



Public  
Law  
Project

**Public Law Project's response to the Ministry of  
Justice Review of Civil Legal Aid Call for Evidence,  
February 2024**

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## Introduction

In responding to this Call for Evidence we have tried to add value by drawing on sources wherever possible that are not already available to the Review of Civil Legal Aid. However, we would like to note the quick succession of consultations in 2023 and 2024 that we and other legal aid practitioners and civil society organisations have spent significant time responding to. This is in addition to engagement with Review of Civil Legal Aid's four workstream sub-groups. For the sake of clarity, we outline these responses below:

- Public Law Project's response to the National Audit Office consultation on legal aid, July 2023. <https://publiclawproject.org.uk/content/uploads/2023/07/Public-Law-Projects-response-to-the-National-Audit-Office-consultation-on-legal-aid.pdf>
- Public Law Project's response to the Ministry of Justice's 'Legal Aid Fees in the Illegal Migration Bill' consultation, July 2023. [https://publiclawproject.org.uk/content/uploads/2023/07/IMB-Legal-Aid-Fees-Consultation\\_As-Submitted.pdf](https://publiclawproject.org.uk/content/uploads/2023/07/IMB-Legal-Aid-Fees-Consultation_As-Submitted.pdf)
- Response to the Review of Civil Legal Aid practitioner survey, conducted by PA Consulting and resulting in a report published in January 2024. <https://assets.publishing.service.gov.uk/media/65aa4068ed27ca000d27b28a/civil-legal-aid-providers-survey.pdf>

Furthermore, we note that the Public Accounts Committee is currently accepting evidence for its 'Value for Money from Legal Aid' inquiry which will likely generate valuable recommendations for the Review of Civil Legal Aid to consider. We are also considering responding to this inquiry.

For this Call for Evidence, we have responded to the questions where Public Law Project has most expertise to share as an organisation with experience both from being involved in legal aid empirical research and policy work, and from being a legal aid provider.

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## Question 1

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

**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? [...]**

**Please provide any specific evidence or data you have that supports your suggestions.**

### **The scale of the problem**

1. Our response to this question relates primarily to the immigration and asylum legal advice sector as this area forms the basis of the majority of our legal aid research. However, the civil legal aid sector is a complex ecosystem and providers undertake a range of work across areas of law. To build the capacity of the profession to a sustainable level requires building capacity across civil legal aid. With this in mind, we consider that the changes we propose here are likely to also be beneficial to other areas of civil legal aid.
2. Our recent research report, 'Access to immigration legal aid in 2023: An ocean of unmet need'<sup>1</sup> demonstrates that the immigration and asylum legal advice sector has collapsed. Immigration and asylum legal aid work is not sustained by legal aid fees, which leads providers to rely on mixed funding from private practice and charitable funders, as well as relying on the goodwill of staff. Our research found numerous examples of providers subsidising legal aid work to make it sustainable, including:
  - Grant funding – Greater Manchester Immigration Aid Unit drew on funding from 17 different charitable funders, subsidising legal aid work by around £285,000 and relying on further grant funding to be able to train staff.
  - Supplementing with better paid work – Wilsons Solicitors indicate their lawyers must take on a private case paying £88 p/hr, to subsidise a legal aid case paying (£52 p/hr), as the break-even cost is around £70 p/hr.
3. Provider capacity in the sector is saturated, with many providers receiving significantly more enquiries than they can take on. Research conducted by Dr Jo

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<sup>1</sup> Daniel Rourke, Ed Cripwell, Joseph Summers and Jo Hynes (2023) Access to immigration legal aid in 2023: An ocean of unmet need. Public Law Project. Available at: <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>

Wilding, including a recent report with Refugee Action, clearly outlines the significant capacity gaps that exist in immigration and asylum legal aid.<sup>2</sup>

4. In the context of this saturated provider capacity, support organisations' referrals are going unanswered. PLP's national Legal Aid Capacity Data Collection Survey<sup>3</sup> found that only 1 in 16 referral attempts to legal aid providers were successful. Even in London and the South East procurement area, where there are the most providers, an increasing and significant proportion of individuals are unable to access advice and assistance. Haringey Migrant Support Centre were unable to place 58% of visitors over a 6-month period between 1 August 2022 and 1 January 2023.
5. As a result, and as the Ministry of Justice is already aware through pre-action correspondence, we are currently considering a proposed legal challenge to the Lord Chancellor's ongoing failure to discharge his statutory duty to make immigration and asylum legal aid available.

## Solutions

6. Addressing the huge deficits in immigration and asylum legal aid provision requires significant short and long-term solutions. Firstly, whilst there is substantial data evidencing legal aid deserts and droughts across many areas of law, this has been gathered by civil society organisations and academics and there is no ongoing monitoring of the problem by a government body.
7. The Legal Aid Agency (LAA) has neither the mandate nor the resources to monitor the levels of legal need or unmet legal need in England and Wales. Remedying this was a recommendation of both the Westminster Commission,<sup>4</sup> Justice Select

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<sup>2</sup> Jo Wilding (2022) No access to justice: how legal advice deserts fail refugees, migrants and our communities. Refugee Action. Available at: [https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/62a1e16c8478993c7d512c\\_No%20access%20to%20justice%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf](https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/62a1e16c8478993c7d512c_No%20access%20to%20justice%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf)

<sup>3</sup> Daniel Rourke, Ed Cripwell, Joseph Summers and Jo Hynes (2023) Access to immigration legal aid in 2023: An ocean of unmet need. Public Law Project. Available at: <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>

<sup>4</sup> Westminster Commission on Legal Aid (2021) Inquiry into the Sustainability and Recovery of the Legal Aid Sector, page 79. Available at: <https://lapg.co.uk/wp-content/uploads/The-Westminster->

Committee,<sup>5</sup> and National Audit Office.<sup>6</sup> We consider that a LAA research programme monitoring both legal need and legal aid provider capacity would be an important step in addressing the issues we outline above. Furthermore, monitoring legal aid provider capacity needs to capture a more accurate and nuanced picture of capacity than the current reliance on ‘matter starts’ which do not accurately reflect whether such supposed spare capacity is available in practice.

8. Secondly, in the short term, the immigration and asylum legal aid sector needs to be fairly remunerated for their work to stop the drain in the number of providers and to retain staff. Uplifting hourly rates to a sustainable level 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. Long-term sustainability will only be achieved through growth in the sector from its current point, which requires investment beyond that needed to simply stop further losses.
9. The LAA should also reconsider the use of fixed fees, because of the way they introduce unnecessary additional financial risk and have a negative impact on provider sustainability. In addition, these fees should be reviewed on an annual basis by an independent panel, with a minimum expectation that they be uprated with inflation.
10. Thirdly, in the long term, the Lord Chancellor is empowered by s.2 of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 to make ‘such arrangements’ as he considers appropriate for carrying out his functions. These arrangements include making grants or loans to persons to provide services, making grants or loans to individuals to enable them to obtain services and establishing and maintaining a body to provide services (s.2.2(a)-(c)). The Lord Chancellor has exercised his power under s.2(2)(c) of the Act by establishing the LAA, an executive agency of the Ministry of Justice. As of January 2020, the Lord Chancellor had never

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[Commission-on-Legal-Aid\\_WEB.pdf](#). See also recommendation G (‘conduct further research into how to increase the capacity of providers in areas that are currently in scope’) and recommendation H (‘[d]evelop robust research mechanisms for measuring legal need, and link the commissioning of services to that research’).

<sup>5</sup> House of Commons Justice Select Committee (2021) The Future of Legal Aid HC 70, page 54. Available at: <https://committees.parliament.uk/publications/6979/documents/72829/default/>

<sup>6</sup> National Audit Office (2024) Government’s management of legal aid, recommendation b (‘MoJ should, working with LAA and others, ensure that those who want (and are eligible for) legal aid can access it in future by improving [...] its view of demand and capacity in the legal aid market’).

exercised his powers under s.2(2)(a) to provide grants or loans to organisations to provide services or facilitate access.<sup>7</sup> PLP are not aware of any individuals having obtained grants or loans under s.2(2)(b) and consider it likely that power has also never been exercised.

### Question 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.**

11. Providers face a large administrative burden in maintaining a legal aid contract and the associated billing and audit processes. This administrative burden results from the design of the legal aid scheme itself.
12. As part of data collection for our Ocean of Unmet Need report,<sup>8</sup> providers told us that the scale of this administrative burden was both large and unnecessary. One provider reported that they employed five full-time staff to administer and bill their legal aid work at a cost of around £200,000 annually. Another provider described the legal aid billing process as a 'complete nightmare', taking vast administrative resources to manage. These overheads were not recoverable as the fees from the LAA barely covered the costs of employing the fee earning staff and administrative work could not be charged for.
13. In addition to the general administration and billing processes, LAA compliance activity can be disproportionate and punitive, resulting in unnecessary burdens and creating financial risk due to the sanctions which may be imposed for minor errors. Our own research confirms that even highly technical contract errors can result in providers facing substantial losses. Providers reported that mixing 'reporting codes' when billing or missing contractual 'Key Performance Indicators' resulted in them being pulled up by the LAA, at significant financial cost.<sup>9</sup> The impact of disproportionate LAA activity is clear in the case study of South West Law in our

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<sup>7</sup> FOIA request by a lawyer associated with Devon and Cornwall Refugee Support.

<sup>8</sup> Daniel Rourke, Ed Cripwell, Joseph Summers and Jo Hynes (2023) Access to immigration legal aid in 2023: An ocean of unmet need. Public Law Project. Available at:

<https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>

<sup>9</sup> Daniel Rourke, Ed Cripwell, Joseph Summers and Jo Hynes (2023) Adrift: An explainer for navigating the immigration legal aid framework. Public Law Project. Available at:

<https://publiclawproject.org.uk/content/uploads/2023/09/Adrift-explainer.pdf>

recent report, which sets out the experiences of one legal aid provider who was given a £250,000 fine, only for this to be reduced to £2,500 on appeal due to the mistakes made by the auditors.<sup>10</sup>

14. Reducing administrative burdens would mean that legal aid practitioners could spend more of their time supporting clients and undertaking chargeable work, which would contribute to addressing the problems of financial risk and unsustainability which providers face.
15. Firstly, the periodic tendering process for legal aid contracts is both time consuming for providers and prevents providers from providing much needed legal aid services until the next tendering cycle. We suggest the LAA should explore other ways of controlling access to the legal aid scheme, for example through a registration process.
16. Secondly, those in receipt of means tested social security benefits should be 'passport' through both the income and capital means tests for legal aid eligibility, given that their level of financial need has already been assessed by the state in another domain. In one recent case, PLP's casework team estimate that assessing and establishing legal aid eligibility took around 10 hours of work, only 6 of which were chargeable, and all of which would have been unrecoverable had it turned out that the client was not eligible for legal aid. 'Passporting', which allows people whose financial need has already been assessed by another part of the state to bypass parts of the means test, is one way which the administrative burden can be reduced.
17. Thirdly, LAA compliance activity should reflect the peer review scores received by providers, so that those who receive the top two levels at peer review are audited less frequently. Ultimately, the LAA should adopt an approach which is proportionate, taking into account the low financial risk posed by minor errors, and the cost of requiring providers to comply with extensive compliance activities.

#### Question 4

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<sup>10</sup> Daniel Rourke, Ed Cripwell, Joseph Summers and Jo Hynes (2023) Access to immigration legal aid in 2023: An ocean of unmet need. Public Law Project. Available at: <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>



**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.**

18. There are significant risks for the future of civil legal aid, including both general long-standing risks, and additional risks created by insufficient changes being made to the current system. PLP has considered in detail the specific problems affecting immigration and asylum legal aid. The sector is now at the point of collapse with two-thirds of the population without access to an immigration and asylum provider in their local authority area.<sup>11</sup>

19. As explained in our response to Q1 (above), we initially sent a pre-action letter<sup>12</sup> to the Lord Chancellor on 8 September 2023. In our view, he is in breach of his duty to make legal aid available for these matters. We have taken this action because we consider the risks of further collapse of the immigration and asylum advice sector to be high without urgent action.

20. In our answer to questions 7 and 8, we have explained how starting a career in legal aid is expensive and poorly remunerated. As a result, in the medium term, the sector risks not having enough junior lawyers. If this trend continues, then, in the longer term, the sector might experience 'brain drain' and come to lack experienced staff too. Therefore, providers must be better resourced to recruit the next generation of legal aid lawyers.

21. The opportunities in the future of civil legal aid are numerous; the advice sector has retained many hardworking practitioners who want to see civil legal aid put on a sustainable footing for the good of their clients. There are opportunities to build on this goodwill from an albeit dwindling base of practitioners by addressing the issues identified in responses to this Review, including to the recent practitioner survey.<sup>13</sup> Not least of all there are opportunities to reduce the administrative burdens placed on

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<sup>11</sup> Law Society (2022) Immigration and asylum – legal aid deserts. Available at:

<https://www.lawsociety.org.uk/campaigns/civil-justice/legal-aid-deserts/immigration-and-asylum>

<sup>12</sup> [https://publiclawproject.org.uk/content/uploads/2023/10/230803-PAP-v-5.2-as-servedclickable\\_links\\_contact-details-removed.pdf](https://publiclawproject.org.uk/content/uploads/2023/10/230803-PAP-v-5.2-as-servedclickable_links_contact-details-removed.pdf)

<sup>13</sup> Review of Civil Legal Aid practitioner survey, conducted by PA Consulting and resulting in a report published in January 2024. Available at:

<https://assets.publishing.service.gov.uk/media/65aa4068ed27ca000d27b28a/civil-legal-aid-providers-survey.pdf>

providers, as outlined in our response to question 3, which could be done immediately and at low or no cost to the LAA.

## Question 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.<sup>14</sup>**

22. Currently, various levels of government have found themselves needing to fund legal advice where it is unavailable,<sup>15</sup> either for humanitarian purposes or to prevent other costs being incurred. For example, to save costs required to support families who would be entitled to leave to remain in the UK if they were assisted in making the proper applications.<sup>16</sup> In a time where local authorities are being forced to cut services in other areas it seems perverse that funds are being drained due to a failure by central government to provide sufficient legal advice services.

23. The lack of immigration providers and community care providers creates a ‘perfect storm’ for those who are particularly vulnerable, who may be unlawfully denied services due to a lack of understanding of how their immigration status affects their entitlements.<sup>17</sup> Issues which might be solved at an early stage with appropriate advice often are only raised at the stage of a ‘Letter before Action’ due to a lack of providers as well as the lack of pre-litigation funding. The difficulties that those affected have in getting expert advice means that greater resources are used in resolving problems by both legal representatives and local authorities.

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<sup>14</sup> Our response to this question was drafted with the much-appreciated expertise of Siân Pearce, a doctoral student at the University of Exeter and, until recently, a solicitor specialising in immigration and asylum cases.

<sup>15</sup> Marie Mallet-Garcia, Zach Bastick and Sarah Spencer (2022) Responses to Migrants with Precarious Status in Cardiff: Frames, Strategies and Evolving Practices, Centre on Migration, Policy and Society. Available at: <https://www.compas.ox.ac.uk/wp-content/uploads/LoReMi-Responses-to-Migrants-with-Precarious-Status-in-Cardiff-Frames-Strategies-and-Evolving-Practices.pdf>

<sup>16</sup> Jo Wilding (2020) ‘It’s a no-brainer’: Local authority funding for immigration legal advice in the UK” (Justice Together. Justice Together Initiative. Available at: <https://justice-together.org.uk/wp-content/uploads/2023/05/JT-Local-authority-funding-for-immigration-v3.pdf>

<sup>17</sup> Marie Mallet-Garcia, Zach Bastick and Sarah Spencer (2022) Responses to Migrants with Precarious Status in Cardiff: Frames, Strategies and Evolving Practices, Centre on Migration, Policy and Society. Available at: <https://www.compas.ox.ac.uk/wp-content/uploads/LoReMi-Responses-to-Migrants-with-Precarious-Status-in-Cardiff-Frames-Strategies-and-Evolving-Practices.pdf>

24. PLP has conducted research to assess whether the Exceptional Case Funding (ECF) scheme provides sufficient access to justice for family cases.<sup>18</sup> It showed two ways that LASPO was resulting in costs, rather than savings, in this area.
25. Firstly, there was a sharp rise in Litigants in Person after LASPO came into force.<sup>19</sup> Our research concluded that this was putting pressure on the courts system. This is likely leading to inefficiency because the courts system cannot operate effectively where individuals must perform tasks that would otherwise be carried out by a professional and for which they lack the requisite training or expertise.
26. Secondly, the report concluded that the ECF mechanism is not providing sufficient access to legal aid because the application process is too onerous, and most providers lacked capacity to make applications. This, the report held, is resulting in 'long-term social costs' where individuals are not able to access advice and representation for family proceedings, particularly when children are involved, and arrangements for contact or financial provision cannot be agreed upon.<sup>20</sup>
27. Our research indicates that the current legal aid regime is leading to wider social and economic harms by inhibiting eligible individuals' access to legal aid and through decision-making inefficiency where individuals do not obtain legal representation, or where they do but their provider is over-burdened and under-resourced so is at risk of providing a sub-standard service. It also indicates that this is true across different sectors of legal aid work. The downstream benefits of the current civil legal aid sector are therefore significant, but could be far greater if the sector was put on a sustainable footing.

## Question 6

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<sup>18</sup> Emma Marshall, Sue Harper and Hattie Stacie (2018) Family Law and Access to Legal Aid. Available at: <https://publiclawproject.org.uk/content/uploads/2018/04/Family-Law-and-Access-to-Legal-Aid.pdf>

<sup>19</sup> House of Commons Library (2016) Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales. Parliamentary Briefing Paper. Available at: <https://commonslibrary.parliament.uk/research-briefings/sn07113/#:~:text=The%20available%20evidence%20indicates%20that,of%20Offenders%20Act%202012%20took>

<sup>20</sup> Emma Marshall, Sue Harper and Hattie Stacie (2018) Family Law and Access to Legal Aid. Available at: <https://publiclawproject.org.uk/content/uploads/2018/04/Family-Law-and-Access-to-Legal-Aid.pdf>

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

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

**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.**

28. The current fee system creates unhelpful incentives through three structures: fixed fees, higher rates for Illegal Migration Act (2023) work, and unsustainable rates.

29. Firstly, fixed fees create incentives to avoid working in the 'at risk' zone between the fixed fee threshold and the 'escape' fee threshold. Working 'at risk' places a significant financial risk on providers and means that they are not paid for the true time cost of their work. In addition, the administration surrounding the fixed fee structures generates further work for providers.

30. PLP holds legal aid contracts for public law and immigration and asylum work. Most of our matter starts are in public law. The vast majority of our files 'escape' the fixed fee amount, which requires us to prepare an 'escape fee claim' on almost every file. This is onerous and involves preparing a narrative, itemised summary of work undertaken, checking that there is evidence on file for each item of work claimed and submission of the full file to the LAA. It is common for the LAA to dispute the bill on a line-by-line basis. The provider may then dispute the LAA assessment through an internal review followed by an appeal to an Independent Costs Assessor. For our practice, the fixed fee is an arbitrary threshold that provides us/ our clients no benefit whatsoever and is purely an administrative/financial hurdle that creates a large amount of unpaid work and introduces financial risk. Ultimately, providers should be paid for the work they do through hourly rates. At the very least, the evidential requirements associated with escape fee claims should be dramatically reduced.

31. Secondly, only increasing fees for Illegal Migration Act (2023) 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 ECF cases. We are concerned that this may severely impact access to justice for the pre-Illegal Migration Act (2023) cohort whose cases will not attract a higher fee, as providers are incentivised to prioritise

taking on cases from the Illegal Migration Act (2023) cohort, at the expense of other in scope matters.

32. Thirdly, legal aid rates are set at unsustainable levels, creating incentives for providers to leave the legal aid sector and/ or pursue mixed models of funding in order to make their legal aid practice viable. PLP is only able to deliver legal aid services because it can supplement legal aid with other funding.
33. For example, where PLP conducts controlled work under its legal aid contract, it is usually carried out at a loss. The nominal hourly rate used in hourly rates/escape cases is below that of the costs of employing PLP caseworkers, particularly once overheads, including unpaid administration, are taken into account.
34. The system could be better structured by adopting hourly rates across all areas of civil legal aid. Furthermore, these rates need to be set at a level that makes the work sustainable and attractive enough to providers to stimulate growth, otherwise the demand for legal aid will not be met and individuals will not have access to justice. These fees should be reviewed on an annual basis by an independent panel, with a minimum expectation that they be updated with inflation.

## **Question 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.**

## **Question 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.**

35. We propose to answer questions 7 and 8 together. Our recent research on the immigration and asylum legal aid sector highlights the barriers to young practitioners, particularly those with protected characteristics, from starting and continuing their

careers.<sup>21</sup> The 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. 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.

36. The significant financial barriers to starting and maintaining a career in civil legal aid came up in many of our conversations with young legal aid lawyers working in the immigration and asylum sector. For example, a number of participants had to work or take out loans whilst studying or training. One participant worked in two jobs in order to make working in the sector sustainable on a personal financial level.
37. Other participants discussed the lack of entry level positions and the need to find experience through unpaid roles and self-funded study. These financial barriers, both in terms of training to be a legal aid practitioner and of remuneration for work in the sector, risk limiting the pool of people the profession is accessible to, including along axes of protected characteristics.
38. As part of the research, we conducted an online survey which 37 junior practitioners responded to. Over half of these survey respondents said they were unable to advance their career in legal aid practice in the way that they would like to or were finding it extremely difficult. An additional 16% were unsure about whether they were going to be able to advance their career in legal aid practice.
39. Many respondents discussed the lack of personal or professional development opportunities and limited possibilities for career or pay progression. Specifically, a number of caseworkers highlighted that their employer was unable to help them to qualify as a solicitor and the fees for the Legal Practice Course or Solicitors Qualifying Examination were 'prohibitive for those of us on Legal Aid salaries'.
40. When asked what they saw as the most likely scenario in the next five years, 54% of survey respondents said that they anticipated either taking on more immigration and asylum legal aid work or continuing to work in immigration and asylum legal aid practice to the same extent as they did at present. 14% of respondents said they

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<sup>21</sup> Jo Hynes (2023) Overstretched & unsustainable: a case study of the immigration and asylum legal aid sector. Public Law Project. Available at: <https://younglegalaidlawyers.org/wp-content/uploads/2023/04/YLALPLP-Report-April-2023.pdf>

would take on less immigration and asylum legal aid work and 19% said they anticipated either leaving immigration and asylum legal aid practice or legal aid practice entirely. For a number of these respondents, they anticipated that they wanted to be in a position to start a family or buy a house in the next five years and felt that their experience of inflexible working patterns and low pay in legal aid practice was incompatible with these life changes.

41. The interviews we conducted with junior practitioners told a similar story. For one caseworker we interviewed, they felt that they had reached something of a casework ceiling and were having to rely on family to study to qualify as a solicitor, given the lack of other routes. As one respondent suggested, there are 'few incentives' to train in legal aid practice compared to private practice, even though they would prefer to do so.
42. In summary, our research points to significant financial barriers to legal aid practitioners starting careers in legal aid practice and in developing their careers in satisfying and sustainable ways. This is likely to reduce the diversity of the profession over time. Indeed, The Bar Council have suggested that the problems surrounding retention and career development for junior legal aid lawyers, particularly those without independent financial means, may have serious consequences for the diversity of the profession.<sup>22</sup> They argue that there is a 'real danger that efforts to make the Bar as a career more accessible to those from less privileged backgrounds, women and barristers from ethnic minority backgrounds will go into reverse'.
43. 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'.
44. In PLP's experience, securing external funding has allowed us to recruit practitioners, despite sector wide difficulties in recruitment. While we have been able to attract large numbers of applicants for junior lawyer positions at PLP, we have benefited from grant funding to subsidise salaries which has meant that our salaries for these

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<sup>22</sup> The Bar Council (2021) Running on Empty: Civil Legal Aid Research Report. Available at: <https://www.barcouncil.org.uk/uploads/assets/6a65477c-9288-4db2-897b696f548813cd/Running-onEmpty-Civil-Legal-AidFull-Report.pdf>

positions are more competitive than many other legal aid providers. In addition, all of the training contracts and pupillages we have offered in the past decade have been funded by the Legal Education foundation through its Justice First Fellowship programme. This points to the value of Ministry of Justice funded training and qualification placements as a way of addressing the significant recruitment and retention challenges facing the sector, as well as improving diversity in the sector.

## **Question 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.**

45. In our answers to questions 1, 3, 6, and 13, we have explained how large numbers of providers have withdrawn from civil legal aid because delivery under the scheme is unnecessarily complex, paid poorly and only available for limited types of work. In our response to this question, we will explain how those effects obstruct individuals from accessing civil legal aid services.

46. Broadly, individuals seeking to access civil legal aid face three barriers: there are not enough providers to meet demand for services; some of those who most need access to services are not eligible for them; and some services offered under civil legal aid is of too low a quality to effectively help those who need it.

### **Not enough civil legal aid providers.**

47. As explained in paragraph 1 of our response, most of our legal aid research has focussed on the immigration and asylum sector. In our response to question 1, we explained that provision in this sector has effectively collapsed. As a result, when somebody seeks immigration and asylum support and is referred for legal aid, they will often not have access to it.<sup>23</sup> Or at least, that access will not be timely. For example, in 2022, PLP conducted an online focus group with members of Migrants Organise (a membership organisation for individuals affected by the hostile environment immigration policies) to understand how the legal aid regime is being

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<sup>23</sup> Daniel Rourke, Ed Cripwell, Joseph Summers and Jo Hynes (2023) Access to immigration legal aid in 2023: An ocean of unmet need. Public Law Project. Available at: <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>



experienced.<sup>24</sup> Every single participant talked about delays in the progress of their case associated with difficulty in finding legal aid funded representation for which they were eligible.

48. How difficult it is to find an immigration and asylum legal aid provider varies according to where someone is seeking support and what they are seeking support for. PLP's report 'An Ocean of Unmet Need' (2023)<sup>25</sup> documented how experiences of trying to access immigration legal aid differs by procurement area. The situation was worst in two areas: the North West and South West.
49. When providers in the North West were contacted with referrals, none had capacity for the foreseeable future. The Red Cross in Liverpool, for example, reported they alone make more referrals (responding to between 50 and 60 inquiries a week) than there is local capacity to support. Dr Jo Wilding estimated that, in 2022, there was demand for providers to open a further 6,470 matter starts but no provider capacity to actually do so.<sup>26</sup>
50. In the South West procurement area, at least six providers have closed in the past two years, leaving only four to five providers covering an area where there are 4,603 asylum-seekers.<sup>27</sup> We now estimate that there are fewer than 300 matter starts available annually in the South West.<sup>28</sup> Accordingly, individuals in these areas who seek legal aid support are unlikely to be able to find any.

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<sup>24</sup> Jo Hynes (2023) Overstretched & unsustainable: a case study of the immigration and asylum legal aid sector. Public Law Project. Available at: <https://younglegalaidlawyers.org/wp-content/uploads/2023/04/YLALPLP-Report-April-2023.pdf>

<sup>25</sup> Daniel Rourke, Ed Cripwell, Joseph Summers and Jo Hynes (2023) Access to immigration legal aid in 2023: An ocean of unmet need. Public Law Project. Available at:

<https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>

<sup>26</sup> Jo Wilding (2022) No access to justice: how legal advice deserts fail refugees, migrants and our communities. Refugee Action, p. 103. Available at: [https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/62a1e16cba8478993c7d512c\\_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf](https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/62a1e16cba8478993c7d512c_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf)

<sup>27</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1156826/section-95-support-local-authority-datasets-mar-2023.xlsx)

<sup>28</sup> Daniel Rourke, Ed Cripwell, Joseph Summers and Jo Hynes (2023) Access to immigration legal aid in 2023: An ocean of unmet need. Public Law Project, p. 27. Available at: <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>

51. Individuals with certain types of cases are also less likely to be able to access immigration legal aid. In our response to question 13 below, we have explained why providers are disincentivised from using the ECF mechanism. As a result, individuals whose problem is out-of-scope for legal aid but whose fundamental rights are at risk face a greater barrier to access. The following example is a real case, which was documented in PLP's report 'An Ocean of Unmet Need' (2023).<sup>29</sup>
52. A woman in her fifties, who appeared to be a victim of modern slavery, was advised by Haringey Migrant Support Centre on 3 May 2022. She was advised to seek a referral to the National Referral Mechanism and made an application based on very significant obstacles to reintegration. No solicitor was found. She was detained on 14 June 2022 and claimed asylum in detention. She was forced to find the money to pay a private solicitor. In August 2022, she received a positive decision finding that there were reasonable grounds for believing that she might have been a victim of modern slavery. She still had no legal aid solicitor and could no longer afford her private solicitor. The Home Office refused her asylum application on 5 December 2022. A private solicitor helped her submit an appeal pro-bono but the quality of their work was poor. The appeal was declared invalid. By the time she found a legal aid solicitor, on 9 February 2023, the appeal deadline had passed. Her legal aid solicitor helped her make an out of time appeal. It took her 9 months to find a solicitor, even though she was in the National Referral Mechanism.
53. This illustrates that even where someone is eligible for immigration legal aid, they are regularly denied access to it because there are not enough providers. Lack of provision is not, however, the only barrier to entry. Our litigation experience detailed below demonstrates that restrictive legal aid eligibility criteria presently obstruct access for some of the individuals who most need it.

### **Restrictive Eligibility Criteria**

54. In the last three years, PLP has conducted litigation to ensure access to legal aid for low-income domestic violence survivors and children in care/care leavers. All of the following successful judicial reviews were only possible because PLP acted pro-bono and secured indemnification against adverse cost risks from the Law Society for our

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<sup>29</sup> Ibid, p. 18.

clients. In each case the Lord Chancellor or the Director of Legal Aid Casework (DLAC) had opportunities to resolve the matter at the pre-action stage but did not.

55. R (GR) v DLAC [2020] EWHC 3140 (Admin)<sup>30</sup> - GR, a low-income homeowner, was refused legal aid in a family court case as she didn't satisfy the means test due to the capital in her home. She was unable to sell the home to pay for a lawyer as it was jointly owned by her abusive ex-partner, who would not have agreed to the sale. The High Court held that the DLAC had a discretion to disregard 'trapped capital' from the means assessment if necessary to ensure compliance with the principle of access to justice and GR's Convention rights. As a result, GR and numerous other women with 'trapped capital' have been able to access legal aid.

56. R (RH) v DLAC [2020] (unreported as settled pre-hearing) - RH was unable to access legal aid due to owning a home despite it being heavily mortgaged and her being in receipt of Universal Credit. Her challenge led to the Lord Chancellor laying regulations so that now the full value of a person's mortgage is deducted by the Director of Legal Aid Casework when assessing the value of their property for the purposes of the means test.

57. R (WA) v DLAC and Lord Chancellor [2023] EWHC 689 (Admin)<sup>31</sup> - WA – a student and single parent - was refused legal aid by the DLAC on means grounds, applying guidance which said a child could be only considered as part of one household. As WA's son lived with her ex-partner most of the time (something that was in breach of the 50/50 child custody arrangement she was seeking to enforce in the family proceedings), WA was assessed as having higher income than was, in fact, the case. This was because no account could be made for the cost of a second bedroom needed for her son to live in when not with his father. Following the challenge, WA was granted legal aid and the Lord Chancellor has changed his guidance on separated parents so now both parents can be treated as having a child in their household.

58. R (CR) v DLAC (2021) (unreported as settled pre-hearing) - the foster parents of CR – a severely disabled child in care – were denied legal aid to bring a Special Educational Needs Tribunal appeal on her behalf concerning an unsuitable school

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<sup>30</sup> Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2020/3140.html>

<sup>31</sup> Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2023/689.html>

placement. The foster parents, who were in the process of trying to adopt CR, had their means assessed by the DLAC despite the fact they did not have full parental responsibility for her. Following the case, the Lord Chancellor amended his regulations so now foster carers or prospective adoptive parents of looked-after children will no longer be means tested when they apply for 'legal help' (initial advice and support) or 'legal representation' in a SEND Tribunal appeal.

59. In each of these cases, the individuals concerned had to engage in separate legal proceedings to secure access to legal aid. Additional litigation compounded the stress and emotional toll that these individuals were already suffering. Therefore, the restrictive approach that is taken to legal aid eligibility requirements presents an additional barrier to some of the individuals most in need of legal aid.

### **Quality of Service**

60. Our responses to questions 1 and 3 explained that to provide a high-quality service under the legal aid regime, dedicated actors, in exchange for stagnant pay, regularly work long, additional, unremunerated hours. Unfortunately, our research indicates that a small number of legal aid providers are unable to provide such a service.

61. In PLP's report 'An Ocean of Unmet Need',<sup>32</sup> a number of organisations who refer clients to legal aid providers raised this concern. Haringey Migrant Support Centre reported that they had experienced low-quality representation putting visitors at an increased risk of destitution, detention, or removal.<sup>33</sup> As a result, those visitors felt that they were unable to protect their families and children from the same harms.

62. Migrants Organise reported that solicitors had been taking much longer to progress cases and were more regularly off sick.<sup>34</sup> They also reported that more members had stated to turn to private firms to take on their cases, even when they are ostensibly eligible for legal aid. Those firms, in the experience Migrants Organise, often conduct poor work and members who go to them regularly return to Migrants Organise asking for a referral. Typically, their cases have often progressed unsatisfactorily and it becomes even more difficult to refer for legal aid. Therefore, even when someone does access legal aid they might not receive the level of service that they expect.

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<sup>32</sup> Daniel Rourke, Ed Cripwell, Joseph Summers and Jo Hynes (2023) Access to immigration legal aid in 2023: An ocean of unmet need. Public Law Project. Available at: <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>

<sup>33</sup> Ibid, p. 15.

<sup>34</sup> Ibid, p. 15.

63. In summary, legal aid is poorly remunerated and difficult to provide. As a result, individuals most in need of legal aid struggle to access it: there are not enough providers and the requirements for eligibility are enforced restrictively. Where someone does access legal aid, they are likely to receive a dedicated service from a hardworking lawyer. Unfortunately, some will not. Their provider might be one of the few whose service is unsatisfactorily low.

### Question 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.**

64. ECF was intended to offer a 'safety net' to ensure that legal aid would still be available where the European Convention or European Union law rights of individuals would otherwise be breached. The need for such a safety net was acute in the context of the broad cuts to legal aid introduced under LASPO 2012, as the Act removed many types of case from the scope of legal aid. We do not consider that the ECF scheme is currently operating in a way that effectively provides this safety net.

65. A survey of 89 practitioners we conducted in 2020 provides an indication of why the ECF scheme is currently not working.<sup>35</sup> The survey results showed that 77% of respondents disagreed that ECF is effective in ensuring that people can access legal aid when it is needed (61% 'strongly disagreed') and nearly 50% of respondents have only made between 1 and 5 applications since the scheme was introduced. Providers reported a range of reasons for not using the scheme. These included:

- the risk of not being paid, particularly where resources are stretched and the applications are not cost effective;
- previous applications being refused; and
- the application process being off-putting, particularly due to it being time consuming.

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<sup>35</sup> Joe Tomlinson and Emma Marshall (2020) Improving Exceptional Case Funding: Providers' Perspectives. Public Law Project. Available at: <https://publiclawproject.org.uk/content/uploads/2020/01/Improving-Exceptional-Case-Funding-Website-Publication-Version-docx.docx.pdf>

66. Recent research<sup>36</sup> we have conducted also indicates that certain types of cases, in particular work that would require a grant of ECF, are harder to find providers for. In fact, multiple providers reported that they have stopped taking on work that would require ECF altogether because of the associated administrative burden. Many of those that do perform this type of work only do so where they have existing relationships with the individuals concerned. As a result, individuals whose case falls outside of the normal scope of legal aid, but who are nonetheless eligible to receive it, are unable to access funding. This is particularly concerning given that such cases, by definition, occur where individuals' fundamental rights appear to be at risk.

67. Since LASPO came into force, the number of ECF applications for immigration legal aid, and the grant rate, has gone up significantly. There were 2,264 immigration applications made in the 2022/2023 financial year and 87% of those applications were successful.<sup>37</sup> Given these high grant rates, we suggest there is a clear case for broadening the scope of legal aid, particularly for human rights immigration cases based on the right to respect for private and family life under Article 8 of the European Convention on Human Rights.

68. In addition to broadening the scope of legal aid to reduce unnecessary hurdles for cases that are highly likely to be given ECF, we suggest the following improvements to the ECF scheme:

- The ECF application process and evidence required should be simplified so that if needed, individuals can obtain ECF without specialist support.
- Contactable LAA caseworkers should be assigned to applications.
- The scheme should be financially viable for providers.
- Providers should have increased delegated powers to determine eligible ECF controlled work cases without the need to make an application to the DLAC.

## Question 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**

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<sup>36</sup> Daniel Rourke, Ed Cripwell, Joseph Summers and Jo Hynes (2023) Access to immigration legal aid in 2023: An ocean of unmet need. Public Law Project. Available at: <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>

<sup>37</sup> Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1166010/legal-aidstatistics-tables-jan-mar-2023.ods](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1166010/legal-aidstatistics-tables-jan-mar-2023.ods)

**and thoughts on how the system could make the most effective use of remote advice services and the implications for services of this.**

69. Remote legal advice can assist people in accessing civil legal advice, particularly those living in advice deserts. However, we remain concerned that its use will present significant obstacles for some people (the focus of the following question) and the current operation of remote advice schemes remain lacking.

70. PLP does not object to remote advice provision in itself, subject to our response to the following question that there are many situations in which remote provision will not be appropriate and it should exist as an alternative to face-to-face provision rather than as a substitute for it. We are however concerned by remote provision being used to address sustainability issues in specific procurement areas: for example, through the operation of a South West list for remote access immigration and asylum legal aid providers. Such an approach merely risks pushing existing capacity problems from one area to another.

71. Whilst capacity shortages are particularly acute in legal aid deserts,<sup>38</sup> capacity is lacking in the civil legal aid sector everywhere. The under-provision of immigration and asylum legal aid in the South West procurement area cannot be mitigated through the provision of remote advice by providers located in other regions, as there is no surplus of provision elsewhere in the system and remote delivery of advice is unsuitable for some individuals. In addition, any capacity used by an out-of-area provider becomes unavailable for use in their own geographical area, potentially leading to the denial of access to justice in those areas instead.

## **Question 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?**

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<sup>38</sup> Jo Wilding (2022) No access to justice: how legal advice deserts fail refugees, migrants and our communities. Refugee Action. Available at: [https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/62a1e16cba8478993c7d512c\\_No%20access%20to%20justice%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf](https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/62a1e16cba8478993c7d512c_No%20access%20to%20justice%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf)

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

Please provide any specific evidence or data you have that supports your response.

72. Barriers with regard to the use of technology exist for both providers and users of civil legal aid. With respect to providers, research conducted by Ceri Hutton is particularly instructive.<sup>39</sup>

73. With respect to users of civil legal aid, significant barriers exist to the use of technology to conduct complex, emotionally draining exchanges, often involving complicated documents, paperwork and interpreters. Even those who meet the UK Consumer Digital Index's<sup>40</sup> threshold of a Foundation Level of digital skills and are able to use technology to conduct routine tasks, such as browsing the internet, will not necessarily be comfortable with using technology to access legal advice.

74. Remote provision will not be suitable for some individuals due to their vulnerability, trauma, age, or their Equality Act characteristics or needs. There are key groups who face particular barriers in accessing remote advice and for whom remote legal advice is often not appropriate.

75. For example, people who have limited English language literacy, and/ or who require an interpreter face additional barriers to this method of advice delivery. A report by Sophia Taha Hayat and Jude Hawes found that '[l]iteracy / English language proficiency is a significant barrier to remote access for some client groups.'<sup>41</sup> They concluded that these people would still require an in-person service option.

76. People who are in digital poverty and/or have poor digital literacy may also face barriers. A report by Ceri Hutton<sup>42</sup> found that a '[l]ack of client skills, confidence and

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<sup>39</sup> Ceri Hutton (2022) How the remote delivery of immigration advice evolved during Covid. Paul Hamlyn Foundation. Available at: <https://justice-together.org.uk/wp-content/uploads/2022/06/How-the-remote-delivery-of-immigration-advice-evolved-during-Covid-FINAL2.pdf>

<sup>40</sup> Lloyd's Bank (2023) UK Consumer Digital Index. Available at: [https://www.lloydsbank.com/assets/media/pdfs/banking\\_with\\_us/whats-happening/231122-lloyds-consumer-digital-index-2023-report.pdf](https://www.lloydsbank.com/assets/media/pdfs/banking_with_us/whats-happening/231122-lloyds-consumer-digital-index-2023-report.pdf)

<sup>41</sup> Sophia Taha Hayat & Jude Hawes (2021) Locked Out: Barriers to Remote Services. Citizens Advice Staffordshire North & Stoke-on-Trent, p. 19. Available at: <http://www.snsCab.org.uk/assets/Reports/Locked-Out.Final.pdf>

<sup>42</sup> Ceri Hutton (2022) How the remote delivery of immigration advice evolved during Covid. Paul Hamlyn Foundation. Available at: <https://www.phf.org.uk/publications/how-the-remote-delivery-of-immigration-advice-evolved-during-covid-the-digital-and-capacity-implications-of-this->



language or literacy to effectively use technology' was a key challenge in the provision of remote immigration legal advice. They found digital exclusion to be a limiting factor in the effectiveness of remote advice across all client groups and that it was an exacerbating factor for people with limited or no English language skills.

77. The characteristics of these groups are likely to be strongly represented in the cohort of people needing immigration and asylum advice. The report by Sophia Taha Hayat and Jude Hawes found that the three client groups whose contact with Citizens Advice had dropped the most significantly during a shift towards remote services were asylum seekers, refugees, and migrants with No Recourse to Public Funds.<sup>43</sup> Such individuals, where they are reliant on asylum support, might not be able to afford reliable internet or sufficient mobile data on their phones.<sup>44</sup> Furthermore, some such individuals might not have access to a private location for personal calls.<sup>45</sup> It is therefore likely that immigration and asylum law is a category where the use of technology would be particularly challenging.

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<sup>43</sup> Sophia Taha Hayat & Jude Hawes (2021) Locked Out: Barriers to Remote Services. Citizens Advice Staffordshire North & Stoke-on-Trent, p. 19. Available at:

<http://www.snsCab.org.uk/assets/Reports/Locked-Out.Final.pdf>

<sup>44</sup> Asylum Matters (2023) Surviving in poverty: A report documenting life on asylum support, p. 6. 58% of respondents reported that they were not able to buy all the mobile data and credit they needed and a further 30% reported that they were only sometimes able to.

<sup>45</sup> See for example Helen Bamber Foundation (2023) Ghettoised and traumatised: the experiences of men held in quasi-detention in Wethersfield, p. 13.



Public  
Law  
Project

## **About us**

Public Law Project is an independent national legal charity.

We are researchers, lawyers, trainers, and public law policy experts.

For over 30 years we have represented and supported individuals and communities who are marginalised through poverty, discrimination, or disadvantage when they have been affected by unlawful state decision-making.

Our vision is a world where the state acts fairly and lawfully. Our mission is to improve public decision making, empower people to understand and apply the law, and increase access to justice.

We deliver our mission through casework, research, policy advocacy, communications, and training, working collaboratively with colleagues across legal and civil society.

Public Law Project contributes and responds to consultations, policy proposals, and legislation to ensure public law remedies, access to justice, and the rule of law are not undermined.

We provide evidence to inquiries, reviews, statutory bodies, and parliamentary committees and we publish research and guides to increase understanding of public law.

Public Law Project's research and publications are available at:

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