

Review of Civil Legal Aid Consultation Response

February 2024

The Helen Bamber Foundation (HBF) is a specialist clinical and human rights charity that works with survivors of trafficking, torture and other forms of extreme human cruelty and believes that all survivors should have safety, freedom and power. Our multidisciplinary and clinical team provides a bespoke Model of Integrated Care for survivors which includes medico-legal documentation of physical and psychological injuries; specialist programmes of therapeutic care; a medical advisory service; a counter-trafficking programme; housing and welfare advice; legal protection advice; and community integration activities and services. Asylum Aid, part of the Helen Bamber Foundation group, provides high quality legal representation to some of the most vulnerable people seeking asylum in the UK, including but not limited to: children, survivors of trafficking, and stateless people.

Introduction

The scope of this response is discreet and relates to HBF's experience of:

- clients who are represented by legal aid representatives in respect of their asylum and/or trafficking claim under an immigration contract;
- access to justice following implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), including the availability of legal aid, quality of legal representation and access to early legal advice;
- the impact of Covid-19 and move to remote ways of working both by the Home Office and legal representatives; and
- anticipated challenges and recommendations regarding the provision of remote legal advice.

Whilst much of our response to this consultation relates to our experience at HBF, we refer the reader to the seminal report of Dr Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market*, which assesses the supply and demand of legal aid, following the implementation of LASPO which has resulted in the exponential increase of advice deserts and droughts in large areas of England and Wales.¹

Increasing numbers of advice deserts and droughts compounds issues of capacity and overwhelm for those remaining within the immigration sector. Coupled with the very real reduction in legal aid fees and lawyers leaving the profession in their droves,² it is unsurprising

¹ <http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>

² <http://www.younglegalaidlawyers.org/sites/default/files/Soc%20Mob%20Report%20-%20editcad.pdf>

that LASPO's implementation has adversely affected clients' access to justice and the quality of representation.³ We note that these issues are not exclusive to immigration law, indeed the Bach Commission found that LASPO has 'seriously damaged the functioning of the justice system, especially for those most in need'.

HBF's interaction with legal aid

A key component of our holistic model of specialist care, is legal protection. In practical terms this means offering legal support to a client in collaboration with their lawyer. The majority of HBF clients have legal representation funded by legal aid. However, our 2023 acceptance data shows that approximately 37% did not have legal representation despite being eligible for legal aid.⁴ Extrapolated across the sector, this suggests that of those who meet our criteria and form part of our core client group, over 1/3 do not have representation under legal aid. However, that is probably an underestimate, as identified by Dr Jo Wilding in a November 2022 blog post which found that approximately 50% of asylum applicants were unable to access legal aid representation.⁵ Where a client does not have a lawyer or where they are no longer able to afford a privately paid lawyer, the legal team prepare a referral to a legal aid representative. This can often be a time-consuming process owing to the vagaries of a solicitor's capacity; the volume of papers to be obtained (i.e. by way of a subject access request to the Home Office) and organised and the gathering of documentation to demonstrate that the client is eligible for legal aid. Additionally, we provide a legal summary of the client's history in order to aid the representative in quickly understanding the basis of the claim for international protection, which may help to secure their interest in taking the case on. We find that without preparing a referral in this way, the case is much less likely to be taken on by a legal aid representative. We believe access to justice should be a human right that is guaranteed; however charitable funds and resources are expended in order to ensure good quality legal aid representation is secured thus fillings gaps in the sector created as a direct result of LASPO.

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

In collaboration with previous sector responses and in line with the consultation response prepared by the Immigration Lawyers Practitioners' Association (ILPA), with whom we agree and support entirely, our top line asks include:

- Increasing rates;
- Reverting to hourly rates;
- Improving the bureaucracy around legal aid contracts, audit and billing.

Further detail is set out below:

³ <https://www.lawcareers.net/Explore/Features/25022020-Is-a-career-as-a-legal-aid-lawyer-viable-in-2020>

⁴ It is not always clear why someone eligible for legal aid chooses to pay for their legal representation but in some cases this is because there is no legal aid lawyer available to take their case on whether due to capacity or geographical location.

⁵ <https://rli.blogs.sas.ac.uk/2022/11/04/new-freedom-of-information-data-indicates-half-of-asylum-applicants-are-unable-to-access-legal-aid-representation/>

1. **An immediate increase of fees in line with inflation and an additional uplift of at least 50% for all immigration work.** The Law Society now calculates that the real-terms depreciation of civil legal aid fees is just under 50%. Immigration legal aid fees have not increased since 1996. All civil legal aid rates must increase with the amount they have lost in the decades of inflation since they were set in 1996, and must be index-linked to future proof their stability. Fees have not been adjusted for inflation even during a cost-of-living crisis. Furthermore, the inadequacy of the rates when they were set, particularly against the scope of work now required, necessitates the review and, where appropriate, uplifting of rates across civil legal aid. The government should increase fees immediately to allow for fair wages and to allow for investment and development of the sector, especially taking into account the complexity of the immigration and asylum system. Legal Aid rates should be increased in line with inflation, and all cases should be paid at an hourly rate so that legal aid is sustainable⁶and providers can afford to continue this vital work.⁷
2. **All immigration, asylum, citizenship and NRM work for migrants should be within the scope of legal aid.** Areas that were removed from scope following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (family reunion, applications based on Article 8 etc.) should be brought back into scope and provision for advice on trafficking cases including pre-NRM should be made available to all.
3. **End advice deserts across the country.** Supply of legal advice and representation must meet demand. The Law Society estimates 39m people (66%) do not have access to a local immigration provider. The provision of legal aid should be accessible for all, both geographically and meeting the capacity needs of the area. The Lord Chancellor has a range of powers in s2 of the LASPO Act to enable him/her to fulfil the duty in s1 to secure the availability of legal aid. These advice deserts are well-mapped across different areas of law and urgent action is needed, using the existing powers to make alternative arrangements such as grant-funding or other support to retain or attract providers in desert areas.
4. **Reduce work being done “at risk”**
 - **Pay providers and counsel for the work they do** at revised uncapped hourly rates (rather than the current scheme of fixed rates with the potential for losses if matters do not escape)
 - **Upper Tribunal appeal work should not be at risk:** put it back in scope and bring it back under Controlled Legal Representation (CLR).
5. **Reduce the administrative burden and cashflow problems of legal aid work**

⁶ As part of the sustainability of legal aid, ILPA in its [consultation response to the Ministry of Justice legal aid consultation](#) called for a change to the payment regime so that there is the option to claim payment on account during the life cycle of a case, which can often take years to conclude before the legal representative can bill the case.

⁷ ILPA, [Consultation response to the Ministry of Justice legal aid consultation](#), August 2022. Legal aid hourly rates have not increased since 2007 when they were first introduced and were cut in 2011.

- **Create a sensible and supportive approach to the auditing process**, to reduce the risks of claw-back in assessment and audit, so that providers are not as concerned that they may be penalised in an audit and discouraged from doing legal aid work.
 - **Introduce a quality element to the auditing process:** auditing should not just be about financial accounting
 - **Provide better technical support**
 - **Introduce more billing stages** so that providers can claim their profit costs at regular intervals and do not suffer as a consequence of the slow pace of decision-making by the Home Office
 - **Reduce the disbursement claim time** to 3 months
6. **Increasing quality of representation and communication for clients**
- **Introduce a single and clear pathway to making complaints about an adviser**, regardless of whether they are regulated by the SRA/OISC/The Bar Council/etc.
7. **Increase funding for recruitment and training** to allow for **sustainable** replenishment and maintenance of the workforce
- **Fee waiver or discounts** for accreditations from OISC / Law Society, and better cross-qualification
 - **More accessible** traineeships / apprenticeships to qualify as an immigration adviser
 - **Accessible information** on how to qualify as an immigration adviser
8. **Improve safeguards for unrepresented appellants**
- Ensure that **any person lodging an appeal is apprised of the availability of legal aid**, and how to find legal aid providers in their area(s)
 - Provide clearer **practice directions on the importance of legal representation** including when adjournments are appropriate

4. What potential risks and opportunities do you foresee in the future for civil legal aid: i) in general; and ii) if no changes are made to the current system?

In HBF's experience, positive immigration/asylum decisions are often dependent on the quality and knowledge of legal representatives and services who advocate for survivors. Survivors of torture and trafficking require individual support throughout these arduous procedural systems, and assistance with providing the requisite evidence to substantiate their case, including medical evidence.⁸ However, the very low funds paid for this work and the failure to increase the rates over the past two decades has resulted in the decimation of the legal aid sector. Recent research showed that 90% of support workers helping survivors struggled to find legal advisors for their clients in the past year, with almost half reporting delays of six months or

⁸ HBF provides expert, court standard medico-legal documentation for clients involved in legal procedures. However, we also advocate for recognition that the majority of victims of trafficking have no access to such evidence or any medical documentation, and struggle in many cases to obtain access to appropriate healthcare services.

longer.⁹ Half of asylum applicants are unable to access legal aid representation.¹⁰ The crisis in legal aid leaves survivors without access to lawyers equipped to work on their cases, undermining their access to justice.¹¹ Others may resort to paying private lawyers and may get into high levels of debt for services which are often sub-standard due to the lack of regulation in the private sector.

The trajectory of legal aid in respect of the immigration and asylum sector is dire. Already more than 50% of client group cannot access good quality legal aid representation¹². The context in which HBF operates is in sourcing good quality legal aid representation for clients who are accepted into our service as part of a holistic model of care (as set out above). Legal protection is a key component of that care; ensuring that survivors of torture and trafficking have legal representation enables them to continue to recover once their claims are successful and legal status granted to them. The majority of HBF clients, approximately 73%, are represented by legal aid solicitors.

In 2019, of those referred to our service approximately 30% did not have legal aid representation i.e. they either had no legal representation or were paying privately despite being eligible for legal aid. In 2023 this had increased to 37% of those accepted by our service.

Since the significant cuts to legal aid as a result of LASPO, if no changes are made to the system then lawyers will continue to leave the sector in droves,¹³ thus reducing the pool of good quality legal aid representatives contributing to the already dire situation for individuals seeking representation. Furthermore, the volume of work will continue to increase in particular in relation to the additional (uncertain) work needed to conduct cases under the Nationality and Borders Act 2022, the Illegal Migration Action 2023¹⁴ and the Safety of Rwanda (Asylum and Immigration) Bill. Despite the cuts following LASPO the need has not disappeared. Instead cases that do not have early access to legal advice end up more complicated and in need of a more significant intervention down the line. In Dr Wilding's May 2022 report, 'No Access to Justice', the unmet need in 2020/2021 was approximately 6000¹⁵ (though this was likely an underestimate) rising to 25,000 in 2021/2022 following an updated FOI¹⁶. There is an opportunity to take an active approach to legal aid by sufficiently funding it as called for by ILPA in their consultation

⁹ <https://atleu.org/news/2022/10/17/it-has-destroyed-me-new-report>

¹⁰ <https://rli.blogs.sas.ac.uk/2022/11/04/new-freedom-of-information-data-indicates-half-of-asylum-applicants-are-unable-to-access-legal-aid-representation/>

¹¹ The European Court of Human Rights has found that the right to access to a court contained in Article 6 (1) of the ECHR encompasses the right to free legal assistance in civil matters when such assistance proved indispensable for effective access to the courts and a fair hearing (in particular for ensuring the equality of arms). Human rights protections under Article 6 have been further elaborated on in the Court of Appeal in the UK in the context of legal aid for civil litigation. The court specified that these include practical and effective rights of access to the courts, the ability to 'present the case properly and satisfactorily' before the court of tribunal, and equality of arms such that each side can present their case 'under conditions that do not place them at a substantial disadvantage vis-a-vis their opponent'. *R (Gudanaviciene) v The Director of Legal Aid Casework* [2014] EWCA Civ 162

¹² Ibid.

¹³ <https://younglegalaidlawyers.org/wp-content/uploads/2023/04/YLALPLP-Report-April-2023.pdf>

¹⁴ <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>

¹⁵ https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/62a1e16cba8478993c7d512c_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf

¹⁶ <https://rli.blogs.sas.ac.uk/2022/11/04/new-freedom-of-information-data-indicates-half-of-asylum-applicants-are-unable-to-access-legal-aid-representation/>

response to the new fees regime for new work under the Nationality and Border Act 2022¹⁷ and as set out in our submission to the JCHR [set out above].

The sector can be reinvigorated but it needs funding and a streamlined way of handling cases both for fee earners and the Legal Aid Agency (see Jo Wildings recent paper: A menu of civil legal aid policy options for a new government and our answer to Q1)¹⁸. A failure to do so will leave thousands of potentially vulnerable survivors at risk of serious harm, unable to find a lawyer and unable to represent themselves in a labyrinthine system thus hindering any opportunity for recovery.

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.

A particularly prevalent issue that we see amongst our referrals and accepted clients is in respect of early legal advice. We see a clear correlation between access to early advice and front-loading of a client's case, and its swift resolution. Where clients have not received legal advice at the outset of their claim for asylum or trafficking and/or their cases are not front-loaded with relevant evidence prior to a decision being made (i.e. a medical report or country expert report), often we see these cases drawn out, taking much longer to conclude¹⁹. Notably, our experience mirrors the research published by the Law Society²⁰, which supports the position that early access to advice results in legal issues being resolved much sooner. Thus, simple issues are resolved prior to matters and costs escalating. The need for early legal advice was also identified in the Post-Implementation Review of Part 1 of LASPO, which found that improving access to legal advice earlier on, avoiding the matter and costs escalating once the case gets to court, was at the heart of legal support.²¹

A typical example of where someone would benefit from early legal advice and representation is in respect of their trafficking and asylum claims. Once the person is referred to the National Referral Mechanism and has claimed asylum, their two claims continue in tandem. If the case is sufficiently prepared and evidence (such as an expert report including a medico-legal report and county expert report) is provided from the outset, then this increases the likelihood that a positive decision will be made, and a grant of status will be issued. In this instance the front-loaded preparation negates the need for further funding of an appeal (freeing up valuable court resources); additional support for asylum accommodation and financial support whilst an appeal continues and frees up the lawyer to take on another case. Quite clearly this also benefits

¹⁷ <https://ilpa.org.uk/wp-content/uploads/2022/08/LPA-and-PLP-Response-to-Moj-Immigration-Legal-Aid-consultation-on-new-fees-for-new-services-10.08.22.docx.pdf>

¹⁸ Dr Jo Wilding, 'A menu of civil legal aid policy options for a new government' <https://justice-together.org.uk/wp-content/uploads/2024/02/Legal-Aid-Policy-Options.pdf>

¹⁹ <https://www.ft.com/content/894b8174-c120-11e8-8d55-54197280d3f7>

²⁰ <https://www.lawsociety.org.uk/topics/research/research-on-the-benefits-of-early-professional-legal-advice>

²¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf

the individual, who will no longer be in the asylum system and will be free to work (something they are only permitted to do in limited circumstances) and contribute to society as well as recover from their experiences.

Properly funded early access to legal advice ensures that issues are addressed and rectified as early as possible often without the need for access to the court process resulting in a resolution for the individual sooner not only saving money, time and valuable resources but the health and well-being of the individual. As set out in 2018 by Public Law Project²², 'there is evidence that indicates that the reduction in early legal advice shifts the burden of public spending, rather than reducing it. Where individuals are unable to access initial advice for their legal issues, there may be wider societal costs. For example, an additional burden placed on the NHS and welfare system where legal issues escalate to great societal problems such as homelessness'. As a result, many organisations are calling for the reinstatement of early access to legal advice, including ILPA, ATLEU, PLP, the Law Society and the Bar Council. ²³The difficulty as set out elsewhere in this response, is that the immigration legal aid sector is all but decimated.

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.

As set out in this response a suite of recent reports continue to set out how dire the situation currently is in the legal aid immigration sector. All highlight the same key issues:

- There are not enough legal aid providers to take on work relating to immigration, nationality and asylum leaving people 'at risk of serious harm'²⁴;
- There is inadequate provision for initial asylum-seeking applicants²⁵;
- Remote legal advice is not a viable solution to the severe shortage of advisors²⁶;
- There is a lack of specialist advisors to take on trafficking claims or domestic violence matters²⁷;
- There is a serious shortage of free and low-costs advice outside of scope of legal aid in most parts of England and Wales²⁸.
- Providers rely on mixed models of funding in order to supplement the provision of legal aid advice, which is often loss making²⁹;

²² <https://publiclawproject.org.uk/content/uploads/2018/05/Legal-aid-and-access-to-early-advice.pdf>

²³ <https://ilpa.org.uk/wp-content/uploads/2022/08/ILPA-and-PLP-Response-to-Moj-Immigration-Legal-Aid-consultation-on-new-fees-for-new-services-10.08.22.docx.pdf>, <https://drive.google.com/file/d/15xlzaXCpN2eyXSlw7Ubx2Au1lr6mRXRF/view>, <https://www.lawsociety.org.uk/campaigns/civil-justice/early-legal-advice>, <https://www.barcouncil.org.uk/resource/access-to-justice-cant-survive-further-budget-cuts-new-report-from-the-bar-council.html#:~:text=the%20Bar%20Council-Access%20to%20justice%20can't%20survive%20further%20budget%20cuts%3A%20new.report%20from%20the%20Bar%20Council&text=Access%20to%20justice%20in%20England.the%20Bar%20Council%20released%20today.>

²⁴ https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/62a1e16c8478993c7d512c_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf

²⁵ Ibid.

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>

- Referrals often go unanswered and/or take many months to find an available legal aid representative;
- Providers are at capacity and in some cases are unable to take on cases prepared at the initial stage to appeal stage;
- Individuals struggle to access ECF without the assistance of a supporting organisation;
- The sector as a whole is overstretched and unsustainable with legal representatives having experienced vicarious trauma or burnout.³⁰

In addition to the above, in our experience, there are a number of additional barriers to accessing legal aid, and these are particularly acute due to the language barrier and the particular vulnerabilities of those who are survivors of trafficking and torture. Some of these factors relate to the individual (internal factors) and some relate to the sector as a whole (external factors).

Internal factors

In our experience it is very difficult for clients to find their own legal aid lawyers. Many of our clients do not have the digital skills or ability to call and email numerous firms to lay out their case clearly and coherently. Some of this is due to a language barrier, some is due to digital literacy. However, even when those two factors are not in play, understanding the complexities of legal aid remains the barrier.

In a recent example a client of HBF was unrepresented. He tried to find a lawyer prior to being referred to our service. Over the course of a year he sent emails to over 20 lawyers providing legal aid from a list provided by local community centres and through word of mouth. He did this three times over the course of the year and all lawyers refused to take his case on due to capacity and he was told to contact them when he had a deadline i.e. his interview was scheduled or a court hearing date. Eventually he was able to secure a lawyer through a friend. However when he was sent the legal aid forms to complete, he did not know how to do this and so he returned incomplete forms. The lawyer then no longer had the capacity to take his case on and he was told to wait until they had capacity at some undetermined point in the future. Even in the case where a lawyer can be found, the client's inability to complete legal aid forms was a barrier.

External factors

By far the driving factor in attempting to access legal aid is the state of the sector and the lack of good quality legal aid lawyers.

Legal aid lawyers are leaving the profession in their droves and as such there are fewer sufficiently qualified and experienced representatives remaining to take on increasingly complex cases. As already set out in our response over 50% of individuals in immigration did not have legal representation.³¹

³⁰ <https://younglegalaidlawyers.org/wp-content/uploads/2023/04/YLALPLP-Report-April-2023.pdf>

³¹ <https://rli.blogs.sas.ac.uk/2022/11/04/new-freedom-of-information-data-indicates-half-of-asylum-applicants-are-unable-to-access-legal-aid-representation/>

In HBF's experience we are finding it increasingly difficult to make successful referrals as the pool of lawyers able to take on complex cases, which often need a medico-legal report, reduces. The result is that many of our clients continue to be represented by lawyers who are privately funded even where they are eligible for legal aid, and/or the lawyer does not have the requisite knowledge or experience (or indeed trauma-informed ways of working) to adequately represent the client.

"Poor-quality providers are protected in the market. Clients lack information about the reputation of providers when they choose a representative and are prevented from changing provider if they discover the existing one is poor quality."³²

Where our clients are represented by poor quality lawyers, this results in significant intervention from HBF to assist the lawyer with the preparation and strategy of the case. A further result of the decreasing availability of good quality lawyers, is that HBF clients who are unrepresented (usually around 1/3 on acceptance), can often wait long periods until a lawyer of suitable quality and experience is available. This can be particularly difficult for the client who may be unable to properly engage in our service (for example in trauma-focussed therapy) until their legal claim is in progress. These factors contribute to increasing the burden on legal aid resources.

Additionally, following years of cuts to legal aid and no real time increase to the rates for almost 20 years,³³ lawyers are withdrawing from the sector and some firms are restricting what legal aid work they take on. Clients are losing representation, either because firms are withdrawing from legal aid altogether or because they no longer take on appeal work. Having to find new representation in a 'market' which can only accommodate half of the demand from new applicants is a futile task. Beyond that, with almost half of asylum applicants unable to access legal aid representation, and firms no longer able to weather the financial loss of doing appeals work, it is clearly urgent that rates of pay are increased, and bureaucratic demands reduced, to enable the remaining providers to remain in the sector and return to appeals work.

10. What could be done to improve client choice such that it is easier for clients to find civil legal aid providers and make informed decisions about which one best meets their needs?

A key issue is improving an individual's understanding of how to find and access good quality legal representation. There is no one place that is accessible to individuals to search for a legal aid solicitor. The Law Society's 'find a solicitor' function, is only accessible via their website. If one does have access to it, a simple search reveals only 11 providers that accept legal aid³⁴, which we know at HBF to not be the case. So the first issue that an individual needs to contend with is a faulty search function. If someone searching for a solicitor does not speak English, or is unable to use the search function, then often individuals rely on word of mouth to find a lawyer. This

³² <http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>

³³ The Civil Legal Aid (Remuneration) Regulations 2013, Schedule 1, Part 2 'Hourly rates - Controlled Work).

³⁴ Accessed 05/02/2024

can lead to individuals who are eligible for legal aid paying a 'community solicitor'³⁵ to take on their case, often paying privately with no clear indication that they've been advised about their eligibility for legal aid. Whilst there is regulation of those who practice under a legal aid scheme (variously by SRA, OISC, Lexcel and SQM), there is significantly less regulation for those offering immigration advice on a private basis. In HBF's experience this can lead to individuals at risk of being exploited or remaining in exploitation as they are unable to afford a legal representative on a privately paying basis.

11. Do you think that some people who are eligible for civil legal aid may not know that it is available and/or how to access it? If so, how do you suggest that this is addressed?

In HBF's experience, clients who have never had legal representation before often do not know about legal aid. It is usually down to our in-house legal protection team to provide legal education to clients and help them to find a lawyer under the legal aid scheme. One way in which this can be addressed is more joint working with the Home Office and accommodation providers to share the information about where to access information regarding legal aid lawyers. This could be done in their first interaction with the client, or posters and information sheets around accommodation sites and in interview rooms.

Clients of HBF benefit from our in-house legal team's expertise and connections within the sector and are able to help prepare a case for referral to a legal aid lawyer (as set out above). Those who do not have a third party, be it NGO or support network to help them do this, will often struggle to find a lawyer.³⁶

12. How do you think that people receiving civil legal aid can be supported in cases where they have multiple or 'clustered' legal issues and some of these are outside of the scope of civil legal aid?

Individuals often have multiple matters at any one time. This is particularly the case for HBF's client group, where survivors often have both an NRM matter and asylum matter. Approximately 90% of our clients' cases concern both a claim for asylum and a trafficking claim. Until recently there was no legal aid to advise a client prior to entering the NRM; however after a MOJ consultation on new fees for work under the Nationality and Borders Act 2022, there is now a minute amount of legal aid resource available to advise individuals pre NRM.³⁷ Prior to this being available, these two intersectional issues had to be disentangled to ensure that advice was exclusive to the claim for asylum. On occasion, where the trafficking claim also meant that the individual had a viable claim for asylum, that individual could receive advice on both matters due

³⁵ By this we mean, someone from their local community, usually of the same nationality or cultural background. Whilst there is no issue with this on the face of this, in our experience there are indeed some scrupulous individuals who are wont to take advantage of their community.

³⁶ <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>, ATLEU <https://drive.google.com/file/d/15xlzaXCpN2eyXSlw7Ubx2Au1lr6mRXRF/view>

³⁷ Though we understand this is not due to start until the relevant sections of the Nationality and Borders Act 2022 are in force.

to the nexus of the two claims. This adds an additional barrier and complexity to an already complex advice system.

Where there is a clear link and interaction between the two claims, and where one matter is out of scope, that matter should be brought 'within scope'. This would simplify the current advice system and streamline the giving of advice to an individual with two or more inter-related matters. Furthermore, this would mean that there would be one lawyer able to assist with both matters and avoid the need for a second lawyer to take on the 'out of scope' matter on a different funding basis i.e. under the Exceptional Case Funding regime (ECF) or privately and would ensure that the two interrelated matters are addressed in tandem. The risk of not dealing with a second matter that is 'out of scope' is that it may be ignored or overlooked i.e. if someone has both an Article 3 claim based on their mental health and an Article 8 family life claim, only the former is within scope resulting in the equally important Article 8 claim being overlooked. The best way in which a client can be supported to receive legal aid is in ensuring that 'clustered' legal issues are dealt with together.

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?

A report by NACCOM³⁸ led by Refugee Action found that between 2005 and 2018 over half of the legal aid providers in asylum and immigration and 64% of not-for-profits were lost.³⁹ A significant factor was LASPO rendering whole areas of immigration outside the scope of mainstream legal aid provision. ECF was introduced to fill the gap for the cases where it could be shown that an individual's human rights were at risk of being breached unless legal aid was granted. The initial preparation for ECF applications is done 'at risk' without guarantee of payment. As shown by the subsequent challenges to the scheme,⁴⁰ in essence ECF now operates to grant funding in *most* cases that fall outside the scope of legal aid with a grant rate of 65% up from 1% in the first year of operation in 2013.⁴¹ This demonstrates an unnecessary hurdle in obtaining legal aid for 'out of scope' matters, placing a further administrative burden on lawyers who remain in practice. As such, HBF prepares ECF applications, obtaining the grant of legal aid before referring a case to a lawyer, to remove the administrative burden of making the ECF application from the lawyer. Often this preparation includes obtaining the Home Office file of papers, gathering evidence of financial means, drafting a legal case summary and completing the ECF forms. Without doing this preparation work and obtaining the grant of legal aid beforehand, we will not be able to refer the case to a legal aid lawyer.

In the past two years we have submitted seven ECF applications, often taking hours to complete and gather the relevant information to ensure that the application is granted first time around

³⁸ The No Accommodation Network - <https://naccomm.org.uk/>

³⁹ <https://www.refugee-action.org.uk/wp-content/uploads/2018/07/Access-to-justice-July-18-1.pdf>

⁴⁰ *Gudanaviciene and ors v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 and *IS (by way of his litigation friend, the Official Solicitor) v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464.

⁴¹ <https://www.lawsociety.org.uk/en/topics/legal-aid/exceptional-case-funding-guidance-for-solicitors>

to avoid further delay in obtaining legal representation. All applications have been granted, however this cost-shifting from legal aid lawyers to the NGO sector takes away valuable time and resources. This situation is not unique and is clearly one others in the sector feel obligated to assist with⁴² less vulnerable clients whose fundamental rights will be breached are left without legal representation. ECF was introduced following LASPO to ensure that these fundamental rights were upheld. The Legal Aid Agency's own data for ECF shows that over the past ten years the demand for ECF has increased,⁴³ with ECF applications in the immigration category making up 79% of all granted ECF applications (1,966 out of 2,494). The percentage increase of ECF applications granted in the immigration category is 49,050% (4 ECF applications were granted in 2013 rising to 1966 in 2023). The demand for 'out of scope' issues to be resolved has not disappeared, instead they are either ignored or left to NGOs to do the initial work in preparing the ECF application before applying for legal aid. It begs the question what the point is of the additional hurdle.

In terms of improvements to the ECF system, it is a sticking plaster to a much bigger issue. The need is there and so the best improvement that can be made (analogous to properly funded early legal advice) is to bring matters that were taken out of scope such Article 8 matters (in particular where they are linked to a matter already in scope as set out in our answer to Q12) back within the scope of mainstream legal aid. Anything less than this will not address the issues identified above or the cost/resource shifting that is placed on NGOs and further will continue to act as a barrier to access to justice for some of the most vulnerable in society.

14. What are the ways in which technology could be used to improve the delivery of civil legal aid and the sustainability of civil legal aid providers? We are interested in hearing about potential improvements from the perspective of legal aid providers and people that access civil legal aid.

(See answer to Q15 below)

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

In our answer to question 16 we explore why remote legal advice might not be suitable for more vulnerable individuals. Where advice is provided remotely, it is essential that:

- Individuals are able to access spaces where they can confidentially discuss matters with their legal representatives. It is currently rare, for example, for lawyers to have remote

⁴² <https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf> p13

⁴³ <https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-july-to-september-2023>

appointment with someone in immigration detention/asylum accommodation where they are in allocated space away from others.

- Individuals are able to contact their legal representatives when they need to and vice versa – this requires access to both phone and internet for email/WhatsApp and a confidential device capable of accessing these communication methods.
- Individuals are able to confidentially share documents with their legal advisers. In both immigration detention and asylum accommodation we have seen instances where clients have been unable to share documents and are reliant on staff for access to faxes and emails, which raises concerns regarding confidentiality.⁴⁴

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

A recently published report commissioned by the Paul Hamlyn Foundation, 'How the remote delivery of immigration advice evolved during Covid: The digital and capacity implications of this change',⁴⁵ looks at the remote working methods being used by immigration advice providers, and summarises the benefits and challenges resulting from an increasingly digitised approach to client-facing work. It finds that "recent technological advances have enabled remote working and a transition away from face-to-face advice" and that this "has brought benefits in terms of expanded reach, with some projects being able to extend their offer to people across a much wider geographical area". However, crucially the report highlights that:

"In the longer term, remote working methods were shown to be unsuitable for people where their situation and vulnerability meant that lack of in-person support and contact could expose them to even more risk".

The report identifies client groups for whom remote advice and casework are particularly challenging and this includes those seeking asylum and people with multiple vulnerabilities. Practical barriers to accessing advice safely include access to any private, safe line for communication but even where immediate practical barriers are not present, the report highlights the need to gain the trust of such clients as well as ensuring that safeguarding measures are in place in order to get the information necessary to progress the case. Doing this online "can be extremely challenging for providers and clients alike".

This echoes the findings in Refugee Action's recently published report 'No Access to Justice',⁴⁶ which reviews and maps provision and demand for free and low-cost immigration legal advice throughout the whole UK, and concludes "remote advice is only a small part of the solution". The report found that:

- Providers find it takes longer to advise remotely, meaning they face greater financial losses.

⁴⁴ https://www.helenbamber.org/sites/default/files/2022-11/Institutional%20accommodation%20and%20remote%20legal%20advice_Nov22.pdf

⁴⁵ <https://www.phf.org.uk/wp-content/uploads/2022/06/How-the-remote-delivery-of-immigration-advice-evolved-during-Covid-FINAL.pdf>

⁴⁶ Refugee Action, No Access to Justice: How legal advice deserts fail refugees, migrants and our communities, May 2022

- It is difficult to create the rapport with the client needed to enable them to disclose traumatic information remotely.
- Remote advice is more suitable for follow-up appointments than as the sole form of provision.
- Remote advice also places a burden on support organisations which have to provide a private space, a device, an internet connection or data, sorting and scanning of documents, and the psychological support to access an adviser remotely, which few are resourced to provide.

There is little additional research on the use and effectiveness of remote legal advice and representation but our research on remote Home Office interviews and existing research on the impact of remote hearings in immigration tribunals has highlighted that clients disclose less information; are more likely to become disengaged; and cultural differences in non-verbal communication are exacerbated.⁴⁷ Communication problems between a client and their interpreter are more difficult to notice and rectify. There can be a negative effect on lawyer/client relationships and it can be much harder to build trust.⁴⁸

In our experience, while remote advice can work well if a rapport has already been built with the client, it is rarely the most appropriate option for the first meeting. It can be extremely difficult to take a detailed history and instruction remotely – there is a real difficulty in unpicking complex factual information that may be affected by trauma, distress or avoidance and when you are unable to pick up on physical cues.

Examples of legal processes and tasks which may be inappropriate to conduct remotely include:

- Completing a mental health screening form
- Assessing re-traumatisation or distress when taking instructions or in other appointments
- Spotting interpreting errors or issues a client might have with an interpreter
- Checking maps
- Taking detailed witness statements, reading back and checking the client understands and agrees with the account
- Reading back medio-legal assessments including psychiatric assessments
- Taking evidence of sensitive issues e.g. sexual or gender-based violence, sexual orientation, religious conversion.

Visual communication methods can also play an important role in advice provision. For example, Asylum Aid lawyers (part of the Helen Bamber Foundation Group) will often get clients to draw maps or write down words for interpreters to read back which is not possible to do remotely. They might also look up certain towns on Google images and get clients to look at them to try and prompt their memories, and again this is not possible to do remotely. Therefore, we believe that every effort should be made to ensure that all people seeking asylum are able to access

⁴⁷ <https://www.lag.org.uk/article/209006/remote-hearings-in-the-immigration-tribunal>

⁴⁸ Ibid.

face to face advice, at least for their first contact with a lawyer, if not for the duration of their claim where they are part of a vulnerable group as set out above. Some people seeking asylum may prefer receiving advice remotely – for those who would prefer to see someone face to face they should be able to request this. In short, anyone needing legal advice should have a choice as to whether that advice is provided in person or remotely.

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

For the reasons already set out above, immigration is an area where the use of technology may be particularly challenging. Quite apart from anything else there is a lack of providers. *While we appreciate that the Home Office perceives remote advice to be an answer to the shortage of legal aid providers, it is important to note the stark conclusion in the 'No Access to Justice' report that "remote advice is not a viable solution to the severe shortage of advice in particular regions or sub-regions in England and Wales, because there is no significant surplus capacity to be redeployed remotely to other regions".* Provision in England, Wales and in Northern Ireland may not even be adequate for first-time adult asylum applications (even allowing for some applicants having the resources to pay privately), let alone other matters for clients who are eligible for legal aid. Remote advice at best offers geographical equality of (impoverished) access, not adequacy of provision.⁴⁹

⁴⁹ https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/628f50a1917c740a7f1539c1_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf