



Bar Council response to the Ministry of Justice consultation on Legal Aid Fees in the Illegal Migration Bill

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice (MoJ) consultation on Legal Aid Fees in the Illegal Migration Bill. ¹
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. The Bar Council has previously expressed grave concerns about the framework contained in the Illegal Migration Bill itself, one of the consequences of which is the likely significant increase in the need for legal aid at a very early stage and within a very short timescale to ensure access to justice for vulnerable individuals is not lost altogether. Additionally, the Bar Council has serious concerns about the workability of this scheme, given the shortage of qualified legal aid providers in the relevant proposed geographical locations to undertake this important, complex and urgent work. There is already a huge strain on this sector and pressure and significant underfunding, particularly given the lack of any increase in legal aid rates for many

¹ https://consult.justice.gov.uk/digital-communications/legal-aid-fees-in-the-illegal-migration-bill/supporting_documents/legalaidfeesillegalmigrationbill.pdf

years. This has had and will have an adverse impact on access to justice and the rule of law. Moreover this is by contrast with other areas of legal aid.²

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

5. Yes.

6. We recognise that carrying out this work would generally require an additional uplift on standard legal aid fees due to its difficult and stressful nature, the speed, complexity and novelty of the legal framework, and the vulnerability of the client base. This is the case both at the point of initial instruction and when preparing for any appeal. In addition, account needs to be taken of the difficulty providers will have in accessing this client base, who will mainly be in detention. Where people are not detained but accommodated in remote accommodation centres such as RAF bases and barges, there are likely to be difficulties and costs in travelling to and from these locations for both providers and clients. Access to advice will be subject to the availability of local provision, with appropriate expert services likely to be very strained.

7. This agreement with the need for an uplift, however, should be set against the context of our position more generally that there is a need for an increase in fees across the board for civil legal aid, albeit we recognise that there are features of this particular work which justify additional remuneration, as with other areas of asylum work.

8. We are also concerned, as outlined below, that given the absence of any spare capacity in the immigration legal aid sector, an increase in fees at this level to incentivise providers to take on work under the IMB will simply move capacity away from other important work. The proposed increase is not sufficient in our view to lead to an increase in capacity more generally.

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?

9. The Bill has fundamental impacts on access to justice which we do not consider can be remedied by a small increase in fees.

10. We note from the consultation paper that the 15% figure was suggested by practitioners. Although the Bar Council was not involved in the discussions referenced, our understanding is that this increase was suggested as an interim,

² For example public law family cases and high costs cases there

emergency rise to support the provider base, pending the outcome of the Review of Civil Legal Aid. It is understood to have been based on the recommendation of the Bellamy review of an immediate 15% uplift for criminal legal aid work (which recommendation of course preceded the recent high levels of inflation). It was never suggested or expected that 15% would be a sufficient increase in the long- or even medium-term to secure the existing provider base, let alone increase capacity to take on new work. In our view, as set out above, it is not adequate.

11. However, if the only option under consideration were to be an increase of up to 15% for this work, then we consider that the uplift should be at the top end of this range i.e.15%.

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

12. It is not possible to separate the question of IMB work from the question of building capacity for publicly funded immigration work more broadly. As the rates relate to overall levels of capacity shortfall, this shortfall must be addressed.

13. Legal aid should be raised across the board to increase capacity and make this area of practice financially sustainable. An increase of 15% is not adequate for that purpose. Rates have not risen for many years. This real-terms cut in income is a critical factor in the decimation of the immigration legal aid provider base. Unless urgent steps are taken to address this across the range of immigration legal aid work (indeed across civil legal aid in general), there will not be sufficient capacity to take on the additional, important and urgent work now required on a large scale by the impact of the terms of the Bill as enacted.

14. Currently, rules for lawyers travelling to detention sites will not apply to those in accommodation centres. There are practical obstacles to clients in accommodation centres travelling to providers' offices and providers cannot afford to bear the financial risk of travelling to see clients in remote locations. Lawyers should be properly remunerated for travelling and waiting in accommodation centres in line with those travelling to detention centres.

15. On capacity more generally, and the loss of providers: there are 217 provider offices listed, as of 21 June 2023 (though this list still includes some offices which have closed). This is the lowest figure since 2007-08 and represents a continuing loss, with 11% of offices withdrawing in the 12 months to June 2023, and a loss of 109 offices or one third of all offices given contracts in September 2018.

16. Aside from the simple loss of providers, a number of other factors impact on capacity. In particular:

- a. Providers aiming to provide high-quality representation generally limit the number of legal aid cases they take on because the fixed fee scheme means they lose money on almost every case. That means they limit the amount of legal aid work to the amount that they can cross-subsidise from other income sources. The amendment of the escape threshold to double, rather than triple, the fixed fee should improve the financial losses but a) it will not eradicate them, especially given the rate of inflation, and b) it is not possible to rapidly expand teams even if they could afford to, because of the recruitment crisis and the long lead-in time for a new staff member to begin earning money, given the lag in receiving payments and the need for new legal aid caseworkers to obtain accreditation under the Law Society scheme, which takes at least 2-3 months.
- b. Providers have shifted capacity into immigration-focused public law rather than pure immigration work, or have focused on work for unaccompanied children, which is paid at hourly rates and enables them to do the quality of work they want to do for a particularly vulnerable client group. This should be borne in mind in any consideration of offering higher payment rates for one particular work stream.

17. High-volume providers including Albany in Bristol and South Wales have recently withdrawn because of cash flow problems (as explained in their letter to clients). The delays in the asylum process mean that they wait a long time for payment when the case closes. The Legal Aid Agency has attempted to address this by bringing forward the point at which they can bill for the fixed fee, to the point at which they have done at least the amount of work covered by the fixed fee. This is on the basis that there is not a substantial amount of work in progress on the case if they have only done 2-3 hours' work on it.

18. However, higher-volume providers may have 2-3 hours' work in progress on two, three or four hundred open cases, amounting to a very substantial volume of work in progress for which they cannot bill. Each individual case does not exist in isolation. Moreover, in most asylum cases the work which needs to be done at the early stage of the case will have crossed the escape threshold often by many multiples and yet it is not possible to bill for more than the fixed fee until the case is concluded. This means that providers may have large work in progress balances on asylum matters where they are unable to bill due to long delays in Home Office decision making.

19. Two important points follow from that:

- Although the fees for all immigration work need to be raised urgently, and although it is reasonable to add an uplift for urgent or challenging work, or work involving additional travel or waiting, it is also essential to rethink the mode of payment, and move away from the default payment in arrears on closure of the case.
- The sector has now lost a large number of providers, including high-volume providers. Practitioners have moved into other jobs and accreditations may have lapsed. It is not possible to simply switch the supply back on. There is a recruitment crisis and there will be a lead-in time to replenish the profession so that capacity can be restored. However, the longer the attrition continues, the more difficult it will be to restore it.

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.

20. No

21. In our view two years is too long to wait for a review. We would suggest an interim review after six months. The operation of this scheme must also form part of the civil legal aid review. The scheme envisaged by the legislation is unprecedented and will have a vast impact on access to justice and on the delivery of legal services to this vulnerable client group. For the reasons set out herein, this will be happening in the context of an already grave shortage of advice provision. The precise impacts cannot be predicted with any confidence, particularly given the uncertainty arising from the ongoing Rwanda litigation. Clients will need advice on a number of areas including admissibility, human rights claims in relation to proposed third countries, suspensive claims and habeas corpus applications. Given the legislative scheme, this advice will need to be given immediately (the Bill allows 8 days for a suspensive claim to be raised after service of a removal notice). In these circumstances, not reviewing the operation of the scheme for the first two years is, in our view, a wholly unsustainable position to take. Meaningful early review is critical.

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]

22. The first and most significant issue is an absence of meaningful data. The Equalities Statement identifies two 'pools' of individuals affected by the proposals: immigration legal aid providers and clients. In relation to the first pool (providers),

the information relied on in the Equality Impact Assessment and Equalities Statements dates back to a 2015 survey of 644 legal aid providers carried out by the Legal Aid Agency; the survey covered less than a third of providers at that stage, focused only on owners/managers of firms, and did not include counsel. The survey does not appear to have differentiated between legal aid providers providing immigration advice and representation, and those providing other types of civil legal aid services. Similarly, the data used to estimate the impact on the Bar uses 2023 data from across the justice system, including those not practising in immigration or asylum law and those not practising in legal aid; it is highly unlikely to provide meaningful data as to the impact on immigration and asylum barristers funded by legal aid. The lack of accurate or up to date data on immigration legal aid providers and barristers hinders an effective Equality Impact Assessment. It is also surprising, in light of the fact that the duty to provide equality and diversity information about providers' staff and clients to the Legal Aid Agency is a standard term in LAA provider contracts.

23. The 2021 Legal Aid Census conducted by the Legal Aid Practitioners Group³ collated equality data from legal aid providers (including both solicitors and barristers). It noted that in March 2021 the number of civil legal aid provider firms had dropped to 1,445 (approximately two-thirds of that in the 2015 LAA survey). 10% of respondents were practising in immigration and asylum either solely or with other practice areas, and 13.9% of respondents held a legal aid contract in immigration and asylum. Data from respondents showed that 60.9% of legal aid practitioners were female, and 14.6% were from Asian, Black, or mixed ethnicities. 9% of respondents were disabled. Of chambers respondents, 21.9% were practising in immigration and asylum.

24. Whilst the LAPG survey was not focused on the provision of immigration and asylum legal aid services, it provides more helpful and up to date data on the makeup of legal aid practitioners (rather than owners or managers of firms) and hence on those protected characteristic groups most likely to be disproportionately affected by the proposed changes. The LAPG data suggests that there is likely to be a disproportionate impact on women, who represent the majority of legal aid practitioners.

25. 2022 diversity data from the Bar Standards Board⁴ indicates that female barristers are disproportionately likely to be junior barristers (40% of all juniors) than KCs (19%). Similarly, Black barristers represent 3.4% of junior barristers but only 1.3% of KCs; the proportions for Asian barristers are 7.6% and 4.7% respectively. Minority

³ https://lapg.co.uk/wp-content/uploads/We-Are-Legal-Aid_Findings-from-the-2021-Legal-Aid-Census_Final.pdf

⁴ <https://www.barstandardsboard.org.uk/uploads/assets/8e1b9093-b2f7-474f-b5faa3f205d26570/BSB-Report-on-Diversity-at-the-Bar-2022-FinalVersionv2.pdf>

ethnicities represented 15% of junior barristers but 10% of KCs. Because counsel instructed in Tribunal appeals (including the suspensive appeals process in the Illegal Migration bill) are more likely to be junior, the barristers affected by the proposed changes are more likely to be female and/or minority ethnic than the proportions of those groups at the Bar as a whole.

26. As the Equalities Statement recognises, immigration and asylum legal aid clients are disproportionately likely to be from an ethnic minority background and hence to be disproportionately affected by the proposed changes. In addition, there is significant data (not referenced in the Statement) indicating that refugees and asylum seekers are more likely to have long-term mental illness or physical conditions than the general population and that immigration detention also has a significant impact on long-term mental illness; children, women and LGBTQ individuals are disproportionately likely to be affected⁵. Legal aid asylum and immigration clients being provided with services under the Illegal Migration Act are therefore more likely to be disabled for the purposes of the Equality Act 2010 and there is likely to be a cumulative intersectional effect for some disabled individuals.

The Bar Council

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For further information please contact

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

Email: ELamarque@BarCouncil.org.uk

⁵ see, e.g. guidance from the Royal College of Psychiatrists (<https://www.rcpsych.ac.uk/international/humanitarian-resources/asylum-seeker-and-refugee-mental-health>); a recent briefing from the Helen Bamber Foundation (<https://www.helenbamber.org/sites/default/files/2022-09/Impact%20of%20detention%20research%20summary%20Final.pdf>)