



Public Law Project's response to the Ministry of Justice's 'Legal Aid Fees in the Illegal Migration Bill' consultation, July 2023

Question 1: Do you agree with our proposal to pay higher fees for IMB Work? Please state yes/no/maybe and provide reasons.

Maybe.

Higher fees are necessary to make IMB work viable, but we do not consider the proposed uplift for just IMB work is sufficient to address the challenges that this consultation has identified.

We commend the Ministry of Justice's efforts to 'ensure fair and appropriate compensation for immigration and asylum legal aid providers' (paragraph 4 of consultation) and wholeheartedly agree with the stated policy aim of 'building capacity in the immigration legal aid market and incentivising providers by adequately remunerating them for their work' (paragraph 75). The assessment in the consultation document that 'IMB introduces additional demand for legal aid because of the number of individuals captured by the Bill and timescales for removal' is accurate and we welcome the consideration this consultation gives to the consequences of this additional work (point 28).

However, the proposal to pay higher fees for IMB work will not 'rapidly ramp up market capacity' as suggested (paragraph 29). The purpose of the proposal is to increase capacity and to ensure access to justice for those who receive removal notices. Increasing hourly rates is an important factor but will not, on its own, meet these objectives particularly in view of the huge increased demand for legal services, the very short time available to increase capacity and the nature of the work involved. IMB work will be complex and highly time sensitive, involving detained people facing removal who are subject to accelerated processes and who require very urgent work.

There are entrenched capacity problems throughout the sector which are likely to be severely exacerbated by the numbers of people requiring very urgent legal assistance due to the IMB. Existing capacity in the immigration legal aid sector is at a crisis point. In South West England, at least six providers have closed in the last two years, leaving only four to five providers covering a large geographical area spreading from Cornwall to Bristol. We now estimate there are less than 300 matter starts available annually in the South West – a region where Home Office dispersal patterns mean there are thousands of individuals eligible for asylum legal aid. Local Authorities in the area support 4,603 asylum seekers.¹ We are concerned that the proposals contained in this consultation reflect a poor understanding of the scale of the challenges and capacity constraints that the sector faces and the speed with which recovery is possible. Existing caseloads cannot simply be axed and, without extending these proposals of higher hourly rates and no means or merits thresholds to all immigration legal aid work pending the wider Review of Civil Legal Aid, the pattern of people leaving the sector and legal aid providers closing will not be stemmed.

¹ Home Office. (2023). Asy_D11: Asylum seekers in receipt of support by support type, accommodation type and local authority.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1156826/section-95-support-local-authority-datasets-mar-2023.xlsx



Therefore, increasing hourly rates across immigration legal aid and urgently investing in a dwindling provider base crippled by years of underfunding is essential. This would be a bare minimum to mitigate the contraction of the supplier base, to ensure it is sustainable and to encourage sufficient growth to meet the substantial increase in demand.

IMB work should be paid fees higher than the current civil legal aid rates, but not higher than other areas of immigration legal aid. Achieving the goals proposed by the consultation requires viable hourly rates for all immigration legal aid work *and* for work under the IMB. We appreciate the current Review of Civil Legal Aid is underway and look forward to its recommendations. Yet the capacity constraints identified by the consultation (paragraph 29) demand more urgent action if there is to be sufficient provider capacity to undertake IMB work. The lack of interim measures, despite identified capacity issues, while the review is ongoing, is a significant oversight.

Furthermore, only increasing fees for IMB work creates perverse incentives to undertake this work to the detriment of other work, such as initial asylum claims in the backlog, fresh claims or Exceptional Case Funding cases. We are concerned that this would severely impact access to justice for the pre-IMB cohort whose cases would not attract a higher fee, as providers would be heavily incentivised to prioritise taking on cases from the IMB cohort, at the expense of other in scope matters.

There is no reasonable justification for the lack of interim measures to bolster the sustainability of other areas of civil legal aid, such as the remainder of in scope immigration work. This consultation demonstrates it is possible to make changes to rates of remuneration quickly, if there is political will to do so. The same sense of urgency needs to be applied across civil legal aid fees.

Without urgent measures including, but not limited to, an immediate fee uplift to make this work sustainable and to incentivise providers to undertake it, it is unrealistic that capacity can be increased. The Lord Chancellor would then risk being in breach of his statutory duty to make arrangements for civil legal services to be available and there would be a real risk that individuals subject to the IMB would not have effective access to justice.



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

We agree with the consultation's assessment that hourly rates are the only appropriate form of compensation, due to the lack of evidence available to set a fixed fee and the 'demands and timeframes imposed by IMB Work'. We consider that this reasoning also applies to all civil legal aid work.

In terms of the fee itself, legal aid fees have not increased since 1996. The last change, in 2011, was a reduction. The largest provider of immigration work in the UK, Duncan Lewis, considers that even that rate would not act as sufficient remuneration to incentivise providers to increase capacity for IMB work, given the antecedent costs (such as training of existing caseworkers and accreditation of new caseworkers), the additional urgency and the additional complexity of work under the IMB.² Therefore, there is a significant risk that IMB work will not be taken on by providers if the proposed higher rates are not realistic.

Our own research indicates that there is no capacity within the advice sector to undertake the additional work generated by the IMB.³ The immigration and asylum practitioners we spoke to were routinely working over their contracted hours and finding it difficult to take leave. A majority of interviewees and survey respondents expressed a strong feeling that they were always working either at or beyond their capacity in the legal aid sector.

In our view, given the capacity issues set out above, the likely outcome of introducing higher fees in one limited area may be a shifting of available capacity, in the limited areas that it exists, from non-IMB work to IMB work, with no overall increase in capacity and a continuing fall in provider numbers (and overall capacity) over time. Therefore, higher fees for one small area of immigration legal aid could be counterproductive, as it risks incentivising the few remaining providers to abandon taking on new matters that do not carry the uplift, worsening access to justice for individuals with those issues.

To limit these effects, as a minimum, higher rates should be introduced for all immigration legal aid work. This rate needs to be set at a level that makes the work sustainable and attractive enough to providers to stimulate growth, otherwise the demand will not be met and individuals will not have access to justice. We are aware that many legal aid providers consider that the 15% proposal is inadequate and there is a real risk they will not be able to realistically increase capacity to do the work, or to do it at all. If, as a minimum, the rates are set too low so that providers do not do the work or cannot increase capacity to meet demand, then this is a real impediment to access to justice.

² <https://www.duncanlewis.co.uk/onlinelinks/Open%20letter%20to%20LC%20and%20LAC%20-%20DL%20Public%20Law%20-%2011.07.2023.pdf>

³ Jo Hynes (2023) Overstretched & unsustainable: a case study of the immigration and asylum legal aid sector. <https://younglegalaidlawyers.org/wp-content/uploads/2023/04/YLALPLP-Report-April-2023.pdf>



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

The immigration legal aid sector is a complex ecosystem and providers undertake a range of work. To build the capacity of the profession to complete IMB work requires building capacity across civil legal aid. This demands a long-term commitment to uplift fees to a sustainable level, a change from fixed fees to hourly rates across immigration legal aid (not just IMB work) and to review fees on an annual basis, with a minimum expectation that they be uprated with inflation.

Reversing the flow of people leaving the legal aid sector is vital to build capacity. Our research indicates that young practitioners in the immigration and asylum legal aid sector face a barrage of overwork, financial unsustainability and serious emotional and wellbeing concerns, which is driving many to leave the sector.⁴ 19% of those we interviewed said they anticipated either leaving immigration and asylum legal aid practice or legal aid practice entirely within the next five years. Committed legal aid practitioners and their wealth of expertise have been leaving the sector at a concerning rate for a number of years and new capacity cannot simply be generated in response to a bill.

Incentives for legal aid practitioners to train and then stay in legal aid practice, particularly in legal aid desert areas, could help address this retention issue. We agree with the Westminster Commission on Legal Aid's recommendation that '[t]he Ministry of Justice should fund training and qualification placements within legal aid firms and NfPs [Not for Profits] and publicly-funded chambers'.

Reducing the administration burden on providers could also help improve capacity in the sector. The audit process for legal aid providers should be simplified by taking a more pragmatic approach to auditing which 'avoids punitive sanctions and minimises transaction costs in cases of human error or minimal risk to the legal aid fund', as recommended by Jo Wilding.⁵ For example, Jo Wilding suggests paying all cases at hourly rates and only auditing a sample of files or bills for each organisation or barrister, or reducing the escape fee threshold to double the standard fee. This would be underpinned by increasing the minimum peer review score for contract holders to two ('Competence Plus'), to ensure quality within a simplified auditing process.⁶

Reducing the administrative burden also demands simplifying the billing and payment process. Payments on account should be made by the LAA every three months for controlled work and disbursements incurred on controlled work matters must be paid out by the LAA as soon as they are incurred. This would avoid firms paying out large sums and not being reimbursed for several years. The vast majority of immigration and asylum legal aid work requires interpreters. Interpreter fees are limited to £25 per hour and also have not increased in line with inflation since at least 2011. Interpreter fees should be recalculated in line with inflation.

⁴ Jo Hynes (2023) Overstretched & unsustainable: a case study of the immigration and asylum legal aid sector. <https://younglegalaidlawyers.org/wp-content/uploads/2023/04/YLALPLP-Report-April-2023.pdf>

⁵ Jo Wilding (2019) Droughts and Deserts. A report on the immigration legal aid market. https://sussex.figshare.com/articles/report/Droughts_and_deserts_a_report_on_the_immigration_legal_aid_market/23490650

⁶ Jo Wilding (2019) Droughts and Deserts. A report on the immigration legal aid market. https://sussex.figshare.com/articles/report/Droughts_and_deserts_a_report_on_the_immigration_legal_aid_market/23490650

Question 4: Do you agree with our proposal to conduct the first post-implementation review of fees for IMB Work within two years of its implementation? Please state yes/no/maybe and provide reasons.

No.

We agree that a post-implementation review of fees for IMB work is vital. However, we consider that 'within two years' is too broad a timeframe and risks a review not being conducted until two years after implementation. In the context of fees declining in real terms and a cost of living crisis, a review needs to be conducted and completed within one year of implementation. This would also bring a review in line with the Review of Civil Legal Aid and a commitment to a future annual review of civil legal aid fees could be agreed at that point.

We additionally urge that serious consideration be given to how a review of fees will be conducted *prior* to any implementation of these proposals. It is insufficient to consider how a review will be conducted post-implementation, as the system needs to be designed to facilitate the relevant data collection. For a review to be effective, this thinking needs to be embedded in the system design now and we are pleased to see that the consultation has raised it at this stage.



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

The Equalities Statement correctly identifies that the primary pool of individuals affected by the proposals will be immigration legal aid providers and individuals who are seeking advice and/or representation. However, it does not adequately identify the impact of protected characteristics in this area of work.

Specifically, the Equalities Statement suggests that there is only 'limited information on legal aid providers' and draws on a limited range of evidence, including a 2015 survey conducted by the Legal Aid Agency. We suggest that there is a much broader range of information this Equalities Statement could draw on, including the recent Legal Aid Practitioners Group's Legal Aid Census and the Westminster Commission on Legal Aid 2021 report, as well as detailed academic analysis of the challenges and solutions by Dr Jo Wilding.⁷ Furthermore, we would recommend that the Government collect its own additional data, including on asylum and immigration practitioners who will be impacted by these proposals. The Equalities Statement focuses on the owners and managers of legal aid providers, but our research has indicated that it is more often more junior members of staff, including caseworkers, that conduct the bulk of legally aided work and it is unfortunate that these cohorts have been entirely missed in this statement.

At paragraph 71 it is stated that '[T]he proposal will ensure that individuals subject to removal notices under the IMB can access justice by building capacity within the immigration legal aid market and incentivising providers and barristers to take on legal aid work brought into scope of legal aid by the IMB. We therefore do not consider that the proposed change will result in clients being at a disadvantage ...'. At paragraph 75, the Equalities Statement suggests that the proposals may disproportionately benefit 'males, individuals aged between 18-39, and individuals from an ethnic minority' as they are 'overrepresented amongst immigration and asylum legal aid clients' but that there would be no indirect discrimination because these groups would not be particularly disadvantaged (as opposed to advantaged) by the policy. However, neither analysis acknowledges the impact of limiting higher rates to IMB work on clients with non-IMB immigration issues, an oversight which pervades the consultation. Consequently, there is a complete failure to have 'due regard' to the need to eliminate discrimination between those immigration clients whose cases fall under the IMB and those whose issues fall outside it or to give consideration to how such disadvantage can be mitigated. As we have indicated elsewhere in our response, that disadvantage is best mitigated by paying higher fees for all immigration legal aid work.

⁷ Legal Aid Practitioners Group (2021) Findings From the 2023 Legal Aid Census. <https://lapg.co.uk/wp-content/uploads/We-Are-Legal-Aid-Findings-from-the-2021-Legal-Aid-Census-Final.pdf>; Westminster Commission on Legal Aid (2021) Inquiry into the Sustainability and Recovery of the Legal Aid Sector. https://www.apg-legalaid.org/sites/default/files/The%20Westminster%20Commission%20on%20Legal%20Aid_WEB_0.pdf; Jo Wilding (2021) The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Legal Representation. <https://www.jstor.org/stable/j.ctv1wnwtz1>

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