

## Islington Law Centre and the Migrant and Refugee Children's Legal Unit

### Response to the Ministry of Justice

#### Consultation on Legal Aid Fees in the Illegal Migration Bill

7 August 2023

*The focus of the consultation is how legal aid services to people served with a removal notice will be remunerated. The consultation document first outlines the proposal that hourly rates for work undertaken pursuant to Clause 55 of the IMB be up to 15% higher than existing immigration hourly rates.*

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

No. The proposed changes do not take account of, nor do they go any way towards addressing the ongoing crisis in immigration legal aid. Due to existing pressures on the sector, the proposal to pay higher fees for IMA work will neither incentivise providers to take on this work nor does it go any way towards remedying the lack of capacity for any other type of asylum/immigration work. To ensure high quality provision of legal advice for all migrant communities in the UK, a rate increase for all types of immigration and civil legal aid is urgently needed.

The current reality is that demand by far outstrips supply in the immigration legal aid. It is welcome that “capacity constraints within the immigration legal aid sector” are acknowledged in the Ministry’s consultation paper (paragraph 29); however, we do not accept that the proposed changes come even close to addressing the current capacity crisis. The scale of the problem has been documented in repeated reports by Dr Jo Wilding<sup>1</sup> and has also been recognised by the Law Society.

In response to the announcement of this consultation, Law Society president Lubna Shuja commented that, “There is a severe lack of capacity in the asylum and immigration sector, with many asylum seekers dispersed to areas with no legal aid provision, and a growing asylum backlog. [...] The proposed fee increase alone [...] is not going to address this capacity crisis.”<sup>2</sup>

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<sup>1</sup> A list of publications can be accessed here: <https://profiles.sussex.ac.uk/p341436-jo-wilding/publications>

<sup>2</sup> <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/illegal-migration-bill-last-minute-too-narrow-proposal-for-legal-aid><https://www.lawsociety>

Cuts to legal aid and legislation changing the scope of legal aid, most notably through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA), resulted in the dismantling of the legal aid sector, with individuals and firms leaving the legal aid sector such that large parts of the country are now advice deserts. The proposed changes fail to take into account let alone reverse the loss of providers to the sector. Any increase in rates for asylum/immigration work must be such that good quality providers are attracted to return or enter the sector, with a rate increase that ensures that one type of work is not prioritised over another.

Even if an increase in the rates up to 15% for IMA work only may improve the chances that newly arrived migrants have a greater chance of accessing legal representation, then the capacity of those same providers will be lacking for the provision of legal services to other migrant communities who are already struggling to access advice and representation. In other words, if a higher rate is paid for one type of work, this will likely incentivise at least some providers to prefer to take on this type of work with calamitous consequences in other areas of immigration legal aid.

We therefore believe that the proposed change could be counterproductive and reduce rather than increase access to justice, particularly, but not solely for those with complex claims and whose claims form part of the asylum backlog.

The proposal is premised on the need to “ensure fair and appropriate compensation for immigration and asylum legal aid providers for the new work introduced by the IMB” and the intention to “enhance capacity” is asserted throughout the consultation paper. Yet, the proposal to increase the fees for one small area of asylum/immigration work simply cannot address the ongoing capacity crisis. It is too little too late.

The immigration legal aid sector is at breaking point, and has been for several years, with serious consequences for individuals in need of representation and practitioners who are beyond stretched. We need structural changes to legal aid and a commitment from the government to ensure access to justice for all migrants.

***(In regard to 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?***

It is our position that a rate increase for all types of immigration legal aid fees is necessary. Any percentage increase will only be meaningful if it achieves sustainability across the sector, securing current providers and attracting new ones, in order to meet the demand and ensure access to justice for individuals in need of asylum/immigration advice irrespective of when they entered the UK. An increase of up to 15% percent, even if not restricted to IMA work, is inadequate and does not realistically increase capacity to meet demand.

For a meaningful evaluation of the rate for immigration legal aid fees as a whole, we believe that the following need to be taken into account:

- Legal aid fees have not increased since 1996. Rather, they were reduced in 2011 and have not been adjusted in line with inflation. Pinning any increase to the current rates is not going to deliver sustainability as those rates were set at an unsustainable level and have been cut each year due to the lack of inflationary increase. Any increase should reflect the reality of the cost of living and be sufficient to maintain the sector in a way that stimulates growth;
- A 'one-off' increase is not sustainable and therefore a commitment to a yearly inflationary increase to rates is essential to the prospects of enticing those who have left the legal aid sector to return and new providers to bid for contracts;
- The current low rates of pay mean that organisations are only able to offer salaries for lawyers that are not competitive which, in turn, adds to the problems with retaining current and recruiting new members of staff (see also questions 1 and 3);
- There is no recognition within legal aid rates that more experienced staff may be able to undertake work more quickly, which then results in it being uneconomic to employ individuals who have significant experience, as they will cost more in terms of salary, but would have to undertake a greater amount of work to generate the same income. Those individuals would also need to undertake supervision and development of junior staff;
- Whereas Certificated work permits 'uplifts' no such enhancements are currently available for Controlled work notwithstanding the exceptional competence, skill, expertise required for complex cases;
- Burn out has become a serious issue in the sector, and given the psychological impact of working with clients who are deeply traumatised, trapped in poverty, coping with very poor living conditions, pay needs to be at a rate that recognises this, and allows fee earners to have a workload that is manageable and allows sufficient time for self-care;
- Hourly rates are not the only issue, and the rates of pay for other essential services within the system (barristers, interpreters and other experts) need to be sufficiently competitive to retain individuals who are able to deliver quality services.

***Do you have any views on further measures that would help build capacity of the profession to complete IMA Work?***

We do not accept that only looking at work arising from the IMA is a viable response to the current pressures and tensions in the immigration legal aid sector. Building the capacity of the profession to complete IMA work requires building capacity across the sector and civil legal aid for the reasons stated above.

This is crucial as we the way in which we understand how IMA work will operate is that 'success' in relation to this part of a client's case would result in the individual exiting the IMA system. However, if other areas of asylum/immigration legal aid work is not properly funded and/or providers are not available to deliver it, then any investment made by the government in the IMA work would be for nothing if that same individual then could not access 'mainstream' immigration or asylum advice.

Further to the points already made in response to the questions above, we are also concerned that the government is already failing in its duty to provide access to justice for vulnerable individuals and the provision of immigration legal aid must be revised having regard to the government's Public Sector Equality Duty.

As it stands, the current proposal does not take account of who the individuals are that will be affected by the IMA; their backgrounds and needs are written out of the proposal. The government has shown no interest in or attention to the question of whether vulnerable groups require access (or better access) to legal advice, not just in the context of the IMA but for all types of asylum/immigration work. For at least the last decade, the government has not, to our knowledge, sought any information about where and by whom legal aid is needed most and has not made changes accordingly. This proposal only perpetuates this problem.

Without seeking this information and taking steps to address the capacity crisis in the immigration legal aid sector globally, we cannot see how the government can build capacity in the sector to carry out IMA work.

For IMA and asylum/immigration work as a whole interpretation and translation services are indispensable. There has, however, not been a real increase for interpreter fees and a failure to address this not only contributes to the wider issue of viability of the sector but also pushes individuals and organisations providing such services to a dangerous edge of pay rates verging on exploitative, with consequences for individuals who are highly likely to be from refugee and migrant backgrounds.

Interpretation and translation fees need to be increased so that practitioners can afford to access professional supervision and also counselling which is vital given the traumatic information that they have to hold when working on asylum/immigration cases. It is not unlikely that individuals have themselves been through traumatic experiences resulting in them coming to live in the UK, if they are providing translation services for a nationality that has a high number of individuals claiming asylum.

In addition, funding needs to be invested in professionals who wish to enter, qualify and stay within the sector. Such funding needs to be two-pronged: covering the costs of training and accreditation for new entrants; and the prospect of more competitive salaries for those who have qualified and are going to or already have built their career in the sector making it financially and psychologically sustainable to stay.

Retention and recruitment of qualified staff has become a major obstacle for us as a provider. A survey of junior practitioners conducted by the Young Legal Aid Lawyers and the Public Law Project, published in April 2023, found that career trajectories in the sector are dim, with significant numbers of practitioners having either already left or taking a break,

and more were planning to leave in the near future (19% of interviewees said they would leave within five years).<sup>3</sup>

Finally, a reduction in the heavy administrative burden associated with legal aid would free up providers' resources which can then be dedicated to providing legal advice and assistance. At present, significant time is required to comply with the demands imposed by the Legal Aid Agency (LAA) at all stages of opening, working on and closing a legal aid matter, from obtaining evidence of means to time-consuming applications to extend costs limits and the need for specialist knowledge to bill files, with added pressures on providers' cashflow due to payment of disbursements only after the event.

It would be more effective if interactions with the LAA in relation to assessment of means, use of disbursements (including extension requests for these and for case financial limits), and in assessing claims were carried out in a more co-operative and collaborative manner on the part of the LAA.

In our view, at least for Category 1 and 2 rated Peer Review providers, a simplification of the administration of legal aid and a more provider-friendly approach by LAA teams would go a long way to enhance providers' capacity.

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

No. In the event that the proposed changes to pay a higher rate for IMA work are brought in, they should be reviewed sooner than two years and in parallel with an urgent system-level evaluation of the Lord Chancellor's duties under Section 1 LASPOA 2012 for the reasons detailed in response to the questions above.

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<sup>3</sup> <https://younglegalaidlawyers.org/wp-content/uploads/2023/04/YLALPLP-Report-April-2023.pdf>