance that could be used to buy PIN phone credit to contact legal representatives and a free 30-minute appointment with a solicitor – was patchy. Not all prisons were aware of these entitlements, and some detainees had not received them at the time of our fieldwork.' Therefore, issues for persons in immigration detention in prisons persists following the case in *SM v Lord Chancellor* [2021] EWHC 418 (Admin).

[3] Reply from the Tribunal Procedure Committee (March 2019), para. 67 dft-consultation-response.pdf (publishing.service.gov.uk).

seamless as possible. It is not within the remit of this consultation to bring PRN follow-on work into scope.

We remain concerned regarding the follow-on work that could require an ECF application, which may be a barrier to providers taking on the work, and result in PRN recipients without the representation needed to respond by the cut-off date or in any expedited or related expedited appeal.

The Government will be aware that it proposed seven days for an appellant to lodge a notice of appeal in an expedited appeal. It was the view of the Tribunal Procedure Committee, in their Consultation[4] at §52, that '[o]btaining representation and arranging legal aid is likely to take longer than 7 days.' Accordingly, we urge the LAA and MoJ to engage with the Tribunal Procedure Committee to ensure that the proposed timetables for expedited appeals can be met, particularly if certificates must be granted to providers.

Similarly, the suggestion to increase the hourly rates are beyond the scope of this consultation, as it is the Government's view that the civil legal aid fee schemes are more properly considered across the board rather than in isolation.

We would welcome engagement on this matter from the MoJ, as part of the Civil Legal Aid Review. Moreover, we recommend urgent interim measures increasing the hourly rates before any proposals following on from the 2024 Civil Legal Aid Review report are implemented.

Proposal 3: Advice on NRM referral

The Government recognises the strength of feeling by respondents that the proposal of £75 for advice on referral into the NRM is insufficient, as detailed by the five themes outlined above. In light of these responses, the Government is amending this proposal.

We welcome the Government's acknowledgement that its initial proposal was insufficient.

The Government intends to implement a bolt-on fee of £150 for advice on referral into the NRM, double the original proposal. We consider that this addresses the primary concern of most respondents to the consultation that the proposed £75 fee was set with respect to the work required, without consideration for the needs of the victim. The detailed responses from respondents to the consultation have provided a clearer picture of best practice for working with victims of modern slavery and the efforts necessary to ensure a victim is not re-traumatised when seeking legal advice.

We have also heard how some tailoring of advice to the individual will be necessary. Respondents to the consultation explained how advising an individual on whether to enter the NRM and how it could affect their immigration case would be individual advice provided on a case-by-case basis. Some respondents also highlighted their belief that individualised advice would become even more important in light of wider changes to the modern slavery system as set out in the NABA. The Government considers that a revised fee of £150, which equates to around three hours of advice, will enable providers to ensure their advice on referral into the NRM is tailored to the individual.

[4] Tribunal Procedure Committee, 'Possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules arising from Nationality and Borders Act 2022' (27 October 2022) <https://www.gov.uk/government/consultations/possible-changes-to-the-first-tier-tribunal-immigration-and-asylum-chamber-rules-and-the-upper-tribunal-rules-arising-from-nationality-and-borders-a> accessed 17 January 2023.

In our survey, we noted that the most common response to the question '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?' was not three hours, but four to five hours.

Therefore, we again consider that the demarcation of the length of advice, as three hours, without any in-built flexibility for any reasonable adjustments for vulnerable clients is concerning.

We consider it to be a shame that the Government now wishes to introduce this new fixed fee, without any further public consultation as to the adequacy of the fixed figure.

One of ILPA's members, who specialises in providing legal representation to victims of trafficking and labour exploitation, has said that they would rarely, if ever, claim the *still* very low fee of £150. The reason for this is the administrative burden attached in separating out this type of complex advice, which the consultation purports to narrowly define, from other related advice. Therefore, we maintain the position set out in our consultation response.

Parliament agreed that the nature of the advice on referral into the NRM is an "add-on service" and so it is not within the remit of this consultation to change the nature of that advice, simply to set an appropriate fee.

It is our view that Parliament agreed the nature of the service to be an "add-on", but not the method of remuneration. We can see no stipulation in the amendments to Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, in sections 66 and 67 of the Nationality and Borders Act 2022, for the method of payment of such add-on services.

Accordingly, we reiterate and update our recommendations at paragraph 81 of our consultation response:

- 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.
- We recommend that the bolt-on fee is brought in scope and remunerated as part of the fixed fee.
- If neither of our above two recommendations are accepted, we seek assurances from the MoJ and LAA that time spent providing advice, which goes beyond three hours of advice, can be counted towards the escape fee on the individual's existing immigration matter.

It remains the view of the Government that NRM advice contributes to an individual being able to make an informed decision and is valuable regardless of whether a referral is ultimately agreed to and made.

We agree with the Government's position on this.

The rules for claiming the NRM fee will be set out in the immigration legal aid contract. However, we can confirm that it is our intention that advice on the NRM can be provided and the associated fee be claimed even if a client moves to a different legal aid provider part way through the case. In those instances, the NRM fee will be claimable by both providers.

We welcome this intention and look forward to it being reflected in the LAA's approach to drafting amendments to the immigration legal aid contract.

Proposal 4: Age Assessment Appeals

We do, however, recognise that age assessment appeal work will be new for some providers and that some providers will not have the expertise to immediately take on these cases. We are considering what training could be provided or whether accreditation could be helpful in equipping practitioners with the knowledge and skills they need to conduct this work.

We would welcome engagement on this matter for, as we noted in our consultation response, '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.'

The focus of this policy consultation is remuneration for the proposals contained within it. However, the Government appreciates and acknowledges the concerns raised by respondents on dispersal patterns and the effect this has on capacity. The LAA and Home Office discuss dispersal patterns and legal aid capacity and take action when gaps appear.

We remain concerned regarding the capacity of providers. While we are glad to hear that the LAA and Home Office discuss dispersal patterns, we understand that this has been insufficient to address the number of unrepresented applicants. As we noted in our consultation response, '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.'

Moreover, we remain concerned regarding the loss of expertise of specialists in age assessment judicial review work who may consider the proposed First-tier Tribunal fees inadequate to carry on this complex area of work in statutory appeals.

Regarding the quality of advice, legal aid contracts explicitly set out quality standards, and providers are monitored by LAA contract managers to ensure they are meeting contract requirements. There are mechanisms in place to monitor and review performance, including through independent peer review. The quality standards used by the LAA in respect of firms with immigration and asylum contracts are primarily IAAS accreditation, the supervisor standard, ratio of supervisors to fee-earners, and independent peer review. These each have their limitations:

a. IAAS accreditation is not a measure of the standard of the work done in a client's case.

b. The supervisor standard is generic, as is the ratio of supervisors to fee-earners. Therefore, the supervisor may not have any experience of age assessment cases.

c. Independent peer review only takes place if the firm has closed 15 files. It will be a random sample. Therefore, age assessment cases may not necessarily be peer reviewed as part of the process. As there are not enough immigration peer reviewers, it appears to take a long time for peer reviews to take place.

It is unclear whether these standards will be adequate to ensure that firms that are new to age assessment work are doing it competently. It may be necessary to introduce specific age assessment standards, to monitor the quality of work and to take action if necessary to ensure that the quality standards under the contract are being complied with and that only competent firms are acting for

age disputed appellants. Measures may include specific accreditation standards, specific supervisor standards (for example, experience of conducting age assessments), or targeted peer review of age assessment files.

The Government intends to proceed with the proposal to remunerate age assessment appeals work under hourly rates for the First-tier Tribunal as set out in table 10(c) of Schedule 1, Part 3 of the Remuneration Regulations.

The Government remains of the view that work conducted in the First-tier Tribunal should be paid using the First-tier Tribunal rates. Since we intend to proceed with the proposal as agreed in question eight, doing so would ensure parity across the different categories of law to pay immigration, public and community care providers equally.

Tribunals are designed to be accessible and low cost. For this reason, generally, tribunal procedure rules do not provide for costs to be recoverable inter partes in tribunal proceedings, except where a party, or their legal representatives, have conducted the proceedings unreasonably. There are no plans for this to change.

In addition, we would also note that the process in the First-tier Tribunal is likely to be simpler because there will no longer be a permission stage. Whilst this proposal represents a reduction in the hourly rate when compared to judicial reviews, this funding arrangement at the First-tier Tribunal is likely to be more secure given that the removal of the permission stage means that work will no longer be carried out at risk for providers.

We remain concerned regarding the introduction of lower hourly rates and maintain the position in our consultation response:

'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.

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 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 Tribunal Procedure Committee has recently consulted on proposed rules which would introduce new processes for the First-tier Tribunal (IAC), such as interim relief applications and an interested party rule. The established specialists in this area of work are needed to bring their knowledge and expertise to the First-tier Tribunal and guide new practitioners in this complex work for a vulnerable set of appellants.

Proposal 5: Rebuttal Mechanism

The Government intends to proceed with the proposal to remunerate work on the rebuttal mechanism by hourly rates. These hourly rates are paid under table 4(d) of the Remuneration Regulations.

We remain of the view that hourly rates are the simplest and most logical way to remunerate this work in the first instance given that the rebuttal mechanism is a new process and there is some uncertainty as to how much work will be required. We also expect that there will initially be some variation in time taken as both practitioners and the Home Office become familiar with a new way of working.

We consider that work on the rebuttal mechanism is a separate process that begins from when an individual is issued correspondence by the Home Office to notify them of their provisional grouping status and has been offered the opportunity to submit representations as to why they should not be in that group within 10 working days. Advice can be provided on the provisional grouping and the way to rebut that grouping.

We understand that providers may choose to consider the criteria for being a group 2 refugee and provide evidence that could rebut a group 2 presumption from the outset. However, work conducted prior to the receipt of the correspondence would fall under the existing funding scheme applicable to the case. A new matter start for rebuttal work is only to be created if correspondence is received informing of the provisional grouping to group 2 and an individual needs advice in rebutting the claim.

We maintain our position in our consultation response. From the outset, providers must consider, and take instructions on, matters relevant to a rebuttal.

We are disappointed that, despite this lived reality of case preparation, the MoJ has chosen to remunerate this work under the inadequate fixed fee legal help regime. Therefore, in cases where any mistaken view of the Home Office that an applicant is or could be a "group 2 refugee" has been or would have been successfully rebutted early on in the case, thus saving the public purse in a separate rebuttal mechanism needing to be carried out by the Home Office and administered by the LAA, it will only be paid (if at all) under the fixed fee regime.

This represents another perverse incentive to practitioners, to only address any provisional grouping late in the claim, so that it may be remunerated at hourly rates. The LAA will then need to be willing to act quickly, including in granting any disbursements, if an applicant must respond and provide rebutting evidence within 10 working days of the provisional grouping.

We reiterate the remit of this consultation does not include the level of the hourly rates more generally. It is the Government's view that the civil legal aid fee schemes are more properly considered across the board rather than in isolation.

As above, we reiterate our interest in seeing this matter addressed both urgently in interim measures and in the Civil Legal Aid Review.

This question asked whether the proposal to remunerate work on the rebuttal mechanism by hourly rates should be part of the new immigration contract. The Government intends to proceed with the proposal, which means the rebuttal mechanism will be part of the new immigration contract which will begin in September 2024. A tender will be launching in early 2023 to enable other providers to join the existing immigration contract.

As set out in the response to Q11, the Government has no intention of setting a fixed fee for work on the rebuttal mechanism for the new immigration contracts in 2024. No time frame has been prescribed for any future fixed fee. It remains our intention to ensure that sufficient robust evidence has been gathered before any future fixed fee is proposed, which will be subject to a public consultation.

We repeat our reservations in relation to the implementation of a fixed fee for this work, regardless of how distant in the future. We agree that robust evidence must be gathered before this matter should even be consulted upon.

Sustainability and Data

Regarding the collection of case and billing data, the Government relies on data provided through the LAA's case management systems to inform our impact assessments. We are grateful to the legal aid providers who record accurate and complete data to help ensure that these assessments are as robust as possible.

Whilst the subject of this consultation is remuneration for specific proposals, the Government acknowledges the concerns raised regarding capacity of providers, the overall fee schemes and lack of data, and assure respondents that these issues are being considered as part of wider work on the sustainability of the civil legal aid market.

This consultation focuses on remuneration proposals for specific types of work. We know that some of this work is not yet in scope and so have used equalities data for the wider immigration market, in recognition that these proposals will soon be part of the immigration legal aid scheme. How individuals with protected characteristics are impacted more broadly is beyond the scope of this consultation. However, we recognise that the areas covered in this consultation form one part of the wider immigration legal aid market, which the Government is considering as part of wider work on sustainability.

The Government has recently announced a review of the civil legal aid market, with the aim of exploring options to improve the sustainability of the sector. Although we welcome this review, we are concerned that a strategy to secure the sustainability of the immigration legal aid sector needs to be implemented more urgently than the timeframe for which the review allows.

Accordingly, as outlined above, we recommend urgent interim measures to increase rates. We are happy to engage further with the Government on this point and the wider review.

We would also urge the Government to consider what gaps currently exist in its data, and to rectify gaps in its data gathering as a matter of urgency. It has been difficult for us to properly comment on many of the consultation proposals given the vague estimates, assumptions, and inadequate data upon which they have been based. For example, the survey data on which the fixed appeal fee proposals are based, was only published following the submission of our consultation response and the published deadline for consultation responses. The data draws on 17 responses, only 14 of which were full and valid.[5] In ILPA's response to the MoJ's 2021 Call for Evidence on Immigration Legal Aid Fees and the Online System, ILPA requested significant data on the online appeal system so that we could assess the system on the basis of the evidence and provide a further response as part of the consultation.[6] The requested data was not provided to ILPA.

Dr Wilding has suggested that the failure of government bodies to 'collect adequate evidence about the functioning of the [legal aid] market' amounts to the Lord Chancellor effectively 'ignoring a

[5] Ministry of Justice. (2022). Immigration/Asylum survey data. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1098142/immigration-survey-report-data.pdf

[6] ILPA, 'ILPA's Response to MoJ Call for Evidence: Immigration legal aid fees and the online system' (2 December 2021) accessed 26 January 2023.

statutory duty to secure the availability of legal aid'.[7] We urge the Government to use the upcoming review to address this significant evidence gap. In particular, the Government needs to better monitor unmet need as it is clear that available matter starts do not equate to capacity.

Finally, as accepted in the Government's response to the consultation, the Equalities Statement contained within the original consultation document recognises that it is based on 'limited information on legal aid providers'. Indeed, the conclusions drawn about the immigration and asylum legal aid sector and its characteristics are based on data from a 2015 survey conducted by the LAA.[8] We note that the Government accepts 'it is likely outdated as it was conducted prior to the current 2018 Standard Civil Contract.' We would recommend that the Government collect its own additional data, including on asylum and immigration practitioners who will be impacted by these proposals.

In conclusion, urgent interim and long-term measures are needed to secure the sustainability of immigration and asylum legal aid. We would urge the Government to accept our recommendations and engage with us on these matters.

About PLP

Public Law Project is an independent national legal charity that represents and supports individuals and communities who are marginalised through poverty, discrimination, or disadvantage when they have been affected by unlawful state decision-making.

Their vision is a world where the state acts fairly and lawfully and their mission is to improve public decision making, empower people to understand and apply the law, and increase access to justice through casework, research, policy advocacy, communications, and training.

About ILPA

The Immigration Law Practitioners' Association (ILPA) is a professional association and registered charity that exists to promote and improve advice and representation in immigration, asylum and nationality law. They do this through an extensive programme of training and disseminating information and by providing research and opinion that draw on the experiences of members. ILPA is represented on numerous Government, official and non-Governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

[7] Wilding, J. (2022). Beyond Advice Deserts: Strategic Ignorance and the Lack of Access to Asylum Legal Advice. Journal of the Society for Advanced Legal Studies, 3(3). https://journals.sas.ac.uk/amicus/article/view/5439
[8] Ministry of Justice. (2022). Immigration Legal Aid: A consultation on new fees for new services, p.29. https://consult.justice.gov.uk/digital-communications/immigration-legal-aid-new-fees-consultation/supporting_documents/immigrationlegalaidfees%20consultationdocument.pdf