Ministry of Justice

Immigration Legal Aid

The Government's response to its consultation on new fees for new services

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Immigration Legal Aid

A consultation on new fees for new services

Response to consultation carried out by the Ministry of Justice.

This information is also available at https://consult.justice.gov.uk/

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Ministerial Foreword

The Government has made immigration and asylum policy a key priority and we are in the process of a comprehensive reform programme to address long-term challenges and ensure our immigration system is fair but firm.

A key part of our ambition to ensure fairness in the immigration system is access to legal aid. The Government is already taking steps through the Nationality and Borders Act to increase access to this vital support, so individuals are supported to bring claims as early as possible, driving efficiency and ensuring fairness and certainty.

Our proposals intend to ensure legal aid practitioners are adequately remunerated for the immigration and asylum work they do. They will ensure fair and equitable payment and continued access to this important service.

This is the latest step in our wider civil legal aid strategy to ensure a sustainable system of provision where people can get the right advice at the right time, leading to better outcomes for all.

The Government has carefully considered the responses to the consultation and is now, in this document, publishing its policy position. We have made some changes to our initial proposals in light of responses.

I would like to thank all those who have taken the time to respond to the consultation and look forward to continuing constructive engagement as we move towards the next stage of our civil legal aid strategy.

Lord Bellamy KC, Parliamentary Under-Secretary of State for Justice

Introduction and contact details

This document is the Government's response to the consultation paper 'Immigration Legal Aid: new fees for new services'.

It will cover:

- The background to the report
- A summary of the responses to the report
- A detailed response to the specific questions raised in the report
- The next steps following this consultation.

Further copies of this response and the consultation paper can be obtained by contacting Civil and Family Legal Aid Policy at the address below:

Access to Justice
Ministry of Justice
102 Petty France
London SW1H 9AJ

Email: civil.legalaid@justice.gov.uk

This report is also available at https://consult.justice.gov.uk/

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Executive Summary

Introduction

1. This document sets out the Government's response to its consultation 'Immigration Legal Aid: new fees for new services' which ran from 13 June 2022 to 5 September 2022.

2. The consultation sought views on policy proposals to:

- Fairly remunerate legal aid providers with fees that reflect changes to the process of HM Courts and Tribunals Service's (HMCTS) system for the lodging and processing of appeals at the First-tier Tribunal; and

- Fairly remunerate legal aid providers for new work and new services that they are required to provide under changes made to immigration policy through the Nationality and Borders Act 2022.

Background

3. The legal aid scheme is governed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). LASPO sets out which types of immigration services can be funded by legal aid. This is colloquially known as "in scope" legal aid. For immigration services that are not "in scope", legal aid funding may still be available via the Exceptional Case Funding Scheme, where an individual can demonstrate that, without legal aid funding, there is a risk of a breach of their human rights.

4. Fees payable for immigration services are set out in the Civil Legal Aid (Remuneration) Regulations 2013 ("the Remuneration Regulations").

5. The 2018 Standard Civil Contract and Immigration Specification govern the provision of immigration advice between legal aid providers and the Legal Aid Agency ("LAA"), who contract for legal aid services on behalf of the Lord Chancellor.

6. The consultation covered two distinct areas. The first area is changes to remuneration as a result of the online system which is now used in the First-tier Tribunal (Immigration and Asylum Chamber). The second area concerns measures within the Nationality and Borders Act, which both introduce new immigration legal aid services to the scope of legal aid and change existing services, necessitating changes to the remuneration for legal aid providers.

Summary of consultation proposals

7. In advance of publishing the consultation paper in June 2022, we undertook engagement with key stakeholders involved in the delivery of immigration legal aid.

8. We conducted a survey of immigration legal aid practitioners who had completed appeals using the online system in October-November 2021. The purpose of this exercise was to gather information about the impact of the online system on providers, specifically looking to understand how much additional time was being spent on cases using the online system. In addition to this survey, we also held a call for evidence between 4 November 2021 and 2 December 2021 to better understand the views of representative bodies and the wider market. We used this information to develop a set of proposals to ensure that delivery of the scheme is attractive to providers and continues to provide the best possible service to clients.

9. We proposed several key changes which were the subject of this consultation:

    a) The introduction of new fixed fees for online system appeals in the First-tier Tribunal which do not reach a hearing; £669 for asylum cases and £628 for non-asylum cases.

    b) The introduction of new fixed fees for online system appeals in the First-tier Tribunal which do go to hearing; £1,009 for asylum cases and £855 for non-asylum cases.

    c) The introduction of a new escape threshold for online system appeals set at twice the value of the relevant fixed fee and the "decoupling" of the escape mechanism.

    d) To remunerate advice provided to recipients of the new Priority Removal Notice at hourly rates.

    e) The introduction of a new bolt-on fixed fee for advice on referral into the National Referral Mechanism of £75.

    f) To remunerate new age assessment appeals work at the existing hourly rate payable for Licensed Work in the First-tier Tribunal.

    g) To remunerate work on the rebuttal mechanism against the Home Office's process for differential treatment of refugees at the existing immigration and asylum hourly rates and to gather data to inform a future fixed fee for this work.

Conclusions

10. The consultation closed on 5 September 2022 and the Government received 30 responses.

11. Having analysed all the responses provided, the Government will be taking forward the following proposals without change:

    a) The introduction of new fixed fees for online system appeals in the First-tier Tribunal which do not reach a hearing; £669 for asylum cases and £628 for non-asylum cases.

    b) The introduction of new fixed fees for online system appeals in the First-tier Tribunal which do go to hearing; £1,009 for asylum cases and £855 for non-asylum cases.

c) The introduction of a new escape threshold for appeals set at twice the value of the relevant fixed fee and the “decoupling” of the escape mechanism.

d) To remunerate advice provided to recipients of the new Priority Removal Notice at the existing immigration and asylum hourly rate of £51.62 per hour in London and £47.30 per hour outside of London.

e) To remunerate work on age assessment appeals at the existing First-tier Tribunal hourly rate of £55.08 per hour in London and £51.53 per hour outside of London.

f) To remunerate work on the rebuttal mechanism against the Home Office’s process for differential treatment of refugees at the existing immigration and asylum hourly rate (in (d) above) and gather data to inform a fixed fee in the future.

12. In light of feedback from the consultation, we intend to make the following change to the original proposal:

g) To double the bolt-on fixed fee for advice on referral into the National Referral Mechanism (NRM) from £75 to £150.

13. We also intend to implement an additional change:

h) To reduce the escape threshold for legal help (advice and assistance) cases to match the proposed new escape threshold for online system appeals, set at twice the value of the relevant fixed fee.

14. This full response paper sets out why the Government believes this to be the most appropriate course of action.

15. The Equalities Impact Assessment published in the consultation paper remains in line with the available data and evidence. The updated Impact Assessment has been published alongside this consultation response.

16. A Welsh language response paper is available upon request. To request this please contact Civil.LegalAid@justice.gov.uk.

17. A list of organisations that responded to the consultation is at Annex A.

Responses to the consultation and the Government's conclusions

18. A total of 30 responses to the consultation paper were received. The respondents included legal aid providers, representative bodies of legal aid providers, third sector organisations, and individuals responding in their own capacity.

19. Alongside the consultation, we held meetings with stakeholders, practitioners and representative bodies involved in immigration legal aid. The feedback received in these sessions has also been considered when deciding the way forward.

20. The 16 questions asked in the consultation are set out below (some are grouped for ease), followed by a summary of responses and then the Government's conclusions.

21. Some participants responded collectively on behalf of a wider organisation. As a result, there were certain questions where agreement was not unanimous and so we have classified these as "mixed" responses. There were also particular questions where respondents interpreted what was meant by "agreeing with the proposal" differently. For example, some respondents said that they agreed with payment by hourly rates, but then went onto say that they did not agree with the level of the hourly rates. Some respondents would classify this as "agreeing" to the proposal, whereas others would classify this as "disagreeing" to the proposal. Therefore, figures do not clearly depict agreement or disagreement and should be considered as indicative of the views of respondents rather than conclusive.

Q1: Do you agree with our proposals for new fixed fees for asylum and non-asylum appeals? If no, please explain why and suggest an alternative.

22. We received a total of 28 responses to this question, with 2 agreeing and 26 disagreeing.

23. There were a number of different reasons given for why respondents disagreed with the proposals, which we have grouped into the following four themes. Please note that grouping by theme is intended to broadly show the reasons given by respondents to the consultation and does not mean that each reason was given by each respondent.

<u>The evidence and data used to underpin the fixed fee proposals</u>

24. Respondents who raised concerns felt that the data/evidence gathering period whilst hourly rates had been paid had not been long enough. One respondent said "the evidence gathering period has not been long enough to pick up LAA data on long and complex closed cases." Respondents questioned whether the fee proposals had been set too low because of the evidence gathering period, with the one respondent going onto say "this may have skewed the data set to suggest that cases on average involve

less time and work than they actually do." Two respondents felt the proposals were difficult to evaluate without knowing the types of cases that were part of the datasets and whether longer-running cases had been excluded.

25. Other respondents commented on the survey of practitioners to say that the low response rate means that the data is not robust and is an insufficient data sample. One respondent commented "we are concerned that the survey data which partly informs the new fixed fee and average time taken in asylum and non-asylum cases is based on responses from only 17 provider offices, not all of whom were able to complete all of the survey questions." Some respondents went on to raise concerns about the providers chosen for the survey and the wording of the questions, arguing that the survey was unrepresentative: "this is an incredibly small data set to inform proposals on such critical issues. […] There remains no evidence to prove that the survey of 14 full valid responses and 2 partial responses is a representative dataset."

26. One respondent said that they considered the proposals were not based on the call for evidence, particularly with respect to the level of the appeal skeleton argument (ASA). That respondent also felt that "it is noteworthy that external counsel were (sic) not surveyed by the MoJ, nor is there any indication of the number of cases in which external counsel was instructed."

27. Another respondent expressed their view that "there is an assumption that non-escape fee files are 'normal', though no indication is given for this assumption." One respondent questioned "a drive for a fixed fee" if the proposals are cost neutral.

<u>The nature of fixed fees and the level of the proposed fixed fees</u>

28. Many respondents took the opportunity to express their dissatisfaction with fixed fees as a concept. Three respondents said that fixed fees themselves are not a sustainable model, with another respondent explaining that they "recognise that, in principle, a fixed fee scheme may result in firms being paid more on some cases than if the work had been conducted on hourly legal aid rates" but that the "reality is different." A different respondent explained why fixed fees were preferred, as did some comments in other responses where an organisation was responding on behalf of more than one person.

29. Many respondents said that fixed fees encourage providers to 'work within the fee'. One respondent expressed their concern that "fixed fees can offer a perverse incentive to some providers to work to the fixed fee and this can impact negatively on the quality of service to clients." Some respondents felt that fixed fees "incentivises providers to spend minimal time on cases" and one respondent explained that in their research project, "providers […] were limiting the number of fixed fees cases they would take on because they could not afford to do any more." Two respondents explained their concerns that "legal aid fee structures discourage and prevent lawyers from taking on cases involving modern slavery/trafficking."

30. Respondents also provided their views on the escape fee mechanism when talking about fixed fees. One respondent expressed their view that "the escape fee system puts too

much financial risk on providers." Some respondents explained that there will always be cases that fall in the gap between the fixed fees and the escape threshold, which, in their view, makes fixed fee work unsustainable. Another said that "the proposal renders it even harder to escape the fixed fee", going on to say that because "the fixed fees have gone up without increasing hourly rates", that "this increases the Remuneration Gap [the lacuna between the fixed fee and escape fee threshold] by increasing the number of hours of chargeable work required to escape out of the fixed fee."

31. A few respondents commented on the billing system, where one respondent said that escape fee cases are "increasingly onerous" in terms of administration and that this could lead to providers "to only take on the "easier"/less complicated cases." A different respondent added that "the escape fee system is complex and should be simplified, the complexity disincentivises providers from applying escape fees." One respondent also questioned whether providers accurately record the time they spend on cases that are paid by a fixed fee, saying that if the time is inaccurately reported then "it is impossible to analyse the effect of fixed fees."

32. Many respondents felt that the level of the proposed fixed fees was too low. Two respondents said that the increase in fees does not reflect the work done on a case, with one saying "the new fixed fees need to reflect the actual cost of providing advice." Others commented that immigration fees more broadly have remained unchanged for a long time, with one respondent explaining their views that "the rates of legal aid remuneration proposed reflect dated models of the cost of operating a legal aid practice and furthermore do not reflect the current cost of living crisis."

<u>Impact of fixed fees on counsel</u>

33. The general feedback provided by respondents on this theme was that the payments that would be available for counsel were not clear from the consultation document.

34. Respondents explained that counsel are instructed in appeal cases and "frequently instructed to draft the ASA." One respondent felt that "by proposing fixed fee remuneration, the consultation proposals fail to recognise the value that external counsel can add," going on to say that this could save money to the "public purse in numerous ways."

35. Another respondent agreed with this sentiment, saying that "the proposals could disincentivise counsel from being instructed at an early stage, as if a case did not go beyond the escape threshold, the fixed fee would offer very little payment for counsel to work on the ASA." This was echoed by a different respondent, who commented that "a move back to fixed fees will make it even harder for counsel to obtain payment of a fair fee for this work in cases which do not escape the fixed fee." The same respondent also explained that it may be necessary for counsel to "draft a further skeleton argument for the appeal hearing, whether because further evidence has been obtained, the Home Office review raised new issues, or because of the passage of time." They also went on to say that sometimes, different counsel may be instructed for the hearing because of

the passage of time, which means that counsel "need to effectively reacquaint themselves with the case in order to prepare for the hearing."

36. A final point made by a respondent was that "the fixed bolt-on fee for advocacy in a substantive hearing […] is insufficient payment for all of the preparation entailed in an appeal and representation of the appellant on the day of the hearing."

Miscellaneous concerns

37. Respondents raised a variety of other policy and operational concerns when responding to this question.

38. Wider points on the working of the immigration and/or tribunal system were also made by some respondents. One respondent felt that the proposals ran "counter to the aims of the online system […] and so would make the new system less able to meet its aims of bringing parties together at an earlier stage." Another respondent explained that they were aware of "significant issues associated with Home Office decision-making backlogs" and another respondent drew attention to "changes required in the Tribunal in the formulation of witness statements", saying that this is "a huge change […] which seems incompatible with the fixed fee." A further respondent said the fixed fees "do not take account of Case Management Appointments." A different respondent said that "there is no assessment of the impact of numerous changes to the law and Rules to be applied in asylum appeals, following sections of the Nationality and Borders Act 2022 coming into force."

39. Other respondents expressed disappointment with what was not contained within the consultation document, such as the mention of advice deserts. One said "members […] are disappointed that the consultation contains nothing on considering necessary scope changes, improving exceptional case funding or dealing with advice deserts." Many respondents expressed their views that the fees should be increased, and a common suggestion was that the fees should rise at least in line with inflation. "

40. Finally, respondents shared that the lack of mention of costs or disbursements made this question difficult to respond to. Some respondents mentioned the CW3 scheme, which is an LAA self-grant scheme which aims to simplify the process of obtaining extensions to incur profit costs and disbursements above the standard limits permitted by delegating responsibility for making the decision to the legal aid provider. One respondent said that the scheme was a burden, with another respondent giving an example of the time delay when seeking an extension, saying that "disbursements […] are not easy to obtain quickly for those not chosen by the LAA to use the Self Grant Scheme [the CW3 scheme]." Another respondent said that "any costs limit should allow a significant majority of cases to be progressed without recourse to extensions."

41. Almost all respondents who disagreed with the proposals for fixed fees recommended adopting payment by hourly rates on a permanent basis, with the most common reason for that recommendation being that it would provide more certainty for providers and counsel that they would be paid for their work. A secondary reason given was that it

would make immigration legal aid practice more sustainable. One respondent also felt that it would "remove the administrative complexity for providers in having to operate under fixed fees and hourly rates in the same case" and that it may also benefit the LAA by reducing bureaucracy in assessing escape fee claims."

42. Another recommendation was to introduce fixed fees after a longer evidence-gathering period, which one respondent felt would be when "the LAA has sufficient real data from completed online appeal cases." A further suggestion was for a separate payment fee for the ASA to be introduced.

43. Other recommendations included an increase in the hourly rates and that the hourly rates and fixed fees should rise regularly, for example, be index linked or raised in line with inflation. Some respondents also advocated for hourly rates to be adopted for certain types of cases, such as for victims of trafficking or modern slavery.

The Government's response to Q1

44. The Government intends to proceed with implementing this proposal as consulted on.

45. The fixed fees for online system appeals at the First-tier Tribunal will be as follows:

    a. £669 for asylum cases and £628 for non-asylum cases that do not reach a hearing;

    b. £1,009 for asylum cases and £855 for non-asylum cases that have a substantive hearing.

46. The Government has always been clear that paying hourly rates for appeals using the online system was a temporary measure. Prior to the introduction of interim hourly rates, less than 5% of immigration claims exceeded the escape threshold to earn an escape fee.[1] The Government remains of the view that fixed fees have a part to play in a fair and efficient immigration legal aid payment scheme. Fixed fees are advantageous in the simplicity of their administration, the certainty of payment they provide and how their usage is helpful for budget planning and financial forecasting.

47. The Government considers that the proposed fixed fees and associated changes to the escape threshold and mechanism represent a fair and equitable payment model for providers. We are aware that there are differing views between respondents to the consultation on fixed fees, where some respondents have indicated that they prefer them and others would prefer a different payment structure. The Government remains of the view that fixed fees are a core part of the payment model for the average case, and the escape fee mechanism provides a way for providers to claim their actual costs when the fixed fee would be inappropriate., where some prefer them, and others would prefer a different payment model.

[1] 2015-16 to 2019-20. Source: Main data of Legal Aid Statistics July – September 2022 (https://www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2022)

48. The Government recognises the value that counsel can add to proceedings and is clear that it is the decision of individual providers as to whether they instruct counsel. It is not the Government's position to dictate how a legal aid provider should conduct their case. No changes to the additional payments for advocacy services as set out in table 4(c) of Schedule 1, Part 1 of the Remuneration Regulations were proposed as part of this consultation.

49. This remit of this consultation was limited to the proposals on individual fees. As a result, points made about fees more generally, the scope of the immigration legal aid scheme or the immigration or tribunal systems were not part of this consultation. These comments have, however, been passed onto the respective teams within the Government. Operational concerns raised have been passed to the LAA.

50. The LAA will shortly be commencing the contractual consultation necessary to implement this policy.

Q2: Do you agree with our proposal to change the escape fee threshold? If no, please explain why and suggest an alternative.

51. We received a total of 26 responses to this question, with 9 agreeing, 12 disagreeing and 5 mixed responses.

52. Some respondents were in favour of the proposal to decrease the escape fee threshold from three times the value of the fixed fee to two times the value of the fixed fee. One respondent said "two times the fixed fee is much fairer to the provider," and another said that the proposal will "mitigate the risk of [...] not being paid adequately for their work, because it will reduce the number of cases in which the value of work done exceeds the fixed fee but does not reach the escape threshold."

53. One respondent commented that they felt escape fees are more burdensome for providers, saying "generally there is more unpaid administrative work involved in claiming escape cases." This sentiment was agreed with by another respondent, who said that the escape fee system "is complex and should be simplified, the complexity disincentivises providers from applying escape fees."

54. Many respondents caveated their agreement to this question by saying they agreed with this proposal only if the fixed fees described in question 1 were implemented, but otherwise many expressed their preference for payment by hourly rates to be maintained.

55. Some respondents queried why 2x the value of the fixed fee had been chosen as a new escape fee threshold as opposed to another number, for example, 1.5x the fixed fee.

56. Some respondents also repeated their views from question one that fixed fees are not an appropriate way of remunerating for immigration and asylum appeals, with some

going on to say that some providers would still lose out and would not be paid their actual costs if their work totalled more than the fixed fee but less than the escape threshold.

57. Many respondents expressed their surprise that the decrease in the escape threshold would only apply for appeals work (stage 2) and not at the legal help level (stage 1), with one respondent saying “the failure to make a similar proposal in relation to stage 1 cases is inexplicable.” A couple of respondents felt that this could “encourage doing minimal work at stage 1 to keep within the fixed fee and waiting until stage 2 to do a more thorough job,” with both respondents going on to highlight the potential negative impact this could have on the tribunal, “clearly that could mean more cases go to appeal instead of being allowed at first instance,” and pointing out that this could increase the overall cost to the taxpayer.

58. Some respondents also suggested that the differing escape thresholds of stage 1 and stage 2 could cause unnecessary confusion, and so this was the most common recommendation made by respondents in pursuit of consistency and simplicity of the payment scheme.

59. The other common suggestion made was to continue to pay hourly rates for appeals work, with respondents generally arguing that this is the fairest way to remunerate providers for their work, with one respondent saying “hourly rates are far preferable and much fairer.”

60. One respondent suggested that the previous escape fee values under the 2a and 2b regime should be kept and another asked for providers to be able to “interim bill in long-running cases […] (e.g. every 6 months).”

The Government’s response to Q2

61. The Government intends to implement this proposal as consulted on, so the escape fee threshold for appeal cases (stage 2) will be 2x the value of the fixed fee. The Government agrees with respondents who suggested that a 2x escape fee threshold is a fairer payment model for providers, especially when combined with the decoupling of the escape mechanism as proposed in question three.

62. These two changes result in a system which balances the under-remunerated with the over-remunerated cases and will result in a higher proportion of cases being paid their reported case costs.

63. The suggestion of interim billing is a matter for the LAA.

64. The Government has listened to the views of respondents and is persuaded by the arguments that decreasing the appeals threshold without a corresponding change to the legal help threshold may not achieve desired outcomes. Users of the immigration legal aid system deserve to have their case put forward in the strongest way at the earliest point in time, and a system that may unintentionally incentivise the opposite is not a fair and sustainable system. Unnecessary appeals simply serve to delay access to justice for the individual, waste the valuable time of a legal aid providers and the judiciary and add to the backlog in the Immigration Tribunal.

65. As a result, the Government will also be decreasing the legal help (stage 1) threshold to 2x the fixed fee, meaning the escape fee threshold for both stage 1 and stage 2 will be the same. We hope this consistency in thresholds will be welcomed by legal aid providers and contribute to a fairer and more sustainable payment model.

Q3: Do you agree with our proposal to change the escape fee mechanism? If no, please explain why and suggest an alternative.

66. We received a total of 26 responses to this question, with 16 agreeing, 7 disagreeing and 3 mixed responses.

67. The majority of respondents to this question agreed with the proposal to "decouple" the escape mechanism to allow stage 1 and stage 2 claims to escape on their own, rather than be added together.

68. One respondent said that they "envisage this will benefit most providers" and another said that it would "increase the opportunities for appeal cases to escape." A few respondents explained that this proposal would support the cashflow of a providers' practice, with one supporting "a system that […] improves cash flow" and another commenting that decoupling will "increase the sustainability of immigration legal aid practice."

69. One respondent who disagreed with the proposal said "there is large gap [sic] between the proposed fixed fee and the escape threshold and providers will either have to operate at a very low charge-out rate for work or rush cases to get them within the fixed fee limit." Another respondent said that "the escape fee concept should be eliminated" without providing any elaboration on why they thought this.

70. The main suggestion made in response to this proposal was to decrease the legal help (stage 1) threshold from 3x the value of the fixed fee to 2x the value of the fixed fee. Two other respondents suggested permitting providers "to elect whichever mechanism they prefer."

The Government's response to Q3

71. The Government intends to implement this proposal as consulted on, so that stage 1 and stage 2 claims no longer need to be added together to determine whether they meet the

escape threshold. Instead, stage 1 and stage 2 claims will be separated and can each escape on their own.

72. The Government found in its modelling that this would increase the number of escape cases, would decrease the number of cases not being paid within 10% of their reported costs, and overall would result in a small increase in income for providers.

73. As detailed in the Government's response to question two, we intend to decrease the escape threshold for stage 1 (legal help) to 2x the value of the fixed fee, which will result in stage 1 and stage 2 having the same escape fee threshold (2x).

Q4: Do you agree with our proposed approach to remunerating the maximum of seven hours of advice on receipt of a PRN? If not, please explain why and suggest an alternative.

74. We received a total of 26 responses to this question, with 9 agreeing, 10 disagreeing and 7 mixed responses.

75. Many respondents welcomed, in principle, the provision of seven hours of non-means tested and non-merits tested advice paid at hourly rates as detailed in this proposal. Those who agreed felt that paying at hourly rates was a positive move which may help to drive up the quality of legally aided advice. Others commented favourably that travel time, travel costs, waiting time and fees for interpreters would be claimable in addition to the advice.

76. Some respondents raised concerns about the proposal, which can be grouped into three themes:

- The policy of providing a maximum of seven hours of advice;
- The level of the hourly rates;
- How the proposal will work in practice.

<u>The policy of providing a maximum of seven hours of advice</u>

77. Some respondents commented on the policy of a maximum of seven hours, generally to argue that it wasn't enough time. One respondent said, "the 7 hours is not means-tested which is good, however, this appears to be an underestimation of the time that it will take." Another commented, "given the tight deadlines of a response given by the Home Office, seven hours does not seem sufficient in light of possible variables, for example, newly arrived clients." Some respondents then went on to suggest a cap of 10 or 12 hours, and others asked for a way to continue providing advice beyond the seven hours, for example, as one respondent suggested, "there should be a mechanism available to increase the seven hours if necessary."

<u>The level of the hourly rates</u>

78. Many respondents, both those who said they agreed and disagreed with the proposal, argued that the hourly rates are too low and should be reviewed. One respondent said, “we have real concerns about the sufficiency of the 2007 rates, reduced in 2011”, and another commented similarly that “this [proposal] may be appropriate so long as the hourly rate is set at an appropriate level – at the moment it is not. Legal aid rates have not increased in nearly 20 years.” A common suggestion was for the hourly rates to be increased in line with inflation.

How the proposal will work in practice

79. The majority of respondents had specific questions on the implementation of the proposal. Some asked for clarity on the wider Priority Removal Notice (PRN) policy, such as who the PRN recipients would be and what the PRN process in the Home Office would be. Others focused on what the legal aid rules would be, such as what would be permitted within the seven hours, whether a PRN recipient could seek a second opinion from a different legal aid provider, how the follow-on work process would work and what would happen if a PRN is served during an existing case. Some respondents made implementation suggestions, particularly around follow-on work, for example, that follow-on work should be brought into scope or that if the follow-on work requires an Exceptional Case Funding (ECF) application, suggesting an expedited ECF process.

The Government’s response to Q4

80. The Government intends to implement this proposal as consulted on, which is that the initial PRN advice of up to a maximum of seven hours will be remunerated at the hourly rates for Legal Help in table 7(d) of the Remuneration Regulations (Schedule 1, Part 1). Travel and waiting time will also be remunerated separately at the rates in table 7(d), and travel costs and fees for interpreters will be claimable separately too.

81. Questions on follow-on work are addressed below in question five.

82. The Home Office will shortly be communicating the PRN process to stakeholders and interested organisations.

83. The LAA will shortly be commencing the contractual consultation, which will seek to address the queries mentioned above that relate to how the proposal will work in practice. We are grateful to respondents for asking these questions.

84. We cannot consider the suggestion to increase the number of hours of advice, because seven hours is the amount agreed by Parliament and is set out in amendments made to LASPO by the Nationality and Borders Act. It is not part of this consultation. The suggestion to increase the hourly rate is also beyond the remit of this consultation and therefore will not be taken forward at this time.

Q5: Do you agree with our proposed approach to remunerating follow-on work after the maximum of seven hours of advice? If not, please explain why and suggest an alternative.

85. We received a total of 24 responses to this question, with 14 agreeing, 7 disagreeing and 3 mixed responses.

86. "Follow-on work" refers to any further work carried out by a legal aid provider after the maximum of seven hours of initial advice has been provided to a PRN recipient. At the end of the maximum of seven hours of legally aided advice, a provider must make a determination as to whether the individual qualifies for further legally aided advice and/or representation.

87. Many respondents welcomed the proposal of paying follow-on work (work after the maximum of seven hours of advice) at hourly rates, with some commenting that they "believe hourly rates are the most appropriate way to remunerate work done."

88. Respondents on all sides continued to argue that the existing hourly rates are too low and should be reviewed and increased. Some also felt that remunerating this proposal at hourly rates was a "basis for extending hourly rates beyond this service." One respondent felt that remunerating follow-on work at hourly rates "irrespective of the type of matter is unhelpful as it will create confusion", suggesting instead that follow on work should be remunerated according to the existing scheme of either a fixed fee or an hourly rate dependent on the type of case.

89. The majority of concerns raised by respondents related to how the follow-on work remuneration process would work in practice. Some respondents asked for clarification on how follow-on work would be defined and what the test for it would be.

90. Many respondents surfaced their thoughts on the ECF scheme as a whole, especially because some follow-on work could require an ECF application. One respondent said the ECF scheme is a "complex and time-consuming process carried out at risk by legal aid providers who will not be paid for their time if the ECF application is not successful." Another commented that "ECF has been shown to act as a significant barrier to provision of legal advice, and also creates a delay." Two of respondents raised concerns about the capacity of legal aid providers, especially in terms of making ECF applications and asked for there to be no penalties for legal aid providers who cannot undertake follow-on work.

91. Some respondents suggested that PRN follow-on work should be brought into scope, or alternatively, that the ECF process should be changed, for example, "a streamlined process with a presumption that PRN follow on work should qualify for ECF" or for "a simple (and expedited) extension application replacing the ECF application."

The Government's response to Q5

92. The Government intends to implement this proposal as consulted on, which is that follow-on work will be paid by hourly rates according to the level of the service provided.

93. “Follow-on work” refers to any further work carried out by a legal aid provider after the maximum of seven hours of initial advice has been provided to a PRN recipient. The “test” for follow-on work is therefore no different to any other legally-aided case.

94. Follow-on work could be an in scope matter (i.e. a civil legal service listed in Schedule 1 of Part 1 to LASPO) or an ECF matter, and it could be Controlled or Licensed Work. The Government’s policy intention is that all follow-on work will be remunerated at hourly rates to ensure that it is attractive for providers to continue the necessary work to resolve a client’s case. The Government’s view is that this approach of paying hourly rates after an initial consultation has worked well in other areas of immigration advice, such as matters opened following an initial 30-minute appointment under the Detained Duty Advice Scheme.

95. The applicable hourly rates for the follow-on work, both in scope and under ECF, will depend on the level of the service provided. For example, if the follow-on work constitutes a Legal Help matter, the hourly rates will be as set out in table 7(d) (of Schedule 1, Part 2 of the Remuneration Regulations). If the follow-on work constitutes a Controlled Legal Representation matter, the hourly rates will be as set out in table 8(c) (of Schedule 1, Part 2 of the Remuneration Regulations).

96. The Government acknowledges the value of the feedback received on the ECF scheme and is grateful to respondents for their helpful suggestions to make applying for ECF as PRN follow-on work as seamless as possible. It is not within the remit of this consultation to bring PRN follow-on work into scope. Similarly, the suggestion to increase the hourly rates are beyond the scope of this consultation, as it is the Government’s view that the civil legal aid fee schemes are more properly considered across the board rather than in isolation.

Q6: Do you agree with our proposed fee of £75 for advice on referral into the NRM? If no, please explain why and suggest an alternative.

97. We received a total of 27 responses to this question, with 6 agreeing, 19 disagreeing and 2 mixed responses.

98. Most respondents disagreed that 1.5 hours, and therefore the corresponding fee of £75, was enough time to advise an individual on referral into the National Referral Mechanism (NRM). However, some respondents welcomed the proposal in principle, with one respondent saying “we applaud the underlying principle of flagging the importance of identifying and referring [victims].”

99. We have grouped the concerns of respondents about this proposal into five key themes:
    - Victims and their experiences impact on the ability to gain trust and identify issues;
    - Advising on the NRM cannot be easily separated from the client’s circumstances or immigration matter;
    - Actual referral into the NRM must be made by a First Responder;

- NRM advice is not simply procedural advice and requires tailoring to the individual; and
- Implementation of the proposal.

Victims and their experiences impact on the ability to gain trust and identify issues

100. Respondents who raised concerns under this theme varyingly pointed to sources of information or guidance to illustrate their points, such as the Home Office's statutory guidance[2], the Trauma Informed Code of Conduct[3] and the Law Society's guidance for vulnerable clients[4] and for victims of trafficking.[5]

101. The core of the respondents' arguments is that working with victims or survivors of trafficking should be done in a trauma-informed way, with regard to their client's vulnerabilities, their experiences and their needs. One respondent explained that their view was that the consideration of the fee has been based only on the type of work done and "there is no real consideration of how this work might be impacted by the needs of the client." Another respondent agreed, saying "no account is given in the Consultation to a trauma-informed approach to the nature of the material to be discussed, the vulnerability or needs of the individual, […] and the importance of building trust and confidence with the individual being advised."

102. Respondents further explained that as victims are likely to have experienced trauma, they may have mental health needs, "which makes it difficult for them to describe their experiences" and may have difficulty in trusting their legal aid provider. Consequently, multiple appointments may be required to establish trust and to understand the victim's experiences and obtain disclosure of relevant information.

103. Another respondent commented that "numerous factors" will affect how long it will take to provide advice, including "how well the individual understands their own immigration/asylum matter; how well they understand concepts of trafficking and modern slavery; the complexity of their immigration or asylum matter; [and] their ability to comprehend advice, based on their age, education level, language abilities and vulnerability." Respondents also stated that victims may need multiple sessions of advice before feeling able to agree to a referral. The need for interpreters was frequently raised, with many saying that this could double the amount of time needed.

Advising on the NRM cannot be easily separated from the client's circumstances or immigration matter

[2] https://www.gov.uk/government/publications/modern-slavery-how-to-identify-and-support-victims/modern-slavery-statutory-guidance-for-england-and-wales-under-s49-of-the-modern-slavery-act-2015-and-non-statutory-guidance-for-scotland-and-northe#about-this-guidance.

[3] https://www.helenbamber.org/resources/best-practiseguidelines/trauma-informed-code-conduct-ticc.https://www.helenbamber.org/resources/best-practiseguidelines/trauma-informed-code-conduct-ticc

[4] https://www.lawsociety.org.uk/topics/client-care/meeting-the-needs-of-vulnerable-clients.

[5] https://www.lawsociety.org.uk/topics/immigration/victims-of-modern-slavery-guidance-for-solicitors.

104. Respondents said that advice on the NRM cannot be ringfenced. One respondent explained that it “forms part of a much wider dialogue with the clients where trust is established.”

105. Another concern raised was that whilst identifying a client’s trafficking indicators would not be in scope of the bolt-on fee, “the need to identify trafficking indicators […] is an issue that as providers we need to be mindful of at all times.” Respondents further pointed out that it is necessary to know their client’s immigration history, together with the indicators of trafficking, to be able to assess whether they meet the trafficking test and to be able to explain this to the client themselves.

<u>NRM advice is not simply procedural advice and requires tailoring to the individual</u>

106. Many respondents disagreed that NRM advice would be largely procedural in nature, drawing particular attention to the fact that the Government specified in the consultation document that advice on referral into the NRM should cover ‘the impact of entering the NRM on an individual’s immigration case.’

107. One respondent explained that individuals will want to know “is it a good idea for me to enter the NRM and will it harm my immigration case?” Continuing, they said “responding to those questions requires the adviser to refer to the facts of the case and the indicators.”

108. Some respondents also explained that advice on referral into the NRM must be tailored “because of the serious implications of coming forward to the government with a claim that might not be accepted and with disclosures that will be on the record with the Home Office and could potentially impact your immigration case.” Two respondents also outlined their concerns about the impact of changes made by the Nationality and Borders Act 2022.

109. Respondents also argued that in order to be able to advise their client on what they will be asked on referral, this will relate to their exploitation and so this advice will be tailored to the individual.

110. Many respondents also said that advice on referral into the NRM may be needed on multiple occasions. One provider said it was an issue that providers needed to be aware of at all times, and another respondent said that “the point at which a referral into the NRM is made is not always defined and may emerge over time.” Another respondent said that “trafficking is often missed by others, demonstrating that NRM referral is an ongoing process.”

111. Some respondents also commented that advice given may need to be followed up in written work, and that the “individual may need to go away, reflect on the advice and return with follow-up questions.” Another highlighted that “1.5 hours of work is not the same thing as 1.5 hours of advice, if the provider also needs to undertake preparation for the meeting or put the advice into writing.”

Actual referral into the NRM must be made by a First Responder

112. As legal professionals are not First Responders, one respondent drew attention to what a legal aid provider would need to do to get their client referred to a First Responder, commenting that "no remuneration is offered for the actual referral to the First Responder."

113. The same respondent explained that for one First Responder organisation, they are required to provide a "brief outline of the client's circumstances, experiences of modern slavery including trafficking and exploitation as appropriate." The respondent goes on to detail what that would involve doing as a legal aid provider, including reviewing their instructions, the indicators set out in the modern slavery guidance and any objective evidence to substantiate the client's account. The respondent suggested that this could take between 1-3 hours, and that correspondence with the First Responder may also be required before a Reasonable Grounds decision is made.

Implementation of the proposal

114. Some respondents were concerned that a bolt-on fee would "add complexity to the administration of the legal aid process, both for providers and for the LAA," with one respondent commenting that "if the amount is only £75, any claim must be simple."

115. Others asked for clarity between the bolt-on fee and the work undertaken in the substantive case, raising concerns that "the LAA would interpret the time reporting of the work tendentiously and to providers' detriment (for example, pushing a claim below the escape threshold)."

116. Finally, some respondents made suggestions to improve the proposal, on the basis that they felt the allocated 1.5 hours and corresponding fee of £75 was not enough. Some respondents recommended an increase in the bolt-on fee to anywhere between 2-5 hours of advice, with 5 hours being the most popular mentioned by 7 respondents.

117. Alternative recommendations were made to paying for advice on referral into the NRM via a bolt-on fee. One suggestion was to bring NRM advice into scope and pay it as part of the fixed fee, or alternatively to pay the whole of a case where advice on the NRM is needed at hourly rates.

118. A final suggestion, generally made as a compromise if the £75 value was not increased, was that time spent beyond the 1.5 hours should be counted towards the escape fee threshold and this advice "should not be assessed […] to determine whether it is 'procedural' and to have that time deducted if it exceeds one and [a] half hours."

The Government's response to Q6

119. The Government welcomes the helpful responses submitted in response to this question. We agree with respondents that advice on referral into the NRM is an important piece of advice. Legal aid providers may be able to help a victim of slavery understand

the concept of modern slavery and the NRM, allowing the victim to make an informed decision as to whether to enter the NRM.

120. The Government recognises the strength of feeling by respondents that the proposal of £75 for advice on referral into the NRM is insufficient, as detailed by the five themes outlined above. In light of these responses, the Government is amending this proposal.

121. The Government intends to implement a bolt-on fee of £150 for advice on referral into the NRM, double the original proposal. We consider that this addresses the primary concern of most respondents to the consultation that the proposed £75 fee was set with respect to the work required, without consideration for the needs of the victim. The detailed responses from respondents to the consultation have provided a clearer picture of best practice for working with victims of modern slavery and the efforts necessary to ensure a victim is not re-traumatised when seeking legal advice.

122. We have also heard how some tailoring of advice to the individual will be necessary. Respondents to the consultation explained how advising an individual on whether to enter the NRM and how it could affect their immigration case would be individual advice provided on a case-by-case basis. Some respondents also highlighted their belief that individualised advice would become even more important in light of wider changes to the modern slavery system as set out in the NABA. The Government considers that a revised fee of £150, which equates to around three hours of advice, will enable providers to ensure their advice on referral into the NRM is tailored to the individual.

123. Parliament agreed that the nature of the advice on referral into the NRM is an "add-on service" and so it is not within the remit of this consultation to change the nature of that advice, simply to set an appropriate fee.

Q7: Do you agree with our proposal to allow the bolt-on NRM fee to be claimed irrespective of whether an individual enters the NRM? If no, please explain why and suggest an alternative.

124. We received a total of 25 responses to this question, with 22 agreeing and 3 disagreeing.

125. Many respondents who agreed with the proposal explained that it was not within the provider's control whether a referral is actually made to the NRM, with one respondent adding "providers should not be required to carry out this work at risk" and another saying that "if the work is done then it should be paid."

126. One respondent expanded on this by saying "[providers] cannot be accountable for a client's decision of whether to enter the NRM", and another respondent commented that it would be "harmful to incentivise NRM referrals if it's not beneficial to the individual."

127. There were two suggestions made by respondents on this proposal. One suggestion was to ensure that NRM advice can be provided in the future by a different practitioner if

a client switched providers partway through a case. The other was to suggest that hourly rates are paid where a positive reasonable grounds decision is made, arguing that it would bring victims of trafficking or modern slavery in parity with unaccompanied asylum-seeking children.

The Government's response to Q7

128. The Government intends to implement this proposal as consulted on, so that legal aid providers can claim the NRM fee whether or not their client is actually referred into the NRM.

129. We agree with respondents to the consultation that providers must be paid for advising on the NRM and that as a decision to be referred into the NRM rests with their clients, it would be unfair and inappropriate to only allow the fee to be payable when a referral is made. It remains the view of the Government that NRM advice contributes to an individual being able to make an informed decision and is valuable regardless of whether a referral is ultimately agreed to and made.

130. The rules for claiming the NRM fee will be set out in the immigration legal aid contract. However, we can confirm that it is our intention that advice on the NRM can be provided and the associated fee be claimed even if a client moves to a different legal aid provider part way through the case. In those instances, the NRM fee will be claimable by both providers.

131. The suggestion to pay hourly rates where a positive reasonable grounds decision has been made is outside the scope of this consultation, which is focused on remuneration for advice on referral into the NRM only, and therefore will not be taken forward at this time.

Q8: Do you agree with our proposal to have age assessment appeals sit within immigration, public and community care categories of law? If no, please explain why and suggest an alternative.

132. We received 26 responses to question 8. 18 agreed with the proposal, 5 disagreed, and 3 were mixed responses.

133. The majority of respondents agreed that age assessment appeals should sit across immigration, community care and public law categories of law. One respondent stated "that asylum and immigration providers should have the opportunity to do this work whilst retaining the expertise built up by community care and public law providers."

134. Concerns were raised about the existing capacity of community care and public law providers and how they would deal with an increase in cases, as well as with the existing capacity of immigration providers in taking on this new work. One respondent noted that "capacity is already quite limited, as is local availability so should be delivered by all with expertise." Another stated "it is important that any increase in capacity, through allowing

immigration providers to take on age assessment appeals cases, does not impact the quality of any such advice."

135. One respondent said that having these appeals sit across three categories is "preferable as there are parts of the country which accommodate unaccompanied asylum-seeking children (UASC) where there are no community care or public law providers who undertake age assessment or immigration-related work, including Wales."

136. Several respondents noted the level of expertise required to conduct age assessment appeals work and highlighted concerns over how immigration providers would be upskilled accordingly. One respondent said that "the immigration sector would need a significant expansion in terms of capacity and specific, child-centred expertise."

137. Another said that "there appears to be no impact assessment as to the additional time it would take for public law and community care providers who are not ordinarily instructed in appeals before the IAC [Immigration and Asylum Chamber] to become sufficiently knowledgeable with the rules, directions and guidance of the Chamber."

The Government's response to Q8

138. The Government intends to proceed with the proposal to have age assessment appeals sit within the immigration, public and community care categories of law.

139. The Government proposed allowing immigration providers to conduct age assessment appeals in addition to existing community care and public law providers for two reasons. Firstly, because the appeal right is specifically for individuals within the immigration system, and secondly, because these appeals will be heard in the Immigration and Asylum Chamber. Whilst immigration providers may not immediately have the subject matter expertise, immigration providers are likely to be more familiar with the processes and procedures in the immigration tribunal.

140. We do not consider it logical to limit age assessment appeals to public law and community care providers as this could further exacerbate capacity concerns, and we consider that keeping the pool of providers who can conduct this work as wide as possible is the most appropriate approach.

141. We do, however, recognise that age assessment appeal work will be new for some providers and that some providers will not have the expertise to immediately take on these cases. We are considering what training could be provided or whether accreditation could be helpful in equipping practitioners with the knowledge and skills they need to conduct this work.

142. The focus of this policy consultation is remuneration for the proposals contained within it. However, the Government appreciates and acknowledges the concerns raised by respondents on dispersal patterns and the effect this has on capacity. The LAA and Home Office discuss dispersal patterns and legal aid capacity and take action when gaps appear.

143. Regarding the quality of advice, legal aid contracts explicitly set out quality standards, and providers are monitored by LAA contract managers to ensure they are meeting contract requirements. There are mechanisms in place to monitor and review performance, including through independent peer review.

Q9: Do you agree with our proposed approach to remunerating age assessment appeals? If not, please explain why and suggest an alternative.

144. The Government received 21 responses to Q9. 6 agreed with the proposal, 10 disagreed, and there were 5 mixed responses.

145. The majority of respondents agreed with hourly rates in principle. Several respondents raised concerns regarding the difference in proposed hourly rates in the First-tier Tribunal compared to the current hourly rates for existing providers who conduct age assessments as judicial reviews.

146. Some respondents also noted that in addition to the lower proposed hourly rates, providers will no longer be able to claim back inter partes costs. Some stated that claiming back inter partes costs often subsidises legal aid work and that losing this could risk causing current providers to leave the market or stop conducting age assessment cases, as the work would no longer be financially viable. This could, in turn result in the loss of expertise that has been built up from conducting this work.

147. As an alternative, several respondents suggested maintaining the current remuneration rates at which age assessment appeals are paid as judicial review hearings. One justification was that age assessment appeals are still specialist hearings that are factually complex and that this would not change by moving them to a tribunal. Another respondent cited the lack of cost data of age assessment appeals, both how current judicial review cases compare with other judicial review cases, and how much the new appeal route to the tribunal will cost. They suggested that "rather than lowering fee levels until we gather more information on the actual cost of the new work, fee levels should be maintained at current levels until enough data is gathered to assess whether they are indeed fair."

The Government's response to Q9

148. The Government intends to proceed with the proposal to remunerate age assessment appeals work under hourly rates for the First-tier Tribunal as set out in table 10(c) of Schedule 1, Part 3 of the Remuneration Regulations.

149. The Government remains of the view that work conducted in the First-tier Tribunal should be paid using the First-tier Tribunal rates. Since we intend to proceed with the proposal as agreed in question eight, doing so would ensure parity across the different categories of law to pay immigration, public and community care providers equally.

150. Tribunals are designed to be accessible and low cost. For this reason, generally, tribunal procedure rules do not provide for costs to be recoverable inter partes in tribunal proceedings, except where a party, or their legal representatives, have conducted the proceedings unreasonably. There are no plans for this to change.

151. In addition, we would also note that the process in the First-tier Tribunal is likely to be simpler because there will no longer be a permission stage. Whilst this proposal represents a reduction in the hourly rate when compared to judicial reviews, this funding arrangement at the First-tier Tribunal is likely to be more secure given that the removal of the permission stage means that work will no longer be carried out at risk for providers.

Q10: Do you agree with our proposed approach to remunerating work on the rebuttal mechanism? If not, please explain why and suggest an alternative.

152. We received 24 responses to this question. 6 respondents agreed with the proposal, 10 disagreed and there were 8 mixed responses. The proposal is to remunerate work on the rebuttal mechanism using the hourly rates set out in table 4(d) of Schedule 1, Part 1 of the Remuneration Regulations.

153. The majority of respondents agreed with the proposal to remunerate the rebuttal mechanism work by hourly rates, however some respondents did not agree with the level of hourly rates and suggested that these should be increased across the board.

154. One respondent suggested that remuneration "should be part of the overall fixed fee rather than a separate NMS [new matter start] to ensure work is carried out holistically and in a joined-up manner throughout the life of a case."

155. Another respondent added that the remuneration proposal may "disincentivise providers to do the necessary work outside of the rebuttal process."

156. Several respondents raised concerns on how the rebuttal mechanism will work in practice, for example, some respondents were concerned about billing this work as a new matter start, based on the understanding that advice regarding an individual's refugee grouping would take place from the outset. Another respondent asked what form the rebuttal process would take, and how costs and disbursements would work.

The Government's response to Q10

157. The Government intends to proceed with the proposal to remunerate work on the rebuttal mechanism by hourly rates. These hourly rates are paid under table 4(d) of the Remuneration Regulations.

158. We remain of the view that hourly rates are the simplest and most logical way to remunerate this work in the first instance given that the rebuttal mechanism is a new process and there is some uncertainty as to how much work will be required. We also

expect that there will initially be some variation in time taken as both practitioners and the Home Office become familiar with a new way of working.

159. We consider that work on the rebuttal mechanism is a separate process that begins from when an individual is issued correspondence by the Home Office to notify them of their provisional grouping status and has been offered the opportunity to submit representations as to why they should not be in that group within 10 working days. Advice can be provided on the provisional grouping and the way to rebut that grouping.

160. We understand that providers may choose to consider the criteria for being a group 2 refugee and provide evidence that could rebut a group 2 presumption from the outset. However, work conducted prior to the receipt of the correspondence would fall under the existing funding scheme applicable to the case. A new matter start for rebuttal work is only to be created if correspondence is received informing of the provisional grouping to group 2 and an individual needs advice in rebutting the claim.

161. We will continue to consider the operational issues raised. The LAA has set out the rules for claiming for work on the rebuttal process in the immigration specification.

162. We reiterate the remit of this consultation does not include the level of the hourly rates more generally. It is the Government's view that the civil legal aid fee schemes are more properly considered across the board rather than in isolation.

Q11: Do you agree with our proposal to use data gathered by hourly rates to inform future legal aid fixed fees? If not, please explain why.

163. We received 24 responses to Q11. 7 respondents agreed with the proposal, 14 disagreed, and there were 3 mixed responses.

164. Most respondents agreed with the need for robust evidence to be gathered before a fixed fee is set.

165. One said that a future fixed fee "should not happen unless evidence shows that the time taken for this work is relatively consistent."

166. Several respondents suggested alternatives, including continuing to pay the work at hourly rates indefinitely. One respondent said that this work "should always be hourly rates as work depends on the needs of the client and the individual circumstances."

167. A number of respondents noted that there should be transparency in how the data is used before any fixed fee is proposed, with two respondents asking for data to be published.

The Government's response to Q11

168. We reiterate that hourly rates have been introduced as the most appropriate approach given that work on the rebuttal process is a new process and this will take time to bed in. This will ensure that legal aid providers are remunerated for the time spent on this aspect of an individual case as the new process is introduced, refined and becomes familiar to those working within it.

169. The Government remains of the view that work on the rebuttal mechanism could lend itself to a future fixed fee informed by data gathered by remuneration at hourly rates. Collecting this data would allow us to set a fair and equitable fixed fee in the future, helping to ensure sustainability of delivery of legal aid services for providers, as well as value for money for the taxpayer.

170. However, the Government recognises the need for sufficient, robust evidence to be gathered before any future fee is set and we can be clear that no time frame has been prescribed for this exercise. Any future fee proposal will be subject to a consultation which will set out the justification and sources of data used to inform any proposal.

Q12: Do you agree with our proposal that remuneration for the rebuttal mechanism will be part of the new immigration contract?

171. We received 20 responses to question 12. 13 respondents agreed with the proposal, 6 disagreed, and there was 1 mixed response. The power for differential treatment came into force whilst the consultation was open. A contractual amendment was made to the existing immigration and asylum specification to ensure that remuneration by hourly rates for the rebuttal mechanism was available from the date the power came into force. This question asked whether respondents agreed with this remuneration proposal being part of the future immigration contract.

172. Most respondents agreed that remuneration for the rebuttal mechanism should be part of the new immigration contract.

173. Some respondents interpreted Q12 as asking whether remuneration for the rebuttal mechanism should be payable as a fixed fee in the new immigration contract. Several respondents were concerned that insufficient time would have passed by the time the tender for the new immigration contract would have launched to be able to effectively inform any fixed fee. One respondent said that it is “unlikely MoJ would have large enough sample size of completed rebuttal mechanism cases over a long enough duration to make informed decisions on fixed fees to apply for the term of the next contract.”

174. Another respondent said that remuneration for work on the rebuttal mechanism should not be part of the new contract. They said that a new matter start is “unhelpful” and that “it is too soon to know how it will operate in practice,” adding that “the changes will require providers to change their admin and case management systems twice over the course of the next years.”

The Government's response to Q12

175. This question asked whether the proposal to remunerate work on the rebuttal mechanism by hourly rates should be part of the new immigration contract. The Government intends to proceed with the proposal, which means the rebuttal mechanism will be part of the new immigration contract which will begin in September 2024. A tender will be launching in early 2023 to enable other providers to join the existing immigration contract.

176. As set out in the response to Q11, the Government has no intention of setting a fixed fee for work on the rebuttal mechanism for the new immigration contracts in 2024. No time frame has been prescribed for any future fixed fee. It remains our intention to ensure that sufficient robust evidence has been gathered before any future fixed fee is proposed, which will be subject to a public consultation.

Q13: Do you agree with the assumptions and conclusions outlined in the impact assessment? Please provide any empirical evidence relating to the proposals in this paper.

177. We received 18 responses to this question. 3 respondents agreed with the assumptions and conclusions outlined in the impact assessment and 15 did not agree.

178. One respondent agreed with the "overarching objective […] to ensure a fair and equitable fee scheme."

179. Of those that did not agree, several respondents said that the assumptions outlined in the paper do not reflect the current landscape of the market. One said that the assumptions are "based on sufficient capacity and flexibility to absorb new work streams on NABA [Nationality and Borders Act] work," making reference to Dr Jo Wilding's research of the market.

180. Concerns were also raised regarding the low level of fees. One respondent said "the fees are too low to meet the aim of fair and equitable remuneration." Another added that "there was no consideration to increase the hourly rate amount, especially in light of increase in Inflation and the cost of living."

181. Several respondents expressed concerns over the limited data on which the impact assessment was based. One said that the "lack of data about legal aid providers causes serious problems, as there is a lack of info about financial viability, business models, staff profiles and difficulties with recruitment, training and retention.

182. Additionally, a respondent said that the "LAA and MOJ lack info about unmet (and partially met) need among would-be clients." Another respondent said that the "[Impact assessment] needs a more detailed and up to date basis for assumptions." They added

that the LAA "need to collect and publish data on how many cases are going through each service as well as the billing figures."

183. One respondent disagreed that Option 1 will "provide financial certainty for legal aid providers," on the basis that it "is only certain for completed cases within the fixed fee […] uncertainty remains if the fee is exceeded and doesn't reach the threshold as could result in providers doing substantial unpaid work."

184. On the assumptions in Options 2-5 (services introduced by the Nationality and Borders Act) that the additional cost to the Legal Aid Fund is equal to the value of the additional services provided to the client, one respondent said it was unclear if the additional cost included any increased LAA administration costs, and said that "if so, the value of additional services to the client is less than costs to the Legal Aid Fund."

185. Several respondents did not agree with the assumption in Option 4 (age assessment appeals) that there will be baseline of around 800 appealable decisions generated per year where the appellant will take up legal aid. Respondents anticipated that the figure is likely to be much higher. Two respondents said that appeals will be a lot higher than 800 "based on the 2021 and current 2022 figures." Another respondent said that "the Home Office do not separate statistics in relation to young people who have age assessments carried out and young people treated as significantly over the age of 18 without an age assessment carried out."

The Government's response to Q13

186. The Government welcomes information and views on the impact assessment to help improve the quality of our impact assessment.

187. With regards to Option 1 (introducing new fixed fees for online system appeals with changes to the escape mechanism), the Government remains of the view that the proposed fixed fees and associated changes to the escape threshold and mechanism represent a fair and equitable payment model for providers. Fixed fees provide advantages in terms of certainty of payment and simplicity of administration, and these proposals help to ensure sustainability of delivery of legal aid services for providers as well as value for money for the taxpayer.

188. With regards to Options 2-5[6] where it is stated that the additional cost to the Legal Aid Fund is equal to the value of the additional services provided to the client, this additional cost does not include any increased LAA administration costs. These are typically absorbed within existing budgets.

[6] Option 2: Remunerate advice provided under a PRN and follow on advice at hourly rates; Option 3: Introduce a new bolt-on fixed fee for advice on referral into the NRM; Option 4: Remunerate age assessment appeal work at the existing hourly rates payable for licensed work in the First Tier Tribunal; and Option 5: Remunerate work on the refugee differentiation rebuttal mechanism at hourly rates.

189. With respect to Option 4, as set out in the impact assessment, the volumes provided for this proposal are very uncertain because of the limited data available. These were based on 2019 figures and on the broad assumption that the legal aid immigration system will return to volumes seen prior to the coronavirus pandemic. The Government notes that migration could be lower or higher in future.

190. Regarding the collection of case and billing data, the Government relies on data provided through the LAA's case management systems to inform our impact assessments. We are grateful to the legal aid providers who record accurate and complete data to help ensure that these assessments are as robust as possible.

191. Whilst the subject of this consultation is remuneration for specific proposals, the Government acknowledges the concerns raised regarding capacity of providers, the overall fee schemes and lack of data, and assure respondents that these issues are being considered as part of wider work on the sustainability of the civil legal aid market.

Q14. From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?

Q15. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please provide data and reasons.

192. Questions 14 and 15 received 16 responses.

Legal aid providers

193. Most respondents said that women and ethnic minority practitioners are over-represented as fee earners within immigration and asylum legal aid work. One said that those from an ethnic minority background are "likely to be disadvantaged in terms of facing greater demand for services whilst currently unsustainable fees remain static and in some cases reduced, which creates additional stress and may result in providers having to close down."

194. Some respondents expressed disappointment with the data source for the assessment on legal aid providers. They referred to the Legal Aid Practitioners Group (LAPG) 2021 Legal Aid Census,[7] adding that using this "would have helped illuminate some of the assumptions and assessments made about impact on providers."

Clients

[7] Legal Aid Practitioners Group, 2021: "We Are Legal Aid: Findings from the 2021 Legal Aid Census": We-Are-Legal-Aid_Findings-from-the-2021-Legal-Aid-Census_Final.pdf (lapg.co.uk).

195. On those who are granted legal aid funding, one respondent said that legal aid clients from ethnic minority backgrounds will be impacted negatively by “inadequate fees.” Other respondents agreed with this comment, with many mentioning how a lack of legal aid providers is likely to negatively impact clients trying to access legal aid.

196. Several respondents highlighted different groups and individuals with protected characteristics in response to this question.

197. One respondent said that “among clients there is overrepresentation in terms of age (children and young people), gender (female), ethnicity (those from an ethnic minority background), and disability (chronic health conditions, mental illness, learning and physical disabilities affecting various family members), as well as high levels of victimisation and vulnerability.”

198. Another respondent said that they work with “LGBTQI+ people seeking asylum”, stating that it is “difficult to find providers due to the fixed fee disincentivising [providers] to take on more complex cases where risk doing work that exceeds fee but might not meet escape threshold.”

The Government’s response to Q14 and Q15

199. The Government welcomes the views of respondents to the consultation on the equalities impacts of these proposals.

200. This consultation focuses on remuneration proposals for specific types of work. We know that some of this work is not yet in scope and so have used equalities data for the wider immigration market, in recognition that these proposals will soon be part of the immigration legal aid scheme. How individuals with protected characteristics are impacted more broadly is beyond the scope of this consultation. However, we recognise that the areas covered in this consultation form one part of the wider immigration legal aid market, which the Government is considering as part of wider work on sustainability.

201. The Government acknowledges that there are limitations in the data collected on the protected characteristics of those who provide publicly funded legal services and of those who are granted legal aid.

Legal aid providers

202. The data used for legal aid providers is from a 2015 survey carried out by the LAA which asks about the protected characteristics of those who have ownership or managerial control of the firm. As noted in the equalities statement, the Government acknowledges the limitations of this data, most notably the limited response rate and the fact that it is likely outdated as it was conducted prior to the current 2018 Standard Civil Contract.

203. The Government welcomes the additional data provided by respondents, including the LAPG Legal Aid Census 2021, which gathered key demographic characteristics of around 1200 legal aid practitioners. The LAPG data does not break down practitioners by category of law, and so it is difficult to draw firm parallels with the Government's data as it does not focus on asylum and immigration practitioners who will be impacted by these proposals.

204. Broadly, the LAPG data showed that women are overrepresented (61%), with the majority of practitioners from a white British background (77%) and without a disability (91%). This data contradicts the Government's assessment which assessed that males, individuals from an ethnic minority background and individuals are 40-49 are overrepresented when compared to general population, however, the two cannot be directly compared as the pool of individuals were not the same. The Government's 2015 data from the survey was limited to owners and practitioners of immigration legal aid firms, and the LAPG data did not break down by category of law, and so it is difficult to draw firm parallels between the two.

Clients

205. The Government is grateful for the information provided on legal aid clients from respondents. This includes information on protected characteristics that the LAA does not routinely collect, such as sexual orientation.

206. The ethnicity data provided in the consultation responses matches the Government's assessment that the proposals will disproportionately indirectly impact clients from an ethnic minority background.

207. Whilst there are some differences between the comments provided by respondents and the Government's data, particularly around sex and age, we do not expect one respondent's experience to be directly comparable with the overall data used for legal aid clients, given the nature of certain organisations who predominantly work with one particular group, e.g. children.

208. The Government remains of the view that even though certain protected groups are overrepresented by the proposals, these would not be directly nor indirectly discriminatory because they are not likely to particularly disadvantage clients, providers or barristers. We think that any particular disadvantage as a result of these proposals is justified as a proportionate means to achieve the policy aim of introducing new fees that sufficiently remunerate practitioners for their work.

Q16. What do you consider to be the impacts on families of these proposals? Are there any mitigations the Government should consider? Please provide data and reasons.

209. Question 16 received 15 responses.

210. The Family Test is an internal Government challenge to departments to consider the impacts of their policies on promoting strong and stable families.

211. One respondent said that the “proposals recognise the tensions but do not provide a satisfactory conclusion.”

212. A further respondent mentioned that the proposals are “likely to drive further providers out of market thereby reducing the number of practitioners offering advice to families.”

213. Another respondent said that families will be “particularly affected by provisions in the Nationality and Borders Act, including the PRN and the differential grouping of refugees, which are highly likely to have the effect of splitting up families and potentially raise Article 8 issues.” They added that it is “essential that impacted individuals have sufficient access to legal aid to obtain advice on their situations and challenge decisions that have been incorrectly made.”

The Government’s response to Q16

214. This consultation focuses on remuneration for specific types of immigration work, and the Government appreciate that families or individual family members will be within the immigration system and therefore impacted by these proposals.

215. The proposals aim to sufficiently remunerate legal aid practitioners for their work, and as a result, individuals, including families, can be supported through the immigration system by access to legal advice and representation to assist with their matter.

216. The Government acknowledges concerns regarding the capacity of the immigration sector and overall fee schemes, and assure respondents that these issues are being considered as part of wider sustainability work.

Impact Assessment, Equalities and Welsh Language

Impact Assessment

The Impact Assessment (IA) for these policy proposals has been updated in line with the latest data and evidence following this consultation exercise. It has been published alongside this document.

Equalities

The Equalities Impact Assessment (EIA) for these policy proposals remains in line with the available data and evidence.

Welsh Language

A Welsh language translation of this document is available upon request. To request this please contact Civil.LegalAid@justice.gov.uk.

Conclusion and next steps

217. As laid out above, the policy changes that the Government will take forward to implementation are:

a) The introduction of new fixed fees for online system appeals in the First-tier Tribunal which do not reach a hearing of £669 for asylum cases and £628 for non-asylum cases.

b) The introduction of new fixed fees for online system appeals in the First-tier Tribunal which do go to hearing of £1,009 for asylum cases and £855 for non-asylum cases.

c) The introduction of a new escape threshold for online system appeals set at twice the value of the relevant fixed fee and the "decoupling" of the escape mechanism.

d) The reduction of the escape threshold for legal help (advice and assistance) cases to match the new escape threshold for online system appeals, set at twice the value of the relevant fixed fee.

e) To remunerate advice provided to recipients of the new Priority Removal Notice at the existing immigration and asylum hourly rate of £51.62 per hour in London and £47.30 per hour outside of London.

f) The introduction of a new bolt-on fixed fee for advice on referral into the National Referral Mechanism (NRM) of £150.

g) To remunerate work on age assessment appeals at the existing First-tier Tribunal hourly rate of £55.08 per hour in London and £51.53 per hour outside of London.

h) To remunerate work on the rebuttal mechanism against the Home Office's process for differential treatment of refugees at the existing immigration and asylum hourly rate (in (e) above) and gather data to introduce a fixed fee in the future.

218. Following the publication of this consultation, the LAA will issue a contractual consultation which will incorporate the policy position laid out in this response into the immigration and asylum specification.

219. A statutory instrument will be laid to make the necessary changes to bring the new fixed fees for online appeals and the NRM into effect. The remaining measures use hourly rates that are already set out in legislation and so no changes are required.

Annex A – List of respondents

We received responses on behalf of the following organisations	
Asylum Justice	Immigration Law Practitioners Association
ATLEU	Islington Law Centre
BA Chambers	Law Centres Network
Bar Council	Law Society
Barnes Harrild and Dyer Solicitors	Legal Aid Practitioners Group
BHT Sussex	Positive Action for Refugees and Asylum Seekers
Bristol Law Centre	Public Law Project
Burton and Burton	Refugee Migrant Children's Consortium
CILEX	University of Liverpool Law School, with input from Liverpool Law Clinic
Coram Children's Legal Centre	University of Sussex
Duncan Lewis	Young Legal Aid Lawyers

Thank you also to those individuals who submitted responses on their own behalf – your feedback was informative and considered throughout the consultation process.

Alternative format versions of this report are available on request from the Ministry of Justice.