



# Ministry of Justice’s Consultation: Legal aid fees in the Illegal Migration Bill

## Response of the Immigration Law Practitioners’ Association

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### About us

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<b>Are you content for the Ministry of Justice to include your affiliated organisation in a public list of respondents to the consultation exercise?</b> Yes
<b>If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent:</b> Please see the Introduction below.

## Introduction

1. 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.
2. This is a response to the Consultation 'Legal Aid Fees in the Illegal Migration Bill',<sup>1</sup> by the Ministry of Justice ('MoJ'), running from 27 June 2023 to initially 24 July 2023, but extended to 7 August 2023.
3. The proposals in the Consultation are:
  - i) for work undertaken pursuant to section 56 of the Illegal Migration Act 2023, 'hourly rates will be up to 15% higher than existing immigration hourly rates' and 'that this will apply to all activities captured by the hourly rates, including for Controlled Work and Licensed Work.'<sup>2</sup>
  - ii) to conduct a post-implementation review of fees for work under the Illegal Migration Act 2023 'in close consultation with stakeholders and interested parties, within two years of the new fees being implemented',<sup>3</sup> 'to assess the sustainability and effectiveness of the fee structure for IMB Work, ensuring its continued suitability as the demand for legal aid services evolves over time.'<sup>4</sup>
4. We welcome the opportunity to respond to this Consultation.

## Engagement outside of this Response

5. ILPA was invited to two roundtables with the MoJ, chaired by Farah Ziaulla, Director of Access to Justice. The first took place on Wednesday 10 May 2023, prior to the Consultation, and the second took place on 13 July 2023, after the Consultation opened.

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<sup>1</sup> Ministry of Justice, 'Legal Aid Fees in the Illegal Migration Bill' (27 June 2023, updated 24 July 2023) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1165677/legal-aid-fees-illegal-migration-bill.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165677/legal-aid-fees-illegal-migration-bill.pdf)> accessed 5 August 2023 (hereinafter 'Consultation').

<sup>2</sup> Consultation [36].

<sup>3</sup> Consultation [41].

<sup>4</sup> Consultation [40].

6. On 9 May 2023, ILPA recommended that invitations to the first roundtable be extended to other relevant organisations in the sector with concerns regarding legal aid provision in what was then the Illegal Migration Bill ('IMB') and recommended that a larger number of legal aid providers (including in various regions and of various sizes) be included to provide a better picture of the likely impact for the sector. We were informed that the MoJ was 'keeping the invitee list for this roundtable small as this is very initial engagement on policy that is still being formed'. It was at this small roundtable that one stakeholder mentioned that they had recommended a 15% rather than a 5% enhancement in early 2023 in relation to the Legal Aid Agency Consultation on changes to 2018 Standard Civil Contract Specification Category Specific Rules: Immigration and Asylum, but that this recommendation had not been taken on board.<sup>5</sup> The same stakeholder also noted that, in October 2021, the Westminster Commission on Legal Aid, a cross-party initiative formed by the All-Party Parliamentary Group on Legal Aid, recommended a 25.02% increase for inflation:

*While the cost of the legal aid system generally increased in the decades pre-LASPO, the fees paid to providers have not been increased since 1996. We recommend that legal aid fees be raised in line with inflation as this would mitigate the damage done by many years of frozen or decreasing fees. This would incentivise practitioners to return to legal aid work and reflect that the cost of delivering services has increased over time. An equitable settlement will include an uprating to reflect inflationary increases over a specified period of time. We would suggest using 2011 as a baseline for this calculation so that an inflationary increase can also account for the 10% cut introduced to civil fees that year. The services producer price inflation index gives a 25.02% rate of inflation since 2011. If this rate is applied to all of civil and family legal aid, we estimate that this will cost £171m more per annum. If the same rate is applied to criminal legal aid, this would be a further £224m.<sup>6</sup>*

7. Nevertheless, it was the 15% enhancement suggestion that resonated with the MoJ and which appears in this consultation, with the proviso that it is only *up to* 15%.
8. At the second roundtable, ILPA enquired about the lack of an impact assessment in relation to this Consultation, which it has still not seen published. Given that there has been no impact assessment, ILPA has not been able to assess or understand the Ministry of Justice's or Home

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<sup>5</sup> This recommendation was echoed in ILPA, 'ILPA's response to the Legal Aid Agency's Consultation on proposed changes to the 2018 Standard Civil Contract Specification Category Specific Rules: Immigration and Asylum' (23 February 2023) 19  
<<https://ilpa.org.uk/ilpa-response-to-laa-consultation-on-changes-to-the-2018-standard-civil-contract-specification-category-specific-rules-immigration-and-asylum-23-february-2023/>> accessed 7 August 2023.

<sup>6</sup> The Westminster Commission on Legal Aid, 'Inquiry into the Sustainability and Recovery of the Legal Aid Sector' (October 2021) 22-23, Recommendation A  
<[https://www.apg-legalaid.org/sites/default/files/The%20Westminster%20Commission%20on%20Legal%20Aid\\_WEB\\_0.pdf](https://www.apg-legalaid.org/sites/default/files/The%20Westminster%20Commission%20on%20Legal%20Aid_WEB_0.pdf)> accessed 7 August 2023.

Office's assumptions or projections relating to the proposed fee increase, including the projected impact on other areas of immigration and asylum legal aid and its sustainability more generally.

9. This Consultation asks providers to anticipate the necessary rates for supply of services for new work, without providing any figures or projections as to demand for those services. We would reiterate that it is unreasonable to expect practitioners to be able to state the fee increase required to sustainably carry out work under the Illegal Migration Act 2023, when the Home Office has stated it is 'not possible'<sup>7</sup> to estimate what deterrent impact - if any - the Act will have, and the MoJ has not provided any projections of the number of cases with which providers would need to assist. In such circumstances, how is it expected that providers can estimate the increase in staff members and other costs arising from this demand?

## Background

10. Our response to this Consultation should be read in conjunction with and seen against the background of responses and briefings that ILPA has produced on immigration and asylum legal aid over the years.
11. Most recently, on 21 July 2023, ILPA responded to the National Audit Office's Consultation on Legal Aid,<sup>8</sup> and in this response we repeat some of the pertinent points made. Following enactment of the Nationality and Borders Act 2022 (NABA), in August 2022, ILPA also responded jointly with the Public Law Project to the Ministry of Justice's 'Immigration Legal Aid: A consultation on new fees for new services', making recommendations and urging the Lord Chancellor to use his powers to secure the sustainability of the sector.<sup>9</sup> However, the necessary arrangements have not been made.<sup>10</sup>

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<sup>7</sup> Home Office, Impact Assessment: Illegal Migration Bill (HA 0438) (26 June 2023) [30] <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1165397/Illegal\\_Migration\\_Bill\\_IA\\_-\\_LM\\_Signed-final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf)> accessed 7 August 2023.

<sup>8</sup> National Audit Office, 'Consultation on legal aid' <<https://link.webpolsurveys.com/Participation/Public/1d4ca70f-e4e3-40fe-9d3e-93dcdb680384>> accessed 20 July 2023; ILPA, 'ILPA's Response to National Audit Office's Consultation on Legal Aid' (21 July 2023) <<https://ilpa.org.uk/ilpas-response-to-national-audit-offices-consultation-on-legal-aid-21-july-2023/>> accessed 5 August 2023.

<sup>9</sup> ILPA and PLP, 'ILPA and PLP Response to Ministry of Justice Immigration Legal Aid consultation on new fees for new services' (10 August 2022) <<https://ilpa.org.uk/ilpa-and-plp-response-to-ministry-of-justice-immigration-legal-aid-consultation-on-new-fees-for-new-services-10-august-2022/>> accessed 21 July 2023.

<sup>10</sup> ILPA and PLP, 'Joint statement on the Government's response to the consultation on immigration legal aid fees' (30 January 2023) <<https://ilpa.org.uk/ilpa-plp-joint-statement-on-the-governments-response-to-the-consultation-on-immigration-legal-aid-fees/>> accessed 20 July 2023.

12. Instead, the Legal Aid Agency ('LAA') announced<sup>11</sup> that it was extending the 2018 Standard Civil Contract, until 31 August 2024, to permit 'time to consider findings from the planned Ministry of Justice Civil Legal Aid Review' and 'then consider how any changes could be introduced into future civil contracts'.<sup>12</sup> The variation of the contract offered neither rate increases nor any contractual changes necessary to address the inherent issues with the legal aid system that have persisted and only been exacerbated since 2018. Therefore, the present unviable situation is secured for at least a further year.
13. Throughout consultation and debate regarding legal aid work arising from recent legislation, the MoJ has referred to the Review of Civil Legal Aid ('RoCLA'), as if it were the panacea for these ills. However, over the course of the past six months it has become clear that RoCLA will not solve the unsustainability issues arising from legal aid rates. As noted at paragraph 31 of the Consultation, RoCLA includes 'the procurement of services, user experiences and the broader impact of civil legal aid on the justice system'.<sup>13</sup> As the newly published Terms of Reference<sup>14</sup> for RoCLA do not encompass a review of the loss in value of legal aid fees and a review of what fees are required for a sustainable justice system, we understand that recommendations in relation to rates will not form part of the March 2024 report. On 16 February 2023, ILPA joined other representative bodies in expressing our concern about the restrictive scope of RoCLA and urging the MoJ to take urgent action to restore fee viability through an immediate 50% fee increase across civil legal aid to prevent further loss to the supplier base. No action has been taken, and it is likely to be a year, if not years, before the outcome of RoCLA is implemented, potentially under a new Government. By then, it will be too little too late.
14. To suggest that RoCLA is an adequate remedy for the current situation in immigration and asylum exposes an alarming underestimation of the scale of the legal aid crisis faced: the debilitating capacity issues of all legal aid representatives, the vast legal aid deserts, the swathes of unrepresented individuals across England and Wales, and the complex and ever changing hostile legal and policy landscape with which practitioners must keep pace.
15. Our members report that their asylum and immigration legal aid practices are financially unsustainable and unviable. This is primarily due to the limited scope of legal aid which excludes most non-asylum immigration matters, the administratively burdensome Exceptional Case Funding ('ECF') process, where time spent on unsuccessful applications is not remunerated, complex and administratively burdensome billing and auditing processes that require work to be done at-risk or to go unpaid (such as the fixed fee system before a provider reaches the escape

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<sup>11</sup> Legal Aid Agency, 'Civil news: extension of civil contracts until 31 August 2024' (3 October 2022) <<https://www.gov.uk/government/news/civil-news-extension-of-civil-contracts-until-31-august-2024>> accessed 21 July 2023.

<sup>12</sup> *ibid.*

<sup>13</sup> Consultation [31].

<sup>14</sup> Ministry of Justice, 'Review of Civil Legal Aid, Terms of Reference' (7 August 2023) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1176013/overarching-terms-of-reference-for-the-review-of-civil-legal-aid.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1176013/overarching-terms-of-reference-for-the-review-of-civil-legal-aid.pdf) (accessed 7 August 2023).

threshold and is paid at hourly rates), inadequate and out-of-date fees, and cash flow problems arising from insufficient billing stages for practitioners to claim their costs at regular intervals to avoid suffering from Home Office and Tribunal backlogs. These themes appear time and time again in the practitioner comments provided in response to ILPA's Survey for Immigration & Asylum Practitioners on Legal Aid Sustainability<sup>15</sup> and featured heavily in ILPA's August 2022 response to the Ministry of Justice's prior consultation.

16. Combined, these systemic issues result in fewer specialist immigration and asylum practitioners to take on in-scope legal aid and ECF matters, with vulnerable persons who cannot afford private representation going without any legal representation due to practitioners refocusing their practices on higher paying work. The providers that do still take on matters are extremely stretched and almost always at full capacity. The scale of advice deserts has been well documented.<sup>16</sup> Many practitioners have taken on a greater proportion of private immigration and asylum work to legal aid immigration and asylum work, have focused on better paying legal aid work, or have abandoned legal aid work altogether. As reflected in ILPA's July 2023 legal aid sustainability survey, private work or grants often subsidise loss-making legal aid work.<sup>17</sup>
17. As legal aid becomes less sustainable each year, existing firms, not-for-profit organisations, and chambers become unable to retain existing practitioners and train and recruit new practitioners in the specialist areas of immigration legal aid (such as asylum, trafficking, detention, and domestic violence). 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.
18. Immigration legal aid is in a downward spiral and, while this has been apparent for many years, no action has been taken to change this trajectory. In a cost of living crisis, in which the public sector is offered pay rises, to be paid for by migrants,<sup>18</sup> immigration legal aid rates for those providing essential advice and representation to migrants in need of it have not increased for nearly three decades, but were instead cut more than a decade ago.

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<sup>15</sup> ILPA, 'APPENDIX: Additional Comments Provided in Response to ILPA's Survey for Immigration & Asylum Practitioners on Legal Aid Sustainability' (19 July 2023) <<https://ilpa.org.uk/wp-content/uploads/2023/07/Survey-Results-Additional-comments-1.pdf>> accessed 7 August 2023.

<sup>16</sup> Jo Wilding, *No access to justice: how legal advice deserts fail refugees, migrants and our communities* (2023) <[https://assets.website-files.com/5ea9ba3a86899781dfe3c099/62bc314261e2f338e0953848\\_No%20access%20to%20justice%20-%20how%20legal%20advice%20deserts%20fail%20refugees.%20migrants%20and%20our%20communities.pdf](https://assets.website-files.com/5ea9ba3a86899781dfe3c099/62bc314261e2f338e0953848_No%20access%20to%20justice%20-%20how%20legal%20advice%20deserts%20fail%20refugees.%20migrants%20and%20our%20communities.pdf)> accessed 20 July 2023; Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) <[https://www.researchgate.net/publication/333718995\\_Droughts\\_and\\_Deserts\\_A\\_report\\_on\\_the\\_immigration\\_legal\\_aid\\_market](https://www.researchgate.net/publication/333718995_Droughts_and_Deserts_A_report_on_the_immigration_legal_aid_market)> accessed 20 July 2023; Jo Wilding, *The Legal Aid Market* (2021, Bristol University Press).

<sup>17</sup> ILPA, 'ILPA's Legal Aid Sustainability Survey' (19 July 2023) 'ILPA-Legal-Aid-Sustainability-Survey-Results-Spreadsheet: Sheet 2 - 2. Current Providers Summary' 12 out of 17 carry out private work and see page 6 of the Appendix with Additional Comments <<https://ilpa.org.uk/results-of-ilpas-legal-aid-sustainability-survey/>> accessed 20 July 2023.

<sup>18</sup> HC Deb 13 July 2023, Vol 736, Col 526.

19. In the meantime, the Government has passed the Illegal Migration Act 2023 ('IMA'), a piece of legislation imposing far-reaching and damaging changes to immigration and asylum, critically impacting individuals practising within these areas of the law. There is no published impact assessment modelling the number of applications, claims, and appeals anticipated under the IMA; however, the MoJ refers to the fact that 45,755 people arrived in the UK on small boats in 2022.<sup>19</sup> This was more than five times the small boat arrivals in 2020 (8,466) and nearly double the number in 2021 (28,526).<sup>20</sup> The Impact Assessment for the Illegal Migration Bill referred to a further '3,400 recorded detections of people attempting to enter the UK illegally through other routes' in 2022.<sup>21</sup> There is no evidence that arrivals will cease to rise year on year.
20. As is appreciated by the MoJ, the IMA will create new work for representatives, which must be done on an expedited basis.
21. Under the IMA, it would appear that the first time a person will have legal advice, for example, to prove one or more of the four conditions in section 2 does not apply to them, will be when they receive a removal notice. This will create inefficiencies for representatives, applicants, the LAA, HMCTS, and the Home Office, who may have to engage with the suspensive claim and appeal process when it could have been avoided. Without early access to in-scope legal assistance, before an inadmissibility decision is made, an individual may be unable to:
  - i) prepare a case to explain that they did not use deception to obtain entry to the UK (if that is alleged);
  - ii) make representations as to the exceptional circumstances referenced in section 6(4)-(5) IMA which would mean they cannot be removed to certain countries or territories; and
  - iii) prove that they did not pass through or stop in a country where their life or liberty was not threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion, which will require significant gathering of evidence of conditions in local countries through which they passed, to evidence the threat they faced.
22. As we stated in our joint briefing with Bail for Immigration Detainees and the Public Law Project, before the IMA received royal assent, '[i]mmigration law is highly complex and extremely difficult - if not impossible - to navigate without a lawyer. It is unrealistic to believe that individuals seeking asylum, who have just arrived in the UK, who may be traumatised and vulnerable, and who may speak no or little English, can understand our complex laws and make

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<sup>19</sup> Consultation [67].

<sup>20</sup> Home Office, 'Irregular migration detailed datasets and summary tables: Irr\_D01' (last updated 25 May 2023) <<https://www.gov.uk/government/statistical-data-sets/irregular-migration-detailed-dataset-and-summary-tables>> accessed 7 August 2023.

<sup>21</sup> Home Office, Impact Assessment: Illegal Migration Bill (HA 0438) (26 June 2023) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1165397/illegal\\_migration\\_bill\\_ia\\_-\\_lm\\_signed-final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/illegal_migration_bill_ia_-_lm_signed-final.pdf)> accessed 7 August 2023.

effective representations (including lodging suspensive claims with the compelling evidence required under the Bill) without professional legal assistance.<sup>22</sup> As Lord Justice Underhill stated in the Court of Appeal’s decision on the Rwanda scheme, handed down on 29 June 2023, cases where a decision is fair where there has been no access to legal assistance are ‘likely to be exceptional’.<sup>23</sup>

23. The vast number of inadmissible applicants, who the Home Secretary will have a duty to remove, will simply not be able to find a legal representative to challenge their detention, make a human rights and/or suspensive claim, or plead any circumstances as to why they should be excluded from the draconian provisions of the IMA. It is foreseeable that many people will struggle to express themselves in English let alone have the ability to make ‘compelling’ written representations, meeting the form and content yet to be prescribed, while detained and without access to a lawyer within seven days of being served a notice of removal. As was also stated in the Court of Appeal’s decision on the Rwanda scheme:

*The evidence clearly establishes, and it is in any event obvious as a matter of common sense and experience, that in many cases it will indeed be impossible for claimants to submit effective representations within seven days of receipt of a Notice of Intent, even if they have ready access to legal assistance and only wish to make representations on matters specific to their particular circumstances.*<sup>24</sup>

24. In this Consultation, the MoJ has accepted ‘the strict timelines implemented through the IMB and the high anticipated volume of cases’ pose a ‘unique challenge’, particularly in light of the ‘challenges posed by the existing caseload and the capacity constraints within the immigration legal aid sector’.<sup>25</sup> By introducing new “fast track” procedures, suspensive claims, appeals, and detention powers, the Act, if implemented, will place further limitations on the already stretched capacity of a limited pool of providers practising in this area.
25. The IMA provides an extremely short timeframe of seven days<sup>26</sup> for an individual to seek and find legal advice and representation and provide sufficient instructions for a representative to submit an in-time suspensive claim with compelling evidence against removal. If they miss this deadline, they must provide ‘compelling reasons’ why they did not claim in-time, and if these are not accepted by the Home Secretary, they have only seven working days to apply to the Upper Tribunal for a declaration that there were such reasons. If the suspensive claim is refused, but not certified as clearly unfounded, there are only seven working days to lodge an appeal with the

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<sup>22</sup> ILPA, BiD and PLP, ‘Joint Briefing on Amendment 155 to the Illegal Migration Bill for Report Stage in the House of Lords, 3 July 2023 (Duty to make legal aid available within 48 hours)’ 3 [7]  
<<https://ilpa.org.uk/wp-content/uploads/2023/07/Joint-Briefing-Legal-Aid-Detention-Amendment.docx-1.pdf>> accessed 5 August 2023.

<sup>23</sup> *R (AAA and ors.) v SSHD* [2023] EWCA Civ 745 at [429].

<sup>24</sup> *R (AAA and ors.) v SSHD* [2023] EWCA Civ 745 at [441].

<sup>25</sup> Consultation [3], [28]-[29].

<sup>26</sup> Illegal Migration Bill Explanatory Notes [178]

<<https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf>> accessed 7 August 2023.

Upper Tribunal and provide ‘compelling’ evidence in the notice of appeal, with the possibility of onward appeal to the Court of Appeal or Court of Session. If the claim is refused and certified as clearly unfounded, an application for permission to appeal must be made to the Upper Tribunal within seven working days, as there is no automatic right of appeal, and if refused there is no onward right of appeal. Time limits can be extended by the Tribunal ‘if it is satisfied that it is the only way to secure that justice is done in a particular case’, and time limits for determining applications for permission to appeal or making a decision on an appeal can be extended by up to three working days where a new matter is raised.<sup>27</sup> This new fast-track process will undoubtedly require legal representatives to assist claimants, applicants, and appellants at unworkable speed.

26. However, it is not the case that one irregular arrival equates to one suspensive claim and one subsequent appeal. Rather, the IMA traps individuals in perpetual limbo and inadmissibility. For the vast majority of individuals arriving, who are not nationals of a State listed in what will be section 80AA of the Nationality, Immigration and Asylum Act 2002, as introduced by section 59 of the Illegal Migration Act 2023, the Home Secretary can continue to try to remove them to “safe” third countries, if the first country to which she attempts to remove them is found to not be “safe” (i.e. if the serious harm condition is found to be met in relation to the person). In fact, the Home Secretary is duty-bound by section 2 of the IMA to make arrangements for their removal. Thus, in relation to each proposed third country, an individual may bring a serious harm suspensive claim, and the endless cycle of necessary representation and challenge continues.<sup>28</sup>
27. Furthermore, depending on the extent to which detention powers under the IMA are employed, there may be a large number of urgent bail applications to the Home Secretary and applications for writs of *habeas corpus* to the High Court in the first 28 days of detention, bail applications to the First-tier Tribunal for most children and adults after 28 days and certain unaccompanied children after eight days, as well as judicial review challenges regarding detention on limited grounds for the first 28 days of detention and public law grounds thereafter.
28. Provision of legal aid is a key component in ensuring the constitutional right of access to justice, itself inherent in the rule of law.<sup>29</sup> The courts have repeatedly upheld the principle that a failure to provide legal aid can amount to a breach of fundamental rights.<sup>30</sup> However, in England and Wales, following a decade of austerity and cuts to legal aid services and fees,<sup>31</sup> the decreasing number of legal aid providers in asylum and immigration law with capacity to take these cases

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<sup>27</sup> Illegal Migration Act 2023, s 49.

<sup>28</sup> ILPA and Amnesty Joint Briefing, Illegal Migration Bill (21 June 2023)

<https://ilpa.org.uk/illegal-migration-bill-joint-briefing-21-june-2023/> accessed 7 August 2023.

<sup>29</sup> Echoing the words of Lord Reed in *R (Unison) v Lord Chancellor* [2017] UKSC 51 at [66].

<sup>30</sup> *R (Gudanaviciene & Others) v Director of Legal Aid Casework and Lord Chancellor* [2014] EWCA Civ 1622.

<sup>31</sup> For example, hourly rates, which were introduced on 1 October 2007 in the Community Legal Service (Funding) Order 2007 have not risen, but were further cut in 2011 by 10% in the Community Legal Service (Funding) (Amendment No.2) Order 2011. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 excluded most non-asylum immigration matters from the scope of legal aid, including cases based on the right to respect for private and family life under Article 8 of the European Convention of Human Rights.

impedes access to free legal advice and representation in any meaningful sense. Already insufficient legal aid provision is made even harder to access.

29. Nevertheless, this Consultation only presents a piecemeal solution, which will do nothing to address the present failure(s) of the legal aid market. It does nothing to acknowledge or address the vast number of unrepresented individuals, presently eligible but unable to access legal aid representation and advice. At paragraph 3 of the Consultation, it is said the higher fee for immigration work relating to the IMA is 'to help ensure that the sector can meet the demand for legal aid'. However, this fails to recognise that, prior to the implementation of the vast majority of the IMA, demand already far outstrips supply.
30. Government figures from 2022 suggest that around half the number of people seeking asylum do not have access to legal aid advice.<sup>32</sup> An October 2022 report by the Anti Trafficking and Labour Exploitation Unit (ATLEU) reveals a staggering 90% of support workers surveyed struggled to find a legal aid immigration lawyer for a survivor of trafficking and modern slavery in the past year, with devastating impacts.<sup>33</sup> Bail for Immigration Detainees (BID) recently published a Legal Advice Survey based on 42 people being held in Immigration Removal Centres, with only 14 with a lawyer funded by legal aid.<sup>34</sup> Before the legal aid cuts came into force, 79% of people had legal representation of which 75% were legal aid, and the figures have remained far lower ever since.<sup>35</sup> The survey found that after legal aid cuts, in May 2013, just 43% of people had a lawyer in their immigration case, and only 29% had a legal aid solicitor.<sup>36</sup> In 2022, we understand an ILPA member, Refugee and Migrant Forum Of Essex & London (RAMFEL), was unable to refer three out of four asylum seeking clients for legal aid representation.
31. Evidence gathered by Detention Action in 2021 showed that the Detained Duty Advice Scheme through which 30 minutes of free legal advice are provided to people in detention (after which the representative must undertake a means and merits test) was operating with persistent fundamental defects, including people not knowing whether they had a legal representative willing to take on their case at the end of the session and being denied representation on the basis of complexity or provider capacity.<sup>37</sup>

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<sup>32</sup> Dr Jo Wilding, 'New Freedom of Information data indicates half of asylum applicants are unable to access legal aid representation' *Refugee Law Initiative* (4 November 2022)

<<https://rli.blogs.sas.ac.uk/2022/11/04/new-freedom-of-information-data-indicates-half-of-asylum-applicants-are-unable-to-access-legal-aid-representation/>> accessed 20 July 2023.

<sup>33</sup> Anti Trafficking & Labour Exploitation Unit (ATLEU) "'It has destroyed me": A legal advice system on the brink' (2022) 4 <<https://drive.google.com/file/d/15xlzaXCpN2eyXSlw7Ubx2Au1lr6mRXRF/view>> accessed 20 July 2023.

<sup>34</sup> Bail for Immigration Detainees, 'Autumn Legal Advice Survey' (December 2022) <[https://hubble-live-assets.s3.amazonaws.com/biduk/file\\_asset/file/716/221205\\_LAS.pdf](https://hubble-live-assets.s3.amazonaws.com/biduk/file_asset/file/716/221205_LAS.pdf)> accessed 20 July 2023. Those individuals were all BID clients. Not all were individuals seeking asylum.

<sup>35</sup> For more detail, see BID's 'Legal advice in immigration detention: a 10-year review' <[https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2\\_assets/files/1293/10\\_Years\\_of\\_Legal\\_Advice\\_Survey.pdf](https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1293/10_Years_of_Legal_Advice_Survey.pdf)> accessed 20 July 2023.

<sup>36</sup> Bail for Immigration Detainees, (n 34).

<sup>37</sup> *R (Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin).

32. On 28 June 2022, Dr Jo Wilding reported that from September 2021 to March 2023, 38 (constituting 14.5% of) immigration and asylum providers were lost, taking the total figure down from 262 to 224.<sup>38</sup> In 2021 to 2022, there were also a similar number of inactive providers that did not open any new matters and 25 providers opened ten or fewer matters.<sup>39</sup> In 2020-2021, she had calculated a 'deficit of at least 6,000 between the number of new asylum applications and the number of new immigration and asylum legal aid matters opened' and, in 2021-2022, this had increased fourfold to a 'deficit of at least 25,000 between provision and need',<sup>40</sup> with the real deficit being larger as not every immigration and asylum matter start corresponds to a new asylum claim.
33. Significant capacity within these sectors is spent searching for legal representation, detracting from the ability to support the core needs of survivors, individuals in need of protection, and other vulnerable persons.
34. The implementation of the IMA, including with these proposals, will result in further unmet legal need and growing gaps in provision of advice, representation, due process, and effective access to justice. There are no short-term or piecemeal measures that will prevent this. We warn against implementation of drastic changes to the immigration and asylum system in the IMA or the NABA, before stability and sustainability have been secured within the legal aid market.
35. The Consultation's Foreword from Alex Chalk KC MP, Lord Chancellor and Secretary of State for Justice, states that the higher fees for this work proposed 'will make sure legal aid practitioners are properly remunerated for the important work they do – and ensure fair payment and access to justice for all who seek it'.<sup>41</sup> If it is necessary to properly remunerate legal aid practitioners for the work they do, why is the rate increase proposed only for this small area and not all of civil legal aid, and not even for all of immigration and asylum legal aid? If funds can be found for delivery of this 'key Government priority',<sup>42</sup> why can funds not be found to ensure access to justice for all? Is that not a Government priority?
36. This is a proposal to shift rather than to increase capacity, to incentivise providers away from certain areas of immigration and asylum legal aid, and to entice them to instead refocus their efforts on a small amount of work relating to removal under the IMA. If the MoJ is successful in this endeavour, it will cause further serious gaps in legal aid provision for the rest of in scope and

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<sup>38</sup> Dr Jo Wilding, 'Serious decline' in legal aid provision reveals extent of post-LASPO crisis' *The Justice Gap* (28 June 2023) <<https://www.thejusticegap.com/serious-decline-in-legal-aid-provision-reveals-extent-of-post-laspo-crisis/>> accessed 7 August 2023.

<sup>39</sup> *ibid.*

<sup>40</sup> Dr Jo Wilding, 'New Freedom of Information data indicates half of asylum applicants are unable to access legal aid representation' *Refugee Law Initiative* (4 November 2022) <<https://rli.blogs.sas.ac.uk/2022/11/04/new-freedom-of-information-data-indicates-half-of-asylum-applicants-are-unable-to-access-legal-aid-representation/>> accessed 20 July 2023.

<sup>41</sup> Consultation, 3.

<sup>42</sup> Consultation [28].

ECF immigration and asylum advice and representation, including for the backlog of asylum claims made before the IMA received royal assent. The large numbers of individuals presently without representation will remain without it. As an example of the scale, ILPA understands that in the first cohort of 1,500 individuals, in the Streamlined Asylum Processing Flow cohort, 923 (61%) had no representative on record with the Home Office.

37. The MoJ is aware that urgent and permanent increases across the entirety of civil legal aid are necessary to stabilise the market and address its inherent systemic faults. This is the way to 'ramp up market capacity'.<sup>43</sup> All civil legal aid rates must increase with the amount they have lost in the decades of inflation since they were set in 1996, and must be index-linked to future proof their stability. Furthermore, the inadequacy of the rates when they were set, particularly against the scope of work now required, necessitates the review and, where appropriate, uplifting of rates across civil legal aid.
38. For example, in immigration and asylum, in the years since LASPO, and the cutting of rates in 2011, there has been an enormous amount of legislative activity, including the Immigration Act 2014, Modern Slavery Act 2015, the Immigration Act 2016, the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, Nationality and Borders Act 2022, Judicial Review and Courts Act 2022, and the Illegal Migration Act 2023, in addition to a host of secondary legislation. There is also a significant amount that is in policy rather than law. The Immigration Rules are changed through thousands of amendments each year. This is the ever-changing landscape that practitioners face and with which they must keep pace.
39. However, many of these legislative, policy, and practice decisions of the Government impact the ability of those who need it most to access legal aid.
40. For example, when the Prime Minister announced his intention to eradicate the sizable backlog of thousands of initial asylum claims (made before 28 June 2022),<sup>44</sup> representatives were expected to drop everything at a hat or have their clients face dire consequences. There was no apparent regard to the capacity of the limited pool of immigration and asylum legal aid providers to assist with thousands of claims, at speed, under threat of individuals' asylum claims being withdrawn. Instead, in a counterproductive manner, focused on driving efficiencies in the Home Office above all else, a wholly new asylum claim questionnaire was to be completed, such that Home Office caseworkers would not need to look at previously submitted questionnaires or witness statements. There is no additional remuneration to cover this work unless the case has reached the escape threshold, at which point the work would use additional public funds to reiterate matters already submitted to the Home Office. It is clear that legal aid has not kept

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<sup>43</sup> Consultation [29].

<sup>44</sup> Prime Minister Rishi Sunak, 'PM statement on illegal migration: 13 December 2022' (13 December 2022) <<https://www.gov.uk/government/speeches/pm-statement-on-illegal-migration-13-december-2022>> accessed 20 July 2023; Letter from Home Secretary to Rt Hon Dame Diana Johnson MP (29 January 2023) <<https://committees.parliament.uk/publications/33804/documents/184602/default/>> accessed 20 July 2023.

pace with such policy change. For example, paragraph 8.73 of the Immigration and Asylum specification makes no reference to the standard legal help fee covering the questionnaire, but refers to 'initial advice, drafting of statements and representations'.<sup>45</sup>

41. As a further example, without sufficient consideration being given to these limitations on capacity and legal aid deserts, individuals seeking asylum are moved and dispersed into contingency accommodation, such as hotels, barracks and military sites, in parts of the UK without available legal aid representatives to provide advice in person. ILPA raised this numerous times in relation to Napier Barracks, including in response to the Home Office's Consultation on 'Napier Barracks planning application',<sup>46</sup> and in evidence to the Independent Chief Inspector of Borders and Immigration.<sup>47</sup> Nevertheless, further accommodation centres on military sites and barges are planned,<sup>48</sup> where individuals in great need of legal aid are likely to fail to receive it. In Lincolnshire, where the Home Office has proposed to create a new, large-scale asylum accommodation facility at RAF Scampton<sup>49</sup>, there is no provision for legal aid at all.<sup>50</sup> In the South West, where the barge, the Bibby Stockholm, is located in Portland, we are told there are only four legal aid providers remaining: Immigration Advice Service, Elisabeth Dean Solicitors, Bristol Law Centre, and Migrant Legal Project. At present, the proposed solution is to identify legal aid

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<sup>45</sup> Ministry of Justice, '2018 standard civil contract category specific rules: immigration and asylum' (April 2023) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1147860/2018\\_Civil\\_Contract\\_Category\\_Specific\\_Rules\\_Asylum\\_and\\_Immigration\\_April\\_2023.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147860/2018_Civil_Contract_Category_Specific_Rules_Asylum_and_Immigration_April_2023.pdf)> accessed 7 August 2023.

<sup>46</sup> ILPA, 'ILPA's Public Statement on the Home Office's Consultation on 'Napier Barracks planning application' (29 January 2022) <<https://ilpa.org.uk/wp-content/uploads/2022/02/ILPA-Public-Statement-Napier-Barracks-Consultation-2.pdf>> accessed 20 July 2023.

<sup>47</sup> ILPA, 'ILPA's response to the ICIBI's Call for Evidence: An inspection of the use of hotels and barracks as contingency asylum accommodation' (19 February 2021) <<https://ilpa.org.uk/wp-content/uploads/2021/02/2021-02-19-ILPA-response-ICIBI-Asylum-Accommodation.pdf>> accessed 20 July 2023.

<sup>48</sup> Home Office, 'Factsheet: Asylum accommodation on a vessel in Portland Port' (updated 4 August 2023) <<https://www.gov.uk/government/publications/asylum-accommodation-factsheets/factsheet-asylum-accommodation-on-a-vessel-in-portland-port#when-will-the-barge-be-in-place-and-for-how-long>> (accessed 7 August 2023); Home Office, 'Factsheet: MoD Wethersfield asylum accommodation' <<https://www.gov.uk/government/publications/asylum-accommodation-factsheets/factsheet-mod-wethersfield-asylum-accommodation#timescales>> (accessed 7 August 2023); Home Office, 'Factsheet RAF Scampton asylum accommodation' <<https://www.gov.uk/government/publications/asylum-accommodation-factsheets/factsheet-raf-scampton-asylum-accommodation-accessible#when-will-the-site-at-raf-scampton-open>> (accessed 7 August 2023).

<sup>49</sup> Joe Duggan, 'Row erupts over plans for detention centre at RAF base that 'may scupper £300m revamp project' *i-News* (8 March 2023) <<https://inews.co.uk/news/immigration-detention-centre-plans-raf-scampton-row-regeneration-2194731>> accessed 20 July 2023.

<sup>50</sup> Jo Wilding, *No access to justice: How legal advice deserts fail refugees, migrants and our communities* (2022, Refugee Action) 19 <[https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/628f50a1917c740a7f1539c1\\_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%20migrants%20and%20our%20communities.pdf](https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/628f50a1917c740a7f1539c1_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%20migrants%20and%20our%20communities.pdf)> accessed 20 July 2023.

providers from outside the South West willing to provide advice to those accommodated on the Bibby Stockholm.

42. Whether vulnerable individuals on the Bibby Stockholm, or in other remote accommodation or detention,<sup>51</sup> will be able to access in-person legal advice remains in doubt. In the past our members have raised their concerns with providing remote-only advice to particularly vulnerable individuals, due to the difficulty in building the trust and rapport necessary for highly sensitive cases, but also for practical matters such as assessing re-traumatisation during appointments, taking sensitive instructions on matters such as sexual orientation and religious conversion, taking long statements over the phone and checking they are being properly read back and agreed, and reading back psychiatric assessments.
43. It is entirely unclear what modelling the MoJ has undertaken to determine that the unworkable proposal of *up to 15%* will be sufficient to 'ramp up' market capacity. It is unlikely that new providers will be able to solely carry out the enhanced fee work (or the degree to which this would be feasible or best practice if a client required legal advice or assistance with challenges, such as judicial review challenges, which are outside the enhanced fee), or existing at-capacity providers will be able to take on this enhanced fee work in addition to their current caseload.
44. In ILPA's July 2023 survey<sup>52</sup> on the sustainability of legal aid, on average, a sample of not-for-profit immigration legal aid providers indicated that they would need a minimum fixed fee and hourly rate increase of 129.8%, and, on average, a sample of private legal aid providers indicated they would need a minimum increase of 42% to fixed fees and 52% to hourly rates, to viably deliver their current level of legal aid services in immigration and asylum. Our survey was specifically focused on their current level of provision, and our survey stated at the outset: 'For those currently providing immigration and asylum legal aid services, our question focuses on your current level of legal aid services. We understand that it remains difficult to predict the exact impact on sustainability and capacity of potential further changes arising from the Nationality and Borders Act 2022 and the Illegal Migration Bill.' To understand what would draw in the potential pool of providers, we asked them what minimum percentage increase to legal aid fees would encourage them to tender for a contract to provide legal aid services in immigration and asylum. On average, a sample of not-for-profit organisations indicated they would need more than a 50% increase to fixed fees and hourly rates, and, on average, a sample of private firms indicated they would need a minimum of 100% to fixed fees and 83.3% to hourly rates. Overall, the averages for the sample of potential and current legal aid providers was in

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<sup>51</sup> Home Office, Economic Impact Assessment: Illegal Migration Bill (HO 0438)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1165397/Illegal\\_Migration\\_Bill\\_IA\\_-\\_LM\\_Signed-final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf)> [131]. As noted in the Economic Impact Assessment, '[t]he location of any potential additional detention centres has not been defined and so cannot be assessed'.

<sup>52</sup> ILPA, 'ILPA's Legal Aid Sustainability Survey' (19 July 2023)

'ILPA-Legal-Aid-Sustainability-Survey-Results-Spreadsheet'

<<https://ilpa.org.uk/results-of-ilpas-legal-aid-sustainability-survey/>> accessed 20 July 2023.

excess of an 84% increase to both fixed fees and hourly rates. The two barristers who responded to the survey provided a minimum percentage increase of 40% and 45% to their fees to viably deliver their current level of legal aid services in immigration and asylum.

45. Similarly, ILPA notes the joint letter of 4 August 2023 from 66 legal aid providers, requesting both an increase for inflation, noting that ‘hourly rates worth around £52 in 1996 would be worth approximately £100 as of May 2023’, and requesting a further uplift ‘to enable providers to train new staff and take on this highly demanding work at pace’. As Duncan Lewis Solicitors has said in their response to the Consultation, ‘[s]uch an uplift would be consistent with hourly rates enhancements available for certificated work at Section 6 of the Lord Chancellor’s Standard Civil Contract (‘SCC’). For certificated work, an enhanced fee is payable where the work was done with exceptional competence, skill, expertise, speed, or the case involved exceptional circumstances or complexity. A 100% uplift is available for work involving the High Court, Court of Appeal, Upper Tribunal and Supreme Court; work not involving these courts is payable with an uplift of up to 50%.’
46. However, even with rate increases, after decades of eroding the value of legal aid rates and whittling down legal aid services/practices, increases in capacity will not take place overnight. Providers are not able to recruit, train, and obtain accreditation for new and/or senior caseworkers immediately following the announcement of a rate increase (whether for the tiny and insufficient area proposed by this Consultation or more generally). They are not able to entice back to legal aid, or even to the profession, experienced practitioners and providers who have moved onto other better paid areas of law or who are suffering grave mental health issues and vicarious trauma from insufficient support and who fear returning to a broken legal aid system in an increasingly hostile environment.
47. This Consultation, however well-intentioned, must be seen for what it is: a plaster that covers only a small part of the self-inflicted and gaping wound that is immigration and asylum legal aid. It is a disproportionately small response to what is rightly called a crisis. The proposed rate increase to only a small part of immigration and asylum legal aid will place the Lord Chancellor at risk of breaching his duties under LASPO to secure the availability of legal aid for individuals within all other areas of immigration and asylum legal aid. ILPA raised these concerns in a stakeholder meeting with the Ministry of Justice, ‘Roundtable 1: Consultation on Legal Aid Fees in the Illegal Migration Bill’, on 13 July 2023. However, we reiterate and expand on our views in this response to the Consultation, submitted via email to [IMBLegalAid@justice.gov.uk](mailto:IMBLegalAid@justice.gov.uk).

### **Question 1: Do you agree with our proposal to pay higher fees for IMB Work?**

Please state yes/no/maybe and provide reasons.

48. Maybe.

49. In summary, we agree with your proposal to pay higher fees, but we disagree:
- i) with the proposal that the enhanced fees be only for a narrow area of work arising from the IMA; and
  - ii) with the proposal of 'up to 15%'.
50. We note with disappointment that the 15% increase would not even cover all work brought into scope by the IMA. For example, the amendment to paragraph 19 of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), to ensure that judicial reviews of a human rights claim in relation to removal to a third country arising from Article 2 or 3 of the European Convention on Human Rights are in scope without restrictions, would not be covered by the rate increase. At paragraph 25 of the Consultation, it is stated that '[t]he higher fees proposed within this consultation would not apply to such JR claims or indeed any other JRs or claims outside the definition of IMB Work.' It does not cover the other new work created by the IMA, including a far greater number of applications and claims relating to bail and detention.
51. Rather, the fee increase would only apply to what the Consultation defines as 'IMB Work', namely, 'legal aid services provided to a person served with a removal notice, in relation to the removal notice, including any suspensive claim brought in relation to the notice and any application under Clause 55 subsection (4) of the Bill'.<sup>53</sup>
52. As above, for the detailed reasons we have given in the Background, it is our firm view that all civil legal aid rates must be increased in line with inflation and be index-linked and reviewed at least annually thereafter. Furthermore, we comment on the necessary uplift for immigration and asylum in particular, so as to not speak out of turn for other areas of civil law. Immigration and asylum legal aid rates must be increased to account for policy change and urgently ensure the sustainability of legal aid services.
53. If money is not spent here and now on legal aid, it will be indirectly spent by HM Treasury elsewhere. As we explained in our response to the National Audit Office, the failures of immigration and asylum legal aid have had and will continue to have clear consequential cost implications for the rest of the system, not least for the expenditure of the Home Office, devolved Government, and local authorities, due to the delay in fair resolution of claims and challenges as a result of the reduced capacity of practitioners to sustainably assist in cases. This includes support provided under sections 4(2), 95 and 98 of the Immigration and Asylum Act

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<sup>53</sup> Consultation [7].

1999, while certain claims are ongoing,<sup>54</sup> support provided by local authorities under section 17 of the Children Act 1989 which amounted to a collective annual cost of £64 million for 72 councils in the financial year 2021 to 2022,<sup>55</sup> and the funding of immigration advice by local authorities and devolved Governments.<sup>56</sup> It also includes the cost of the supported asylum backlog. The IMA's Impact Assessment stated that 'as of May 2023, the supported population has more than doubled to approximately 114,000, and the average per person per night support cost has risen to £90'.<sup>57</sup>

54. It is plainly the case that access to high quality legal advice and representation, from the outset, is likely to result in better prepared cases and in more efficient consideration by the Home Office, courts, and tribunals. Representatives can assist the Home Office in clearing the backlog. For example, new streamlined asylum processes, such as the asylum questionnaire, rest on the ability of legal representatives to assist applicants to complete questionnaires fully and accurately to avoid the need for the Home Office to seek further information or conduct interviews.<sup>58</sup> Representatives also act in the interests of justice by ensuring efficient progression and early resolution of challenges and appeals with fewer avoidable adjournments. However, the current failure to make legal aid sustainable has the opposite effect. Applications prepared poorly, without the necessary legal assistance, are more likely to be incorrectly refused and overturned on appeal.<sup>59</sup>
55. We agree with the proposal<sup>60</sup> that hourly rates (without a cap on the number of hours) should be used for compensation. For the detailed reasons provided in our August 2022 response to the MoJ's 'Immigration Legal Aid: A consultation on new fees for new services', it remains our view

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<sup>54</sup> Asylum support under section 95 of the Immigration and Asylum Act 1999 is available for individuals with ongoing asylum claims or claims under Article 3 of the European Convention on Human Rights, who are destitute or about to become destitute, and their dependants. For fresh human rights and asylum claims that cannot be fairly pursued outside the UK, support under section 4(2) of the Immigration and Asylum Act 1999 may be available. Section 98 support is a temporary support that is provided to individuals seeking asylum who appear to be destitute and who are awaiting the outcome on their application for section 95 support.

<sup>55</sup> NRPf Network, 'NRPf Connect data report' <<https://www.nrpfnetwork.org.uk/nrpf-connect/nrpf-connect-data>> accessed 20 July 2023.

<sup>56</sup> Jo Wilding, 'It's a no-brainer': Local authority funding for immigration legal advice in the UK (May 2023) <<https://justice-together.org.uk/wp-content/uploads/2023/05/JT-Local-authority-funding-for-immigration-v3.pdf>> accessed 20 July 2023.

<sup>57</sup> Home Office, 'Impact Assessment' (HO 0438) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1165397/Illegal\\_Migration\\_Bill\\_IA\\_-\\_LM\\_Signed-final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf)> accessed 20 July 2023.

<sup>58</sup> ILPA, *Joint Open Letter to Home Secretary Re: Remedying the 'Asylum Questionnaire'* (1 March 2023) <<https://ilpa.org.uk/joint-open-letter-to-home-secretary-re-remedying-the-asylum-questionnaire-1-march-2023/>> accessed 20 July 2023.

<sup>59</sup> Ministry of Justice, 'Tribunal Statistics Quarterly: January to March 2023' (8 June 2023) <<https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2023/tribunal-statistics-quarterly-january-to-march-2023#immigration-and-asylum>> accessed 20 July 2023. Around 50% of the 7,700 First-tier Tribunal appeals against Home Office decisions were allowed/granted. However, the degree of avoidable costs incurred in the justice system is unknown.

<sup>60</sup> Consultation [34].

that *all* immigration and asylum legal aid work should be remunerated in this manner rather than through fixed fees.

56. We welcome your intention to ‘remove the means test for legal aid for removal matters’ by amending the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.<sup>61</sup>

**Question 2: We are evaluating the possibility of increasing fees for IMB Work by up to 15% compared to the current immigration legal aid fees. Within the range of up to 15%, what percentage increase do you believe would be appropriate?**

57. In our opinion, the proposed range of ‘up to 15%’ is inappropriate, arbitrary, and unjustified in all of the circumstances.
58. As above, it is our view that all civil legal aid rates must increase with the amount they have lost in the decades of inflation since they were set in 1996, and must be index-linked and reviewed at least annually to future proof their stability. Furthermore, the inadequacy of the rates when they were set, particularly against the scope of work now required, necessitates the review and, where appropriate, uplifting of rates across civil legal aid.
59. Taking into consideration the views of the 66 legal aid providers in their letter of 4 August 2023, and in accordance with our survey, an appropriate range for increasing rates across all of immigration and asylum legal aid is a minimum of 100% to 150%, which includes the necessary inflationary increase to account for the fact that rates have lost 91% of their value from 1996 to June 2023.<sup>62</sup>
60. It is entirely unclear on what basis the ‘up to 15%’ fee increase has been deemed to be an ‘adequate uplift’, to ‘incentivise providers to take on IMB work’.<sup>63</sup> The only justification given is that it ‘would broadly align with the uplift in fees (charged on an hourly rate basis) which has previously been used to motivate experienced solicitors to join the Law Society Advanced Family Law Panel and/or the Children Panel (as set out in the Standard Civil Contract 2018), and with the fee uplift recommended by the Independent Review of Criminal Legal Aid in 2021.’<sup>64</sup> Elsewhere in the Consultation it is also said that ‘[s]uch an increase would meet the level suggested by providers in initial discussions on fees for this work and is broadly aligned with the 15% uplift in fees (charged on an hourly rate basis)’.<sup>65</sup>

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<sup>61</sup> Consultation [27].

<sup>62</sup> Bank of England, Inflation Calculator

<<https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator>> accessed 7 August 2023 shows £1 in 1996 costs £1.91 in June 2023.

<sup>63</sup> Consultation [39].

<sup>64</sup> Consultation [38].

<sup>65</sup> Consultation [48].

61. From our enquiries in the Ministry of Justice roundtable on 13 July 2023, we understand ‘initial discussions’ refer to the single ‘small’ roundtable that took place on 10 May 2023. With all due respect, such a roundtable is insufficient consultation on which to base the upper limit of the range, without any wider public consultation regarding what the range should be. What initial discussions were there with potential providers or with ex-providers who had left immigration and asylum legal aid, all of whom might be incentivised to undertake this work?
62. Although there is no mention of it in the Consultation, other percentage increases were raised in that same roundtable, including the 25% suggested by Westminster Commission on Legal Aid and the 50% interim measure suggested by representative bodies in response to RoCLA. Moreover, simply because that figure has been implemented or recommended for other areas of the law does not make it an appropriate figure for immigration and asylum. Considering that fees were cut by 10% in 2011, all that a 15% increase would do would be to restore fees to their figure before that period of time, and, as for inflation, it would not even cover the 7.9% CPI increase in the 12 months to June 2023.<sup>66</sup>
63. 15%, which is the uppermost end of the proposed range, is highly unlikely to leverage the necessary capacity to undertake all of the necessary work under the IMA to the vast number of affected vulnerable individuals. To the extent that it does, it will certainly be insufficient to increase capacity in the sector as a whole, and will simply draw capacity away from other areas including from the rest of vulnerable individuals in need of immigration and asylum legal aid who fall outside the enhanced-rate IMA work.

### **Question 3: Do you have any views on further measures that would help build capacity of the profession to complete IMB Work [Open Question]?**

64. As we have said above, we warn against implementation of drastic changes to the immigration and asylum system in the IMA or the NABA, before stability and sustainability have been secured within the legal aid market.
65. In addition to the rates increases and index-linking we recommend across immigration, asylum, and the rest of civil legal aid, to secure the sustainability of immigration and asylum legal aid rates, we have recommended and continue to recommend the following:
  - i) Expand the scope of legal aid (such as to include claims made on the basis of Article 8 of the European Convention on Human Rights, for which the grant rate of ECF is very high) and reform Exceptional Case Funding (ECF).<sup>67</sup> For areas without high grant rates, the

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<sup>66</sup> ONS, ‘Inflation and price indices’

[https://www.ons.gov.uk/economy/inflationandpriceindices#:~:text=The%20Consumer%20Prices%20Index%20\(CPI,down%20from%208.7%25%20in%20May.>](https://www.ons.gov.uk/economy/inflationandpriceindices#:~:text=The%20Consumer%20Prices%20Index%20(CPI,down%20from%208.7%25%20in%20May.>) accessed 7 August 2023.

<sup>67</sup> See [40]-[48] of ILPA, ‘ILPA’s Response to National Audit Office’s Consultation on Legal Aid’ (21 July 2023)

<https://ilpa.org.uk/ilpas-response-to-national-audit-offices-consultation-on-legal-aid-21-july-2023/> accessed 5

application process and evidential requirements should be simplified and be financially viable. Practitioners (whether legal aid providers or not) should be paid for the time taken to make an ECF application, regardless of the outcome. Providers should have increased delegated powers to determine eligibility for ECF controlled work.

- ii) Abolish fixed fees and remunerate all of immigration and asylum legal aid at hourly rates, to provide a clear, fair, and single method of remuneration which removes work that is uncompensated if it falls between the fixed fee and the escape fee threshold.
- iii) Address legal aid deserts, and recognise that remote-only advice is not a solution for all, particularly it may be unsuitable for vulnerable individuals.
- iv) Address cash flow problems arising from insufficient billing stages for practitioners to claim their costs at regular intervals to avoid suffering from Home Office and Tribunal backlogs.
- v) Reduce the administratively burdensome billing and auditing process, by simplifying it, requiring less of providers during audits, placing more trust in providers, and taking a pragmatic approach that prioritises quality of advice.

66. We further endorse the remaining recommendations of the 66 legal aid providers, in their letter of 4 August 2023:

- i) Payments on account should be made by the LAA every three months for controlled work.
- ii) Enhanced rates for controlled work must be available where they can be justified in line with the pre-existing criteria for enhanced rates for certificated work (exceptional competence, skill, expertise, speed, circumstances or complexity).
- iii) The cost of accreditation for trainee casework assistants, casework assistants and senior caseworkers must be funded in full by the MoJ.
- iv) Disbursements incurred on controlled work matters must be paid out by the LAA as soon as they are incurred, in line with the rules for certificated work.
- v) Interpretation fees should be recalculated in line with inflation.

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August 2023. For example, in immigration, according to the Ministry of Justice's statistics from April 2022 to March 2023, there were 1,962 grants and 2,264 applications (86.66% grant rate). In the same months of 2021 to 2022, there were 2,279 grants and 2,612 applications (87.25% grant rate), and in the year prior there were 2,019 grants and 2,334 applications (86.5% grant rate). Additionally, immigration had the highest number of ECF applications, more than five times the number of the next highest area Inquest (which had 403) and Family (which had 372) in the year April 2022 to March 2023, and much higher grant rates than either of these areas, which were 61% and 43% respectively.

67. Furthermore, to remove administrative delay and allow for a larger pool of accredited individuals to carry out work under the IMA, we endorse the LAPG's recommendation to "roll forward" accreditation for individuals who feel ready and able to deliver services at the relevant level and whose work would be remunerated subject to passing and receiving accreditation from the Law Society at the next available sitting.
68. In addition to the above recommendations in relation to accreditation, we join Public Law Project<sup>68</sup> in urging the MoJ to accept the Westminster Commission on Legal Aid's recommendation that '[t]he Ministry of Justice should fund training and qualification placements within legal aid firms and NfPs and publicly-funded chambers'.<sup>69</sup> This is particularly important to bring practitioners up to speed with the new laws, policies, and processes accompanying implementation of the IMA.
69. In a roundtable meeting on 13 July 2023, a representative attending on behalf of LAPG enquired whether applications for permission to appeal in the Upper Tribunal would be remunerated regardless of whether the application was successful, or whether it would only be remunerated retrospectively if successful. MoJ colleagues were unable to provide a definitive answer to the question, but we would warn against a retrospective regime if it is the MoJ's intention to incentivise practitioners to take on this work. Such an approach may result in a large number of individuals unable to find a practitioner willing to assist them with the relevant application, an undue burden on the Upper Tribunal if applicants were to attempt to make such applications as litigants in person, and grave implications for fairness and access to justice.
70. ILPA is also concerned with how advice will be delivered to individuals in detention, in relation to their removal notice. As noted above, there have been documented issues with the quality of advice provided under the Detained Duty Advice Scheme, and, in any case, the existence of the scheme does not secure that an individual detained *in any place* the Home Secretary considers appropriate will have access to the Scheme or a representative willing to take on their case. Therefore, ILPA would once more recommend a system for automatically allocating a legal aid representative to an individual within 48 hours of the individual entering detention.<sup>70</sup> This is crucial given the Bill provides the Home Secretary wide powers to indefinitely detain families and vulnerable people, including children who are alone. An amendment, tabled by Lord Bach during

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<sup>68</sup> Public Law Project, 'Legal Aid Fees in the Illegal Migration Bill – consultation response' (24 July 2023) 4 <<https://publiclawproject.org.uk/resources/legal-aid-fees-in-the-illegal-migration-bill-consultation-response/>> accessed 7 August 2023.

<sup>69</sup> The Westminster Commission on Legal Aid, 'Inquiry into the Sustainability and Recovery of the Legal Aid Sector' (October 2021) 24, Recommendation D <[https://www.apg-legalaid.org/sites/default/files/The%20Westminster%20Commission%20on%20Legal%20Aid\\_WEB\\_0.pdf](https://www.apg-legalaid.org/sites/default/files/The%20Westminster%20Commission%20on%20Legal%20Aid_WEB_0.pdf)> accessed 7 August 2023.

<sup>70</sup> ILPA, BiD and PLP, 'Joint Briefing on Amendment 155 to the Illegal Migration Bill for Report Stage in the House of Lords, 3 July 2023 (Duty to make legal aid available within 48 hours)' <<https://ilpa.org.uk/wp-content/uploads/2023/07/Joint-Briefing-Legal-Aid-Detention-Amendment.docx-1.pdf>> accessed 5 August 2023.

Committee and Report Stages of the Illegal Migration Bill in the House of Lords,<sup>71</sup> proposed the framework for ensuring a detained person would be able to access civil legal aid services, including legal aid assistance to properly prepare a human rights or asylum claim, before their claim is declared inadmissible and they are served with a removal notice.

71. Furthermore, in relation to detention, we recommend that the MoJ and Legal Aid Agency closely monitor the quality and availability of legal aid advice for individuals in detention, including during the surgeries.
72. Finally, we recommend consideration be given to how to support the mental health, including for preventative care and care for vicarious trauma, of practitioners in this area, who are working on the frontline to support thousands of vulnerable individuals, who hear their accounts of torture, conflict, persecution, domestic abuse, sexual violence, and life in horrific accommodation for years on end, and who see their client's suicide attempts and serious mental health conditions as a direct result. The first immediate step needed for capacity is to retain the current practitioners specialising in these areas of the law, and support for their mental health is vital for their retention and longevity in this field of practice.

**Question 4: Do you agree with our proposal to conduct the first post-implementation review of fees for IMB Work within two years of its implementation?**

Please state yes/no/maybe and provide reasons

73. No, unless there is an assurance that the review will not result in a decrease in fees and will not result in the implementation of a fixed fee, both of which we strongly warn against if your aim is sustainability, fairness, and access to justice.
74. We are concerned that a review in two years is too lengthy of a period of time for several reasons. First, it will be in the midst of the new Civil Legal Aid Contract to commence in the Autumn of 2024. Therefore, providers will have tendered for that Contract, only to potentially have contractual changes imposed part-way through the Contract. Second, issues with capacity to carry out this work, resulting in grave implications for due process, fairness, and access to justice for individuals in the intervening period, should be minimised and mitigated wherever possible. Third, we recommend that rates are index-linked and reviewed at least annually. To this end, we recommend close and constant review and monitoring of the ability of individuals impacted and targeted by the IMA to access legal aid advice and representation, and of the caseload and capacity of existing providers.
75. At the moment, it would appear that no government department takes responsibility for monitoring the number of unrepresented individuals who require and are eligible for legal aid assistance with their immigration and asylum matters, including to ensure that the Lord

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<sup>71</sup> HL Deb 3 July 2023, Vol 831, Col 1092.

Chancellor complies with his duty under section 1(1) of LASPO. The Legal Aid Agency claims that they do not have this data. The Home Office will be aware of whether a large number of applicants have a representative on record. However, it is unclear whether the MoJ obtains, monitors, and checks the Home Office's data against its own data. It would also appear that there is no published data on the capacity or caseload of providers; therefore, it is unclear what formal mechanisms for monitoring these are in place.

**Question 5: From your experience, are there any groups or individuals with protected characteristics who may be particularly affected by the proposals in this paper, who are not included in the Equalities Statement?**

[Open Question]

76. This question is phrased in an odd way. We agree that the 'primary pool of individuals affected by the proposals will be immigration legal aid providers, including barristers who take on publicly funded immigration work, as well as new providers who may wish to enter the immigration legal aid market. The proposals will also affect the individuals who are seeking advice and/or representation'.<sup>72</sup> However, there are other issues with the Equalities Statement.
77. First, the Impact Assessment is based on the false assumption that the immigration and asylum legal aid sector have sufficient capacity and flexibility to meet unmet immigration and asylum legal need with a 15% fee increase for a small area of work. This is unlikely to be the case. The proposed fee increase, due to the narrowness of the scope and the disproportionately small size, is likely to cause grave shortages of provision and result in even greater numbers of unrepresented individuals by failing to address the systemic issues at the heart of the legal aid crisis. While the Assessment states that the MoJ does not 'consider that the proposed change will result in clients being at a disadvantage or treated less favourably because of their protected characteristics',<sup>73</sup> it makes no assessment and gives no consideration to the number of individuals or the protected characteristics of such individuals who may be turned away from representation and denied effective access to justice, because practitioners are instead incentivised to undertake work relating to IMA removal notices. To mitigate this, as above, we recommend fee increases across the entirety of immigration and asylum legal aid.
78. Second, the Impact Assessment itself recognises that it is based on 'limited information on legal aid providers' as it is based on a 2015 survey conducted by the Legal Aid Agency.<sup>74</sup> It is disappointing that no further data has been collected in the intervening eight years, and no reference is made to other more recent materials such as LAPG's 2021 Legal Aid Census.<sup>75</sup>

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<sup>72</sup> Consultation [52].

<sup>73</sup> Consultation [71].

<sup>74</sup> Consultation [53].

<sup>75</sup> LAPG, 'LAPG publishes the findings of the 2021 Legal Aid Census' (31 March 2022)

<<https://lapg.co.uk/lapg-publishes-the-findings-of-the-2021-legal-aid-census/>> accessed 7 August 2023.

Moreover, the data is based on ‘owners and managers of legal aid providers’ rather than practitioners. Therefore, it may not reflect all practitioners, including junior practitioners, female practitioners, and practitioners who are People of the Global Majority who may not be owners or managers of providers.

79. Finally, we would urge the MoJ to have regard to the mental health of practitioners and their clients and the significant, adverse, and long-term impact these proposals may have.

## Conclusion

80. We believe this Consultation is guided by the right principles, ‘to make sure legal aid practitioners are properly remunerated for the important work they do – and ensure fair payment and access to justice for all who seek it’.<sup>76</sup> However, we disagree with the specifics of the approach proposed.
81. ILPA remains willing to work closely with the MoJ, LAA, and Home Office to secure these outcomes for all, by urgently reforming and remedying immigration and asylum legal aid, before the situation worsens and specialist knowledge and expertise among practitioners is lost without the possibility of return.

7 August 2023

Zoe Bantleman  
Legal Director  
Immigration Law Practitioners’ Association

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<sup>76</sup> Consultation, 3.