ILPA

Legal Aid Agency Consultation
Proposed changes to 2018 Standard Civil Contract and Category Specific Rules Immigration and Asylum

Response of the Immigration Law Practitioners' Association

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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 October 2023 Consultation of the Legal Aid Agency ('LAA'), which per the email of Eleanor Druker, is to consult on changes to the General Specification 'to allow remote supervision in line with the 2022 Standard Crime Contract and the 2024

Standard Civil Contract', and 'changes to the 2018 Standard Civil Contract Immigration to reflect provisions in the IMA and the outcome of the response' and 'other operational changes that are planned for when the IMA is implemented'.

3. ILPA is not one of the three Consultative Bodies under the 2018 Contract, but submits these representations through one such body.

4. The LAA's proposed changes to the contract are in red, italicised text, with existing provisions in italicised black text where required to show the changes, and our specific comments are in black text.

Executive Summary

5. The proposed amendments do not assuage the concerns we raised in our response, of 7 August 2023, to the Ministry of Justice's Consultation: Legal aid fees in the Illegal Migration Bill.[1] We are concerned that many of the proposals in this Consultation will only further add to the systemic issues and result in even fewer specialist immigration and asylum practitioners to take in-scope legal aid and exceptional cases, with vulnerable persons who cannot afford private representation going without any legal representation.

6. The proposed specification amendments would introduce additional complexity for providers who are already working at extremely limited capacity. Despite repeated pleas from practitioners and stakeholders that the LAA ought not impose unnecessary administrative burdens on providers, these proposals do exactly that. One ILPA member has stated that the civil legal aid system is *"reminiscent of the Marvel multiverse"* due to its differing rates and procedures depending on variables such as the type of application or appeal, or the stage of the case.

Licensed Work

7. We are concerned that applications and appeals in the Upper Tribunal in relation to Illegal Migration Act suspensive claims have been poorly subsumed into the existing Licensed Work provisions, without sufficient regard to the unique regime introduced by the Act. We are of the view that applications and appeals to the Upper Tribunal and Court of Appeal, arising out of the suspensive claim process in the IMA, should be remunerated at the higher hourly rates available for licensed work, and that hourly rates enhancements in §6.13 should apply for exceptional competence, speed or complexity.

8. However, fundamentally, we are concerned that the existing certificated process is too administratively burdensome and that it is inappropriate for applications to the Upper Tribunal to be done at risk. Amendments must be made to account for the unique nature of

[1] ILPA 'ILPA Response to Ministry of Justice Consultation on 'Legal aid fees in the Illegal Migration Bill' (7 August 2023) <https://ilpa.org.uk/ilpa-response-to-ministry-of-justice-consultation-on-legal-aid-fees-in-the-illegal-migration-bill-7-august-2023/> accessed 31 October 2023.

the Illegal Migration Act, including the short-time frames, the number of times in relation to a suspensive claim applications would need to be made to the Upper Tribunal, such as for out-of-time claims requiring ‘compelling reasons’ and for permission to appeal applications requiring ‘compelling evidence’ and ‘obvious risk’ for serious harm claims, and that such applications may be an applicant’s single opportunity to access domestic judicial redress. They are fundamentally different in nature to applications to the Upper Tribunal for permission to appeal following the First-tier Tribunal dismissing an appeal.

9. Moreover, there appears to be no recognition of the likely difficulties which will be caused if certain providers, assisting with suspensive claim(s) as part of controlled work, cannot assist with licensed work. We are deeply concerned that statutory deadlines for appeals and applications to the Upper Tribunal may be missed if providers with the ability to undertake Licensed Work do not have capacity to do so.

10. Finally, we would recommend amending the Specification to give providers the ability to self-grant emergency legal aid certificates for all IMA related work including all judicial reviews that could be brought in relation to the matters under sections 56(2) and 56(3) of the IMA. This is necessary to ensure access to the court where the judicial review is non-suspensive and so would have to be brought very urgently and be expedited.

<u>New Matter Starts</u>

11. We have long raised concerns regarding the proliferation of New Matter Starts (‘NMS’) required in the life of an individual’s immigration and asylum case. We are concerned that the Illegal Migration Act will exacerbate this, and that a provider may, in an ordinary case, be required to open four matters in relation to one individual, due to the number of different applications/claims required: human rights, asylum, protection, suspensive, and leave to remain on the basis it would contravene the United Kingdom’s obligations under the Human Rights Convention or any other international agreement. The estimation of four matters is made on the basis that §8.26A is correctly interpreted as meaning that all Controlled Work and Licensed Work in relation to an Illegal Migration Act Matter constitutes one Matter.

12. The reduction of Lot 1 immigration and asylum Matter Starts in the 2024 Contract will give rise to further difficulties, for advising and representing individuals in the community. It is insufficient to require providers to seek an ‘exceptional award’ of NMS, when this is an error in the decision regarding the lots for the asylum and immigration specification and should be rectified for all to provide commercial certainty.

<u>Cost and Disbursement Limits</u>

13. It must be made clear in the Contract that the £3,000 cost limit and £1,500 disbursement limit for IIllegal Migration Act 2023 (‘IMA’) Matters can be extended. We further recommend that the Self-Grant Scheme apply to IMA Licensed Work and be open to all providers.

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<u>Detained Duty Advice Scheme</u>

14. We are pleased that the LAA is attempting to ensure that the Detained Duty Advice Scheme ('DDAS') secures access to justice more efficiently. It is disappointing that the efforts in relation to securing representation for individuals in Immigration Removal Centres have not been extended to prisons or individuals on bail in the community. However, we do not believe that these proposals are likely to achieve that virtuous aim even within immigration removal centres. Additionally, we are deeply concerned about the impact of these changes on providers' limited capacity.

15. The proposals seem bound to result in providers, with sufficient capacity to attend DDAS surgeries, but insufficient capacity to take on the cases following the surgeries, leaving individuals without a legal representative to assist them with the urgent suspensive claim process. To mitigate this risk, we have repeatedly recommended that a representative is instead allocated to an individual upon them entering detention to ensure that an individual has legal representation.

16. Nevertheless, the Consultation proposes that, if a provider does not have capacity, it should be for the provider to go through the likely fruitless motions of trying to refer a case to five other providers who are also unlikely to have capacity. The well-documented lack of capacity in immigration and asylum legal aid means the proposed changes to DDAS appear naive and idealistic, as they rely on the existence of 'Alternative Providers' who have capacity to continue providing civil legal services. In our experience, such providers are simply unlikely to exist, or exist in very small numbers, especially in light of the vast numbers – tens of thousands per year – who will be impacted by the complex provisions and swift timeframes within the IMA.

17. We would like to better understand what the current capacity is in the DDAS to better understand the impact of proposed changes. In particular, we request that the LAA share data on:

    a. the number of individuals seen at the DDAS surgeries;

    b. the number of NMS from those surgeries, so that we may better understand the conversion rates; and

    c. the number of firms on the rota with a peer review rating of (4) or (5).

18. Through these changes, it would appear that the Lord Chancellor intends to place his obligation, to secure that legal aid is made available, on providers.[2] Ultimately, if a provider does not have capacity to take on a case, in spite of the proposed 15% increase and the lack of means and merit testing for IMA work, it is for the Lord Chancellor to use his discretion to make such further arrangements, as he considers appropriate, to ensure that legal aid is

[2] Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 1(1).

available.[3] The sum total of such arrangements cannot be to place additional referral obligations on providers who admittedly have no capacity. Spare capacity they would otherwise have had, to finish casework on other cases and to take on less complex or urgent cases, is unnecessarily wasted. The General Specification, at §2.41-2.45, already places referral obligations on providers:

> *2.41 You must have appropriate arrangements in operation so that you can refer or signpost a Client or potential Client to another Provider where:*
>
> > *(a) you do not provide the services the Client requires;*
> >
> > *(b) you have so much work that you are unable to provide appropriate services to a Client within a reasonable time;*
> >
> > *(c) there is a conflict of interest between two or more Clients or potential Clients wishing to access your services; or*
> >
> > *(d) you are required to make a referral under the professional conduct rules of your Relevant Professional Body.*
>
> *2.42 You must signpost a potential Client at an early stage if it becomes clear that the enquiry concerns a subject which is outside your area of expertise.*
>
> *2.43 If you need to refer a Client after you already have an established Client relationship, have undertaken work on a current case or hold case information or documents, you must inform the Client of any cost implication of referral. Information about advice and assistance already given and any relevant documentation must be forwarded to the new Provider.*
>
> *2.44 Where you make a referral to another Provider you must ensure, so far as practicable, that that Provider is authorised by us to provide services in the Category of Law most relevant to the Client's problem.*
>
> *2.45 Where you refer an existing Client, such referral should be undertaken in a manner which does not prejudice the Client. You must also keep the Client informed in respect of the progress of such referral. If you are unable (or cease to be able) to perform Contract Work for Clients and you are unable to make any referral to another Provider, your procedures must ensure that you make reasonable endeavours to ensure that your Clients' rights are protected, that they suffer no damage and they are provided with all relevant information.*

19. Lord Bellamy KC stated, in the Government's response to the Consultation, *'it is crucial that we respect due process under the rule of law and ensure there is timely and effective access to justice, which is the foundation of fairness in our society. The Act makes provision for legal advice in these circumstances so that people's rights to access to justice are respected.'* Having a right to in-scope legal aid advice and representation is of little utility, if it is not

[3] Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 2.

effective. It should be for the LAA, to make it effective, to find a legal aid provider with capacity, as it is the LAA who is responsible for *'making sure legal aid services from solicitors, barristers and the not-for-profit sector are available to the general public'*.[4] The LAA should be appropriately resourced to ensure it has the capacity to undertake this administrative work. If the LAA cannot find any legal aid providers with capacity to take on the cases, this should signal to the Lord Chancellor that he should use his discretion to make the necessary further arrangements. If anything, the LAA undertaking this process will assist with the Lord Chancellor's own monitoring of the execution of his statutory obligations.

20. We are concerned about the lack of clarity given, both in the proposed contract amendments and by the LAA in our meeting on 18 October 2023, on how the DDAS Referral Scheme will operate. It is difficult to consider and comment on the impacts the scheme may have without being apprised of the full details of its operation. We urge the LAA to consult on more detailed plans for the scheme before making the relevant contractual amendments.

21. Until such feasible arrangements are in place to ensure the accessibility of justice, section 2 of the IMA, and the suspensive claim process, ought not be commenced.

22. Furthermore, there has been no published commitment from the Home Office, that if an individual in receipt of a removal notice under the IMA cannot find a representative without capacity to lodge their serious harm and/or removal conditions suspensive claim(s), in the prescribed form, with compelling evidence, the Home Secretary will use her discretion in sections 42(6) and 43(6) to extend the 8-day claim period before it ends. In no way can the 30 minutes of free advice – in practice, less when one includes the time taken for any interpretation – on the DDAS be sufficient to enable a person to access justice.

23. Moreover, we are deeply concerned that these amendments:

    a. introduce remote DDAS surgeries, to the detriment of vulnerable individuals and individuals with disabilities and cognitive impairments, leaving it to the discretion of providers who may have insufficient information to make a professional judgment regarding the need for a face-to-face appointment;

    b. propose no changes which will truly assist individuals in the community, released on bail, rather than detained in immigration removal centres. Without access to the DDAS, we can see no provisions made to ensure they have access to advice within the short statutory period to make a suspensive claim; and

    c. do not address the process, once a provider assists an individual with their suspensive claim, if they cannot assist with the Licensed Work, such as if they are not accredited by OISC to Level 3, to undertake the full range of activities required during litigation, or if they do not have an Authorised Litigator.

24. Overall, we would reiterate the concerns raised in our response to the Ministry of Justice Consultation on 'Legal Aid Fees in the Illegal Migration Bill'. Capacity of the profession to

[4] Legal Aid Agency, About us <https://www.gov.uk/government/organisations/legal-aid-agency/about> accessed 2 November 2023.

provide legal aid services in immigration and asylum needs to be urgently addressed for any referral schemes, such as that proposed in this Consultation, to be effective. We warned, in our response to the Ministry of Justice's Consultation, that increasing fees for one narrow area of work would not increase capacity:

> *'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 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.'*

25. Lord Bellamy KC, Parliamentary Under-Secretary of State for Justice, recognised in his response to the Ministry of Justice's Consultation *'the need to bolster capacity in the immigration legal aid market.'* It was also recognised that payment at a 15% uplift on hourly rates *'constitute[s] fair and appropriate compensation for immigration and asylum legal aid providers'.* Accordingly, these measures should be introduced across immigration and asylum legal aid, to ensure fair and appropriate compensation for all work.

26. We urge the Ministry of Justice, LAA and Home Office to recognise that to ensure individuals in receipt of a removal notice under the Illegal Migration Act 2023 have access to justice, urgent steps must <u>first</u> be taken to bolster capacity.

2018 Standard Civil Contract: Specification (General Provisions 1-6)

Supervision standard

<u>2.21</u>

Arrangements must be in place to ensure that each Supervisor is able to conduct their role effectively including but not limited to:
(a) designating time to conduct supervision of each Caseworker;
(b) ~~designating at least one day per calendar month to be in~~ attendance at each Office at which they supervise staff where you determine that this is required ~~(which must coincide with attendance by staff supervised)~~; and
(c) ensuring that the level of supervision provided reflects the skills, knowledge and experience of the individual Caseworker.

<u>2.23</u>

Where a Caseworker undertakes Contract Work in a location other than where their Supervisor is based, the Supervisor must conduct~~, as a minimum,~~ face to face supervision ~~at least once per calendar month~~ with the parties present in the same physical location where you determine that this is required.

27. We note these changes mean that supervisors are no longer required to see their staff one day a month and do not have to attend the Office at a time that coincides with the supervised staff. We note this means that supervisors do not have to be in the same physical location unless it is determined to be necessary. We note the amendments were made on 1 November 2023.

28. From the meeting on 18 October 2023, we understood that:
    a. the intention is to leave it in providers' discretion, as to whether face to face supervision is required, as providers are genuinely best placed to determine the needs of their staff;
    b. providers' exercise of discretion would not be adversely held against them in considering their compliance with the Contract; and
    c. in their response to the Consultation, the LAA would provide reassurance on these points.

29. We look forward to receipt of written assurance.

2018 Standard Civil Contract Category Specific Rules Immigration and Asylum

Definitions

8.1

"Alternative Provider" means a Provider participating in the DDAS Referral Protocol as a recipient of case referrals under the Detained Duty Advice Scheme;

"DDAS Referral Protocol" means the arrangements allowing the referral of matters arising from the Detained Duty Advice Scheme described in Paragraph 8.162A to 8.162K below;

"Illegal Migration Act Matter" means civil legal aid services in respect of the rights the rights set out in paragraph 31C of Part 1 of Schedule 1 of the Act ("Removal notices under the Illegal Migration Act 2023");

30. There is a typographical error in the third paragraph: 'the rights the rights'.

31. Additionally, we are unsure of the exact rights in paragraph 31C to which you refer. Paragraph 31C states only:

> *Removal notices under the Illegal Migration Act 2023*
>
> *31C (1) Civil legal services provided to an individual who has received a removal notice, in relation to the removal notice (including in relation to a suspensive claim relating to the removal notice, and an application under section 46(4) of the Illegal Migration Act 2023 as regards such a claim).*
> *(2) Sub-paragraph (1) is subject to the exclusions in Parts 2 and 3 of this Schedule.*

(3) In this paragraph "removal notice" and "suspensive claim" have the meaning given by section 38 of the Illegal Migration Act 2023.

32. Perhaps it would be clearer to state something along the lines of, '*"Illegal Migration Act Matter" means civil legal aid services to an individual who has received an Illegal Migration Act Removal Notice, in relation to such a Notice, as set out in paragraph 31C of Part 1 of Schedule 1 to the Act ("Removal notices under the Illegal Migration Act 2023");*'

"*Illegal Migration Act Removal Notice*" means a notice issued pursuant to paragraph 8 of the Illegal Migration Act 2023";

33. You should refer to section 8, rather than paragraph 8, of the Illegal Migration Act 2023 ('IMA').

Contract Work covered by this Specification

8.7

For the purposes of Controlled Work, a Matter should proceed and be reported under this Specification as an "Asylum Matter" where:

(a) it relates to civil legal services in respect of the rights set out in paragraph 30 of Part 1 of Schedule 1 of the Act ("Immigration: rights to enter and remain"); or

(b) it relates to an asylum issue and is proceeding under paragraph 24 of Part 1 of Schedule 1 to the Act ("Special Immigration Appeals Commission");.

(c) it relates to civil legal aid services in respect of the rights the rights set out in paragraph 31C of Part 1 of Schedule 1 of the Act ("Removal notices under the Illegal Migration Act 2023").

34. There is again a typographical error: 'the rights the rights', and as above the phrasing of 'rights' does not make sense in the context of paragraph 31C.

Delegated Functions in respect of Legal Representation (Illegal Migration Act Matters only)

8.11A Unless otherwise notified by the Director, you have delegated functions in accordance with an Authorisation to determine applications for Legal Representation in Illegal Migration Act Matters.

8.11B You may not exercise the Delegated Function if a determination has been made that your Client does not qualify for Legal Representation or if a determination that your Client does not qualify for Legal Representation has been withdrawn earlier in the same proceedings.

8.11C Where you make a determination that a Client qualifies for Legal Representation you must notify us within five working days of the decision in accordance with Regulation 39 of the Procedure Regulations. This notification should explain, where it is relevant, why it is appropriate for your Client to be separately represented.

35. The purpose of these amendments were unclear to us. It appears that these amendments are to ensure that a provider can make a determination that an individual qualifies for legal representation of a client in any application to the Upper Tribunal, including an application for permission to appeal, which is paid for as Licensed Work. It would seem that the intention is that it enables providers to determine that an individual qualifies for emergency representation. However, we have six concerns regarding these provisions.

36. First, we would query on what basis do you consider that a Client would not qualify for Legal Representation, given it is non-means and non-merits tested? In what cases, is it envisaged that the certificate might be revoked?

37. Second, what is the boundary of Licensed Work under the Illegal Migration Act 2023 with controlled work? §8.70 states:

> *Legal Representation of a Client in any application (including for permission):*
>
> *(a) to the Upper Tribunal; or*
>
> *(b) for Judicial Review or appeal either to the Court of Appeal or Supreme Court,*
>
> *is paid for as Licensed Work and cannot be carried out under Controlled Work.*

38. Can the LAA confirm whether applications to the Upper Tribunal in relation to whether there are compelling reasons for the person not to make the claim within the claim period, even though forming part of the suspensive claim rather than suspensive appeal process, are Licensed Work rather than Controlled Work? If that is the case, is it possible that a certificate may be needed multiple times? First, in relation to an out-of-time claim, then in relation to any application for permission to appeal and to appeal to the Upper Tribunal following the refusal of a suspensive claim?

39. We are concerned that statutory appeals under the IMA to the Upper Tribunal, which skip over the First-tier Tribunal, may have work done at risk. Under the IMA, an application to the Upper Tribunal can constitute an applicant's single bite of a cherry, if they are applying to the Upper Tribunal for a declaration under section 46(4) that there were compelling reasons for the person not to make the claim within the claim period, or if they are applying under section 45(2) for permission to appeal refusal of a suspensive claim that has been certified as clearly unfounded. Therefore, in our opinion, it is wholly inappropriate for the work conducted in making a permission to appeal application to be done at risk. There should be a specific carve out in the Licensed Work provisions for IMA work. Nevertheless, no amendment has been made to §8.142 which reads:

> *8.142 A Licensed Work Certificate must be in place before any applications to the Upper Tribunal for permission to appeal are made or any work in relation to an application is commenced. If you apply to the Upper Tribunal for permission to appeal and permission is refused you may not claim any costs relating to the application or appeal, either by way of Standard Fee or Hourly Rates. Your costs in*

> *the Matter must be limited to those covered by Stage 2 or those allowed under Paragraph 8.138.*

40. §8.142 requires amendment to exempt Illegal Migration Act Matters. Otherwise, a Licensed Work Certificate will still be required before work is commenced in relation to an application for permission to appeal to the Upper Tribunal in such matters. We appreciate that these contractual amendments are being made partly to accommodate for the tight timeframes that will be brought about by the implementation of the IMA. The effect of section 49(3)(a) IMA will be that applicants will always have only 7 working days starting from the day on which they receive notice that their suspensive claim has been certified to apply for permission to appeal (unless the Upper Tribunal is satisfied an extension of time is the only way to secure that justice is done in a particular case).

41. Third, it is unclear how a representative is expected to know whether a determination that their client does not qualify for Legal Representation has previously been made. We understood, when this was raised by the LAPG in a meeting on 18 October 2023, that there is no intention to penalise representatives who act in contravention of §8.11B. Therefore, this must be clarified and safeguards must be put in place in §8.11B to ensure that new representatives to a case are not unduly penalised if they are unaware of prior determinations.

42. Fourth, the requirement for a provider to 'explain, where it is relevant, why it is appropriate for your Client to be separately represented' is vague. It must be clarified in the specification when it will be relevant to make such explanations.

43. Fifth, must providers still ordinarily apply to the Director, using the LAA's Client and Cost Management System ('CCMS') for a 'certificate'? Does this not create an unnecessary layer of administrative work?

44. Sixth, appeals (under section 44(1) IMA) against suspensive claim refusals, which are not certified as clearly unfounded, must also be listed given they are not 'subsequent work' as there is no application for permission to appeal:

> *8.145 Without prejudice to the provisions on payment for Licensed Work in Section 6 of the Specification and unless we notify you otherwise, for the purposes for Licensed Work in the Upper Tribunal, we will pay as follows:*
>
>> *(a) for work carried out on the initial application to the First-Tier Tribunal for permission to appeal to the Upper Tribunal, we will pay the Hourly Rates specified in the Remuneration Regulations for Licensed work in the First-Tier Tribunal;*
>>
>> *(b) for work carried out on a direct application to the Upper Tribunal for permission to appeal and all <u>subsequent work</u> in that forum, we will pay the Hourly Rates specified in the Remuneration Regulations for Licensed Work in the Higher Court.*

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Level of Accreditation for Contract Work

8.18

Type of Contract Work	*Level of Accreditation*
Reserved Matter 5- All Contract Work in respect of an Illegal Migration Act Matter where the Client is not detained in an IRC	*Senior Caseworker and above*

45. The IMA makes fundamental and far reaching changes to asylum law and practice, with which the majority of practitioners are not yet familiar and which the current accreditation for Senior Caseworkers does not cover. It is too early to bring in accreditation at present given there is no clarity on how the IMA will operate in practice, particularly pending the outcome of the Rwanda litigation, and given that important policy, guidance, and Tribunal Procedure Rules have not yet been published. In light of this, there is a significant concern that the novel and complex arrangements under the IMA, including its accelerated claims and appeal process, will mean that there may be many providers who, at least in the initial months, will have to decline to take on work under §3.51(c) of the General Specification of the 2018 Contract on the grounds that they 'do not have the necessary skill or expertise to take on the case or Matter'. Accreditation will not be a relevant indicator of expertise until it is updated.

46. Additionally, is there a purpose to phrasing the accreditation level in this way? For all work for Clients detained in IRCs, a Senior Caseworker and above is also required. Therefore, for all Illegal Migration Act Matters, it is Senior Caseworker and above that is required regardless of where the Client is.

Matter Start rules

8.26A

All advice in relation to a Client's Illegal Migration Act Matter including but not limited to:
(a) any suspensive claim;
(b) any application for permission to appeal to the Upper Tribunal; or
(c) any appeal to the Upper Tribunal,
will constitute one Matter. The Appropriate UKVI unique Client number will be that of the original application given by the UKVI.

47. First we seek a point of clarification. Our reading of §8.26A is that you intend that all of (a)-(c) to constitute one matter start. However, if (c) is Licensed Work, does it form the same matter start?

48. Second, there is a significant issue arising through the reduction of Lot 1 immigration and asylum Matter Starts in the 2024 Contract, and the proliferation of NMS required in the life of an individual's immigration and asylum case, including those introduced through the amendments, this Spring, to the Immigration and Asylum Specification.

49. Following the April 2023 amendments, additional NMS are now needed for asylum applications and any asylum appeal other than Standard Fee Stage 2(a), 2(b) or 2(c) Claims. This means a NMS is needed for any CLR granted on or after 1 April 2023, under §8.25.

50. However, this proliferation does not end with the April 2023 amendments but is exacerbated by the proposed amendments in §8.26A and the IMA:

    a. If an individual wishes to make an asylum claim, even if it would be deemed inadmissible, can they not access legal aid under Paragraph 30, of Part 1, Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO')? Would this not be a separate matter start requiring a separate matter start under §8.25? Would an associated human rights claim regarding their country of origin or habitual residence constitute part of the same asylum matter under §8.34? We would welcome clarification of this.

    b. Would an application made for discretionary leave to remain on the basis that failure to grant leave would contravene the United Kingdom's obligations under the Human Rights Convention or any other international agreement to which the United Kingdom is a party, under section 8AA(4) of the Immigration Act 1971, inserted by section 30 IMA, not also be a separate matter start under §8.32?

    c. If a person makes a human rights claim (say an Albanian national makes a human rights claim about removal to Rwanda), is that not also a separate matter start under §8.32? It is not part of the suspensive claim process (see section 41(3)-(5) IMA 2023), and it is not an asylum or human rights claim regarding return to their country of origin or habitual residence.

    d. Additionally, suspensive claims, applications for permission to appeal to the Upper Tribunal and appeals in that Tribunal thereafter would constitute a further matter.

51. Therefore, it would seem to be the case that a provider may, in an ordinary case, be required to open four matters in relation to one individual.

52. How will this interact with the overall number of matter starts that a provider has? We have had verbal assurance that the LAA does not wish for NMS allocations to be an obstacle to accessing legal advice, in the meeting on 18 October 2023. Therefore, what contractual mechanisms has the LAA put in place to ensure that NMS are not such an obstacle?

53. The 2018 Contract offered 150 NMS per office/access point (under Lot 1), and per §1.21 a provider 'may self-grant Supplementary Matter Starts in a Category of Law in respect of which you have a Schedule and already hold Matter Starts, save that the total number of Supplementary Matter Starts you may self-grant in any year of the Contract Period may not exceed an amount which is equal to 50% of your existing allocation of Matter Starts in the

applicable Category for that year'. Accordingly, a self-grant was available of up to 225 NMS in Year 1, and 337 NMS in Year 2, etc.

54. The 2024 contract, for the Immigration and Asylum Specification, offers those who do only controlled work (and not IRC Contract work) 100 NMS per office/access point. Additionally, as per §1.21 of the General Specification a provider 'may self-grant Supplementary Matter Starts on any number of occasions in a Category of Law in respect of which you have a Schedule and already hold Matter Starts, save that the total number of Supplementary Matter Starts you may self-grant in any year of the Contract Period may not exceed an amount which is equal to 50% of your allocation of Matter Starts in the applicable Category at the start of that year'. We understand the LAA will thus allow providers to self grant up to 150 NMS in year 1 of the 2024 contract, then in subsequent years providers can self-grant up to 50% Supplementary Matter Starts again (225 in Year 2, and up to 337 in Year 3). Therefore, the 2024 Contract constitutes a significant reduction of 75 NMS in Year 1 (2024-2025). Conversely, the NMS for controlled and licensed work has increased from 300 to 350. There are also further NMS available for IRCs.

55. If the provisions of the IMA are commenced, including the duty in section 2 IMA, then the number of individuals who are likely to arrive or enter the UK, and come within the four conditions in section 2 are likely to far exceed the detention capacity of IRCs, which is in the realm of several thousand. Refugee Council estimated in the first year, the total number of people subject to the four conditions in Clause 2 would be 136,462 (upper estimate) and 124,477 (lower estimate).[5]

56. Therefore, ensuring there are sufficient matter starts in IRCs is helpful, but it is not the solution for organisations which do not have Schedule Authorisation, which do not wish to do DDAS work, but which do wish to assist individuals in the community with their suspensive claims.

57. A member has explained that one caseworker requires around 100 NMS to make it financially viable to hire a caseworker. Therefore, the reduction in NMS in the 2024 Contract has a significant impact on recruitment and also on the type/number of cases/clients if there are limited NMS. I understand this will impact expansion for legal aid providers in legal aid deserts. One of our members has mentioned this would result in them managing to retain only two caseworkers in the entire South West of England (excluding Bristol), but they would have no NMS to expand or accommodate the large increase in work likely to be caused by the Bibby Stockholm barge in Portland Port.

58. A member has also said this is an *"unsatisfactory state of affairs [in] which businesses should be required to make commercial decisions. It is frankly ludicrous that they think we should*

[5] Refugee Council, 'Illegal Migration Bill - Assessment of impact on inadmissibility, removals, detention, accommodation and safe routes' <https://www.refugeecouncil.org.uk/wp-content/uploads/2023/03/Refugee-Council-Asylum-Bill-impact-assessement.pdf> accessed 31 October 2023.

rely on the discretion of individual civil servants when thinking about the future of a business and it employees, or that we have to make a business case to them with all that entails when they know the vast need in the thousands."

59. Furthermore, it is insufficient to require organisations to make decisions which affect their long-term ability to continue operating, recruiting, and paying their rent, on the basis that, as was put forward by the LAA in the meeting on 18 October 2023, providers can speak to their Contract Manager and seek an extension on an individual basis and that they will be approved as a matter of course. In fact, §1.23 of the 2024 Contract contains detailed requirements for seeking an 'exceptional award', if more NMS are required above the supplementary grant:

> *1.23 In the event that you have self-granted the maximum number of Supplementary Matter Starts available in any year of the Contract Period and require more, you may apply to us in writing for a further exceptional award of additional Supplementary Matter Starts. Subject to the provisions of this Contract, we will consider all the circumstances including whether we are satisfied that there is evidence of unmet need for the civil legal services in question when deciding whether to issue additional Supplementary Matter Starts. We may issue additional Supplementary Matter Starts to you if we are satisfied that either:*
>
> *(a) you are unable to meet an urgent demand from Clients for your services from your current Matter Start allocation; or*
>
> *(b) an urgent need for services arises as a result of another Provider in your Procurement Area ceasing to provide or reducing the provision of such services for any reason; or*
>
> *(c) there is a general increase in demand for services of that type within your Procurement Area.*

60. This is an error in the decision regarding the lots for the Immigration and Asylum Specification, and it should be rectified for all to provide commercial certainty. Accordingly, we recommend that in accordance with §1.15 of the General Specification, the Matter Start limit for Lot 1 is increased. There was a commitment from the LAA on 18 October 2023 to discuss this matter with their Commercial Legal Team, and we look forward to receipt of the outcome of those discussions. Written assurance within the Contract is required.

61. Further consideration should also be given to simplifying and reducing the number of NMS needed for a single client.

ILPA

Bail

8.42

When attending a Client in detention you must always advise them in relation to Bail (including advising if a bail application cannot be made where the Client has been issued with an Illegal Migration Act Removal Notice) and record the outcome of this advice on the file.

62. It would be helpful to clarify that the inserted words apply where a bail application **to the First-tier Tribunal** is not possible (in light of section 13 IMA) given the Home Secretary is not prohibited by the IMA from granting bail. Presently, an application for bail to the Home Secretary can be made on form BAIL 401.

Detained Cases

8.52

You may only provide advice and representation to Clients under the Detained Duty Advice Scheme and/or the DAC Scheme if you have been granted Schedule Authorisation to do so. However, you may provide advice and representation to Clients in other places of detention e.g. prisons or other designated places of UKVI detention. In accordance with Paragraph 8.42 you must advise the detained Client in relation to the appropriateness of any Bail applications.

63. This consultation does not propose any amendment to §8.52. Nonetheless, we would suggest taking the opportunity to make it clear that firms that do not have exclusive arrangements to do the DDAS surgeries can still do work for detained clients. Perhaps, the second sentence could be replaced with something similar to: '*However, if you do not have exclusive schedule authorisation for the DDAS and DAC schemes you may provide advice and representation to Clients outside those schemes in ~~other~~ all places of detention ~~e.g.~~ including prisons, IRCs, or other designated places of UKVI detention.*' This would align with the clarification for IRC work.[6]

8.53

Where you are providing advice and representation under Paragraph 8.52 you should continue to act for the Client until:
(a) the Client formally ceases to give instructions;
(b) the Client is released from detention;
(c) the Client is dispersed from the area;
(d) the Client is removed from the country; ~~or~~
(e) you are no longer able to act for the Client because of a conflict of interest or other good reason relating to professional conduct~~.~~; or
(f) you have referred the Client to an Alternative Provider under the DDAS Referral Protocol; or

[6] 'Clarification for legal aid advice in Immigration Removal Centres' <https://assets.publishing.service.gov.uk/media/620a31e9e90e0710acb253b1/Clarification_for_legal_aid_advice_in_Immigration_Removal_Centres.pdf> accessed 31 October 2023.

ILPA

(g) you have unsuccessfully attempted to refer the Client to an Alternative Provider under the DDAS Referral Protocol and have advised the IRC.

64. It seems that the intention of §8.53 is that DDAS providers must act for all clients seen at the surgeries unless one of the exceptions at §8.53 (a) to (g) applies. If so, it may be preferable to rephrase in order to make clear that if you act for a detained client, then you *'cannot stop acting for that client unless'* one of the conditions at §8.53 (a) to (g) applies. If the Alternative Provider referral scheme is abandoned, which we recommend that it is until there is sufficient capacity to ensure that it is effective, then it should be made clear on what basis, due to lack of capacity, a provider can stop acting for a Client following a DDAS surgery.

65. Furthermore, as a more general point, it would help to know if 'you have unsuccessfully attempted to refer the client to an alternative provider under the DDAS referral protocol and have advised the IRC', what will the IRC and the LAA then do? This insight might allow for more informed comments on the proposed referral scheme.

66. As a typographical point, why is there 'or' after some lettered points, (e) and (f), but not after (a)-(d)?

8.54 – 8.55

~~Subject to Paragraph 8.55, w~~Where you act for a Client under Paragraph 8.6 or Paragraph 8.52 you may:

~~In accordance with Paragraph 8.171, where you are attending a Detained Duty Advice Surgery under a Schedule Authorisation you may not make any claim for travel or waiting time. Disbursements such as travel and interpreting costs are claimable.~~

67. We welcome the Ministry of Justice's decision to remove the prohibition on claims for travel and waiting time.

68. In the new contract as drafted, §8.55 reads *'8.55 Not used.'* It might be neater to delete it, as suggested in the table of amendments. If §8.55 is deleted, the paragraph numbers within the contract thereafter should be amended to reflect the numbering change.

Matters paid by Hourly Rates

8.101

69. §8.101(u) adds Illegal Migration Act Matters to the list of controlled work that is remunerated through hourly rates. We welcome this, in our opinion, all immigration and asylum legal aid work should be paid at uplifted hourly rates. However, we further emphasise that in our view the hourly rate increase of 15% is inadequate. It is particularly inadequate insofar as the 15% uplift is solely for IMA work and excludes all other immigration and asylum work; it will shift rather than increase capacity, causing shortages of capacity for other immigration and asylum legal aid work.

Cost and disbursement limits for Hourly Rates Matters

8.106

Unless we notify you otherwise in writing, the following Legal Help Cost Limits are the maximum amount of costs that we will pay for at the Legal Help stage of a Matter (excluding VAT):

(a) £100 inclusive of disbursements where:

> *(i) You provide initial advice in relation to an Asylum application prior to making their application for asylum and then you cease to be instructed; or*
>
> *(ii) You provide initial advice in relation to an Asylum application and the Client decides not to make an application or does not provide you with any further instructions in relation to the Matter; or*
>
> *(iii) You provide advice in relation to the merits of an appeal to the Upper Tribunal;*

(b) £500 in Immigration Matters;

(c) £800 in Asylum Matters, (where the Matter progresses beyond initial advice); and

(d) £3000 in Illegal Migration Act Matters.

70. §8.106(d) increases Legal Help Cost Limits at the Legal Help stage of a Matter to £3000 (excluding VAT) for Illegal Migration Act Matters.

71. It is unclear how to extend this cost limit, as corresponding amendments were not made to §8.108 and §8.109, which should now reference '*Paragraph 8.106(b) to 8.106(d)*'. It is not possible to know at this stage how much work would need to be done on legal help in response to a Illegal Migration Act Removal Notice, so there must be the ability to extend that cost limit. We were verbally assured in a meeting with the LAA on 18 October 2023 that the limit would be extendable, but this must be reflected in §8.108-8.109, which currently only make reference to §8.106(b) and (c) but which should also make reference to §8.106(d):

> *8.108 The Legal Help Cost Limit set out in Paragraph 8.106(a) cannot be extended. The Cost Limits set out in Paragraph 8.106(b) and 8.106(c) may be extended by submitting the relevant Contract Report Form to us, however, costs are only payable within the Cost Limits that applied at the point they were incurred. Cost Limits cannot be extended retrospectively.*
>
> *8.109 The Legal Help Cost Limits in Paragraphs 8.106(b) and 8.106(c) are exclusive of the reasonable costs incurred for accompanying a Client to a Screening or Substantive Interview under Paragraph 8.67.*

8.110A

8.110A For Illegal Migration Act Matters only, the Legal Help Disbursement Limit is £1500 (exclusive of VAT) and is the maximum sum we will pay for the total of all disbursements for the Legal Help stage of any Matter.

72. We recommend making clear in §8.111 that this provision also applies to Illegal Migration Act Matters, for which the Legal Help Disbursement Limit may also be extended:

> *8.111 The Legal Help Disbursement Limit, including for Illegal Migration Act Matters, may be extended by submitting the relevant Contract Report Form to us. However, disbursements are only payable within the Legal Help Disbursement Limit that applied at the point they were incurred. Disbursement Limits cannot be amended retrospectively.*

Self grant scheme: Increases to cost

8.116

The Self-Grant Scheme shall only apply ~~between 1 April 2023 and 31 July 2023~~ where we have given you express written authority to operate under the provisions of Paragraphs 8.116 to 8.134.

73. We welcome the removal of the end date of this scheme. We would reiterate our recommendation at paragraph 19 of our joint Consultation Response with PLP to the Ministry of Justice Immigration Legal Aid consultation on new fees for new services, to extend the self-grant scheme to all providers:

> *'We understand that the CW3 self-grant scheme for Asylum and Immigration Controlled Work was introduced by the LAA to simplify the process of obtaining extensions to incur profit costs and disbursements above the standard limits currently permitted by the Immigration and Asylum Specification within the Standard Civil Contract. It is unclear whether the self-grant scheme is only available to certain selected providers, as there appears to be no application process to access it. Our view is that it should be extended to all providers for profit costs, as well as disbursements. This would be fair and a low administration cost for the LAA. We understand that under the Scheme, in cases that meet the self-grant criteria, the decision to grant is passed to providers, and removes the need for providers to complete the CW3 form and the LAA to process the cost extension requests.'*[7]

74. Furthermore, as per our response of 23 February 2023 to the LAA's Consultation earlier this year:

> *'We understand the LAA does not wish to extend to all providers due to "concerns in error rates in immigration cases". However, we understand the LAA will further discuss the proposed criteria with the team, and decide whether they are fit for purpose.*

[7] 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 7 November 2023.

If an artificial criterion such as that drafted in (8.118(b)) is to be kept, would it be better to add or change this so that only providers that are Peer Review Categories 1 and 2 can apply under the scheme, because it's about quality control rather than success rate at CW3 prior authority requests?'

75. However, we note in §8.121 that the Self-Grant Scheme does not apply to Licensed Work. Accordingly, we would again recommend that a carve out is made in the Licensed Work provision to enable the self-grant scheme to apply to IMA Licensed Work.

Illegal Migration Act Claims

8.140A

Subject to Paragraphs 8.140B to 8.140D you may Claim for a Controlled Work Matter, in addition to the circumstances listed in Paragraph 8.139, where the Matter has been open for a period of 6 months and there has been no UKVI decision on the Client's suspensive claim.

76. This provision is confusing as it appears from §8.26A that the Controlled Work and the Licensed Work in relation to an Illegal Migration Act Matter all constitute one Matter. Is the intention for this to exclude Licensed Work done in relation to Illegal Migration Act Matters? In what circumstances is it anticipated that a Controlled Work Matter will be pending for 6 months without UKVI making a decision on the suspensive claim? Why is there no new provision for interim payments during the Licensed Work process, if it too is delayed?

8.140B-D

8.140B - Where you submit a Claim pursuant to Paragraph 8.140A you must continue to provide Contract Work under the original Matter and may submit a supplemental Claim in accordance with Paragraph 3.37.

8.140C - Where you submit a Claim pursuant to Paragraph 8.140A and provide further advice to a Client on the same Matter, regardless of the length of time since the previous advice or submission of the Claim, this must be treated as the same Matter and a separate Matter Start may not be opened.

8.140D - We may, by notice, remove your right to submit Claims pursuant to Paragraph 8.140A if you persistently fail to comply with Paragraphs 8.140B to 8.140C irrespective of the date on which we become aware of such breach.

77. We note that this arrangement mirrors the present arrangements in other areas of the contract, for example at §8.78 for Asylum Stage 1 Claims.

IRC Rota

8.150

If you have Schedule Authorisation to deliver Contract Work under an IRC Rota:

(a) you must deliver that Contract Work which shall include:

(i) providing advice at all IRC Rota Slots you are allocated; and

(ii) where applicable participating in, and meeting your obligations under, the DDAS Referral Protocol; and

(b) I~~i~~f, for whatever reason, you are unable to meet your obligations under an IRC Rota, you must inform us immediately.

78. Perhaps, it should be clarified that obligations *'under an IRC Rota'* in §8.150(b) refers to obligations 'under paragraphs 8.150(a)(i) to (ii)', if that is what is meant.

8.150A

Failure to comply with Paragraph 8.150(a) may result in the imposition of Sanctions pursuant to Clause 24 including but not limited to Sanction 1 suspending or restricting your participation on IRC Rotas. For the avoidance of doubt, obligations under Paragraphs 8.150(a) and (b) are separate and compliance with 8.50(b) does not in itself mean a Sanction will not be imposed in respect of a breach of Paragraph 8.150(a) where this is considered reasonable.

79. It is not clear when it will be considered 'reasonable' for a sanction to be imposed despite compliance with §8.150(b), nor is it clear who will make that determination.

8.152

The IRC Rota will operate during Business Hours from Monday through to Friday inclusive and will exclude any Bank and Public Holidays and pursuant to Paragraph 8.151 you must ensure that you have sufficient numbers of Caseworkers available to meet your IRC obligations when the IRC rota is in operation.

8.154

We will periodically issue (providing at least one month notice) IRC rota allocations which will set out the number (and if applicable the dates) of IRC Rota days during which you must deliver the Detained Duty Advice Scheme services at the designated IRC(s) throughout the Schedule period.

80. In relation to §8.151 and §8.152 it would appear that having a 'sufficient number of Caseworkers available to meet your IRC Rota obligations' means only, when read with §8.150, a sufficient number of Caseworkers to provide advice at the IRC rota slots. It does not mean a sufficient number to take on those cases, following the provision of those 30 minutes of advice. Therefore, it seems that there is no mechanism in the Contract for the LAA to be forewarned of insufficient capacity to take on cases before setting the IRC rota allocations at least one month in advance. Together with the new Referral process, it seems bound to result in situations where individuals only receive 30 minutes of advice, before they are passed from hand to hand in the search for a new legal aid provider.

81. During report stage of the Illegal Migration Bill in the House of Lords, ILPA and Bail for Immigration Detainees proposed an amendment, supported by the Public Law Project and Anti-Trafficking and Labour Exploitation Unit, tabled by Lord Bach, that would address this

issue in England and Wales by ensuring civil legal aid was available, including in relation to suspensive claims, within 48 hours of detention.[8] We understand that a good precedent for this is the facility for people detained at police stations. When a person is taken to a police station and it is decided there is no criminal element to the case, they are allowed to access an immigration lawyer to obtain immigration advice. The police call the duty solicitor call centre, and there are lawyers on a duty rota to take up the case and provide immigration advice and decide on the merits of the case. A new 48-hour system would involve allocating a representative to an individual upon them entering detention. It would obviate the need for the proposed Referral Protocol.

The Detained Duty Advice Scheme

8.154A - 8.154B

You must attend the designated IRC(s) in person to deliver the Detained Duty Advice Scheme surgeries on all IRC Rota days unless we have issued a notice pursuant to Paragraph 8.154B

During the Contract Period we may issue a notice to confirm that you may deliver the Detained Duty Advice Scheme surgeries remotely

82. As we have expressed on numerous occasions, we have grave concerns regarding the provision of remote advice in DDAS surgeries. It is entirely unclear when discretion can be exercised to provide advice remotely, and when a 'notice' will be issued to providers to confirm that they may deliver DDAS surgeries remotely. Will such a 'notice' be linked to the quality of that provider, such as their peer review rating? How will quality be monitored within these remote DDAS surgeries? Will the LAA be peer reviewing samples of remote DDAS surgery records?

83. In *R (Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin) at §103, Mr Justice Calver accepted that it would be sensible to 'close' the monitoring gap, 'by including within the peer review the possibility of sampling cases where a file is not opened but where advice has nonetheless been given under the DDAS scheme to a detainee, particularly on the first occasion in bail cases, in order to strengthen the prospects of independent peer reviewers and/or CMs picking up these cases of inadequate advice, although even then it clearly cannot be guaranteed that such individual cases of inadequate advice *will* necessarily be picked up'. This monitoring gap is further described in §64 of his decision:

> *'Under the Standard Civil Contract, paragraph 8.119, when attending a Client the Caseworker must always advise that Client in relation to bail and record the outcome of this advice on the file. However, unless a new matter is opened, this is not treated as a file which is then subject to potential peer review. The Claimant submits that negligent advice on bail or a failure to advise on bail may then not be picked up on any independent peer review. Similarly, where a provider erroneously advises the*

[8] '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 7 November 2023.

detainee that he has no case (whether substantive or bail related) after the 30 minute interview, no file will be opened and so there is again no file capable of being subjected to an independent peer review'.

84. Within the proposed amendment, we see no acknowledgement of the fact that remote advice is not a universal solution, and that face-to-face appointments will be necessary for certain individuals. In the Government's response to the Ministry of Justice's Consultation, at §85, it 'acknowledges and agrees with stakeholder feedback on the need for some clients to continue to be seen face-to-face'. Moreover, at §156, the Government stated that '[i]t could be argued that remote advice could directly discriminate against those clients with vulnerabilities; however, the Government will allow remote advice to be used at the discretion of the provider.'

85. It is unclear what information the LAA will give to legal aid providers, in advance of DDAS surgeries, to assist them to make a determination using their professional judgement as to whether remote advice is sufficient for a particular individual or whether reasonable adjustments are necessary. The amended §8.156 would only vaguely state, 'details of Clients you are required to see at each Detained Duty Advice sSurgery including any requirement for interpreters'.

86. It is difficult to obtain an individual's paperwork when meeting remotely. It may also be difficult for individuals to build trust, confidence and rapport with their advisor during a remote advice session. Furthermore, for vulnerable individuals, who may be survivors of trafficking, torture, domestic violence, gender-based violence, and/or sexual exploitation, it may be difficult to disclose and communicate these sensitive experiences to an advisor during a remote meeting. It may also be difficult for advisors to assist and support individuals who are re-traumatised by the advice session, and are experiencing flashbacks or distress, to provide full instructions and enable advisors to provide full oral advice. Furthermore, individuals with disabilities and cognitive impairments may be further disadvantaged in remote advice sessions. We are concerned that individuals may be denied effective access to justice in real world conditions if DDAS surgeries take place remotely regardless of an individual's vulnerabilities.

87. We would urge the LAA to undertake further consultation regarding remote advice in DDAS surgeries before introducing these amendments.

<u>8.156</u>

~~During each IRC Rota week you will be informed by the IRC of the number of Detained Duty Advice Surgeries required during that week.~~ On the Business Day immediately preceding a scheduled Detained Duty Advice Scheme IRC Rota day, t~~T~~he IRC will provide you with information as to the:

• ~~N~~number of ~~Detained Duty Advice Surgeries required during the week at the~~ Clients requiring Detained Duty Advice Scheme service~~IRC~~;

• ~~T~~time and date of the Detained Duty Advice Scheme surgery slots ~~Surgery~~;

•l~~L~~ocation; and

• d~~D~~etails of Clients you are required to see at each Detained Duty Advice s~~S~~urgery including any requirement for interpreters.

88. It may be impractical for providers to make arrangements for DDAS surgeries if only informed of the details on the business day immediately before them.

89. It would be helpful to clarify in this paragraph whether the maximum number of 10 clients (indicated in §8.161A) is in fact the maximum number of clients that a provider may be allocated. We welcome explanation as to whether the number of clients a provider will be allocated is contingent on any notifications they have previously given (at least 3 Business Days prior to the Detained Duty Advice Scheme surgery) the LAA about their capacity to advise clients further following the surgery, pursuant to §8.161A, or the prior capacity they have indicated to the LAA and IRC following other DDAS surgeries they have attended (§8.162F).

90. Similarly, §8.155 states 'Due to the unknown demand from individuals at IRCs, we may vary the frequency of days on which you must attend the IRC'. Is the rota to be allocated on the basis of provider capacity, or only on the basis of demand?

91. A fundamental question at the heart of this amendment, and the rest of the DDAS amendments, is whether the LAA only intends to require providers to have capacity to undertake the DDAS surgeries on any particular day, or whether there is an expectation that providers will be allocated DDAS surgeries that accord, based on the evidence before the LAA, to the providers' likely capacity to take on cases following the surgery.

<u>8.157</u>

You may provide a maximum of 30 minutes advice to a Client at a Detained Duty Advice ~~Surgery~~ Scheme surgery without reference to the Client's financial eligibility.

92. Should the 'may' be a 'must'?

<u>8.158 – 159</u>

The purpose of the advice session is to ascertain the basic facts of the Matter and to make a decision as to whether the Matter requires further investigation or whether further action can be taken e.g. advice regarding an Illegal Migration Act Removal Notice or other issue.

93. What is the purpose of adding the text in red?

When attending a Client, the Caseworker must always advise a Client in relation to Temporary Admission and Bail (including advising if a Bail application cannot be made where the Client has been issued with an Illegal Migration Act Removal Notice) and record the outcome of this advice on the file.

94. As with §8.42, this paragraph needs to clarify that it applies to a bail application to the First-tier Tribunal (IAC), not to the Home Secretary.

<u>8.160</u>

On the conclusion of the Client's 30 minute advice session you must make a determination as to whether the Client qualifies for civil legal services in accordance with Legal Aid Legislation and any

Authorisation made under it to ascertain whether you (or an Alternative Provider where applicable) are able to continue to advise the Client under Controlled Work in accordance with this Contract.

8.161

Where the Client qualifies for civil legal aid services, and you have capacity to do so, you must continue to advise the Client e.g. in relation to a potential suspensive claim under the Illegal Migration Act

95. Should it be *'continue to provide civil legal services'* as opposed to *'capacity to advise'*?

96. On 19 October 2023, the LAA stated the following in an email to legal aid providers:

> '***Expressions of Interest***
>
> *To support the implementation of IMA, we will shortly be inviting current immigration and asylum providers to express an interest in delivering IMA work via DDAS.*
>
> *The Expression of Interest (EOI) will be open to providers who:*
> - *i) currently deliver DDAS Contract Work at one or more IRCs and may wish to deliver DDAS Contract Work at additional IRCs; or*
> - *ii) currently deliver immigration and asylum contract work but do not deliver DDAS Contract Work and may wish to do so.*
>
> *The EOI will offer providers the opportunity to deliver work at any of the current IRCs, although you will not need to express an interest in those where you already deliver DDAS.*
>
> *We expect the EOI process to open in mid to late November and the LAA will contact you directly with further details about the process and timelines.'*

97. It is entirely unclear from this if only providers who can assist with Licensed Work can make expressions of interest to deliver work at IRCs. We are concerned about the process for an individual whose claim ultimately requires Licensed Work to obtain access to Legal Representation.

8.161A

Where you will not have capacity to advise one or more Clients following the 30 minute advice session you must inform us of this issue as a minimum at least 3 Business Days prior to the Detained Duty Advice Scheme surgery. When considering your capacity you must assume that 10 Clients per day you are scheduled to attend at a Detained Duty Advice Scheme surgery may require further civil legal aid services following the advice session.

98. First, again, should it be *'capacity to continue providing civil legal services*' rather than '*capacity to advise'*?

99. Second, §8.161A should make clear that a provider will not be in breach of the contract if, upon taking instructions in initial sessions, it becomes clear that they do not have capacity to continue to advise in all of the cases they attend to in the surgeries.

100. Third, we appreciate that this mechanism aims to ensure that individuals who are detained have access to continuing legal advice. However, it seems unrealistic to require providers to assess their capacity to continue to "advise" in advance of receiving full and proper instructions, as they will not yet appreciate the complexities and urgency of the work for which they are assessing capacity.

101. Fourth, as explained above, capacity for matter starts is likely to be significantly reduced depending on the claim(s) pursued. Considering this, on top of the existing crisis in legal aid capacity for immigration and asylum work, it seems quite unlikely that any provider would be in a position to take on 10 clients, possibly all who have removal notices, particularly in light of the extremely short time frames in the IMA. Therefore, it may be that many, if not all, providers would be contractually required to say that they cannot ensure that they will have capacity because the issues that will come up are unpredictable and likely to be urgent.

102. Therefore, it would be helpful to know what action the LAA will take when a provider indicates they do not have the required capacity. It is not clear whether the provider will still be asked to attend the surgery to provide 30 minutes of advice, nor is it clear whether the individual will be warned that the practitioner they see may or will not have capacity to continue work on their case following the session. For example, if a provider states that they have capacity to continue to advise in 3 cases, will they do the first 3 that are on the rota? Or, will they see all 10 clients to obtain instructions, so that they understand the relative urgency and required expertise for each matter?

103. Whilst it does seem like a good idea, in theory, for notice to be given, it is not clear how or if alternative arrangements would be made by the LAA for an individual to see an advisor with capacity. Moreover, it is not clear if such arrangements are even possible.

104. We understand that individuals will not be able to choose which day they see an advisor on the DDAS, but rather they will be allocated to the first available DDAS surgery. However, it would seem this may disadvantage certain individuals if they are allocated to a DDAS surgery to see a provider the LAA is aware has no capacity to take on the case following the surgery. Thus, such a detained individual would need to attend the next available DDAS surgery once more, if their case is not successfully referred, in order to again see if another provider has capacity to take on their case, and, if they do not, the cycle repeats *ad infinitum.* All the while, the 8-day statutory period for making a suspensive claim is eaten away, and there is no written confirmation that an automatic extension to the 8-day claim period will be issued by the Home Secretary.

<u>8.162</u>

You must ensure the client is given adequate information in a written format at the end of the Detained Duty Advice Scheme surgery whether or not the matter requires further investigation. This information should sufficiently address the outcome of the Detained Duty Advice Scheme ~~S~~surgery with details of the name of the Caseworker who has advised the client. Where the DDAS Referral Protocol is in place this must also include the information as specified in Paragraph 8.163F.

105. It would seem the text in blue above should be amended for consistency.

106. §8.163F does not exist. Should this refer to §8.162F?

The DDAS Referral protocol

<u>8.162A</u>

*To facilitate the timely provision of legal aid services to detained Clients the LAA may, **from time to time**, operate the DDAS Referral Protocol. This will provide a mechanism for Providers delivering the Detained Duty Advice Scheme who have insufficient capacity to continue to advise the Client in accordance with this Contract to refer Clients who qualify for civil legal services in accordance with Legal Aid Legislation and any Authorisation made under it to an Alternative Provider at the conclusion of the 30 minute advice session*

107. What does 'from time to time' mean? Will the DDAS Referral Protocol not always be in operation? How will a provider know that the protocol is in place? Does this mean this protocol can be turned on and off by the LAA, with little notice to providers? By introducing and removing contractual obligations, this makes the Contract more difficult for providers to navigate.

<u>8.162B</u>

Where the LAA confirms that the DDAS Referral Protocol is in effect you must comply with operational instructions issued by the LAA and the provisions in Paragraphs 8.162B to 8.162G shall apply.

108. How and when will the LAA confirm that the protocol is in place? This should be clarified, as the notice gives rise to mandatory contractual obligations.

<u>8.162C</u>

We will periodically provide you with confirmation of the Alternate Provider(s) who may be available to accept referrals pursuant to Paragraph 8.162A

109. The term 'periodically' is vague. How often will the list be managed, reviewed, and amended in light of the capacity updates being provided by providers? Will it be re-circulated each time an Alternative Provider states that they do not have capacity? What if there are no Alternative Providers?

110. Additionally, it would be helpful to know what the criteria is for such Alternative Providers and how their capacity is measured. Will capacity be measured by the providers' responsiveness to referral requests? If an Alternative Provider does not have capacity to take on a case, will this be centrally recorded? If an Alternative Provider simply does not reply to a request, will it be assumed that they do not have capacity? What if a provider has capacity for specific types of cases, and not others? Will Alternative Providers be in the area, or available to provide services remotely only? If remotely only, this is of significant concern for vulnerable, disabled and other people for whom face-to-face appointments may be necessary, as we explain above.

111. An ILPA member has explained that their experience in relation to the LAA's previous list of providers for the South West was that *"it was not updated and was left to local charities to discover most of the firms did not actually have capacity."*

112. Furthermore, remote provision only exacerbates the legal aid deserts across the country. One of our members has stated that lists of providers willing to give remote advice favour providers without local presence. Those with a local presence are paying additional costs for the privilege of having an office, when in fact they do not need one if they could simply be listed to provide remote advice. Our member has stated that this process provides *"no incentive to grow an organisation locally – even if financially affordable, which it is not – when national competitors can just step in"*. Their experience of lists is that *"providers might take on CW1s but will then drop clients at appeal. We have taken on many cases locally from charities with service users who have been dumped. That is not acceptable and LAA needs to make sure this does not happen in any alternative provider model."*

113. Lessons must be learned from the prior attempts at remote provision lists for the South West. For example, in the last week, we have heard from individuals and organisations of firms and providers on the list for remote provision in the South West who have stated they are not doing legal aid anymore but are offering to prepare fresh claims for £1,000, or that they have large waiting lists.

114. If DDAS Referral Protocol is introduced in the format suggested, it will be vital to ensure that it is not left to providers to discover that firms on the 'Alternative Provider' list do not have capacity in reality. At present, it is unclear how the list will be kept accurate. Therefore, there is a risk of there being a vicious cycle of no capacity and onward referral. We urge the LAA to consider and consult on the details of the Protocol prior to amending the contract.

8.162D

Within one Business Day of the conclusion of the Client's 30 minute advice session you must contact a minimum of 5 potential Alternate Providers by such means as we may specify which may include telephone call, internet-based communication methods of similar to ascertain if they have capacity to accept referral of the Client's Matter

115. Can you guarantee that there will be a minimum of five potential Alternative Providers available to contact at any one time? If not, it is unfair that providers will risk breaching the contract due to matters beyond their control.

116. Will the referral be by one method or multiple methods of communication?

117. It would be helpful to know how contract compliance will be monitored overall, and particularly with regard to the Protocol.

118. Although it is appreciated that the referral procedure is intended to ensure access to civil legal services, this task would be a significant burden for already overstretched practitioners. If a practitioner only has capacity to continue providing services in one case out of the ten in which they have a 30 minute advice surgery, they would need to comply with the requirements in §8.162D for nine clients, so would be mandated to make 45 referral attempts within one business day of the surgery. This is a significant amount of work to undertake without any form of remuneration. Respondents to ILPA's Survey on Legal Aid Sustainability in June 2023 described excessive administrative burdens and unpaid costs as attributing to the unviability of providing legal aid services in immigration and asylum.[9] Therefore, we are worried that these extra unpaid administrative tasks will exacerbate the current unviable state of affairs in immigration and asylum legal aid.

119. Providers will likely comply with this requirement in form, as it is a contractual obligation, but it will greatly reduce their capacity with uncertain and/or low prospects of a successful referral. We urge you to consider the administrative burden you are placing on providers, and whether it will diminish their willingness to engage with the DDAS if it contains these obligations.

120. The burden of ensuring access to legal aid advice and representation should not be shifted onto providers who themselves do not have capacity. We would respectfully suggest that a government department should be responsible for undertaking these functions, to ensure the Lord Chancellor discharges his duty under section 1 of LASPO.

8.162E

Where a potential Alternative Provider has capacity to accept a referral you must provide relevant information by email to the Client and the Alternative Provider including but not limited to:
(a) the Clients details;
(b) completed Legal Aid Application Forms; and
(c) a summary of the information obtained etc during the advice session

121. What does *'etc'* mean? If this is to be a contractual obligation, it should be clear.

[9] ILPA, 'APPENDIX: Additional Comments Provided in Response to ILPA's Survey for Immigration & Asylum Practitioners on Legal Aid Sustainability' (19 July 2023) accessed 25 October 2023.

ILPA

8.162F

Where you have complied with the obligations under Paragraph 8.162D and are unable to refer the Client to an Alternative Provider you must immediately inform the IRC and you must advise the Client that you have been unable to facilitate a referral.

122. The contract should specify the reasonable time frames in which the Client and IRC must be informed, rather than use the word 'immediately'.

123. What are the Client and the IRC expected to do upon receiving such information?

124. Should the LAA also be informed at the same time as the IRC and Client? What does the LAA then do in such a case, to ensure that an individual does have access to legal aid assistance in accordance with paragraph 31C of Part 1 of Schedule 1 to LASPO? The Lord Chancellor must secure that legal aid is made available and has wide discretion to make relevant arrangements in section 2 of LASPO.

8.162G

At the conclusion of the Detained Duty Advice Scheme surgery you must using the pro-forma document and email address that we shall provide you with for this purpose, provide a summary of the surgery session including:
(a)details of Clients advised; and
(b) copies of all emails sent pursuant to Paragraph 8.163F,
and you must not copy any Alternative Provider(s) or Clients(s) into this email

125. Do you mean §8.162F rather than 8.163F in §8.162G(b)?

8.179

You may ~~not make any~~ Claim for travelling time or waiting time to attend a Detained Duty Advice Scheme surgery in person. Reasonable disbursements such as costs of travel and interpreting costs are claimable

126. We welcome that providers will now be permitted to claim for travelling time or waiting time to attend a DDAS Surgery in person.

8.181

The Standard Fee you may Claim is dependent on the number of Clients you advise at the Detained Duty Advice Scheme s~~S~~urgery.

Other Comments

127. We would welcome further detail on what the LAA plans in terms of quality assurance processes of IMA work, and whether there will be any additional resources for this.

128. Considering the potentially dire consequences for clients who are subject to the removal duty under the IMA, including extremely tight timeframes for challenging removal notices, quality assurance is all the more crucial.

129. Various documents require updating to reflect the novel procedures that will be introduced by the IMA, including the internal guidance to Contract Managers and peer reviewers and the guide to IRC work. What does the LAA have planned to train Contract Managers on IMA Work?

130. The LAA should also ensure sufficient training is provided to Contract Managers on the complexities of IMA procedures, to ensure sufficient monitoring of work. This is also particularly important if the Matter Start limit cannot be increased in the immediate future, considering our comments above that providers are likely to require multiple matter starts per individual affected by the IMA.

131. Many, if not most, practitioners will be unfamiliar with how to advise on the provisions in the IMA, considering the wide-ranging and significant changes it makes and the lack of clarity on how it will operate in practice. The LAA may therefore wish to consider targeted peer review of IMA Work, to ensure it is an effective means of quality assurance.

Immigration Law Practitioners’ Association

10 November 2023