

Ministry of Justice’s Review of Civil Legal Aid - Call for Evidence

Response of the Immigration Law Practitioners’ Association

21 February 2024

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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. Most of our response to this Call for Evidence repeats and reiterates previous recommendations and evidence, from ILPA and other organisations and individuals, to the Ministry of Justice (MoJ). We urge the MoJ to use the Review of Civil Legal Aid (RoCLA) as an opportunity to take the concerns of stakeholders seriously and take meaningful action to address the crisis within and caused by the current state of civil legal aid.

Overarching Questions

1. Do you have any suggestions of changes that could improve civil legal aid – both short-term and longer-term changes?

3. Provision of legal aid to individuals who seek redress is a key component in ensuring the constitutional right of access to justice, itself inherent in the rule of law.¹ Domestic courts have repeatedly upheld the principle that a failure to provide legal aid can amount to a breach of fundamental rights.² Our suggestions are made in furtherance of the objective of effective access to justice.
4. The civil legal aid system must ensure that high quality legal services are both available and accessible to persons without the independent means to secure legal assistance. Supply must meet demand. Ideally, individuals should be able to choose their representative.
5. This is of particular importance in immigration and asylum law, where the consequences of inadequate or no legal representation in a claim could be severe. Unlike some other areas of civil law, there exists a significant disparity in resources and power between the client and their opponent, the Home Secretary, and his department, the Home Office, a government body which wields substantial power and has access to significant resources. It is beyond dispute that, in the last two decades, immigration and asylum policies have become increasingly restrictive, making it more difficult for an individual to present their case and access justice.
6. There are specific risks for this demographic of clients in making an immigration or asylum application. The refusal of the right to enter or remain in the UK may have consequences such as family separation and detention, which can result in violations of human rights. Migrants in the UK without immigration status are subject to the punitive hostile environment, severely restricting their ability to work, rent, and access basic services. Exposing a vulnerable person to these measures increases the likelihood of their exploitation. Vulnerable persons must have effective access to justice, including judicial

¹ Echoing the words of Lord Reed in *R (Unison) v Lord Chancellor* [2017] UKSC 51 at §66.

² *R (Gudanaviciene & Ors) v Director of Legal Aid Casework and Lord Chancellor* [2014] EWCA Civ 1622.

redress. They are no less deserving – than any other person – of their day in court, to argue for the protection of their fundamental rights.

7. However, the civil legal aid system is in crisis. Practitioners are underpaid by fees which have not increased for nearly three decades. Providers are worn down by the burden of over-convoluted administration, the complexity of the Civil Contract, and their distrust of the Legal Aid Agency (LAA) who they in turn see as distrusting them. These deep-rooted battles mean that providers are fire-fighting everyday, both to stay afloat and to try to meet a soaring level of demand. The scale of advice deserts, a consequence of providers abandoning legal aid because of its serious deficiencies, without anyone to replace them, means that demand far outstrips supply. Practitioners are overworked and over-stretched as a result. All of this has a very real impact on the ability of practitioners to provide high quality legal services to those who need them. Access to justice is undoubtedly and dangerously compromised.
8. The current threats to access to justice will not be resolved overnight. Due to the scale of the crisis, which worsens each day, systemic and cultural changes will take time to embed and the rippling effect of our recommendations may take time to have a positive impact and secure sustainability. Sustainability in civil legal aid will not be secured instantaneously, after decades of neglect.
9. Nevertheless, there are several short and long term changes that the MoJ must make in order to stabilise, sustain, and improve civil legal aid. Demand, supply, and the overarching functioning of civil legal aid all require serious attention.
10. We welcome RoCLA's objectives of ensuring the civil legal aid system is accessible to those eligible, has optimised and user-friendly processes that minimise unnecessary administrative work, and offers a financially viable business option for legal aid providers, including making it an attractive career option that attracts a high-calibre and diverse workforce.³ The MoJ should be cognisant of the fact that the current system achieves none of these objectives and must be willing to make fundamental systemic improvements.
11. A meaningful review of fees is long overdue. Without such a review, it will be impossible to achieve a civil legal aid system that is financially viable and sustainable, given that rates have entirely failed to keep up with changes to market conditions since 1996. We have noted with

³ Ministry of Justice, 'Review of Civil Legal Aid: Overarching Terms of Reference' <<https://assets.publishing.service.gov.uk/media/64ca6b6c6ae44e000d11b423/overarching-terms-of-reference-for-the-review-of-civil-legal-aid.pdf>> accessed 15 February 2024.

disappointment that the Terms of Reference for the Economic Analysis do not encompass proposing 'options on specific individual fees'.⁴

12. We endorse the Overarching and Supply policy recommendations of Dr Jo Wilding:⁵

a. **Demarketise the system** -

- i. As the LAA already has in mind, contracts and periodic tenders for contracts should be abandoned, to permit providers, who meet the requirements set by the LAA, to enter the market by registering. This is cost-neutral or cost-saving.
- ii. Abandon matter start allocations, which serve no valuable purpose, and which may impede certain providers from providing assistance. This is cost-neutral.
- iii. Following careful consultation with the sector, where necessary, implement different funding schemes for not-for-profit providers, as part of a mixed model of provision. Dr Wilding states, '[t]his proposal could be cost neutral as a block grant for casework would eradicate the need for some of the administrative burden on both provider and funding authority.'

b. **Defragment the structure and routes of advice** - remove 'the competitive element of the current legal aid market, and facilitating a collaborative sector which encourages (and financially supports) co-working and, where relevant, merging of organisations... This proposal is likely to incur some cost in the short term but may be cost-neutral if collaborative funding models can be implemented between departments.'

c. **Use data and research** - rather than asking for us to supply you with data of unmet legal need, as in this Call for Evidence, the LAA 'should implement a research programme and adequate feedback loops to understand need and provision on an ongoing basis, not only in occasional major reviews.' This proposal is likely to incur some cost.

⁴ Ministry of Justice, 'Review of Civil Legal Aid: Economic Analysis of Civil Legal Aid' <<https://assets.publishing.service.gov.uk/media/63d3c700d3bf7f252bf9083a/terms-rreference-civil-legal-aid-revie-w.pdf>> accessed 15 February 2024.

⁵ Dr Jo Wilding, 'A menu of civil legal aid policy options for a new government' <<https://justice-together.org.uk/wp-content/uploads/2024/02/Legal-Aid-Policy-Options.pdf>> accessed 15 February 2024.

- d. **Reduce the case-by-case and auditing regime administrative burden for providers** - 'This proposal is likely to be cost-neutral or cost-saving for the MoJ depending on the alternative accountability mechanisms adopted.'
 - e. **Fair pay for legal aid work** - 'This does require a funding increase immediately to preserve the remaining provider base, and should include regular independent review of rates of pay... This is likely to increase costs in the short term, but should be offset longer term by savings from other proposals.'
 - f. **Pipeline** - 'Fund social welfare traineeships to ensure that there is a continued stream of new lawyers. It is difficult for individual organisations to afford trainees, particularly given that many leave once qualified because of the low wages. This could include adapting apprenticeships or funding supervision to support the highest quality organisations and those in the least-served areas. This is likely to increase costs.'
 - g. **Addressing advice deserts** - 'The Lord Chancellor has a range of powers in s2 of the LASPO Act to enable him/her to fulfil the duty in s1 to secure the availability of legal aid. These advice deserts are well-mapped across different areas of law and an incoming government should take urgent action using the existing powers to make alternative arrangements such as grant-funding or other support to retain or attract providers in desert areas. This will increase costs but is essential to meet a statutory duty.'
 - h. **Co-location** - 'There is indisputable evidence that people experience clusters of legal problems and that legal problems impact on health and other aspects of life. There should be a strategic approach to co-locating free and low cost legal services with other services (especially trusted services) like primary and secondary health care, libraries and schools. This has set-up costs but could draw on integrated care funds.'
 - i. **Holistic provision** - 'Alongside co-location, there should be a strategic approach to holistic provision which takes account of the 'user journey' from end to end, with 'warm handovers' between organisations where one cannot deal with all issues or all stages of a problem. This might mean combining Citizens Advice and Law Centres to ensure that everyone in the country has access to local facility where they can receive advice on all civil legal issues, from early advice, information and legal education right through to representation in court if needed. This has set-up costs but should consolidate (and streamline) existing spending in many cases.'
13. We stand in solidarity with other civil legal aid practitioners. However, as our specific expertise is in immigration and asylum law, our recommendations in response to this Call for Evidence are specific to these areas of legal aid.

1.1. Do you have any suggestions of changes – both short-term and longer-term changes – that could improve each of the following categories of law?

d. Immigration and Asylum

14. We respond in relation to category (d) Immigration and Asylum.
15. ILPA has made repeated recommendations for both short and long term changes that could improve immigration and asylum legal aid. We have engaged with the MoJ at every available opportunity to discuss our grave concerns and ideas for change. Although some minor changes have been implemented, our wider proposals that would begin to restore the system have continued to be ignored. For the purpose of this Call, we will reiterate key points we have made, time and again, and urge the MoJ to use RoCLA as an opportunity to, finally, begin working with us to save immigration and asylum legal aid from collapse.
16. Our most pressing recommendation in the short term, as indicated above, is an increase to fees. The MoJ has not committed to a fee review in RoCLA, but has the intention of creating policy proposals that would improve the sustainability of legal aid provision by ensuring that the ‘civil legal aid system... offers a financially viable business option for legal aid providers (both private and non-profit) and is an attractive career option that attracts a high-calibre and diverse workforce.’⁶ Research conducted, by PA Consulting for the purposes of this review, has found that the low level of fees is the factor most likely to prevent providers continuing service provision.⁷ The MoJ, in committing to this review, must open its eyes to reality.
17. Further to a fee increase for all civil legal aid work, ILPA made several recommendations in its response to the MoJ consultation on Legal Aid fees in the Illegal Migration Bill, on 7 August 2023,⁸ which we reiterate:

⁶ Ministry of Justice, ‘Review of Civil Legal Aid: Overarching Terms of Reference’ <<https://assets.publishing.service.gov.uk/media/64ca6b6c6ae44e000d11b423/overarching-terms-of-reference-for-the-review-of-civil-legal-aid.pdf>> accessed 15 February 2024.

⁷ PA Consulting, *Survey of civil legal aid providers in England and Wales: Informing the Review of Civil Legal Aid* (January 2024) (‘PA Consulting Report January 2024’) <<https://assets.publishing.service.gov.uk/media/65aa4068ed27ca000d27b28a/civil-legal-aid-providers-survey.pdf>> accessed 15 February 2024, p 30: ‘Factors related to fees, the low level of fees (81%) and fee structure (66%), as well as unbillable time (64%) were rated most likely to prevent providers continuing their service provision in the future’.

⁸ ILPA, ‘Ministry of Justice’s Consultation: Legal aid fees in the Illegal Migration Bill Response of the Immigration Law Practitioners’ Association’ (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 15 February 2024.

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).⁹ For areas without high grant rates, the 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.

18. We agree with the Legal Aid Practitioners' Group (LAPG) that the current Advanced Caseworker uplift of 5% for Controlled Work and expert fees are too low, and that the MoJ should consider reducing the requirement to a requirement to maintain at each Office a ratio of at least one full time equivalent Senior Caseworker for every two Casework Assistants/Trainee Casework Assistants for providers who demonstrate their strong compliance and/or have a high peer review rating.

⁹ 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 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.

19. None of these changes in isolation will have the overall impact necessary to fix the current state of affairs. A fundamental shift is required to build a sustainable legal aid system in immigration and asylum.
20. On 6 February 2024, the MoJ informed us of a new funding scheme for accreditation and re-accreditation of senior caseworkers, following overwhelming feedback from stakeholders that the cost of accreditation acts as a financial barrier to increasing their capacity to recruit additional staff, and take on more complex cases. While we appreciate this step, it does not go far enough. It does not cover all accreditation costs; the MoJ will only cover the membership fee (£227+VAT), which is larger than the application fee (£127+VAT),¹⁰ and will not cover the costs of initial accreditation as a casework assistant. Furthermore, the scheme is only available until 31 December 2024, but the crisis in immigration and asylum legal aid will take years to rectify. The loss of capacity in recent years has been drastic and the expertise required to deliver high quality services in this complex area cannot be restored overnight. We urge the MoJ to retain the scheme, as an interim measure, until immigration and asylum legal aid is sustainable. We recommend that the MoJ periodically review the need for the scheme, through meaningful consultation with stakeholders, to determine its necessity.

2. What are the civil legal aid issues that are specific to your local area? Please provide any specific evidence or data you have that supports your response.

21. ILPA's membership spans the United Kingdom. Members from across England and Wales have raised the alarm about advice deserts in their localities, in line with the well documented scale of this issue, of which we appreciate that the MoJ will be aware. According to the Law Society's analysis, 65.8% of the population do not have access to an immigration and asylum legal aid provider.¹¹ Annex C to the Call for Evidence shows an increase of nearly 10,000 controlled work claims between 2018-2019 and 2022-2023, but a drop of 51 providers and 81 offices in the same period of time.
22. There are a multitude of reasons for the exodus of practitioners from the legal aid sector.
23. The reduction of the scope of legal aid, under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), significantly narrowed the market within which practitioners could provide legal aid services. It removed from scope '[a]ll immigration cases except for

¹⁰ The Law Society, 'Immigration and Asylum Law Accreditation' <<https://www.lawsociety.org.uk/career-advice/individual-accreditations/immigration-and-asylum-law-accreditation>> accessed 15 February 2024.

¹¹ The Law Society, 'Immigration and asylum – legal aid deserts' (8 February 2024) <<https://www.lawsociety.org.uk/campaigns/civil-justice/legal-aid-deserts/immigration-and-asylum>> accessed 15 February 2024.

asylum cases and a limited number of non-asylum cases such as immigration detention and applications for leave to remain where the individual is a victim of trafficking or domestic violence'.¹² Immigration and asylum practitioners with expertise in a particular area that was no longer in scope, have left the legal aid sector to focus on their area of expertise.

24. The MoJ's failure to increase fees in line with both inflation and the increasing complexity of immigration and asylum law means that legal aid work is no longer a financially viable option for many practitioners. This was illustrated in the response to ILPA's survey on legal aid sustainability in July 2023—on average, respondents who were potential providers said they would need an increase of 68% to fixed fees and 61% to hourly rates to be encouraged to tender for an immigration and asylum contract.¹³ Financial unsustainability has forced legal aid providers to either subsidise their legal aid work with higher paying private work, which reduces capacity for legal aid, or forced providers to leave the sector altogether.
25. Home Office dispersal practices aggravate the demand issue in deserts, with large numbers of people seeking asylum being accommodated in areas with no legal aid provision. The Bibby Stockholm has capacity to accommodate 500 individuals, with many already there, and is berthed in Portland Port, Dorset.¹⁴ The South West England has been well documented as a legal advice desert. An ILPA member who is one of the last remaining legal aid providers in the South West, frequently reports to us the intense pressure on their team to cope with the impossible demand for their services. These issues in the South West are also detailed in the 2023 report of Public Law Project (PLP).¹⁵
26. The LAA accepts the severe shortage of available advice in the South West. It has attempted to plug the capacity gap by providing a list of legal aid advisers who are based outside of that procurement area and are able to provide advice remotely.¹⁶ Aside from the problems with remote advice, which we detail in our response to [Question 15](#), a member has explained how this measure could inadvertently decrease capacity in the deserted South West:

¹² National Audit Office, 'Government's management of legal aid' (9 February 2024) <<https://www.nao.org.uk/wp-content/uploads/2024/02/governments-management-of-legal-aid.pdf>> 15 accessed 15 February 2024.

¹³ ILPA, 'Results of ILPA's Legal Aid Sustainability Survey' (19 July 2023) <<https://ilpa.org.uk/results-of-ilpas-legal-aid-sustainability-survey/>> accessed 15 February 2024.

¹⁴ Home Office, *Portland Port: factsheet* (updated 29 December 2023) <<https://www.gov.uk/government/publications/asylum-accommodation-portland-port/portland-port-factsheet#why-is-the-government-using-vessels-to-accommodate-asylum-seekers>> accessed 15 February 2024.

¹⁵ PLP, *Access to immigration legal aid in 2023: An ocean of unmet need* (September 2023) <<https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>> accessed 15 February 2024 ('PLP 2023 Report').

¹⁶ Legal Aid Agency, 'Immigration providers south west support directory' (1 November 2023) <<https://www.gov.uk/government/publications/immigration-providers-south-west-support-directory>> accessed 15 February 2024.

“...if it is open season it is actually more of an advantage ('market' wise) not to have an office in Plymouth and incur costs that those outside the area would not incur. So we could just operate out of Bristol for example and join the list.”

27. Access to justice is a fundamental right, to be regarded with the utmost importance in a democratic society. The government should work cross departmentally to ensure this right is not hindered by ill-thought through dispersal practices.
28. The picture in North West England is equally bleak. We know that one of our Manchester-based members, Greater Manchester Immigration and Asylum Aid Unit, has recruited an additional member of staff solely to manage their waiting list of unaccompanied asylum seeking children, possibly the most vulnerable and desperate client group in this field. A mapping exercise conducted by Manuel Bravo Project found that none of the then ‘current’ (according to the LAA) legal providers in Leeds had capacity.¹⁷
29. On an individual level, the inadequate salaries, excessive time spent on unbillable matters, stress of audits and sheer complexity of the legal aid system drives practitioners to pursue alternative job opportunities. Added to this, the stress of trying to meet an unachievable level of demand for a vulnerable cohort, and the mental and emotional toll of being unable to do so, is a result of deserts, but also continues to drive practitioners out of the sector. An email we received from a practitioner exemplifies the depth of the crisis:

“I just wanted let you know that after 16 years working in asylum / immigration legal aid [...] I am leaving the world of asylum and immigration law. Today is my last day and I am moving on to a different job entirely unconnected.

The last 12 months have been the worst I have ever experienced and for my own mental health I need to get out. I am sure that I am not the only member who feels like this or who is on the brink of breaking point and I wanted to share something before I go just because we have been trying and trying to make our views and voices heard with the Legal Aid Agency, with MPs and with the Home Office and it just falls on deaf ears.

It is heartbreaking to see so many legal aid lawyers hanging up their hats and leaving the profession / legal aid law firms returning contracts and closing. The whole system is at breaking point and at a time when there are due to be 2000 new

¹⁷ PLP 2023 Report, 33.

asylum seekers housed in [...] the South West, [the area] is now down to around 4 lawyers in total. It is staggering how bad it is.

It seems to be more and more clear over time that the Government's plan is to destroy legal aid in asylum law by making it as unsustainable as it could possibly be, getting rid of as many lawyers as they can (I mean the hatred is seen in the negative rhetoric spoken over and over [...]).

[...] our role is not to support thousands of asylum seekers who are being tormented, threatened with inadmissibility, threatened with removal, living in horrific accommodation for years on end (seeing more suicide attempts and serious mental health conditions as a direct result of that). Yet this is what we are doing day in day out.

We are working on the frontline in one of the darkest areas of law with the most traumatised people and yet no provision is made for mental health support for the vicarious trauma suffered [...].

So, if there is any way ILPA could find time, space, capacity to advocate on behalf of their members and the legal aid asylum / immigration profession to push forward some urgent changes in Legal Aid, [...], a recognition from the Home Office that we are actually there to help them and do an awful lot to make their job easier [...]. Without that I honestly do not see how much longer it will survive."

30. Crucially, the MoJ must urgently consider taking the steps recommended in our response to [Question 1](#) and [Question 1.1](#) to make any progress in meaningfully injecting capacity into legal aid deserts, to prevent vulnerable individuals who are eligible for legal aid being left without effective access to it.

3. What do you think are the changes in the administration of civil legal aid that would be most beneficial to providers? Please provide any specific evidence or data you have that supports your response.

31. As outlined above, the change that would be most beneficial to the administration of legal aid would be to reduce the administrative burdens of billing and auditing, by simplifying the process. The sheer complexity of the legal aid contract, which gives rise to uncertainty about what it requires and permits, places an unreasonable administrative burden on providers.
32. Additionally, the auditing process must require less of providers. The fundamental shift that needs to be made is to place more trust in providers. The system currently sees the LAA

operating with a culture of suspicion, working against rather than with providers. The focus of monitoring should be on improving the quality of advice to promote meaningful access to justice, rather than subjecting financial claims to unreasonably intense scrutiny.

33. The view of an organisation successful in a 2024 tender to provide immigration and asylum legal aid services encapsulates the impact that structural issues with administration can have on new and prospective providers:

“[W]e started out providing casework in immigration and avoided asylum as much as possible, but ultimately we had so many people come to us with no legal representation that we’ve ended up dealing with them, but without having any legal aid. Its got to a point where we need a contract in the patch and so we’ve bit the bullet and gone for it, but as a relatively small charity its been very daunting – and complex to navigate what is needed... We are also highly concerned about the administration and billing which legally aided colleagues consistently say is a real danger zone... get it wrong and we could be putting our whole organisation in jeopardy. But, ultimately our service users need us to do this and so we are going to give it our best shot.”

34. The LAA claims that the intense scrutiny of immigration and asylum providers is due to mistakes being made. However, they have created a system of Byzantine complexity, to govern funding of advice in an area of law of equal if not greater complexity.

Complexity

35. Members frequently raise concerns around the complexity of the legal aid contract. During ILPA’s Legal Aid Working Group meeting on 8 February 2024, one member stated that *“knowing legal aid is like knowing a separate area of law”* another remarked that they would need to hire a person with a PhD to interpret the immigration and asylum legal aid provisions. The theme of excessive complexity arose in responses to ILPA’s survey on legal aid sustainability in July 2023. One respondent, a private firm which does not provide legal aid in immigration and asylum, said:

‘Based on my previous experience of working in a practice providing legal aid services I would not find providing legal aid viable because of... Complexity of making Legal Aid funding applications e.g. for witnesses and difficulty dealing with LAA decision makers. Costs of resources to make such applications.’

36. The MoJ expects providers to negotiate complex provisions in order to be remunerated for their work. For example, the Immigration and Asylum Specification confirms that there is a bolt-on fee for pre-NRM advice. However, these provisions are not yet in force. A member

was informed in a communication for providers that the sections of the Nationality and Borders Act 2022 giving effect to the fee had not yet commenced so the fee could not be claimed. Instead a claim for a bolt-on fee for pre-NRM advice that had already been undertaken could be made by way of an ex-gratia request. Immigration providers may be punished for reading the contract and making claims for fees that it purports are available. Uncertainties about provisions in the contract can cause anxiety about work that has already been done by their team in other cases.

37. Feedback from members indicates that even Contract Managers struggle to keep pace with the complexity of the contract, which raises concerns about their ability to monitor compliance competently. As one member explains:

“the rules are so complex and varied, even the CMs cannot keep on top of them all. That can be difficult but I understand, and appreciate being given flexibility and understanding by CMs when we also might get confused. It can be difficult when the policy team apparently are not clear either. Wherever there is uncertainty over a position, that makes me worry about work already done and how to guide my team going forward as I need to be clear with them.”

38. Members have explained that conducting a matter that is paid via a combination of fixed fees and hourly rates is cumbersome, with one member describing it as a “nightmare”. Caseworkers must flip between the two regimes, each of which requires a different approach. The complexity of the fee system, with an excessive number of codes for different types of work and with varying payment structures, should be simplified. There should be a singular system of payment for all immigration and asylum work. This is explained further in our response to [Question 6](#) below.

Unbillable activities

39. The billing process is administratively burdensome, requiring providers to undertake hours of unpaid work to be remunerated for the billable work they have done. Research commissioned by the MoJ for RoCLA found that the administration involved in getting paid was one of providers’ high priority issues with the system.¹⁸ LAPG is so concerned with the amount of non-chargeable work involved in legal aid contracts that it has obtained funding for a project researching the issue. Not only is requiring practitioners to undertake hours of unnecessary and unpaid work wrong in principle, ILPA members' experience illustrates the impact of non-billable work on providers’ capacity, work/life balance, and ultimately their wellbeing. The MoJ must simplify the billing process to reduce hours spent on unpaid work,

¹⁸ PA Consulting Report January 2024.

and remunerate practitioners for the time they spend on essential work that is currently non-chargeable. An ILPA member has stated:

"[i]t is very hard to quantify this but I would say I do about one day a week of LAA related admin (also taking into account the times when I might do multiple days in a week related to legal aid work) in relation to work across the organisation and that is not covered by legal aid income at all and my salary is one for a head of legal practice. My colleagues' admin time will be on top of that."

40. When this topic was discussed in our Legal Aid Working Group meeting on 8 February 2024, one member explained that their organisation *"devoted 2 days a week of our own paralegal shared between 8 lawyers on escape fee billing alone, that's on top of a finance member of staff on £35,000 on a 3 day week, plus a consultant 2 days per month - just on controlled work billing."* The overwhelming feeling amongst members was that the administrative burden and complexity of billing causes providers an enormous amount of stress, and the time providers must dedicate to these tasks reduces their capacity for providing legal services to clients. As we mention throughout this response, capacity is a huge concern in immigration and asylum legal aid. The MoJ and LAA are complicit in reducing practitioners' capacity by imposing unpaid and unnecessary administrative tasks which divert practitioners from the important work they do for clients.
41. Our 2023 survey on the sustainability of legal aid asked two substantive questions. The first asked respondents to provide a figure of the percentage increase they would require either, if they were a current provider, to continue to provide their current level of immigration and asylum legal aid services viably, or, if they were not a current provider, to encourage them to tender for a contract to provide such services. Then, we asked for additional comments on the viability of providing immigration and asylum legal aid services. The most common theme to arise in answers to this question was unpaid work. Respondents highlighted:
- *'The LAA has overseen such a complicated reporting system that many unpaid hours are spent getting cases paid. The codes need to be streamlined rather than continually added and expanded. We spent much time and expense in resubmitting files that have wrongly been rejected for payment as the LAA doesn't understand their own rules or lacks the flexibility or common sense when dealing with rules that are unclear.'*
 - *'High administrative and auditing burdens carried by practices with immigration departments make this work unviable. Immigration files are subject to the highest margin for error because of the complexity in running them as there are so many variations in fees, codes, bolt ons, funding limits, VAT status, the combination of legal help and CLR stages. For example, immigration providers use interpreters in most*

cases. The LAA's requirements for interpreter qualifications, what information must be on an invoice, in relation to minimum charges, and low translation fees and no special rate permitted for telephone interpreting make it burdensome to find interpreters, manage interpreter payments and then ensure all of those are in order for billing. Another example, we pay for a billing coordinator one day a week for our small practice and her fees come out of our controlled work income. Immigration billing is the most difficult in all our legal aid work.'

- *'It is an exhausting daily struggle and not helped in any way by LAA admin, audits and disallowing costs.'*
- *'Billing is a nightmare.'*
- *'There are bureaucratic burdens which could be reduced in order to improve viability.'*
- *'Additional cost allowance should be made for the cost of administering the LA contract, cost of billing'.*
- *'The real issue is that we are only paid for the time actually spent with clients. So there is no time to study or draft unless we do that at night. I am quitting and moving to other field of law as I need a life. It is not sustainable to work 90 hours a week at such low salaries.'*¹⁹

42. Much of the essential work done by legal aid practitioners, including client care and training, is non-chargeable. Client care is particularly important in immigration and asylum law, where clients have a high level of trauma and mental health difficulties. Training and studying is also crucial, due to the fast-paced and complex nature of the law and the re-accreditation requirements. As well as cutting out unnecessary administrative burdens, the MoJ should remunerate practitioners for the vital work they do for clients which currently goes unpaid.

43. The majority of legal aid practitioners resort to working outside of their working hours to keep on top of their workload. Almost all practitioners in LAPG's 2021 Census reported working in their free time.²⁰ We are already concerned that the mental health of practitioners, which is already at risk in immigration and asylum due to their exposure to

¹⁹ ILPA, 'ILPA's Legal Aid Sustainability Survey' (19 July 2023) ('ILPA's Legal Aid Sustainability Survey 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 15 February 2024.

²⁰ LAPG, *Findings from the 2021 Legal Aid Census* (March 2022) §3.1 ('LAPG Census') <<https://lapg.co.uk/wp-content/uploads/We-Are-Legal-Aid-Findings-from-the-2021-Legal-Aid-Census-Final.pdf>> accessed 15 February 2024.

accounts of their vulnerable clients' harrowing experiences, is not given sufficient attention by the MoJ. Adding an inability to maintain a healthy work/life balance, on top of vicarious trauma and other potentially grave mental health consequences of working in this field, is unacceptable. The MoJ must take steps to reduce the number of unpaid hours a legal aid practitioner is required to work to sustain their practice.

Monitoring

44. Closely linked to the issues of complexity and unpaid work is the current functioning of the LAA's monitoring and auditing system. PA Consulting found that 59% of civil legal aid practitioners are dissatisfied with the way LAA makes decisions.²¹ Members consistently tell us how difficult it is to work with the LAA. We have had numerous reports of the LAA attempting to recoup extortionate amounts of money, often to realise further down the line that this is a result of their own mistakes, to the detriment of the provider.
45. Simplifying the contract, as suggested above, could help reduce instances of the LAA misunderstanding certain provisions. Additionally, we believe a fundamental shift in the way the LAA approach monitoring is required. The LAA must move towards a system that prioritises trust in providers and working *with* them to ensure access to justice is preserved. We refer to LAPG's response to this Call, and agree with their recommendation to adopt a 'good faith' approach, meaning providers should not be penalised if it is clear that their work was done in good faith. We remind the MoJ that paragraph 2.4 of the 2018 Standard Civil Contract Terms stipulate that 'we agree to work together openly and with mutual trust and co-operation in order to achieve value for money and to ensure that public money is spent with probity, accountability and in the public interest'.²² The current approach of the LAA is far from one of 'mutual trust and co-operation'.
46. A member of our Legal Aid Working Group was recently told that the LAA would recoup £28,000, 21 days from the notice, from a 2005 file for which the organisation no longer holds records. This would cause unimaginable stress for a provider, who has a short time frame within which to dispute the matter and no evidence to do so. It is utterly unreasonable for the LAA to review files from almost two decades ago, and attempt to claw back payments they already approved.
47. Below is another stark case study from a different member.

²¹ PA Consulting January 2024 Report, 8.

²² Legal Aid Agency, '2018 Standard Civil Contract, Standard Terms' (1 January 2021)

<https://assets.publishing.service.gov.uk/media/5feb4c83d3bf7f0895217e83/2018_Standard_Civil_Contract_Standard_Terms_1_January_2021_Clean.pdf> accessed 19 February 2024.

Audit Case Study

A CCA audit was deliberately triggered by their new contract manager, by making minor (non-financial) contract notices. For the CCA, the LAA audited 47 files, nil assessed 10 and made other financial reductions together totalling 56.75% of the costs on files audited. None of the findings had any merit. For example, one finding was that firms were not allowed to reclaim VAT on disbursement costs when charged VAT by a supplier (such as an interpreting agency or an expert). Rule 8.43 of the Unified Contract Civil Specification and Rule 4.39 of the Standard Civil Contract (2010, 2010 amended and 2013 Specifications) allows the LAA to apply this percentage reduction by way of assessment to all other claims for costs submitted since your last CCA audit; or (as in our member's case) in the last 12 months. The LAA, therefore, made a costs reduction of £387,145.54.

There was a right of appeal but, because they then classified our member as a financial risk on the basis they thought our member could not pay, the appeal was non-suspensive and contract sanctions were unilaterally imposed. All profit costs payments were suspended. Our member had to send lists of salaries every month to the LAA so the LAA could sign off enough money for our member to pay their staff, rent, and other operational costs to stay open. However, the directors basically went unpaid for about 6 months.

Our member was summoned to a meeting at the regional LAA office. They describe that they were "humiliated" and told that they would only receive a payment every two months for the next six months and only after an audit was passed before each payment. If they passed three audits in six months, it would go back to normal. The business was affected by the risk of insolvency, if they could not pay creditors. No thought was given to how this affected their clients. The directors were at risk of personal bankruptcy as the Civil Contract requires a personal indemnity, which is not covered by indemnity insurance. The directors had to focus solely on the audit for six months. This wrecked the business. They had to take out bank loans to survive. They describe the emotional toll as heavy.

After the internal appeal, the LAA accepted they had made erroneous findings on virtually all files. The reduction was reduced to £3,688.42, less than 1% of the original LAA claim. However, there was still no admission by their contract manager that he was wrong in his approach or in the process of sanctions, which he continued to enforce.

The appeal continued to an external appeal in relation to three files. In one file, the appeal was found fully in our member's favour. The other two were both hourly rate files. One was for a minimal amount, which our member did not contest due to the time it would

have taken weighed against the amount at stake. In the last file the issue was the amount our member charged the LAA in counsel fees (the counsel profit costs), which was dismissed.

Following the external appeal, the total financial reduction was £256.17.

Our member has still received no apology. The financial losses to their business due to the sanctions imposed were about £100,000.

Bizarrely, the LAA had said to our member: *"We are well aware that there are administrative costs (both to you and to us) involved in dealing with appeals. We are therefore prepared to offset these costs by 5% and apply the reduced assessment rate of 51.75% to your claims should you decide that, having considered the findings and this concession, you do not wish to appeal our audit decisions."*

This concession would have decreased the amount of the total costs to £353,035.80 (instead of £387,145.54). Yet, despite placing a value on the costs involved in the process, no money was offered to our member when the errors were found to be those of the LAA.

48. Reviewing claims for payment is one thing, reviewing payments that the LAA have reviewed and paid in a manner that severely detracts the provider's financial stability is another. Providers are on constant high alert. Their business and livelihood is at the mercy of the LAA's monitoring activity. The LAA's time and resources should be re-focussed on assuring quality of and access to civil legal aid services.

Tendering

49. The current process for procuring providers requires them to bid for contracts during a period of tender. This occurs every three to five years, at the discretion of the LAA. This was introduced with the intention of moving towards competitive tendering, which, aside from being an inappropriate policy intention for securing legal aid providers, is clearly no longer a viable intent, considering the capacity crisis. This system should be abolished.
50. The National Audit Office has said, 'overall, provider numbers have been decreasing. LAA is currently reviewing whether changes to its procurement model for crime, such as allowing new entrants to join before the end of a contract period, may help to reduce barriers to

entry for providers. It intends to consider similar changes to civil procurement pending progress on MoJ's Review of Civil Legal Aid'.²³ We would agree with such an approach.

51. Although it is right that entry should be controlled, providers should be free to apply for registration when they are ready, instead of waiting for a tender to be opened. This would improve the process of re-building capacity in the sector.

4. What potential risks and opportunities do you foresee in the future for civil legal aid: i) in general; and ii) if no changes are made to the current system? Please provide any specific evidence or data you have that supports your response.

52. There are substantial risks to the future of immigration and asylum legal aid presented by two key issues: the influx of new legislation and the increased reliance on institutionalised accommodation.
53. The MoJ has recognised the likely impact of the Illegal Migration Act 2023 on demand in immigration and asylum legal aid. The complexity of its provisions and the speed at which work will be required (by the suspensive claim process) on top of the provisions within the Nationality and Borders Act 2022 (for accelerated detained appeals, priority removal notices, and expedited appeals), will intensify demand for a set of providers that are already extremely short of capacity. The current political climate means there is a real risk of further complex unworkable legislation being introduced, as is shown by the Safety of Rwanda (Asylum and Immigration) Bill before Parliament. The MoJ must have this particular risk in mind when considering how to bring immigration and asylum legal aid in line with (a) the significant levels of work practitioners will now be required to do for clients, (b) the significant time that will be spent by practitioners bringing themselves up to speed on new laws, processes, and policies, and (c) the heightened need to urgently increase capacity to protect the interests of the individuals who will be subject to these policies.
54. As set out in response to [Question 2](#) above, there is a continued risk of individuals seeking asylum being dispersed to areas with little to no provision for immigration and asylum legal aid, only exacerbated by the Home Office's increased reliance on rurally located large-scale accommodation sites.
55. If no changes are made to the current system, the exodus of practitioners from legal aid, without sufficient willingness or expertise to restore lost capacity, will continue. It will

²³ National Audit Office, 'Government's management of legal aid' (9 February 2024) ('NAO 2024 Report') §3.7 <<https://www.nao.org.uk/wp-content/uploads/2024/02/governments-management-of-legal-aid.pdf>> accessed 15 February 2024.

continue until there are no providers left. The implications this would have for access to justice require no explanation.

56. Without making changes to increase the attractiveness of legal aid, through revision of fees, fee structure, and administrative burden, the sector will continue to struggle to retain current practitioners and recruit new ones to replace their expertise when they retire or leave their practices behind. The MoJ are in a race against the clock to attract bright new practitioners to immigration and asylum legal aid while retaining experienced practitioners. If experts in specialist areas such as asylum, trafficking, detention, and domestic violence leave the field, years of knowledge and experience will be lost to the detriment of this vulnerable segment of society.
57. RoCLA is an opportunity for the MoJ to act, before it is too late. We urge the MoJ to listen to our collective evidence, which has been repeated in various consultations, meetings, and forums throughout the years. The MoJ has consistently kicked the can of repairing civil legal aid down the road, in recent years citing RoCLA as the ultimate time to address sustainability. We remind the MoJ of their promises and the opportunity presented by this review and subsequent policy making. We do not promise that our recommendations will fix the system overnight. The immense damage done to immigration and asylum legal aid will likely take years to repair. However, this is an opportunity for the MoJ to take concrete reparative steps towards a sustainable and effective system of civil legal aid. We remain willing to continue working with the MoJ, as both short and long term measures are implemented.

5. What do you think are the possible downstream benefits of civil legal aid? The term 'downstream benefits' is used to describe the cost savings, other benefits to government and wider societal benefits when eligible individuals have access to legally aided advice and representation. Please provide any specific evidence or data you have that supports your response.

58. The potential downstream benefits of a well-functioning civil legal aid system are significant. We reiterate previous comments made to the MoJ in our 2023 response²⁴ to its consultation on fees in the Illegal Migration Bill:

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

²⁴ 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 15 February 2024 ('ILPA 2023 Response to MoJ consultation on legal aid fees in the IMB').

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 1999, while certain claims are ongoing,²⁵ 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 2022,²⁶ and the funding of immigration advice by local authorities and devolved Governments.²⁷ 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'.²⁸

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.²⁹ 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.³⁰

²⁵ 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.

²⁶ NRPf Network, 'NRPf Connect data report' <<https://www.nrpfnetwork.org.uk/nrpf-connect/nrpf-connect-data>> accessed 20 July 2023.

²⁷ 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.

²⁸ 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> accessed 20 July 2023.

²⁹ 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.

³⁰ 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->

59. The findings of the National Audit Office in their report reflect our view. They emphasise the funding by local authorities of immigration advice, and attribute this to LASPO's cuts to the scope of legal aid.³¹ The report further recognised that proper access to civil legal aid in immigration and asylum would reduce pressure on local authorities to support those in limbo, by helping individuals obtain status in a timely fashion. The potential downstream benefits of a sustainable civil legal aid system are enormous.

Fees

6. What are your views on the incentives created by the structure of the current fee system?

60. The structure of the current fee system creates disincentives and perverse incentives. Financial viability is hindered by outdated and woefully inadequate fees, cash flow problems, and a culture of unpaid work. These are a disincentive for current providers to continue this work and for potential providers to start providing legal aid services. This in turn has a direct impact on the number and capacity of remaining providers and practitioners in immigration and asylum legal aid.

Legal Aid Rates

61. Rates have not increased since they were set in 1996. In fact, they were cut in 2011, by 10%. This is despite a significant rise in inflation since then—£1 in 1996 equates to £1.92 in 2023.³² The MoJ has blatantly failed to adjust fees to market conditions. The National Audit Office estimates that '[i]n real terms, civil legal aid fees are now approximately half what they were 28 years ago'.³³ This is not only an insult to practitioners, it makes legal aid financially unsustainable. We hear this time and again from our members.
62. The results of ILPA's 2023 survey on the sustainability of legal aid illustrate that inadequate rates have acted as a direct disincentive to practising in legal aid.
63. In July 2023, we asked a sample of potential providers 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

[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.

³¹ NAO 2024 Report, p 20 Figure 4.

³² Bank of England, Inflation Calculator

<<https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator>> accessed 15 February 2024.

³³ NAO 2024 Report, §3.9.

sample of private firms indicated they would need a minimum of 100% to fixed fees and 83.3% to hourly rates.³⁴ The overwhelming response from members was that, if legal aid continues to pay at its current rates, the system is unsustainable.

64. A sample of current 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.³⁵ One respondent said, *'If the rates are not increased people will have to leave the profession.'*³⁶ This chimes with findings made as part of the provider research for RoCLA, that the most likely pain point to prevent continued provision was low fee level, and that lack of financial viability was the top reason for giving up civil legal aid contracts in the past.³⁷
65. With legal aid unprofitable, providers are left with no choice but to use their time and resources either pursuing privately paying profitable work or applying for and managing grants from other sources. Not only is this a sign that the system is failing, it has a drastic impact on capacity. Evidence from our survey³⁸ illustrates this:
- One London-based solicitor states that *'[o]ur firm can only continue to do any legal aid because we have drastically increased the quantity of private work. This in turn has further reduced our capacity for legal aid work, and despite being longstanding legal aid providers, if our practitioners start to do less and less legal aid, we run the risk of losing our expertise in this highly specialised and complex area of law.'*
 - A London and Yorkshire based not for profit organisation said *'[w]e rely on grant funding to supplement our legal aid casework. Legal aid funding comes with huge risks and cannot cover all of the real costs of running a practice, looking after our staff and doing quality work for clients.'*
 - A not for profit organisation based in the South West explained *'[c]urrently we have other funding which subsidises legal aid and legal aid requires more support from management and admin than any other funder.'* This implicitly illustrates the lost

³⁴ ILPA's Legal Aid Sustainability Survey 2023, Survey Results Spreadsheet - 3. Potential Providers Summary.

³⁵ ILPA's Legal Aid Sustainability Survey 2023, Survey Results Spreadsheet - 2. Current Providers Summary.

³⁶ ILPA's 2023 Legal Aid Sustainability Survey, Additional Comments, page 4.

³⁷ PA Consulting January 2024 Report, 27: 'Frustrations surrounding fees were the most likely to be experienced on a more frequent, weekly basis, specifically the level of fees (70%) and the fee structure (62%)'.

³⁸ ILPA, 'ILPA's Legal Aid Sustainability Survey' (19 July 2023) ('ILPA's Legal Aid Sustainability Survey 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 15 February 2024.

capacity for legal aid work, to manage grant funding from elsewhere, in order to sustain legal aid.

- A London-based non profit organisation stated *'we supplement legal aid immigration work with grant funding- however, we should not have to do that. Grant income is unstable and is short term funding that does not allow us sustainably financially plan.'*
- A London-based solicitor told us that *'[t]he remuneration rates are far too low to support a practice that is not cross-subsidised either by profitable private work or grant funding.'*
- A self-employed barrister described how they sustain legal aid: *'My practice at present is approximately 60% legally aided. I meet the extreme shortfall in part by increasing my private rates for low/medium income clients who are no eligible for legal aid but are not able to pay anything approaching my commercial rate. With inflation in the last 1 1/2 years this has ceased to be a viable model and I am going to have to reduce my legally aided work significantly in order to remain viable. Like many practitioners, I rely (in order for my practice to be commercially viable) on cross-subsidising legally-aided work; this particularly includes cross-subsidisation from inter partes awards in successful certificated claims. This is an unreliable way of cross-subsidising; will become even less so if graduated fees are extended in civil claims; and in any event is reducing my capacity to do legally aided CLR work.'*

66. A member of the Legal Aid Working Group explained in our February 2024 meeting that they subsidise their work with grant funding, but that grants have conditions which require time to be spent on tasks other than legal aid casework. In this regard, it is an understatement to say that low fees simply 'disincentivise' practitioners from providing legal aid services. Practitioners are forced to divert their already limited capacity for legal aid services to other work because this is what helps them sustain legal aid.

67. As explained in our answer to [Question 2](#) above, inadequate fees have played a significant role in the loss of capacity in the immigration and asylum legal aid sector. One consequence of utterly outdated rates is that providers cherry pick cases that are the most profitable, which is at odds with the right of access to justice. Worryingly, we know of one large immigration and asylum legal aid provider, with offices in several procurement areas, who has ceased accepting almost all cases that are at appeal stage. Members also report that they often hear from individuals who are without legal aid representation, having been dropped by their previous provider once their claim was refused and it was necessary for an appeal to be lodged, or individuals who have been told while receiving Legal Help that the provider will be unable to continue representation in an appeal, in the event of a refusal.

This has led to further unpaid work, with members assisting individuals with protectively lodging appeals on a pro bono basis but with no capacity to represent the individual throughout their appeal.

68. Furthermore, in the years since the current rates were set, the complexity of immigration and asylum law has increased remarkably. In the previous two years alone, two incredibly complex statutes which have wide-reaching implications for immigration and asylum law have passed,³⁹ on top of twelve Statements of Changes to the Immigration Rules,⁴⁰ vast amounts of secondary legislation, and the Safety of Rwanda (Asylum and Immigration) Bill currently before Parliament.
69. Our 2023 survey was specifically focused on providers' current level of provision, and 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.'⁴¹
70. The MoJ is well aware of the impact that the Illegal Migration Act 2023 will have on the workload of providers. It is telling that, even without this added demand for complex and urgent work, current and potential providers felt that they would require, on average, an increase in excess of 84% to current rates, to maintain a viable service. The MoJ has only agreed to increase fees for work done in relation to an 'Illegal Migration Act Removal Notice' by a mere 15%.⁴² Over half of the respondents to the MoJ's consultation on this measure stated that '15% is either insufficient or inappropriate, should be the minimum increase and/or that the fee level should be higher than 15%.⁴³ There were various reasons given for this, including the complexity of the work required, the short timeframes in the Act, and the depreciation of legal aid fees over time. The MoJ ignored these concerns, increasing rates by only 15%. We remain certain that this will not cure the capacity crisis and create the supply needed to deal with the Illegal Migration Act 2023. As one member stated, "*we couldn't*

³⁹ The Nationality and Borders Act 2022 and Illegal Migration Act 2023.

⁴⁰ UK Visas and Immigration, 'Immigration Rules: statement of changes' (Updated 7 December 2023) <<https://www.gov.uk/government/collections/immigration-rules-statement-of-changes#statement-of-changes-to-the-immigration-rules:-2022>> accessed 15 February 2024.

⁴¹ ILPA, 'ILPA Response to Ministry of Justice consultation on 'Legal aid fees in the Illegal Migration Bill'' (7 August 2023) §44 <<https://ilpa.org.uk/ilpa-response-to-ministry-of-justice-consultation-on-legal-aid-fees-in-the-illegal-migration-bill-7-august-2023/>> accessed 15 February 2024.

⁴² Ministry of Justice, 'Legal aid fees in the Illegal Migration Act: government response' (Updated 28 September 2023) <<https://www.gov.uk/government/consultations/legal-aid-fees-in-the-illegal-migration-bill/outcome/legal-aid-fees-in-the-illegal-migration-act-government-response>> accessed 15 February 2024.'

⁴³ Ibid, §35.

commit to do IMA work and provide additional capacity without being able to meet our obligations to existing clients and those with non IMA matters, because we couldn't hire somebody new with that tiny increase".

71. Ever-increasing complexity lessens the realistic value of legal aid fees a provider is paid, even with the marginal insufficient increase for only a specific portion of Illegal Migration Act work. These changes in law, policy, and practice contribute to lack of financial viability of practising in immigration and asylum legal aid.
72. The extent of non-billable work that practitioners must undertake to obtain their remuneration from the LAA, set out in response to [Question 3](#) above, further reduces the real value of fees.
73. Low fees have an inevitable direct impact on practitioners' salaries. A member of our Legal Aid Working Group stated that their organisation's senior caseworkers have a salary closer to minimum wage than the median salary in the UK, and they were unsure if they would be able to afford the increase in the National Living Wage (which is due to increase by more than a pound to £11.44 per hour from April 2024).⁴⁴ In our Legal Aid Sustainability Survey 2023:
 - A provider from the West Midlands stated: *'Firms cannot recruit and retain caseworkers (nor afford support staff) as the rates mean salaries for caseworkers (and thus for support staff) are low... On current rates, little profit can be made - so there is no incentive to recruit new caseworkers (at significant expense) to become the next tranche of legal aid lawyers.'*
 - A provider from South East England stated, *'We are endlessly struggling now to cover basic expenses, including salaries and to attract and retain staff. We have been without an office manager for a year as we cannot afford a competitive salary.'*
 - A not-for-profit provider from London and Yorkshire stated, *'It is very very difficult to recruit lawyers with experience and offer conditions that will support and retain them in order to offer and grow a quality service. It is almost impossible to recruit in the north of England. If we do not have staff we can retain, we cannot take on the risk of opening a lot of files, and we cannot earn income that will be realised in a few years to sustain the service. We will not have sufficiently experienced lawyers in the sector to train new lawyers and supervise their work.'*

⁴⁴ Faisal Islam, 'Minimum wage to rise to £11.44 per hour' BBC <<https://www.bbc.co.uk/news/business-67484102>> accessed 15 February 2024.

- A London not-for-profit provider stated, *'It is impossible for us to recruit and retain staff on low salaries. We cannot afford to pay decent salaries due to the extremely low level of remuneration for publicly funded immigration and asylum work. Our organisation has shrunk from 5 solicitors to 1 and in our last 3 recruitment rounds we have been unable to recruit either an immigration solicitor or caseworker.'*

74. Therefore, not only are inadequate fees disincentivising practitioners from the legal aid system, low salaries are disincentivising new practitioners from joining the sector. We repeat our response to [Question 7](#), further detailing this problem.

Cash flow problems

75. Providers suffer significant payment delays, adding to the harm of shockingly low fees. The current system does not support sustainable cash flow, which is driving many practitioners to question whether they can viably continue to provide services. Respondents to our Legal Aid Sustainability Survey 2023⁴⁵ highlighted this:

- A current provider stated: *'money is not released regularly by the LAA as it could be, to make work more attractive and sustain practices throughout the year. If money was released as it is for certificates, with payments on account, this would give firms greater cash flow on a regular basis. The options available for stage claiming profit costs at present are not sufficient.'*
- An organisation which could but does not provide immigration and asylum legal aid explained why, aside from low fees: *'[b]ased on my previous experience of working in a practice providing legal aid services I would not find providing legal aid viable because of 1) Impact on cash flow and risks to business viability due to length of time before payment received and requirement to pay disbursements prior to receipt of Legal Aid settlement.'*

76. The issue of payment in arrears, for fees and costs, is particularly acute in immigration and asylum, due to severe delays in Home Office decision-making. The most recent Home Office statistics show that by 30 September 2023, there were 124,461 asylum applications that had been pending for more than six months.⁴⁶ Although the Home Office ramped up

⁴⁵ ILPA's Legal Aid Sustainability Survey 2023, Appendix with Additional Comments.

⁴⁶ Home Office, 'Immigration system statistics data tables - Asylum applications awaiting a decision detailed datasets, year ending September 2023' Asy_D03 (Last updated 23 November 2023) <<https://www.gov.uk/government/statistical-data-sets/immigration-system-statistics-data-tables#asylum-applications-decisions-and-resettlement>> accessed 15 February 2024.

decision-making to meet its target of clearing the legacy backlog by the end of 2023,⁴⁷ issues remain. ‘Legacy’ cases are those where initial asylum claims were submitted prior to 28 June 2022; ‘flow’ cases were submitted after that date. Significant time has elapsed since 28 June 2022. By the Home Office focussing on legacy cases, a new backlog of claims made for the past year and a half has formed. As of 28 December 2023, the legacy backlog stood at around 4,500, but the overall backlog including flow stood at almost 100,000 cases.⁴⁸ Within that cohort, there is a group of asylum claimants who arrived in the UK after the introduction of the Illegal Migration Bill, and its receipt of royal assent on 20 July 2023. There is significant uncertainty around what will happen to those who may be subject to the provisions in the 2023 Act, some of which come into force retrospectively, for people who arrived in the UK on or after 7 March 2023. We understand the Home Office’s policy is not to progress any claims made by arrivals on or after 7 March 2023, until further Ministerial guidance is received.

77. As a further example, for individuals who arrived between 1 January 2022 and who received a notice of intent prior to 29 June 2023, which informed them that their asylum claim may be considered inadmissible and that they may be removed to Rwanda, it was announced on 14 February 2024 that: ‘the Home Secretary has decided to maintain a general pause in the making of inadmissibility decisions in relation to this group at this time whilst work is completed to address the Court’s findings as these individuals remain in scope for inadmissibility action’.⁴⁹ This means that their applications have remained in limbo, without legal aid providers being fully remunerated, for nearly two years.
78. Additionally, ILPA members have reported that some asylum claims are being implicitly withdrawn in problematic circumstances. The following two examples are anonymised case studies from a member:
 - The first case involves a national of El Salvador who was recently granted refugee status in the UK. They entered the UK and claimed asylum at the airport, in April 2022, and have not left the UK since. Upon claiming asylum, their passport was retained by the Home Office. As the claimant was waiting for a decision in respect of their asylum claim, the Home Office wrote to their then legal representatives in early

⁴⁷ Home Office, ‘Legacy backlog cleared as plan to stop the boats delivers’ (2 January 2024) <<https://www.gov.uk/government/news/legacy-backlog-cleared-as-plan-to-stop-the-boats-delivers>> accessed 15 February 2024.

⁴⁸ Full Fact, ‘Has the asylum backlog been cleared?’ (3 January 2024) <<https://fullfact.org/immigration/asylum-backlog-cleared/>> accessed 15 February 2024.

⁴⁹ Home Office, ‘Consideration of inadmissibility claims under the Migration and Economic Development Partnership’ (14 February 2024) <<https://www.gov.uk/government/publications/inadmissibility-claims-under-the-migration-and-economic-development-partnership/consideration-of-inadmissibility-claims-under-the-migration-and-economic-development-partnership>> accessed 15 February 2024.

March 2023, informing them that their records indicated that the claimant had travelled to El Dorado International Airport, in El Salvador, shortly after their asylum claim. Consequently, the claimant's asylum claim was considered to be implicitly withdrawn by the Home Office in late February 2023, under paragraph 333C of the immigration Rules, which permits an asylum claim to be withdrawn if a claimant departs from the UK, without authorisation, at any time prior to the conclusion of their application for asylum. As such, the consideration of their asylum claim was discontinued. In June 2023, the claimant's new legal representative wrote to the Home Office to have their asylum claim reinstated because they had not left the UK. Within six days, the Home Office reviewed the submissions made, and reinstated their asylum claim, and the claimant has been granted refugee status since.

- The second case involves a Colombian national who claimed asylum in the UK in October 2023 and has not left the UK since. Again, their passport was retained by the Home Office, following their claim for asylum. At the time of their application for asylum, they were unrepresented. In late November 2023, their asylum claim was deemed withdrawn, as the Home Office claimed their records showed that they had left the UK shortly after their asylum claim. In this case, the claimant did not receive this decision letter until 29 December 2023, a week after their eviction notice from Home Office accommodation. The claimant currently remains homeless.

79. Members' experience aligns with significant concern within the sector about, and media coverage of, withdrawn claims.⁵⁰ Individuals who have their claims withdrawn can apply for them to be reinstated. If they are represented, this will entail additional work for them, under the fixed fee and place their claim back in the decision-making queue.
80. As providers can only claim their full fees for the Legal Help stage of an asylum claim after conclusion of the initial claim, these delays have a significant impact on providers' cash flow. Disbursements are claimed at the same time. As LAPG highlights in its response to this Call, this is inherently contradictory, as the contract explicitly refers to paying all payments to third parties 'for their work within 30 days from receipt of a valid invoice'.⁵¹ This issue is particularly acute in immigration and asylum work, which often requires one or more expert reports in a single case.
81. These structural issues also make it difficult for providers to plan for their organisation's future, with one charity's experience highlighting the disincentivising impact this can have:

⁵⁰ See, for example, Lizzie Dearden, 'Government 'cooking the books' to cut asylum backlog as thousands of claims removed from system' *The Independent* (5 August 2023) <<https://www.independent.co.uk/news/uk/home-news/asylum-backlog-figures-withdrawn-sunak-b2383880.html>> accessed 15 February 2024.

⁵¹ 2018 Standard Civil Contract Standard Terms, §3.3b.

“[t]rying to advise my Board of Trustees on this issue has been nothing short of a nightmare. The investment needed is significant, and yet we don’t know what the returns will be”.

82. Providers are expected to shoulder the costs of disbursements and are retrospectively paid back, months if not years later, by the LAA. Not only do these cash flow problems create financial turmoil, but they also have a knock-on effect on providers’ capacity to take on additional immigration and asylum legal aid cases.

Increased rates for Illegal Migration Act work

83. As above, the MoJ has recently amended the fee structure in an attempt to bolster capacity in light of the likely increase in demand resulting from the Illegal Migration Act 2023. Now, providers will be paid hourly rates in ‘Illegal Migration Act matters’,⁵² and these rates will be 15% higher than for any other work.
84. ILPA, along with other stakeholders, raised the risk that this would inadvertently shift limited capacity from other areas of immigration and asylum work, by incentivising practitioners to focus on better paid Illegal Migration Act matters.⁵³ To repeat our concern, this ‘will cause further serious gaps in legal aid provision for the rest of in scope and ECF immigration and asylum advice and representation.’⁵⁴ Indeed, one member described having doubts about whether to confirm that they would undertake IMA work, due to worries around diverting resources from existing clients.
85. The Government failed to recognise this risk in its Impact Assessment of the measures, which we maintain 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

⁵² Legal Aid Agency, 2018 Standard Civil Contract category specific rules: Immigration and Asylum (January 2024) <<https://www.gov.uk/government/publications/standard-civil-contract-2018>> accessed 15 February 2024. 8.1 of the specification states *“‘Illegal Migration Act Matter’ means civil legal aid services to an individual who has received Illegal Migration Act Removal Notice, in relation to such a Notice, as set out in paragraph 31C of Part 1 of Schedule 1 of the Act (“Removal notices under the Illegal Migration Act 2023”)*

⁵³ ILPA 2023 Response to MoJ consultation on legal aid fees in the IMB; Public Law Project, ‘Legal Aid Fees in the Illegal Migration Bill – consultation response’ (24 July 2023) <<https://publiclawproject.org.uk/resources/legal-aid-fees-in-the-illegal-migration-bill-consultation-response/>> accessed 15 February 2024; The Bar Council, ‘Bar Council response to MoJ consultation on Legal Aid Fees in the Illegal Migration Bill August 2023’ (9 August 2023) <<https://www.barcouncil.org.uk/resource/response-to-moj-consultation-on-legal-aid-fees-in-the-illegal-migration-bill-august-2023.html>> accessed 15 February 2024.

⁵⁴ ILPA 2023 Response to MoJ consultation on legal aid fees in the IMB, §36.

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’,⁵⁵ 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.⁵⁶

86. In its response to that consultation, the Government acknowledged views that ‘a raise in fees for IMA Work only could “encourage a shift to this work by providers, away from other essential work that needs to be done” and could lead to “perverse” incentives to undertake this work, to the detriment of other immigration work’.⁵⁷ Despite this appreciation, the Government decided to implement its proposals. In appreciating concerns about the wider system, the response posits RoCLA as the opportunity for these to be addressed.
87. In that consultation paper’s ministerial foreword, the Lord Chancellor claimed that this fee increase will ‘ensure fair payment and access to justice for all who seek it.’⁵⁸ In fact, such targeted increases might only secure access to justice for *some* who seek it, while inadvertently adding further barriers to the remainder of those who require it.

Fixed fees

88. The fixed fee regime means that a practitioner is paid a specific amount for a particular type of matter, regardless of work spent on it (subject to escape thresholds, explained below). It was intended that providers would be able to make up the shortfall in cases, which required more work than the value of the fixed fee, with cases needing less work than the value of the fixed fee. However, this was before LASPO significantly reduced the scope of legal aid. In immigration and asylum, the matters left in scope are often significantly more time

⁵⁵ 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> accessed 15 February 2024, §71.

⁵⁶ ILPA 2023 Response to MoJ consultation on legal aid fees in the IMB, §77.

⁵⁷ Ministry of Justice, ‘Legal Aid Fees in the Illegal Migration Act - The Government’s response to the consultation on fees in relation to the Illegal Migration Act’ (September 2023) <<https://assets.publishing.service.gov.uk/media/651578e97c2c4a000d95e1b2/legal-aid-fees-ima-consultation-government-response.pdf>> accessed 15 February 2024, §40.

⁵⁸ Ministry of Justice, ‘Legal Aid Fees in the Illegal Migration Bill’ (27 June 2023) <<https://assets.publishing.service.gov.uk/media/649ade572caa3e000c3e5f44/legal-aid-fees-illegal-migration-bill.pdf>> accessed 15 February 2024.

consuming than matters that are now out of scope.⁵⁹ Fixed fees are not swings and roundabouts, as they were envisioned to be. As one member has said, the idea that sometimes you win and sometimes lose is a “*delusion*” and “*the reality is, you always lose.*”

89. If a provider’s work exceeds the value of the fixed fee, the work they do on a case remains only partly paid. Practitioners must work twice the value of the fixed fee, before they are paid at hourly rates. If a provider works more hours than the fixed fee remunerates, but fails to meet the level required to ‘escape’ to hourly rate payments, their extra work would go unpaid. To avoid this risk, providers may be incentivised to do less work than is required on a matter in order to remain within the fixed fee. In ILPA’s 2022 survey,⁶⁰ conducted for the purposes of the MoJ’s consultation on new fees for new services, one practitioner stated, if controlled legal representation became remunerated via fixed fee as opposed to hourly rate they ‘*would try to work within the fixed fee*’, as otherwise they would ‘*do lots of hours of work for no pay*’. Another respondent stated, they would ‘*[t]ry to do everything that is needed and escape the fixed fee threshold- appeal work is complex and the stakes are high. Clients deserve good work and fixed fee regime restricts this. I don't see any justification for this approach ... Appeal work has been so much better at hourly rates*’.
90. It is clearly contrary to clients’ best interests, and the interests of justice, for providers to be guided by the financial pressures of the system rather than the need to represent their clients fearlessly, to the absolute best of their ability, regardless of how long this may take.
91. Another possibility is that providers are deterred from taking on complex cases, for fear of undertaking unpaid work. In simpler cases there is less risk that this will occur. We acknowledge that the escape threshold in immigration and asylum is a slight improvement on the threshold across the rest of civil legal aid, which is three times the fixed fee. We continue to appreciate the MoJ accepting our concerns in 2022, when we recommended a lower escape fee threshold for both Legal Help and Controlled Legal Representation if fixed fees were introduced for appeals.⁶¹ Nonetheless, the risk of undertaking unpaid work in immigration and asylum legal aid persists.

⁵⁹ Paragraphs 24 - 32A, Schedule 1, Part 1 Legal Aid, Sentencing, and Punishment of Offenders Act 2012. In summary, asylum matters in scope include civil legal aid services in relation to an application for leave to enter or remain in accordance with the Refugee Convention, Article 2 or 3 of the Human Rights Convention or the Qualification, and in relation to certain accommodation rights. The only services in scope in immigration are those in relation to immigration detention, temporary admission, restrictions pending deportation or restrictions on asylum seekers, and applications for leave for victims of domestic violence and survivors of trafficking, and nationality for separated children.

⁶⁰ ILPA, ‘ILPA and PLP Response to Ministry of Justice Immigration Legal Aid consultation on new fees for new services’ (10 August 2022) (‘ILPA Response to 2022 MoJ Immigration Legal Aid consultation’) <<https://ilpa.org.uk/wp-content/uploads/2022/08/ILPA-and-PLP-Response-to-MoJ-Immigration-Legal-Aid-consultation-on-new-fees-for-new-services-10.08.22.docx.pdf>> accessed 15 February 2024.

⁶¹ Ibid, §5.

92. As well as being a perverse incentive for poorer quality work, the fixed fee regime acts as a disincentive for potential providers to tender for a legal aid contract in immigration and asylum. In response to ILPA's 2023 survey on sustainability of legal aid, two potential providers said:

'The fixed fee regime, even at a 2x escape level, brings with it too much risk and too much unnecessary bureaucracy as well as militating against good quality work. ... For us the fixed fee regime would make it unviable.'

'Based on my previous experience of working in a practice providing legal aid services I would not find providing legal aid viable because of ... Feeling that only inadequate services could be provided if time [was] restricted to the fixed fee set.'

93. The latter quote notably shows concerns around perverse incentives within the fixed fee regime which disincentivised this member from entering immigration legal aid altogether. Providers must choose between (a) doing the work required to provide a high quality service to their client and the risk of doing some of that work unpaid, and (b) restricting the work they undertake for a client to within what they are guaranteed to be paid. This choice is made even more difficult by two factors: fees are outdated and inadequate, and immigration and asylum clients are often some of the most vulnerable and desperate clients that providers assist. It is understandable that practitioners would rather avoid such a punishing choice.

94. Even when cases do escape, the process of claiming for the extra fees incurred is onerous. In our Legal Aid Working Group meeting on 8 February 2024, one provider explained that they do not claim escape fees often, when they do reach the escape fee threshold, because they do not have time, do not trust the LAA's assessment of the claims due to prior experience of being nil assessed, and find it difficult to plan the business with the uncertainty of the regime. The issues of trust and uncertainty are exacerbated by the fact that, in order to be remunerated in cases which escape the fixed fee, providers must make a claim to be paid in full after the matter is completed. These concerns are echoed in responses to our 2022 survey about changing Controlled Legal Representation to fixed fees.⁶² Respondents said:

- *'[e]scape claims are always more burdensome as we have another procedure to go through in order to obtain payment'.*
- In escape fee cases the administrative burden is having *'to justify the fees to LAA'* such that counsel regularly provide pro bono advice in funding.

⁶² ILPA Response to 2022 MoJ Immigration Legal Aid consultation §58.

- The escape fee system '[c]reates delays in firms being paid and unnecessary hoops to jump through' and the 'LAA should change the procedure to mirror hourly rate billing'.

95. Escape fee cases are more administratively burdensome, because providers cannot recoup costs until the end of the case, and even then escape fee processing can take another month after submission of the initial fixed fee claim.
96. We reiterate our concerns about the LAA's monitoring and review process in response to [Question 3](#). The risk does not end when a provider meets the escape threshold. The risk of work going unpaid continues until the LAA accepts that the work a provider claims to have done, was done, and pays them accordingly.
97. Fixed fees remain inappropriately stagnant, even when additional work is required by the government at extremely short notice. In asylum, the government announced its 'Streamlined Asylum Processing' mechanism on 23 February 2023 to help meet its target of clearing the asylum backlog by 31 December 2023. As we explained in our response to the National Audit Office's 2023 consultation on legal aid, this again raises the question of perverse incentives:

*'... in a counterproductive manner, focused on driving efficiencies in the Home Office above all else, the government initially wished for a wholly new asylum claim questionnaire to be completed, such that Home Office caseworkers would not need to look at previously submitted questionnaires or witness statements. There was no additional remuneration to cover this work unless the case had reached the escape threshold, at which point for the pleasure of the Home Office the work would use additional public funds to reiterate matters already submitted to the Home Office.'*⁶³

98. One of our members asked their Contract Manager about remuneration for time spent on these questionnaires, which could take up to four hours for this provider to complete, and were sent for nearly all of their clients in a short space of time, all with a tight deadline. In response, the Contract Manager pointed to two contract provisions.
- a. Paragraph 8.73 of the 2018 Standard Civil Contract Specification, Category Specific Rules: Immigration and Asylum states, with added emphasis:

*The Standard fee covers, **but is not limited to**, the following Contract Work:*

⁶³ 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.

(a) initial advice, drafting of statements and representations;

*(b) consideration of UKVI decision, advice to the Client about that decision and **carrying out any necessary work**;*

(c) applying the merits criteria as set out in the Merits Regulations for appeal; and

(d) completion of a determination that a Client qualifies for CLR or completion of an application for a review of a determination that the Client does not qualify for CLR.

b. Paragraph 3.5 of the 2018 Standard Civil Contract Specification states:

3.5 Subject to the provisions for Escape Fee Cases, where a Matter is payable by a Standard Fee or Graduated Fee you accept that fee as full remuneration for all work required at the Controlled Work level, and must not seek to end a Matter because of the level of time incurred relative to the Standard Fee or Graduated Fee.

99. The Contract Manager explained that “[a]s the Home Office has determined completion of the questionnaire is a necessary part of the asylum application for claims under the SAP, it falls within the description of “all work required.” There is an inherent and problematic power imbalance within these two clauses. Providers can be asked to undertake anything the Home Office demands at extremely short notice, no matter how ill-considered, and regardless of whether the fixed fee was set with this work in mind. With regard to asylum questionnaires, the Home Office failed to undertake any stakeholder consultation before implementing them, they were poorly drafted and often required the re-stating of evidence that had already been provided at an earlier stage, and the demands took no account of the over-stretched capacity of legal aid providers.⁶⁴
100. In the current policy climate, immigration and asylum providers are particularly vulnerable to sudden demands from the government, requiring work that could be encompassed by these vague contractual provisions on fixed fees, increasing the risk of unpaid work. The member explained that some of their asylum questionnaires cases met the escape fee “*but others languished between the £413-826 profit costs and were essentially written off... Many also had to have CW3 extensions made and incurred heavy interpreting and translation costs . The extra work reduced our new matter starts as well so income hit twice. Of course the escape fee process is another cost.*” This illustrates that the fixed fee structure

⁶⁴ ILPA, ‘Joint Open Letter to Home Secretary “Remedying the ‘Asylum Questionnaire”’ (1 March 2023) <<https://ilpa.org.uk/wp-content/uploads/2023/03/Open-Joint-Letter-RE-Remedying-the-Asylum-Questionnaire-01.03.23-1.pdf>> accessed 19 February 2024.

is a major cause of unpaid work. Providers must be fairly remunerated for their hard work, particularly when they react to sudden Home Office changes, acting in their clients' best interests.

6.1. Do you think these support the effective resolution of problems at the earliest point?

101. No.
102. Our response to [Question 6](#) illustrates that the utterly inadequate legal aid rates are a disincentive to practising in legal aid. The impact of this is inevitably reduced capacity, either because providers undertake more privately paying work to subsidise their legal aid work, cherry pick more profitable cases, leave the sector altogether, or struggle to recruit a new generation of practitioners. A reduction in capacity for legal aid work makes it more difficult for users to access a provider (this point is developed further in relation to [User Needs](#)).
103. In addition, as the risk of taking on a case that is likely to require a provider to undertake the burdensome escape fee claim process may deter a provider from doing so, those with more complex matters may find it more difficult to find representation. The harder it is to find representation, the harder it is to effectively resolve your legal problem at the earliest opportunity. This is particularly the case in immigration and asylum, where individuals are required to present their case with significant evidence. For example, asylum claimants after 28 June 2022 must meet the heightened standard of proof introduced by section 32 of the Nationality and Borders Act 2022. Consequently, numerous individuals struggle to compile a comprehensive case for their claim to the Home Office, including all pertinent documents and essential evidence that meets the required standard of proof, without a legal representative. This ultimately has an adverse effect on their claim.
104. As explained in response to [Question 6](#), the perverse incentives created by the fixed fee system result in poorer quality representation. Clients with legitimate claims, that might require more time and attention to be properly presented to the Home Office, may suffer from egregious refusals as a result.
105. These refusals result in more complex immigration histories, fresh applications, appeals, and other challenges. This is fundamentally at odds with the MoJ's aim to foster effective resolution at an early stage.

6.2. How could the system be structured better?

Please provide any specific evidence or data you have that supports your response and any views or ideas you may have on other ways of payment or incentives.

Increase rates

106. We reiterate that our most pressing recommendation is an immediate uplift to fees. It is completely unreasonable that fees have remained stagnant (aside from a decrease) for almost three decades, while inflation and the cost of living has soared. It is undeniable that rates should be increased at least in line with inflation. We repeat our recommendation made as part of our response to the MoJ's consultation on fees in the Illegal Migration Bill:

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.

... 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 2023.⁶⁵

107. Setting fees at a realistic level would begin to address some of the sustainability issues in immigration and asylum legal aid. The change would foster long-term sustainability if the rates were index-linked and reviewed annually.
108. The inflation increase should be applied to all rates, unlike the MoJ's approach in relation to the Illegal Migration Act, to avoid the unintended consequence of diverting capacity from one area of work within immigration and asylum legal aid to another.

Abolish fixed fee system

109. The fixed fee system should be abolished and replaced with hourly rates for all legal aid work. The billing and payment process should be streamlined and free of unnecessary administrative work to maximise the benefits of this change.
110. If fees are increased, as we and many other stakeholders call for, but the fixed fee system continues to be in place, there is a risk that the perverse incentive to ensure work done remains within the fixed fee will be exacerbated. An increased fixed fee will mean an increased escape threshold that will be more difficult to meet, thus heightening the risk of

⁶⁵ §58-59.

unpaid work. Introducing hourly rates across the board is a sensible approach to avoid the impact of this perverse incentive.

111. The current complex systems of fixed fees, hourly rates, and bolt-ons cannot persist. There are too many codes and different regimes.
112. Further to the need to address the perverse incentive issues highlighted above, it has long been ILPA's position that hourly rates are the fairest means of remunerating providers for the work that they conduct.
113. This view was echoed by members in our 2022 survey. The reasons given for preferring hourly rates included:
 - *'You get paid for the work you actually do on a case'.*
 - *'I just think it's fairer to pay these at hourly rates for the amount of work actually done'.*
 - *'In my view hourly rates provide for fairer remuneration - they properly reflect the work that has been done on a case'.*
 - *'Don't see why and how the additional stress of needing to ensure that all of our work is remunerated is justified'.*
 - *'Certainty of not having to do large amount[s] of completely unpaid work. All my cases exceed [the] fixed fee, so I do not gain anything from the fixed fee, but do often lose out where cases do not pass [the] escape threshold'.*
 - *'It is transparent and predictable; those involved can estimate their profit costs/fees and can expect to receive these, subject to funding being granted/self-granted. It avoids unnecessary administrative burden on providers and the LAA, resulting from escape billing. With the diminishing number of legal aid providers, it is both sensible and necessary to keep those with relevant experience and expertise working in the sector, where the demand for quality advice and representation greatly outweighs supply'.*
 - *'Online system appeals front load the evidence. There is a large amount of work in the majority of cases, even if they do not reach a hearing. We should not have to do this at risk of not getting paid the full amount for the exact work done.'*⁶⁶

⁶⁶ ILPA Response to 2022 MoJ Immigration Legal Aid consultation §58.

114. We acknowledge the view of some practitioners that fixed fees are easier due to the burden of keeping on top of billing throughout the lifetime of a case, while simultaneously attending to the client's matter. However, the view expressed by members in ILPA's Legal Aid Working Group meeting on 8 February 2024 was that, in terms of time, the administration involved in hourly rates is no more than that in fixed fee cases (which generally escape); the difference is simply when it takes place. The fact that payment is retrospective, and there are often payment delays, in an escape fee claim (detailed in our response to [Question 6](#)) arguably means that hourly rates are a fairer approach despite requiring a practitioner to keep on top of administration throughout their work.
115. To mitigate practitioner concerns about the excessive administration involved in hourly rates, we would reiterate our suggestions, in response to [Question 3](#) above, to reduce the administrative burdens placed on providers.
116. Additionally, adopting a single method of payment for all immigration and asylum work would reduce the complexity caused by multiple systems for remuneration, and, in line with RoCLA's objectives, minimise unnecessary administration.

Address cash flow problems

117. Significant changes are needed to the payment system to ensure providers have a sustainable cash flow, in light of the Home Office's and First-tier tribunal's backlog, such as through payments on account for controlled work. Providers should be able to receive payments on account for controlled work, as well as licenced. Additionally, the MoJ must allow providers to claim for costs and disbursements at more regular intervals. Providers should not be made to suffer as a result of Home Office delays.

Career development and diversity

7. Is there anything in particular in civil legal aid that prevents practitioners with protected characteristics from starting and continuing their careers? If yes, how could this be addressed? Please provide any specific evidence or data you have that supports your response.

118. There is presently very little to no incentive for legal aid practitioners to continue their careers in legal aid. There is arguably even less of an incentive for prospective and former legal aid practitioners to embark upon or return to a career in legal aid. These barriers, and their consequences, are further exacerbated for those with protected characteristics.
119. The LAPG's 2021 Census findings highlighted the significant challenges the legal aid system has endured in England and Wales, and the struggles legal aid practitioners have had to

sustain amidst the pressures resulting from austerity cuts and reductions in local government funding.⁶⁷

120. The vast majority of prospective and current practitioners attributed their encouragement to practice legal aid to their desire to enhance access to justice and support those experiencing a systemic disadvantage.⁶⁸ PA Consulting's survey of January 2024 found that 79% of participating organisations continued to offer civil legal aid services because they believe that it is the right thing to do, whereas only 37% said they offer civil legal aid because they considered it to be a reliable source of income, and even fewer (35%) said it was a business need / source of income.⁶⁹
121. As such, it is crucial that both prospective and current practitioners' concerns are heard and that measurable change takes place to promote access to justice for those facing socio-economic disadvantages, as this is directly linked to the motivation which keeps the legal aid sector alive. Relatedly, there is much to be learnt from former legal aid practitioners who could not, or chose not to, continue their careers in legal aid.
122. One of the most significant barriers, preventing prospective and current practitioners from pursuing a career in legal aid, is the inadequate pay. LAPG's Census found that more than half (57.6%) of legal aid practitioners earn less than £49,999 and 8.2% of practitioners earn less than £19,999.⁷⁰ Of those earning less than £19,999, at least 17.5% are established solicitors and act as heads of department with years of valuable experience. It is clear that even the very few practitioners earning over £100,000 provided only legal aid services,⁷¹ as the resources needed to sustain legal aid can only be managed with supplementary privately funded work. By comparison, even a newly qualified, and in some cases a trainee, non-legal aid practitioner, often earns significantly more than their more experienced peers in the legal aid sector.⁷² Although the salaries of legal aid practitioners have remained stagnant since 1996,⁷³ as above, the rate of inflation since then has been significant. High inflation affects the affordability of goods and services, and recent data shows that the annual inflation rate was 4.0% in December 2023.⁷⁴ Legal aid practitioners can, therefore, earn more

⁶⁷ LAPG Census.

⁶⁸ Ibid, page 16.

⁶⁹ PA Consulting Report January 2024.

⁷⁰ LAPG Census, §3.4.

⁷¹ Ibid.

⁷² The Lawyer, 'Trainee and newly qualified solicitor salaries for UK law firms' (Last update: 3 November 2023) <<https://www.thelawyer.com/trainee-newly-qualified-salaries-uk-law-firms/>> accessed 15 February 2024.

⁷³ The Law Society, 'Civil legal aid review' (7 February 2024) <<https://www.lawsociety.org.uk/topics/legal-aid/civil-legal-aid-review>> accessed 15 February 2024.

⁷⁴ House of Commons Library, 'Rising cost of living in the UK' (19 January 2024) <<https://commonslibrary.parliament.uk/research-briefings/cbp-9428/>> accessed 15 February 2024.

by moving to a private firm. Such a stark disparity in pay between the private and legal aid sector is unjustified.

123. It is clear that a general dissatisfaction of salary and working arrangements is a pressing issue. This affects most legal aid lawyers, but particularly women (specifically mothers), who are statistically far more likely to be lone parents⁷⁵ or carers.⁷⁶ Maintaining a standard of living in a single-income household requires a salary to meet necessities. Whereas, living in a double-income household can mitigate the consequences of a single lower salary. Mothers also face greater challenges when they try to take on cases that are unfamiliar or that might progress their careers since the stress and time commitments an unfamiliar case entails is often incompatible with their family commitments as a parent or carer.⁷⁷ Over half (57.6%) of the respondents to LAPG's census who had left the legal aid sector were women.⁷⁸
124. Class is also a key characteristic of concern when considering the relationship between poor pay and career developments in the legal aid sector. The Bar Council noted in their 2021 Civil Legal Aid Research report⁷⁹ that there is a real danger that the efforts to make qualifying as a legal aid barrister more accessible to those from less privileged backgrounds, women, and black and minority ethnic (BAME) communities will be reversed, despite these individuals having made major advances in the field. Stephanie Harrison KC stated: *'If you took away the legal aid Bar, the Bar and a lot of solicitors' firms would look pretty much the same as they did 30 years ago, or even 50 years ago.'*⁸⁰
125. It is important for the MoJ to acknowledge that becoming a legal aid practitioner is difficult and disproportionately disadvantages certain demographics from accessing the field, but, once qualified and practising, these groups are then unfairly paid and subject to high levels of student debt and low salaries, which makes legal aid work further unsustainable for those from less privileged socio-economic backgrounds. A member from a law centre has shared that there will be *"no opportunities in the future of legal aid if rates of pay are not increased."* They noted that the legal aid sector was in a *"managed decline"*. In their

⁷⁵ Office for National Statistics, 'Families and households in the UK: 2022' (18 May 2023) <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2022>> accessed 15 February 2024.

⁷⁶ Office for National Statistics, 'Unpaid care by age, sex and deprivation, England and Wales: Census 2021' (13 February 2023) <<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/socialcare/articles/unpaidcarebygesexanddeprivationenglandandwales/census2021>> accessed 15 February 2024.

⁷⁷ The Bar Council, 'Running on Empty - Civil Legal Aid Research Report' (January 2021) <<https://www.barcouncil.org.uk/static/6a65477c-9288-4db2-897b696f548813cd/Running-on-Empty-Civil-Legal-Aid-Full-Report.pdf>> accessed 15 February 2024, Sarah Nicholls' experience on pages 21-22.

⁷⁸ LAPG Census §83.

⁷⁹ Ibid.

⁸⁰ Ibid, page 21.

experience, practitioners leave as soon as they have gained some experience, to better paid fields, the private practice, or organisations where legal aid is subsidised by grant funding or private work.

126. Additionally, LAPG noted that of the students who expressed a desire to work in legal aid, 88.4% said that their background and life experience had played a role in influencing their decision. Students who had personally experienced injustice or poverty (44.9%) and witnessed or heard about injustice (46.4%) were influenced by their experiences to become legal aid practitioners.⁸¹ However, with the current undergraduate tuition fees and a postgraduate vocational course (whether that be the SQE, LPC, or BPTC), studying and training to become a legal aid practitioner is only viable if a student either comes from a background where financial support is readily available or has access to some other savings or a loan. A member from a law centre also noted that people who are not from wealthy backgrounds or who cannot readily rely on some other funding, cannot afford to do legal aid work for a sustained period.
127. Young people are also unfairly disadvantaged as the poor pay in the legal aid sector affects the rate at which training opportunities can be provided for prospective legal aid practitioners, thereby affecting their social mobility in the legal aid sector. The LAPG's data suggests that 41.1% of organisations were not able to train legal aid practitioners, and the most cited reason for this related to limited funding, overstretched capacity and resources, and limited time. For example, 43.8% of organisations said that training practitioners was not cost effective or that they simply could not afford to do it, and 16.4% said they had insufficient resources and infrastructure to facilitate training.⁸² An inevitable consequence of poor remuneration is a stagnation in recruitment to the legal aid sector and general upwards mobility.
128. This is consistent with what respondents reported in response to ILPA's survey on Legal Aid Sustainability, as a member said: *'We do not have the cash reserves to expand and we are turning away between 5 – 10 cases per week we could take on because we lack capacity'*.⁸³ Without the finances to properly take the time to invest and facilitate the training of graduates or young trainees, it is difficult to see how the legal aid sector can maintain itself, let alone grow and diversify. The same is echoed by barristers who have said that they cannot, in good conscience, advise junior practitioners in the field to build a practice based solely on publicly funded work, which has been causing barristers to diversify away from pure legal aid practice in several areas.⁸⁴

⁸¹ Ibid.

⁸² Ibid, page 22.

⁸³ ILPA's 2023 Legal Aid Sustainability Survey, Additional Comments, page 3.

⁸⁴ Ibid, pages 6 - 7.

129. The 2021 Westminster Commission on Legal Aid found that senior legal aid practitioners said that they entered the profession at a time when cost of living and house prices were lower and so the profession provided a comfortable lifestyle at a relatively early stage in their careers, whereas now, junior practitioners can only expect to incur significant debt.⁸⁵ There is very little return on all the required investment needed to have a career in legal aid, and prospective practitioners' understandable lack of interest is apparent in the number of job ads going out. Law Centres used to have 80 to 90 applicants for each role advertised, whereas now, even in London, 10 applicants would be on the higher end of expectations.⁸⁶
130. The MoJ must appreciate that the window in which younger and prospective legal aid practitioners can be trained by their more senior peers is limited, given the depleting number of current legal aid lawyers and the average age in the sector. A member with experience in a legal aid practising firm noted that, eventually experienced practitioners will retire and the legal aid sector is not a financially viable field for ambitious newcomers, who will almost certainly be saddled with student debt.
131. A member responding to ILPA's 2023 Legal Aid survey commented that: *'We do attract very talented interns who do a six-month placement in our offices. They are extremely impressed by our work, but they also see the amount of hard work, stress and battle that is needed to get our clients' cases completed and paid. They express the opinion that although they want to work in immigration they don't want to work in legal aid... on one occasion we received no application to fill a full-time IAAS-qualified caseworker role.'*⁸⁷ Unfortunately, this experience is a pressing, widespread issue. For example, 61.6% of chambers said that they had difficulty finding a qualified legal aid barrister, and 65.5% stated that it was not that easy/not at all easy to retain suitable qualified barristers.⁸⁸ When asked to clarify why this was, over half of chambers said this was due to there being better salaries available for barristers elsewhere, and 11.1% said that this was due to legal aid barristers tending to leave the profession entirely. Similarly, 93.1% of responding organisations said finding suitably qualified legal aid lawyers was difficult, and 62.6% said it was difficult to retain suitably qualified lawyers.⁸⁹

⁸⁵ The All Party Parliamentary Group on Legal Aid, The Westminster Commission on Legal Aid, An Inquiry into the Sustainability and Recovery of the Legal Aid Sector' (October 2021) ('Westminster Commission') §199-200 <https://lapg.co.uk/wp-content/uploads/The-Westminster-Commission-on-Legal-Aid_WEB.pdf> accessed 15 February 2024.

⁸⁶ Ibid §205.

⁸⁷ ILPA's 2023 Legal Aid Sustainability Survey, page 4.

⁸⁸ LAPG Census, §2.4.1.

⁸⁹ Ibid, §2.4.2.

132. A higher proportion of senior practitioners also found that the rates paid in the legal aid sector were unsustainable, with 95.7% of heads of department and 90% of directors of organisations reporting that hourly rates were not viable and only a fraction of what is paid privately.⁹⁰ The experience of senior practitioners is crucial for the efficiency of the legal aid sector as younger practitioners learn from the level of skill, knowledge, and expertise of their seniors. In response to ILPA's 2023 Legal Aid Sustainability survey, a member pointed out that *'Real sustainability will only be achieved if there are new entrants to the sector and if the experience and efficiency of senior practitioners is valued effectively.'*⁹¹ It is important that the legal aid sector can both recruit and retain practitioners to keep the sector growing, but the MoJ must appreciate that effective recruitment requires senior management and guidance.
133. Salaries and remuneration remain a persistent obstacle to adequate recruitment and retention in the legal aid sector, which is having a disproportionate impact on women, BAME groups, junior people in the field, and those from less privileged backgrounds.
134. Though financial matters may be low on the list of motivations for pursuing a career in legal aid, the financial difficulties faced by practitioners in the field is significant as it impacts practitioners' mental well-being and work/life balance. This has become more of a challenge with the cost of living and inflation rising, and fees failing to keep up with these increases. This is only a further impediment to both the entry and continued practice of legal aid practitioners.
135. A recent report from PLP highlighted that 70% of legal aid practitioners experienced vicarious trauma or 'burnout',⁹² feeling that they were always at or beyond their capacity. 24% expected to take on yet more work in the next five years, and 19% planned to leave the sector entirely.⁹³ The mental well-being of legal aid practitioners is, ultimately, tied to their work conditions, which includes but is not limited to poor pay and long work hours.
136. We reiterate to the MoJ that urgent regard must be given to the mental well-being of legal aid practitioners. The lack of increases in legal aid rates (despite our repeated calls highlighted in [Question 6](#)), continues to have an impact on the mental well-being of legal aid practitioners. This has a knock-on effect on former and current legal aid practitioners who have either moved on, or will inevitably move on to other better areas of law with better pay and work conditions. The vicarious trauma caused by such hostile work conditions, in

⁹⁰ Ibid.

⁹¹ ILPA's 2023 Legal Aid Sustainability Survey, Additional Comments, page 3.

⁹² YLAL and PLP, 'Overstretched & unsustainable: a case study of the immigration and asylum legal aid sector' (April 2023) <<https://publiclawproject.org.uk/content/uploads/2023/05/YLALPLP-Report-April-2023.pdf>> accessed 15 February 2024.

⁹³ Ibid.

addition to the poor pay, long work hours, and the ongoing cost of living crisis, is unlikely to encourage prospective legal aid practitioners to enter the sector and only makes former legal aid practitioners fearful of returning to an overstretched and crumbling legal aid system. Though large caseloads caused by the nature of the legal aid regime is a primary cause of burnout, stress, and trauma in the sector, these mental and well-being issues are only worsened for legal aid practitioners who experience additional barriers to working such as neurodiversity or personal financial instability.⁹⁴

8. How can the diversity of the profession be increased in legal aid practice, including ethnicity, disability, sex, age and socio-economic background? Please provide any specific evidence or data you have that supports your response.

137. Legal aid should be welcoming to practitioners from a variety of backgrounds. However, there is a threat to diversity for the aforementioned reasons, as these individuals are finding it exceptionally difficult to enter and remain in the legal aid sector. One way to improve the diversity of the profession in legal aid practice is to provide sustainable funding, which is crucial to keeping the legal aid sector alive and making it easier for those from less affluent backgrounds to make a fair living.
138. It is incredibly difficult for legal aid practitioners to maintain a good quality of life and an adequate standard of living by practising only in the legal aid sector. These difficulties are more prevalent for those with protected characteristics, as illustrated above. A member who works in a law centre said: *“If you want to encourage greater diversity into this field, it has to be better paid. Otherwise this will become an area of law that people will enter into to simply gain some experience, before they rapidly move on to better paid areas of work, that are less stressful and easier to deal with”*. Better pay will help alleviate a number of pressing issues in the legal aid practice and make legal aid a more attractive profession, worth pursuing, as significant time, effort, and money needs to be spent in order for people to qualify as legal aid practitioners. This change will enable more women, ethnic minorities, younger people, and those with various physical ailments and mental health difficulties, to not only pursue a career as a legal aid practitioner, but also to encourage these demographics to continue working as legal aid practitioners.
139. Another limited short-term solution is expanding training contract grants, such as offering grants for CILEx or apprenticeships, or subsidising training, as seen in some private city firms, who are known to pay for their trainees’ SQE (formerly LPC) qualifications. This could help encourage those from less affluent socio-economic backgrounds to pursue a career in legal aid, as financial hurdles faced by juniors, particularly at the publicly funded bar, is a serious

⁹⁴ Ibid.

problem in recruitment. The Westminster Commission found that, on average, those who begin to earn a return on the huge debt they have built to qualify, did so at the age of 33 years old,⁹⁵ and for ‘the years that precede this, individuals incur all of the risks of the economic investment in a career at the self-employed legal aid bar, with no insurance in the form of pension, sick pay, or regular salary.’⁹⁶ It is unreasonable to expect any student or practitioner, at any stage of their career, to place themselves at such risk for such little pay and security.

140. We would also recommend that urgent consideration is given to how adequate support can be provided to improve the mental health of practitioners in immigration and asylum legal aid, as they are more likely to experience vicarious trauma due to the clients who seek their expertise and support. This is of particular concern to those who are working with vulnerable clients who have been subject to conflict, torture, persecution, and other forms of violence. Offering such support, including preventative care, would help retain current legal practitioners and ensure that their mental well-being is not compromised. As illustrated above, a significant number of legal aid practitioners also have lived experience of the hostile environment or socio-economic disadvantages. This support will help with retention in immigration and asylum legal aid in the longer term and also create a sense of security and respect for the well-being of new or returning legal aid practitioners.

User needs

9. What barriers/obstacles do you think individuals encounter when attempting to access civil legal aid? Please provide any specific evidence or data you have that supports your response.

141. The dire lack of providers with capacity to provide services to those eligible for them is a major barrier to accessing civil legal aid. We urge the MoJ to re-focus their research on user needs, to consider those who remain outside of the legal aid system due to their inability to locate a provider.
142. The scale of geographical capacity gaps in England and Wales has been very well-documented, and is addressed in our response to [Question 2](#).
143. Capacity issues are not only felt in the areas known as ‘deserts’. Dr Jo Wilding’s most recent published calculations revealed that ‘there was a deficit of at least 6,000 between the number of new asylum applications and the number of new immigration and asylum legal

⁹⁵ Westminster Commission, §207.

⁹⁶ Ibid.

aid matters opened'.⁹⁷ Demand is extremely high in immigration and asylum. In a survey of civil legal aid providers conducted as part of RoCLA, 83% of respondents in immigration services reported there being 'very high demand', versus a 50% average across civil legal aid categories.⁹⁸ The supply crisis poses a significant obstacle to users.

144. The LAA publishes a directory of firms which hold a legal aid contract in particular categories of law.⁹⁹ In reality, many of the providers on this list do not have capacity to deliver services. Individuals relying on the directory to access civil legal aid will have their calls unanswered, or pleas for assistance rejected, by providers who, although on the directory as a current provider, do not have capacity to provide legal services.
145. Public Law Project's recent research indicated that a large number of referrals by support organisations to legal aid providers go unanswered, and, worryingly, that the issue is worsening.¹⁰⁰ Our members have confirmed that this reflects their experiences. As mentioned in paragraph 128 above, in response to ILPA's survey on the sustainability of legal aid in June 2023, a not-for-profit organisation in London, a current provider at the time, reported that it was turning away between five and ten cases per week. In a meeting of ILPA's Legal Aid Working Group on 8 February 2024, a member from a support organisation described it as "*almost impossible*" to refer service users to legal aid lawyers and estimated that a successful referral currently takes eight to nine months.
146. There is a risk that individuals who are eligible for legal aid resort to paying for private representation, due to their inability to secure a legally aided representative, particularly if their case is urgent. This state of affairs is at odds with RoCLA's aim 'to ensure that the civil legal aid system is accessible to people eligible for legal aid'.¹⁰¹
147. We agree with the National Audit Office, that '[t]heoretical eligibility for legal aid is not enough to achieve [swift access to justice] if there are an insufficient number of providers willing or able to provide it'.¹⁰²

⁹⁷ Jo Wilding, 'New Freedom of Information data indicates half of asylum applicants are unable to access legal aid representation' (*Refugee Law Initiative*, November 4 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 15 February 2024.

⁹⁸ PA Consulting January 2024 Report, 22.

⁹⁹ Legal Aid Agency, 'Directory of Providers' (last updated 23 January 2024)

<<https://www.gov.uk/government/publications/directory-of-legal-aid-providers>> accessed 15 February 2024.

¹⁰⁰ PLP 2023 Report.

¹⁰¹ Ministry of Justice, 'Review of Civil Legal Aid - Call for evidence' (19 January 2024)

<<https://www.gov.uk/government/calls-for-evidence/review-of-civil-legal-aid-call-for-evidence/review-of-civil-legal-aid-call-for-evidence>> accessed 15 February 2024.

¹⁰² NAO 2024 Report, §18.

10. What could be done to improve client choice such that it is easier for clients to find civil legal aid providers and make informed decisions about which one best meets their needs? Please provide any specific evidence or data you have that supports your response.

148. At present, clients are not afforded a choice of civil legal aid providers.

149. The extreme lack of capacity in the sector makes it almost impossible for clients to have any agency about which provider they use. Individuals who are based in advice deserts will have their choice particularly strained. To reiterate paragraph 55, without the implementation of measures we have recommended, capacity will continue to decline and make the notion of client choice in civil legal aid even more fanciful than it already is.

150. Providers participating in the Detained Duty Advice Scheme (DDAS) give clients in Immigration Removal Centres 30 minutes of free advice, before determining the client's eligibility for legal aid and further services. DDAS surgeries are arranged through a rota system. Since 31 January 2024, DDAS providers must inform the LAA at least three business days prior to the DDAS surgery 'where they are aware' that they will not have capacity to advise one or more clients following the 30 minute advice session.¹⁰³ In making this consideration, providers must assume that 10 clients per day that they are scheduled to attend at a DDAS surgery may require further civil legal aid services following the session. When a provider makes such a notification, the LAA may notify them that 'another Provider has capacity to accept a referral', in which case, the provider 'must provide relevant information by email to the Client and the alternative Provider'.¹⁰⁴ It is not clear how this procedure secures any client choice. It appears that the LAA will make a determination as to whether the 'alternative Provider' is the one which best meets their needs.

151. The unprecedented tightening of timeframes for immigration and asylum claims under the Illegal Migration Act 2023 will exacerbate existing barriers to client choice. To reiterate our response¹⁰⁵ to the MoJ's consultation on fees for IMB work:

25. The IMA provides an extremely short timeframe of seven days¹⁰⁶ 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,

¹⁰³ Immigration and Asylum Specification, §8.161A.

¹⁰⁴ Ibid, §8.162C.

¹⁰⁵ ILPA Response to 2022 MoJ Immigration Legal Aid consultation.

¹⁰⁶ Illegal Migration Bill Explanatory Notes §178

<<https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf>> accessed 15 February 2024.

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 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.¹⁰⁷ This new fast-track process will undoubtedly require legal representatives to assist claimants, applicants, and appellants at unworkable speed.

152. For the MoJ to address the complete lack of client choice in civil legal aid, urgent steps must be taken to increase capacity.

11. Do you think that some people who are eligible for civil legal aid may not know that it is available and/or how to access it? If so, how do you suggest that this is addressed? Please provide any specific evidence or data you have that supports your response.

153. It is difficult to quantify the level of unmet legal need. As stated by National Audit Office stated in their 2024 Report:

MoJ does not collect sufficient data to understand whether those who are entitled to legal aid are able to access it. Delivering access to justice is one of MoJ’s three key priorities. However, MoJ lacks a good understanding of both the demand for legal aid and the capacity of existing providers so it cannot ensure advice is available to those entitled to it. We recognise that assessing demand is inherently challenging but MoJ could do more. This report presents the available information on access and sets out the limitations of these datasets. MoJ and LAA do not estimate overall demand for legally aided services. LAA monitors capacity risks through its quarterly capacity reviews and holds data on contracted providers’ legal aid activity, but it does not routinely capture why some providers may undertake few or no legal aid cases. In 2022-23, in all civil law categories except family and mental health, at least one in 10 contracted firms took on no cases. There may be various reasons why providers do not take on work. For example, providers may not have the capacity to take on new clients or there may be low demand. Respondents to our consultation also suggested

¹⁰⁷ Illegal Migration Act 2023, s 49.

*providers may only take on more straightforward cases due to financial constraints. Without the necessary data it is not possible to tell, and MoJ and LAA do not collect routine data on the reasons for low provider activity. Similarly, MoJ does not track whether individual applicants to LAA's exceptional case funding scheme are able to access a provider once their application for funding is approved.*¹⁰⁸

154. Arguably, the Lord Chancellor's duty to make legal aid available extends to ensuring people know it is there for them. If an individual is unaware of their right to access civil legal aid, such services will inevitably be unavailable to them.
155. Although we cannot provide the number of individuals who do not realise their entitlement to legal aid, a member from the Joint Council for the Welfare of Immigrants has reported that, on many occasions, they receive calls on their advice line from individuals who have been advised by legal aid providers that legal aid is not available for their case, even though they would be eligible through ECF. This suggests that, not only are people unaware of their right to civil legal aid, they are actively misadvised of its true availability. Providers either do not appreciate the availability of legal aid in certain cases, perhaps due to the complexities created by LASPO's amendments to scope, or providers are deterred from advising clients on their eligibility for ECF due to that system's burdens on providers. Uncountably many of our legal aid members have told us of their own inability to take legal aid cases, due to their lack of capacity, and frontline organisations who are ILPA members have told us of their difficulties in referring legal aid, particularly ECF, cases.
156. We urge the MoJ to take the recommendations of Dr Jo Wilding and the National Audit Office, among others, and invest in tools that quantify unmet legal need. Without this information, it will be difficult to measure the true impact of any changes implemented to improve sustainability with regard to user needs.

12. How do you think that people receiving civil legal aid can be supported in cases where they have multiple or 'clustered' legal issues and some of these are outside of the scope of civil legal aid? Please provide any specific evidence or data you have that supports your response.

157. As our response is specifically focussed on immigration and asylum, we have little comment on this question. However, even within that area of the law, due to the limited scope of legal aid, it is often the case that an individual cannot receive legal aid for the full range of immigration issues affecting them and their families.

¹⁰⁸ NAO 2024 Report, page 7 §9, original emphasis.

158. As above, we endorse the recommendations of Dr Wilding in relation to co-location and holistic provision (detailed in our response to [Question 1](#) above).

13. How do you think that the Exceptional Case Funding scheme is currently working, and are there any ways in which it could be improved? Please provide any specific evidence or data you have that supports your response.

159. We reiterate the position we set out in our response¹⁰⁹ to the National Audit Office's consultation:

39. Exceptional Case Funding remains a significant barrier to access to legal representation and to justice.

40. The time consuming ECF applications to the Legal Aid Agency, which are only remunerated if successful, have resulted in a great many providers finding the at-risk application process to be unsustainable. Even in cases where a third party organisation, often a frontline organisation which is not a legal aid provider, is able to assist an applicant to successfully make the application, they struggle to refer the case to a legal aid provider.

41. The often insurmountable barrier posed by ECF has left a number of applicants, whose immigration cases pertain to the right to respect for private and family life under Article 8 of the European Convention on Human Rights, without legal representation, as they cannot find legal aid representation and they cannot afford private representation. The lack of representation may lead to extremely dire and dangerous consequences within the immigration context. Due to their inability to present their case with legal assistance, they may face unlawful removal and breach of their human rights.

42. Matters such as refugee family reunion may fall outside the scope of legal aid in England and Wales. Refugee family reunion applications can be extremely complex, and yet the consequences are very serious as these cases often involve separated adults, facing language barriers, in dangerous situations or territories, with significant evidential burdens (such as the provision of DNA evidence). Due to the complexity of the laws and Rules (as an example new Rules were brought in through a new Appendix Family Reunion (Protection), and until days ago, there were different family reunion requirements for 'Group 2' refugees and those with humanitarian

¹⁰⁹ 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.

protection than for 'Group 1' refugees), they cannot navigate the systems without access to legal advice. However, as they are outside the scope of legal aid, they will struggle to find a provider willing to take on their case. This was a matter of concern to the Independent Chief Inspector of Borders and Immigration in his 2022 report, 'A reinspection of family reunion applications'.¹¹⁰ Stakeholders informed him that although 'it was likely that an application for exceptional case funding (ECF) for a family reunion application would be successful, legal aid providers (who would be able to take the case to court if it were to be refused) were already stretched to capacity' and 'Legal aid is a safeguard that has become useless ... ECF work is uneconomical and effectively the work is unpaid.'¹¹¹

160. ILPA members continue to raise concerns about the administrative burdens involved in ECF cases, both in making an application and after a grant of ECF. The following issues were raised at a meeting of ILPA's Legal Aid Working Group on 8 February 2024:

- Charities and support organisations are compelled to complete ECF applications on behalf of their clients, ahead of making a referral, removing the administrative burden in order to boost the chance of the referral's success. Members noted that this was not the premise of the ECF scheme.
- Waiting for an ECF application causes a delay for the client, unless the provider is willing to carry out substantive work at risk of the ECF application being refused.
- A successful ECF application in a family reunion case will result in one legal aid certificate to cover the entire family. This essentially means that all of their work is claimed under the escape fee regime, and with one disbursement pot of £400. One member's ECF cases involved a family of 12, all who needed DNA tests, all to be done within the fixed fee and disbursements on a single file.
- One member noted the difficulties in a case which has an in-scope asylum element, alongside an out-of-scope human rights element for which ECF has been granted. In such a case, providers must split disbursements and fees between in-scope and out of scope matters on the client's file. A consultant who assists the member's organisation with files and billing spends a whole day on just one of these types of cases.
- ECF is only granted for Legal Help, initially. If a case goes to appeal, the client needs to apply for a further grant of ECF. One member noted that this seems to assume

¹¹⁰ ICIBI, 'A reinspection of family reunion applications' (September - October 2022) §§9.21-9.24 <<https://www.gov.uk/government/publications/a-reinspection-of-family-reunion-applications-september-october-2022>> accessed 15 February 2024.

¹¹¹ Ibid 9.21 and 9.23.

that “even though [a user] is not capable of legal help, they can run their own appeal”. This amounts to what he describes as “ridiculous levels of bureaucracy”.

161. The high grant rate of ECF in immigration matters makes the administrative burden even more frustrating. We emphasise the points raised in our response to the National Audit Office’s consultation, that:

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).¹¹² 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).¹¹³ These are consistently high grant rates. 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.¹¹⁴

162. The most recently published statistics illustrate that this is a continuing trend. In the quarter from July to September 2023, there were 448 grants and 487 applications in immigration (91.99% grant rate).¹¹⁵ This was almost eight times the number of grants made in the second highest area, Inquests, which had 57 grants and 103 applications (55.3% grant rate).¹¹⁶

163. We repeat our recommendations, in our response to the National Audit Office’s Consultation, regarding ECF:

44. Operating a costly and bureaucratic ECF application system is not a good use of public funds and it is unjustified against the grant rate. It would be sensible for areas with high grant rates to be brought back into the scope of legal aid to make the best use of the Legal Aid Agency’s and legal practitioners’ limited resources and to increase access to legal representation and justice in cases involving fundamental rights.

¹¹² Ministry of Justice, ‘Legal aid statistics England and Wales bulletin Apr to Jun 2022’

<<https://app.powerbi.com/view?r=eyJrIjoiaMGQwNzY5MjQtYTUyZS00NWUzLWE4NzltYWZhN2U3ZDJlMzE1IiwidCI6ImM2ODc0NzI4LTcxZTYtNDZlMzY1h0WUxLTlJlOGMzNjc3NmFkOCIsImMiOiJh9&chromeless=1&filter=true/ecf&pageName=ReportSection8455f7194babaadd11c>> accessed 21 July 2023.

¹¹³ *ibid.*

¹¹⁴ *ibid* (n 107).

¹¹⁵ Ministry of Justice, ‘Legal aid statistics tables - July to September 2023’

<<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fmedia%2F6582bea2fc07f3000d8d4556%2Flegal-aid-statistics-tables-jul-sep-2023.ods&wdOrigin=BROWSELINK>> accessed 21 February 2024.

¹¹⁶ *ibid.*

45. For areas without high grant rates, the 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.¹¹⁷

164. The high grant rate means the onerous ECF process is an unnecessary bureaucratic obstacle. The time spent on making applications appears to be a pointless exercise. For legal aid providers, the overwhelming sense from ILPA members is that this time has a direct impact on their capacity to work on cases. In light of the extreme lack of immigration and asylum provider capacity, requiring providers to undertake additional work that appears to be pointless is far from sensible.
165. As well as agreeing with stakeholder concerns about the risks to access to justice, the National Audit Office found that processing ECF applications is more resource-intensive for the LAA than a standard legal aid application.¹¹⁸ This, coupled with the high grant rate in immigration, means ECF may not be cost-effective.¹¹⁹ We urge the MoJ to accept our recommendation, and expand the scope of immigration legal aid, in light of this evidence.

Use of technology

14. What are the ways in which technology could be used to improve the delivery of civil legal aid and the sustainability of civil legal aid providers? We are interested in hearing about potential improvements from the perspective of legal aid providers and people that access civil legal aid. Please provide any specific evidence or data you have that supports your response.

15. Remote legal advice, for example advice given over the telephone or video call, can be beneficial for delivering civil legal aid advice. Please provide any specific evidence and thoughts on how the system could make the most effective use of remote advice services and the implications for services of this.

166. There are some ways that the use of technology could improve the delivery and sustainability of civil legal aid. However, it's crucial when discussing ways to incorporate the numerous beneficial aspects of user-friendly technology in delivering legal aid services, that we do not lose sight of its drawbacks, which affects the most vulnerable people in need of legal aid advice.

¹¹⁷ 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.

¹¹⁸ NAO 2024 Report.

¹¹⁹ NAO 2024 Report.

167. Several ILPA members acknowledged that technology can assist with certain aspects of service delivery, such as sharing documents with clients quickly and efficiently. Technology can also make it easier for lawyers to remain in touch with their clients in between appointments.
168. With regard to remote advice, a member noted that online meetings can also be helpful, where the presence of several parties is required. For example, where lawyers are representing children, meetings must be arranged with the child, their social worker, and the lawyer. It can be more difficult to arrange for all parties to be in the same room than to be online at the same time.
169. Remote advice can be useful for users who face barriers to attending an in-person appointment, such as childcare responsibilities or health issues. One member had a previous client that could not afford to get the bus into town, so remote communication suited their circumstances. However, the same member expressed the importance of face to face contact with clients:

"I have a client who is over retirement age who we are assisting to make an application where we need to go through over 20 years of exploitation to make out her case to the Home Office as a victim of trafficking and to obtain leave. She does not read or write in any language or speak English and has not had the benefit of schooling. It is difficult to find a suitable and legal aid qualified interpreter. To get an interpreter at all we need to use one remotely so benefit from the use of technology here. However, it can take time to build rapport remotely. And on one occasion our client had an interpreter that seemed not to be able to see or hear clearly over the screen - interfering with rapport building when we needed to repeat and rephrase more than usual, which affected the comfort level for our client with the session. Even using a remote interpreter that our client is comfortable with, we must have this client in an in person attendance with us even if the interpreter is remote. It would be too much to expect her support worker to facilitate and attend every appointment in the client's home with a screen and our client could not do this herself. She can struggle to use her phone and sometimes has not understood it is me calling her even for a brief call and hung up or not answered. Our client likes to see the face of her interpreter and my observation is that part of the communication is through facial expression so audio only would not be enough. We need to be able to read our client's reactions to the interpreter and our questions when going over years of experiences, in a lot of detail that can sometimes cause distress to discuss. We need to read our client to know when to pause, explain an issue better or take a different approach and with this client that is definitely easier in person. We have

spent 65 hours so far on the case and there is still more to do but it would have taken much longer to complete her statement without in person attendance.”

170. Another member noted that due to the issue of capacity in civil legal aid, the option to provide remote legal advice also meant that legal aid practitioners could do so in a more efficient manner, to more individuals, as it cuts down on significant travel time. This was seen as a particular advantage in applications for bail, as practitioners would often be expected to travel across the country to various detention centres and prisons. Being able to provide remote advice is helpful, insofar as it may enable people to access more experienced practitioners, who are more likely to take on cases if they can do so without having to travel for many hours. However, the member did go on to note that this is only beneficial for those who are not particularly vulnerable and who do not need to recount detailed experiences of trauma to their legal representative. It is vital that the MoJ appreciates this specific issue when considering the benefits of remote advice, as safeguards must be carved out for immigration and asylum legal aid.
171. In immigration and asylum, providers deal with a particularly vulnerable cohort of civil legal aid users. Many clients in this area of law will have significant trauma. Receiving legal advice for an asylum claim necessarily involves recounting their fear of persecution, and often requires detailing traumatic experiences, to a legal representative. It is important for clients to feel safe to disclose such matters. It is difficult to foster the necessary trust and confidence in a legal practitioner, using only remote means of communication. It may also be difficult for advisers 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 advisers to provide full oral advice. It is crucial that victims and survivors of domestic abuse, whose immigration matters are in scope, have a safe space to discuss their cases (which often hinge on them recounting their relationship breakdown) and that there are safeguards protecting against any safety issues that might arise, for example from an abuser having access to a victim’s browser history. Furthermore, individuals with disabilities and cognitive impairments may be further disadvantaged in remote advice sessions.
172. The fact that the client group in immigration and asylum law are foreign nationals, who may not have proficient English language skills, compounds the challenges of trying to build rapport remotely. As one ILPA member put it, although those providing remote advice are receiving positive decisions, the ability to assess a person’s vulnerability is crucial and this is not always possible through a telephone or video call, as people can present less anxious or vulnerable to their legal representatives, if their whole body language and mannerisms cannot be observed. A few members suggested that this problem may be partially mitigated if the initial, or longer meetings could be done in-person, and shorter meetings thereafter could be facilitated remotely, if the individuals have proper access to working IT equipment.

173. It is also worth noting that, legal aid service users may be more desperate to accept remote advice, if it would mean that they could receive some reassuring legal advice or have some progress to their claim made, without realising that their vulnerabilities may be going unnoticed. A member who provides advice to individuals in immigration detention noted that this is of particular concern to those making applications for bail as they are often living in incredibly difficult situations, deprived of many liberties and in a constant state of high stress. As such, although remote advice may seem beneficial to these vulnerable individuals who readily accept them, it may in fact result in legal representatives not being able to suggest appropriate breaks, or realise specific vulnerabilities which may require further assessment, a referral, or an expert report. In the same vein, vulnerable individuals may also be unable to build the level of confidence they need to seek a comfort break or properly open up about an exceptionally traumatic experience, in the space of a short remote meeting. This is not only detrimental to the individual's already vulnerable mental health and well-being, but may also negatively impact their immigration or asylum matter.
174. One member who provides legal advice in a large, multi-practice, legal aid firm noted that an increase in legal aid rates would be greatly beneficial, as it would enable the legal representatives in their department to travel to see individuals who require legal advice. As in-person meetings allow for a quicker development of trust and confidence, this makes a significant difference to how instructions are taken, the level of detail provided, and ultimately, how the case can then progress. The member also noted that in respect of providing advice under the DDAS, they are usually supplied with a list of names and reference numbers ahead of the surgery. Since the introduction of provisions allowing providers to conduct these surgeries remotely, at the providers' discretion, they must make a determination as to the appropriateness of remote advice based on that limited information, with which there is no way to determine vulnerabilities. This is hugely concerning and we hope that, at the very least, the MoJ is closely monitoring the use of remote advice at DDAS surgeries, with these issues in mind.
175. In evidence accepted by the High Court in 2022¹²⁰ and the Court of Appeal in 2023,¹²¹ Dr Jo Wilding explained that she had 'interviewed solicitors providing services remotely who have reported that it was more difficult to obtain a client's paperwork when working remotely and that it was important to meet in person at the outset, in order to build a relationship of trust with the client'.¹²² In the same case, the accepted view of Dr Juliet Cohen was that 'a sensitive interviewer who can perceive and respond to non-verbal cues by offering empathy and support, and reframing questions, will obtain more disclosure'.¹²³ Disclosure of sensitive

¹²⁰ *R (SPM) v Secretary of State for the Home Department* [2022] EWHC 2007 (Admin).

¹²¹ *R (SPM) v Secretary of State for the Home Department* [2023] EWCA Civ 764.

¹²² *R (SPM) v Secretary of State for the Home Department* [2022] EWHC 2007 (Admin) §45.

¹²³ *Ibid* §46.

and traumatic experiences to a legal representative is significant in immigration and asylum cases, where matters often hinge on such issues.

176. Although it was not accepted that providing remote-only legal advice as a contingency measure was a breach of the common law right of access to justice, Whipple LJ stated in her judgement that she would be willing to accept ‘that it is more satisfactory for women in immigration detention, some of whom are likely to be vulnerable, to have available a facility or option for in-person meetings with their solicitors as well as remote options; for some of these women, video-conferencing or telephone as a means of communication is not as effective as meeting in person, at least for some meetings with their solicitors some of the time’.¹²⁴ We agree. It is crucial that users and providers have a choice about whether to provide services remotely. It might be that providers wish to have some in-person meetings to build rapport and ensure the client trusts them if communicating remotely at another point during the life of the case, or when taking instructions on traumatic events, but keep in touch with their client remotely in the meantime. As one ILPA member phrased it: “[remote advice] is an extra for the lawyer’s tool bag, but you can’t just throw the bag away.”
177. There are also concerns around the quality of remote advice and how it is monitored. A support worker at one member’s organisation was told about a London-based service user, a survivor of trafficking, who was referred by their support worker to a lawyer in Bradford, due to the lack of available lawyers in the local area. The lawyer sent the client a copy of only the back page of the legal aid form which the client was required to sign. The client did not understand she had instructed them and had received no correspondence to say a file had been opened. She was not facilitated to see them in person.
178. Quality can be impacted if a provider is unfamiliar with the client’s local area. This poses difficulties, for instance, if a legal representative is trying to obtain a psychiatric assessment for a client without knowledge of the availability and quality of services locally. A member explained that having a local presence as a provider “enables building of essential local networks to refer for myriad problems or to use their facilities for clients (wifi, offices for teams meetings, etc).”
179. A number of members have also raised that the wider implementation of remote services in legal aid, particularly in the absence of any increase in fees to recruit junior support or outsource external IT support, has proven to be incredibly burdensome and a drain on precious time. Members have highlighted that during remote appeals, for example, it is often up to the legal representative to vacate a hearing room (often for at least half a day), set up the relevant technology and provide the necessary equipment to facilitate the

¹²⁴ *R (SPM) v Secretary of State for the Home Department* [2023] EWCA Civ 764 §52.

hearing in accordance with the Tribunal's directions. Since many immigration and asylum legal aid providers are understaffed and overstretched for capacity, this usually requires a practitioner to attend to all the administrative and technical support work, which is time taken away from pressing and time sensitive casework. A member in the North West mentioned that the provision of a confidential space in their office means that a meeting room is occupied for most of the day and this affects their ability to offer other clients appointments, and, if a hearing is adjourned due to the Home Office Presenting Officer not attending, hours of preparation are effectively wasted.

180. Overall, while we agree that remote advice *can* be beneficial, it should be an option, not a default. It is not a cure for the deep-rooted capacity issues in immigration and asylum legal aid. The benefits of remote provision in some matters does not justify the LAA addressing the total lack of providers in the South West by offering users a list of providers who can offer remote services from elsewhere in the UK, which gives users the choice to either access legal services remotely, or not at all. The overarching principle to uphold is that of access to justice for all, which includes giving individuals a choice as to how they wish to receive legal advice, put forward their claim, or attend a hearing. The availability of remote advice, where appropriate, should supplement a functional system where vulnerable individuals have meaningful access to legal representation.

16. What do you think are the barriers with regards to using technology, for both providers and users of civil legal aid?

16.1. Do you think there are any categories of law where the use of technology could be particularly helpful?

16.2. Do you think there are any categories of law where the use of technology would be particularly challenging?

181. Digital exclusion is an obvious barrier with regard to using technology. Exclusion can be a result of a lack of confidence or abilities in using particular devices or systems and/or insufficient access to the necessary equipment. For instance, users who do not have sufficient internet access will struggle to access civil legal aid if doing so relies completely on technology.
182. Immigration and asylum is a category of law in which the use of technology would be particularly challenging, for the reasons identified above in response to [Question 14](#) and [Question 15](#).
183. Internet access is a particular problem for people who are living in asylum support accommodation. One of our members conducted a WiFi mapping exercise in November

2023, finding that individuals in section 4 and section 95 asylum accommodation have no WiFi. Individuals who are supported under asylum support measures will not have the means to improve their access issues—they will have insufficient financial means and likely find it very difficult to access the necessary technology due to being unfamiliar with this country’s systems and language. Language barriers are also likely to impact their ability to properly engage with the digital systems under the civil legal aid system, and their confidence in doing so.

184. These barriers impact the ability of providers to deliver adequate services. For example, if a provider is assisting a client remotely and only has the option of doing so via telephone, rather than via video-conferencing, the issues identified above with regard to rapport-building are exacerbated.

Early resolution

17. What do you think could be done to encourage early resolution of and/or prevention of disputes through the civil legal aid system? Please provide any specific evidence or data you have that supports your response.

185. Access to high quality, accurate legal advice, at the earliest opportunity is most likely to result in adequately prepared cases which can be more efficiently considered by the Home Office and, where appropriate, the courts and tribunals. It is quite clear that legal aid practitioners, as representatives of those seeking help to enter, remain, regularise their stay, or seek protection, can help improve the Home Office backlog in considering claims and reaching decisions. Although we recognise that the encouragement of early resolution, in the context of immigration and asylum legal aid, is ultimately in the hands of the Home Secretary and the quality of the Home Office’s decision-making,¹²⁵ an overall better facilitated and resourced legal aid system can help improve early resolution. Better resourced legal aid practitioners can, for example, take on the more complex claims or appeals and present them in a way which is most efficient for the Home Office to reach a fair and efficient decision. Adjournments are more likely to be avoidable if legal aid practitioners have the capacity to prepare their cases better and in a timely manner. This is more relevant now than ever before, as immigration and asylum law has become increasingly convoluted and individuals usually require legal representation to make a claim.

¹²⁵ See for example, ILPA, ‘ILPA’s Response to the Ministry of Justice’s Call for Evidence on Immigration Legal Aid Fees and the Online System’ (2 December 2021) regarding the Home Secretary’s (lack of) compliance with the meaningful review in the appellate process <<https://ilpa.org.uk/wp-content/uploads/2021/12/ILPA-Response-to-MoJ-Call-for-Evidence-Legal-Aid-Online-System-02.12.21.pdf>> accessed 16 February 2024.

186. If the recommendations in this response to the Call for Evidence are not accepted and implemented, the current legal aid system will only continue to become more unsustainable, as applications which are poorly prepared, or prepared without legal representation, are more likely to be incorrectly refused and find their way to the Immigration and Asylum Chamber of the First-tier Tribunal and Upper tribunal, where they are likely to be overturned.

Other areas for consideration

18. Is there anything else you wish to submit to the Review for consideration? Please provide any supporting details you feel appropriate.

187. Yes, we encourage the MoJ to take into consideration *all* of the responses to other Calls for Evidence and Consultations, conducted by the MoJ and the LAA, and feedback that we have provided in meetings, including in Civil Contract Consultative Group meetings, over the years. Not all of those matters can be repeated here, but they should form part of the MoJ's consideration in this Review.

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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: Please see paragraph 1 in the Introduction above.