Anti-trafficking sector joint response

Immigration Legal Aid:
A consultation on new fees for new services

This submission is by 10 civil society organisations and legal aid providers working to end trafficking and modern slavery:

Anti-Slavery International, Anti-Trafficking Monitoring Group (ATMG), Anti Trafficking and Labour Exploitation Unit (ATLEU), Focus on Labour Exploitation (FLEX), Helen Bamber Foundation (HBF), Hope for Justice (HfJ), International Justice Mission UK (IJM UK), Kanlungan Filipino Consortium, The Snowdrop Project, The Voice of Domestic Workers.

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INTRODUCTION

This is a joint anti-trafficking sector response to the Consultation by the Ministry of Justice (MoJ), *Immigration Legal Aid: A consultation on new fees for new services*[1]. This joint submission responds to how the proposals will impact on access to legal advice for survivors of trafficking and modern slavery.

This response represents the shared views of ten organisations working on trafficking and modern slavery, including civil society organisations and legal aid providers, and should be reflected as such in any data collection on consultation responses. It is informed by our direct and partners' experience of the challenges faced by survivors of trafficking and modern slavery in accessing legal advice and representation.

To inform this response, ATLEU ran a survey to frontline support and advocacy organisations between 26 July and 3 August 2022 to enable them to share their knowledge and evidence about the issues that survivors of trafficking and modern slavery face in accessing good quality immigration advice within a reasonable timeframe. This survey was sent out via ATLEU's newsletter and on Twitter. There were 86 responses despite the short window. Of these, 79% were from Modern Slavery Victim Care Contract contractors or subcontractors, 15% frontline support and advocacy organisations, 5% organisations providing support and legal advice services, and 1% support organisations that are not specialists in trafficking and modern slavery. Respondents included those providing services across all regions of the UK, with a significant number providing services based in London and the South East. A summary of these findings is contained in section 1 of the Executive Summary. ATLEU will publish a more detailed analysis of the survey in a policy paper on access to justice for survivors of trafficking and modern slavery in autumn 2022.

We welcome the sentiments expressed in the consultation that access to legal aid is an important part of a fair immigration system and ensuring access to justice. Similarly, we welcome the commitment expressed by Tom Pursglove MP in the foreword of the Consultation, to 'ensure legal aid practitioners are adequately remunerated for the immigration and asylum work they do' and to 'ensure fair and equitable payment and continued access to this important service'.[2] We welcome the indication that further work on the civil legal aid market as a whole should take place in the future.

However, we wish to highlight our concern that current legal aid immigration funding system is failing survivors of trafficking and modern slavery and penalising legal aid providers who seek to take on trafficking and modern slavery cases. Trafficking and modern slavery cases are particularly complex, long-running and costly. They are very much a specialism with a specialism. Trafficking and modern slavery cases are currently not financially viable for legal aid providers. The result of this is a huge discrepancy between the demand for legal advice on trafficking and modern slavery and available supply. There are 'legal advice deserts' for victims of these crimes across the UK. The problem is particularly acute outside of London, but even within London an overwhelming gap between need and capacity or supply is reported. The end result is that victims are currently unable to get legal

[1] Ministry of Justice, 'Immigration Legal Aid: A consultation on new fees for new services' (13 June 2022) <https://www.gov.uk/government/consultations/immigration-legal-aid-a-consultation-on-new-fees-for-new-services>

[2] Ministry of Justice, 'Immigration Legal Aid: A consultation on new fees for new services' (13 June 2022), Foreword

advice when they need it, despite it being key to their ability to secure rights and their immigration status and their recovery from exploitation.

As such, we have analysed the proposals[3] in this consultation to form a view as to whether they will address these challenges experienced by survivors, support organisations and legal aid providers alike. Our conclusion is that, regrettably, they do not. This consultation, which is an attempt to improve the legal aid system in a piecemeal fashion, will not correct these fundamental issues because it fails to address many current difficulties with the system, and instead risks further complicating access in some areas.

The sustainability of the system overall needs to be considered before implementing piecemeal changes, both to address the critical health of the immigration legal aid market now, and prepare it for the imminent changes brought by the Nationality and Borders Act.

Legal aid funding for trafficking and modern slavery cases requires a tailored response that is reflective of the evidenced complexities of running such cases and the high level vulnerability of this group of survivors. There are certain types of cases that cannot be operated on a fixed fee basis as they are so complicated and to do so leads to a market failure. The government has acknowledged that unaccompanied children are one such vulnerable group and legal advice is therefore paid on an hourly basis.

Advice in trafficking and modern slavery cases should also be treated as a specific case that cannot be operated on a fixed fee basis. This work must be remunerated on an hourly rate basis, and an hourly rate that is sustainable: we recommend that rates of remuneration be urgently reviewed and increased for civil legal aid. This should be accompanied with the introduction of a billing system that is streamlined and more user friendly.

Acronyms used in this submission:

CG Conclusive grounds decision (second stage decision by the government that someone is a victim of modern slavery)
CLR Controlled Legal Representation (the form of legal aid for cases in the immigration Tribunal, usually the First Tier Tribunal)
LAA Legal Aid Agency (executive agency of the Ministry of Justice which administers legal aid funding)
LH Legal Help (initial stage of legal aid for cases, before they proceed to court or Tribunal stage, and to prepare and make applications)
MSVCC Modern Slavery Victim Care Contract
NRM National Referral Mechanism (the government system for identification and support of victims of modern slavery)
RG Reasonable grounds decision (first or gateway decision that someone is a victim of modern slavery)
CA Competent Authorities (the decision making bodies in the NRM: the Single Competent Authority and the Immigration Enforcement Competent Authority - both part of the Home Office).

[3] Ministry of Justice, 'Immigration Legal Aid: A consultation on new fees for new services' (13 June 2022) Executive summary, paragraph 4

Note: Survivors of trafficking and slavery are people who have suffered a very serious crime. We use the terms survivor and victim interchangeably in this briefing.

For further information:

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BACKGROUND

Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

Survivors of trafficking and modern slavery are now significantly less able to access legal advice when they need it since LASPO came into force. The introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) significantly reduced the scope of legal aid, removing most non-asylum immigration work from the scope in England and Wales. It removed many social welfare matters from the scope of legal aid, thus delaying access for many other matters until crisis point. This forced services to move away from holistic advice, and, together with other legal aid cuts and the impact of austerity, the impact on the legal aid sector has been devastating. Since its introduction, half of all law centres and not-for-profit legal advice services in England and Wales have closed, according to government figures. In 2013-14 there were 94 local areas with law centres or agencies offering free legal services. By 2019-20, the number had fallen to just 47.[4] There is also a recruitment crisis in the immigration legal profession across the country and at all levels, from solicitors to supervising caseworkers.[5]

At the same time, the legal framework for migration to the UK, and for people who migrate to the UK, has been transformed by a series of immigration and asylum-related Acts of Parliament, including the Nationality and Borders Act 2022, alongside Regulations, changes to the Immigration Rules, and the UK's withdrawal from the EU. The 'hostile environment' policy has resulted in an ever-more-complex relationship between immigration status – or the ability to prove one's immigration status – and access to an expanding range of other welfare protections, services and necessities. Regularisation of immigration status is often the gateway to obtaining wider support to enable stabilisation, recovery and integration including welfare assistance, community care and housing.

There are outstanding key areas where victims are not able to access legal advice as they are out of scope for legal aid. Firstly, advice before entering the National Referral Mechanism (NRM) is not within scope for all survivors. Under changes introduced by the Nationality and Borders Act (and within the remit of this consultation), pre-NRM advice will come into scope only if a survivor is accessing another in scope matter. Secondly, there is no free standing entitlement to legal aid for advice solely about the NRM identification process, unless this is linked to an application for leave to

[4] https://www.theguardian.com/law/2019/jul/15/legal-advice-centres-in-england-and-wales-halved-since-2013-14

[5] Dr Jo Wilding, *No Access to justice: How legal advice deserts fail refugees, migrants and our communities* (May 2022), Refugee Action, p250

remain after receiving a positive Reasonable Grounds decision, and this is increasingly an unmet need, with the Home Office's Competent Authority (CA) sending out witness statement requests, asking survivors to submit a statement themselves, which puts pressure on non-legally trained support workers to assist them, without advice on the implications. This undermines the likelihood that informed consent to a referral into the NRM has actually been achieved. The witness statement guidance from the CA[6] states: *"It is important to remember that a witness statement is a legal document and therefore can be used as evidence during any ongoing legal proceedings you may be involved with"*. If a document might have relevance for an application for leave to remain, for example, the CA's consideration of discretionary leave, the person who is advising on how it is completed should be regulated by the Office of the Immigration Services Commissioner (OISC) or otherwise be covered by the Immigration and Asylum Act 1999 on who can give immigration advice.

EXECUTIVE SUMMARY

1. The importance of legal advice for survivors of trafficking and modern slavery

Survivors of trafficking and modern slavery present with complex legal and support needs. They often need assistance to access a variety of different types of legal advice and representation. This includes (but is not limited to) immigration and asylum, criminal law (non-prosecution), civil compensation, criminal injuries compensation, community care, welfare benefits, housing, debt advice as well as public law issues which arise.

Access to early, specialist legal advice and representation is absolutely critical for survivors of trafficking and modern slavery to secure rights, support, justice and remedy. The consequences of not being able to access it can be devastating and leave survivors destitute, homeless, at risk of removal, and at risk of further exploitation or re-trafficking. It damages survivors' ability to recover, make informed choices, and achieve lives free from exploitation. It undermines access to justice as well as the prevention of trafficking and modern slavery.

It is for this reason that access to legal advice is a recognised support entitlement of survivors of trafficking and modern slavery across multiple international frameworks. The Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT), and Directive 2011/36/EU (Trafficking Directive) both state that the provision of support and information, specifically in relation to legal advice and rights should be provided without delay and should be free of charge.

[6] SCA Witness Statement Guidance v1 sent to a survivor in June 2021

2. A crisis in legal advice and representation for survivors of trafficking and modern slavery

Victims of trafficking and modern slavery are currently unable to get legal advice when they need it, despite it being so crucial. There is a huge discrepancy between the demand for legal advice on trafficking and modern slavery cases and available supply, with the existence of 'legal aid deserts' across the country'.

Survey of frontline organisations

ATLEU developed its 'Immigration Legal Aid Fees Consultation Survey' to enable frontline support and advocacy organisations to share their knowledge and evidence about the issues that victims of modern slavery face in accessing good quality immigration advice within a reasonable timeframe. Many of those providing support to survivors are not familiar with the detail of the fee structures for immigration legal aid, however, they do possess significant information about the experiences of survivors in accessing immigration legal aid advice. ATLEU aimed to capture this information through circulating a simple survey, designed using Google Forms, to frontline organisations in order to inform this joint anti-trafficking sector response.

The survey was advertised in ATLEU's newsletter and on our Twitter account. It was sent out on 27 July and closed on 3 August 2022. Despite a window of just 7 days, 86 responses were received. Of these, 79% of respondents provided services to survivors for a Modern Slavery Victim Care Contract (MSVCC) contractor/subcontractor; 15% for frontline specialist modern slavery support and advocacy organisations; 5% for organisations providing support and/or legal advice services; and 1% support organisations (not modern slavery specialist). The breakdown of respondents was 79% MSVCC contractor or subcontractors; 15% frontline support/advocacy organisations; 5% organisations providing support and/or legal advice services; 1% non-specialist modern slavery organisations. Respondents included those providing services across all regions of the UK, with a significant number providing services based in London and the South East.

The survey responses amount to a stark and alarming picture of the sheer gulf in available legally aided advice for survivors of trafficking and modern slavery, the immense burden that this is placing on frontline organisations, and the devastating consequences this is having for individual survivors.

> *"It is always hard to find a solicitor, it is a time consuming and frustrating process in all circumstances."* MSVCC contractor/subcontractor

An enormous 90% of respondents said that in the last 12 months they had struggled to find a legal aid immigration lawyer for a potential or confirmed victim of modern slavery, with just 9% saying that they hadn't.[7] 76% reported significant delays, of up to three months or longer, in finding an immigration legal aid lawyer for a potential or confirmed victim of trafficking or modern slavery. 43% of respondents reported serious delays of up to 6 months or longer.

[7] 1% responded 'don't know'

> *"There has been a stark decline in the ability to find legal aid funded solicitors for my clients. It was hard in 2021 but in 2022 it does seem impossible. I am relying on free clinics and other support organisations which hand out legal advice. Solicitors that have already been instructed seem swamped with cases and the system seems to be creaking under the additional pressure."* MSVCC contractor or subcontractor

Support workers also highlight they experience major problems in finding a legal aid lawyer within the survivor's home location. Of the survey respondents, 84% said that over the last 12 months, survivors had sometimes, often, most or all of the time only been able to access legal aid immigration advice outside of their location. Only 16% of respondents did not report difficulties in accessing advice within a survivor's location.

> *"It takes so much time to find a lawyer, we have started looking outside London and using solicitors who have not been recommended in the past. It can take days for us as advocates to find someone, calling 30-40 firms with no clear response."* MSVCC contractor/subcontractor

A requirement to travel long distances in order to access legal advice causes challenges for survivors and support workers alike given the vulnerabilities and circumstances of many survivors and need for accompaniment.

> *"It has been difficult seeking legal aid solicitors due to capacity which means that my clients are using solicitors in different locations from where they are based. This is added stress for them when travelling and often need to rely on a support worker for travel or budget their little income for this travel."* MSVCC provider.

> *Case example: One support worker had a pregnant client referred into the NRM who was living in safe house accommodation. She could not obtain legal advice locally and the nearest available was in a city approximately 30 miles away. In addition to the expenses incurred travelling, this placed a significant strain on the survivor, who was struggling with PTSD, had anxiety about going out to non-familiar areas, English was not her first language, and who had to travel this distance with a newborn baby. Her support worker had to accompany her to the appointments*.

The survey also asked how easy it is to find a legal aid immigration lawyer to help with different types of immigration and asylum matters for potential or confirmed victims of modern slavery in all types of matter. Over 60% of respondents said that they found it *difficult* or *moderately difficult* to secure legal assistance for *all* types of matters, save for initial asylum advice for children (which was at 48%) and 60% still described finding a legal aid immigration lawyer to advise on an initial asylum claim for a survivor/potential survivor moderately difficult. Fresh claims, asylum appeals and non-asylum advice are the most difficult types of case for which to find an immigration legal aid adviser.

> "*We have a list of our clients who either do not have an immigration lawyer or who have one but we have concerns about their quality and we are trying to find a new lawyer. We try and match them with lawyers we think would be suited to their case based on their experience. Depending on the facts of the case and the stage it is at it can take on average up to 3 months (sometimes longer) to find someone to take on the case. This is despite the fact we are in regular contact with legal representatives that we regularly work with to ascertain their*

capacity …In the vast majority of cases the reason given for not taking cases on is capacity. We find that it is easier to find a rep for someone who is pre-decision (for both the asylum and NRM case). In the case of clients who are bringing a fresh claim alongside their trafficking case it is often very difficult to find someone to take the case on." Survivor support/advocacy organisation

It's clear that significant capacity within the anti-trafficking support sector is spent on searching for legal representation for victims, detracting from their ability to focus on core support services and promoting recovery. Of our respondents, 94% said it caused additional work for the survivor's support worker and 68% said that it resulted in the support worker helping with a task that should have been undertaken by an accredited adviser or lawyer.

Case example from an MSVCC contractor/ subcontractor: The client arrived to the safe house having already claimed asylum but with no solicitor. I (the support worker) reached out to numerous solicitor agencies in the local area asking if they had capacity. I had to wait 3-4 weeks for only 2 out of the 10 emails I sent to get replies. I then started searching further afield. As we were now a month into the Client's stay at the safe house, he was getting incredibly anxious that nothing was being done about his asylum claim or that something was going to be missed and he would be deported. This led to him coming into the office every day and speaking to me about this. As I went further afield in my search for a solicitor, I found one 10 miles from the safe house which took the Client 1 hour and 30 minutes to get to via public transport. It took me a further three months to get the Client fully signed on with this solicitor and get the first meeting organised. This meant the Client had been without a solicitor for 4 months. During this time I had to complete witness statements and clarifying points to the SCA for the Client's NRM decision. This is further support that I am not supposed to provide but there was no other choice.

An issue raised by respondents to the survey was poor quality advice given by legal aid immigration lawyers on trafficking and modern slavery cases, or advice that lacked knowledge or expertise around representing a potential or confirmed survivors of trafficking and modern slavery. Advice on trafficking and modern slavery was seen as a specialism within a specialism, and the availability of lawyers with this expertise was seen to be particularly acute outside of London. Concerns around quality of advice, and lack of expertise on such cases, is perhaps an inevitable outcome of a funding model that deters providers from specialising and/or restricts providers who will take on cases but undertake work only on a particular aspect of the case. Of respondents, 56% said that they were concerned often or most or all of the time about the quality of advice, a further 29% said that they were sometimes concerned, with just 4% reporting not being concerned at all.

"Our issue is trying to find quality legal representation that has a specialism and understanding of trafficking, alongside immigration. We come across quite a few solicitors where their lack of understanding has meant that some key issues have not been addressed/badly handled. The most common response to our request for solicitors is that they do not have capacity." Survivor support/ advocacy organisation.

These findings concur with research by the University of Liverpool, University of Nottingham Rights Lab and ATLEU (2021), which found that high quality immigration legal aid practitioners were spending time rectifying previous poor-quality advice from other legal practitioners.[8]

> *"My client (has a positive conclusive grounds decision) with two young boys was struggling to find a solicitor with legal aid capacity to take on her case. I spent around 2 working days searching for a solicitor for her, in the end, we couldn't find anyone in London and we approached a firm in Milton Keynes. They agreed but then later on stated that her claim (10 year parents route) was not covered by legal aid. We contacted ATLEU about this and they spoke to the solicitor directly and sent the correct guidance. In the end, my client was able to access the legal representation she needed, however, this was only through many hours of advocating from myself for the client and through the expert knowledge and guidance of ATLEU."* MSVCC contractor/subcontractor

In the next section, we summarise the findings of the survey on the impact that being unable to find a lawyer has on survivors of trafficking and modern slavery.

The consequences for survivors

The legal aid crisis described in this section has devastating consequences for those affected. Survivors of trafficking and modern slavery who cannot get the advice and representation they so need face destitution and homelessness. When asked about the effects of being unable to find a legal aid lawyer promptly for potential or confirmed survivors, 55% of respondents to ATLEU's survey said it left survivors in destitution or unable to access appropriate accommodation or support.

It puts survivors at risk of criminalisation and removal if they are unable to access quality legal advice.

> *"As we primarily work with people who are detained, there should be no issues in getting cases taken on as the Detained Duty Advice Scheme is operational within Immigration Removal Centres (IRCs). However, in our experience the majority of firms on the DDAS rota have very limited capacity and are overstretched, and so can be reluctant to take on new matters. This includes work for potential victims of trafficking/ victim of trafficking. We also regularly see trafficking indicators not being identified by firms at the DDAS surgery and people not being given legal advice around the NRM at the surgeries. When there are charter flights sometimes there is very limited capacity to get people taken on last minute, as firms on the surgery and those able to take referrals outside of the surgery are over stretched. There have been occasions where we have had to notify the Home Office directly that someone has trafficking indicators because they hadn't been able to get legal advice/representation within the removal directions notice period and were otherwise going to be removed. This is far from ideal and we would want everyone to be able to access independent legal advice before being referred into the NRM."* Survivor support/advocacy organisation

97% of respondents said it caused survivors stress, anxiety or contributed to poor mental health.

[8] *Access to legal advice and representation for survivors of modern slavery*, May 2021, available at https://modernslaverypec.org/assets/downloads/Legal-advice-report.pdf

Case example from a MSVCC contractor/subcontractor: I currently support a woman who has never made an asylum claim but has had previous applications for both Discretionary Leave and statelessness but these were refused. Since arriving with us, she has not been able to access a solicitor and every solicitor we apply for does not have capacity or does not get back to us. This is affecting her mental health drastically and she feels uncertain about her future. Her previous solicitors never gave her information about/ or recognised her as a victim of potential modern slavery. She was entered into the NRM and given her positive Reasonable Grounds in 2022 despite being in the country for 16 years.

64% said it resulted in the survivor being unable to meet a deadline, for example for the Home Office or the Competent Authority. 57% said it left survivors in a position where they were unable to claim asylum.

"We have a client for whom their solicitor failed to register their asylum claim successfully. This led to our client being wrongfully detained. This reminded them of their trafficking experience and caused further trauma."

Of respondents to ATLEU's survey, 29% said it had left survivors in a situation of exploitation. Some victims of trafficking and modern slavery, as a consequence of being unable to obtain legally aided advice, are driven to borrow money to pay for advice which leaves them in debt and drives them back into exploitative situations.

3. Why is there a legal aid crisis for trafficking and modern slavery cases?

"Every solicitor approached states they are at capacity. Hundreds of enquiries and continuously told the same thing." MSVCC contractor/ subcontractor

A funding system that deters providers from taking these cases

The primary reason for the paucity of legal advice evidence in this submission is that trafficking and modern slavery cases are not financially viable for legal aid providers. Trafficking and modern slavery cases are widely regarded as being particularly complex, long-running and costly. As such, these cases are ill-suited to payment by standard legal aid fixed fees which do not change to reflect the time taken or level of work carried out. The financial challenges created by the legal aid payment structure is significantly worse in trafficking immigration cases as opposed to other types of immigration cases.

Uniquely complex

Trafficking and modern slavery cases often involve complicated and interconnected immigration issues that run over a long period of time, and clients often also have other legal issues ongoing not directly related to the immigration case but which may nevertheless impact on it (such as ongoing criminal cases).

For legal representatives, taking on cases of trafficking and modern slavery involves attention to a number of issues in a case. This includes issues around identification as a survivor, protection claims and alternative arguments to be made to obtain leave to remain, for example, under Articles 8 and 4 ECHR, and issues around ongoing support under the Recovery Needs Assessment (RNA). Legal representatives need to consider access to protection for their clients under a number of different legal frameworks, as there may be more than one application to consider, which all fall under the same matter start and within the scope of paragraphs 32 and 32A of Schedule 1, Part 1 of LASPO if someone has a positive reasonable or conclusive grounds decision.

The complexity of the cases also stems from the often very vulnerable position of the clients who have experienced, or are still experiencing, significant trauma. Survivors of trafficking and modern slavery experience significant barriers to disclosure, and may need to spend many hours with their lawyer before they will disclose their full story and sometimes this will need to take place over months or even years. There is often a real fear of engaging with the authorities among survivors. Lawyers in trafficking and modern slavery cases will be required to be able to evidence the traumatised nature of their clients, for example by obtaining psychiatric and psychological reports (not routinely covered by the fixed fee and only recoverable with specific agreement from the Legal Aid Agency).

Trafficking and modern slavery cases involve supporting people with very complex needs that impact upon their ability to engage with legal advice. It is work that demands partnership working between support organisations and legal aid providers. Survivors interact with a wide range of agencies in the course of their identification and support, for example police, social services, and medical professionals. These different professionals and agencies may all be ones who an immigration lawyer needs to be aware of and in communication with.

Trafficking can have close links with international organised crime and have taken place in the UK, meaning persecutors can be located in the UK or have close links to criminal gangs in this country, presenting additional and immediate protection needs which must be addressed and which may involve work with different agencies.

Uniquely long-running

The average length of a trafficking and modern slavery case is significantly longer due to the factors related to the presentation of the client and other issues that need addressing in the case before representations can be made to the Home Office, for example, waiting on medico legal evidence or phased disclosure by clients as they establish trust with their representative.

There are also long delays that come from the NRM system. In our experience, a conclusive trafficking identification decision can take at least two years and sometimes more than three years.

The government's own statistics confirm these huge delays. The NRM data for 2021 states that it took an average (median) time of 448 days from referral to conclusive grounds decisions. As median decision times are for cases that received a conclusive grounds decision from the Competent

Authorities in this period, the report notes that they "*do not reflect the waiting time of all cases within the system."* Further, "*As of 7 January 2022, the majority (80%; 10,214) of referrals made in 2021 are awaiting a conclusive grounds decision, having received a positive reasonable grounds decision. This is a result of the current time taken to make conclusive grounds decisions".*[9]

The average trafficking and modern slavery case is therefore much longer than a standard immigration case where the NRM is not involved. As one immigration matter start covers multiple applications[10], even if someone were to get a positive conclusive grounds decision and not receive leave to remain, the matter would remain open pending the resolution of that issue, whether through discretionary leave, the asylum claim or another application.

The delays in the NRM and asylum processes have recently been recognised in the Court of Appeal in a case brought by two survivors of modern slavery. In EOG & Anor v Secretary of State for the Home Department [2022] EWCA Civ 307,[11] Lord Justice Underhill noted at para 91:

> *"The background to both these cases is* ***the extraordinary length of time which it now takes for the Secretary of State to reach both conclusive grounds decisions in the case of victims of trafficking and decisions in asylum claims****. If the conclusive grounds decision in EOG's case or the decision on KTT's asylum claim had been reached in a reasonable time it is unlikely that either claim would have been brought. In EOG Mostyn J referred to published figures that showed that in 2019 it took an average of 462 days for a person referred into the NRM and in whose case a reasonable grounds decision was made to receive a conclusive grounds decision. We do not have updated figures but we were not told that there had been any improvement.* ***It is likewise notorious that there are very long delays in the asylum system.*** *Mr Tam [barrister for the Secretary of State for the Home Department] in his oral submissions* ***frankly acknowledged these delays and made no attempt to suggest that they were acceptable****." **[our emphasis]***

Historically, it has been the experience of legal aid lawyers and the anti-trafficking sector that if someone is in the NRM and has an outstanding asylum claim, they will experience additional delay. In an email from the Home Office's Modern Slavery Unit on 9 March 2022 they said:
"On 1 February we published an update to the Modern Slavery Statutory Guidance (version 2.6) to reflect the changes to the Modern Slavery Victim Care Contract (see above) and to provide clarity for decision making by asylum case workers by deleting paragraph 14.208. The deleted paragraph could have been misinterpreted to imply that asylum decision making could not progress until a Conclusive Grounds decision had been made in the NRM. No such barrier was intended in policy and it has been removed accordingly."

Despite this, a support organisation reported that they continue to see letters from the Home Office stating that they cannot make a decision on the asylum claim until a Conclusive Grounds decision has been made. ATLEU notes that it has not seen a noticeable increase in the speed of decision making since this announcement. An immigration lawyer who began work at ATLEU in January 2021 inherited

[9]The Modern Slavery: National Referral Mechanism and Duty to Notify statistics, end of year summary, 2021. Available at: https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2021/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2021

[10] Immigration and Asylum Specification para 8.34

[11] https://www.bailii.org/ew/cases/EWCA/Civ/2022/307.html

a caseload of survivors of trafficking who were children and adults, and also had pending immigration applications. In July 2022, one adult with an initial asylum claim received a decision on their applications. No other adults in the inherited cohort of cases who have asylum claims (with cases opened prior to January 2021) have had decisions.

Regrettably, delay is the norm, not the exception. Recent examples of delays in NRM decisions from ATLEU's caseload, on cases without an asylum claim, include:

- A survivor who we assisted to get a positive RG decision in September 2019 is still waiting for a CG decision, almost three years later.
- A survivor who we assisted with reconsideration of a negative CG decision, which was accepted for reconsideration in August 2020 (meaning the individual has positive RG status again) received a CG decision in July 2022. A decision on leave is pending.
- A survivor who we assisted with reconsideration of a negative CG decision, which was accepted for reconsideration in October 2020 received a CG decision in February 2022. Leave to remain was refused, meaning the immigration case continues with an appeal against the refusal of discretionary leave.
- Delays can stretch even longer and some individuals seem to have cases that last longer than others. In August 2022 we were contacted by someone on our advice line who had been working with two survivors who were refused asylum seekers. Both had recently received CG decisions after a five year wait.

Uniquely costly

The average cost of running a case for a victim of trafficking is significantly higher as the cases are more complex. ATLEU estimates this to be an average of over £3000 per case for asylum-seeking victims, at initial legal help stage. Wherever there is delay in a system and difficulty obtaining relevant disclosure, it becomes more difficult to deliver a legal service within the boundaries of a fixed fee.

The structure of the legal aid payment system requires legal aid providers to work on trafficking cases for as long as three years without receiving the true value of the work they do. During this time the legal aid provider must cover all of the costs involved in providing the advice including, the cost of the lawyer's salary and all the associated costs of running a legal practice such as a desk for the lawyer, as well as their management, supervision, training and accreditation.

In October 2020 the Legal Aid Agency introduced changes[12] to help cash flow:

- The ability to stage claim disbursements every 3 months, rather than every 6 months.
- A new Legal Help Stage claim, allowing providers to stage claim their Legal Help costs (Fixed Fee and Hourly Rates) once all submissions have been made to the Home Office and the client has been interviewed (where relevant).
- A new Stage Claim facility for Transitional CLR matters at the Upper Tribunal (UT) stage, where the UT have made a determination to remit the matter back to the FTT.

[12]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926803/201013_2018_SCC_Immigration_Specification_Amendments.pdf

These are very welcome and we hope this direction of travel can be improved on.

However, it remains the case that due to their complexity and length of time, trafficking and modern slavery cases are ill-suited to payment by standard legal aid fixed fees which do not change to reflect the time taken or level of work carried out.

While it is possible to charge for the actual time spent on cases if the work carried out exceeds the certain threshold – thus meeting the escape fee – this is deemed too risky by many lawyers. We have been told about lawyers being actively discouraged from working in this way within firms. The long running nature of the cases and investment required is off-putting when that money cannot be recovered quickly and is not certain to be recovered in full. An example of delay and the costs involved that cannot be realised from ATLEU's caseload is client A:

Case example from ATLEU:

ATLEU's client A is a potential survivor of modern slavery. She has a positive reasonable grounds decision, issued in November 2019. She has made an initial claim for asylum. Her screening interview took place in February 2020. She has still not had a substantive asylum interview, over 2 years and 5 months later and has not had a Conclusive Grounds decision, over 2 years and 7 months later.

The impact on her is significant. It has negatively affected her physical and mental health. She visited the GP this month and was told that her blood pressure has increased because of the stress she is experiencing from the delay. She has experienced anxiety and depression and is having trouble sleeping.

A would like her own space. Living in a safe house is not serving her, with the constant presence of other people around her including support staff. A feels the system is not meant to work like this and describes the way she has been treated as "dehumanising", and although as a survivor she is supposed to be on a journey of healing and recovery, she feels pushed over the edge by her treatment in the NRM system. If she was granted leave to remain she would be able to access housing she could call her own, with the dignity and privacy that comes when creating your own home and space.

Our client said this about the delay she has suffered:

"I suffer with high blood pressure and stress because of what I endure in this place. It is wrecking me. My growth has stagnated with this Home Office. It has destroyed me. It is very hard. The process is stagnating me mentally and emotionally. I cry so much."

ATLEU's solicitor has spent a lot of time working with A, and has raised the impact of delay with the Home Office asylum team and the Single Competent Authority, requesting a decision on the asylum case without an interview in light of the information before the Home Office and our client's mental health. We have spent 66 hours of work on the case to date (£3026.66). We have spent time gathering additional updating evidence including a supplementary statement, due to the long duration of the wait before an interview. This year the Home Office

said they would refer the case to the Safeguarding team but this has not resulted in an asylum decision or invitation to interview yet.

Additionally, it is important to note that legal aid rates have remained unchanged since 2011.[13] Further, according to the Bank of England, consumer price inflation is at 9.4%[14] and is likely to increase to 11%[15] by autumn of this year. In practice this means that legal aid lawyers are experiencing yet another cut in funding. Legal aid rates have always been very low. However, the disparity between the rates of a private high street practitioner and legal aid practitioner is increasing. The effect of this is unduly stringent for legal aid practitioners and should not be ignored. It is reducing the availability of publicly funded advice, as publicly funded work is becoming less sustainable.[16]

The current fee structure: a huge deterrent

The reality is that few legal aid providers can afford to do any trafficking and modern slavery cases.

The financial unviability of cases has three key impacts on the way that immigration legal practitioners, or their firms, approach cases involving survivors:
• Refusing to take on or limiting the number of trafficking/modern slavery cases; or
• Taking on cases of clients who are survivors of modern slavery but restricting the work undertaken on that particular aspect of the case. For example, if a client also has an asylum claim, this will be prioritised. This approach is clearly only possible for those clients with an additional protection claim and carries risks should the claim be unsuccessful; or
• Taking on cases of clients who are survivors of modern slavery and dedicating a significant proportion of unpaid time to the case work, often out of standard work times and at personal cost.[17]

The current payment structure results in very few providers developing trafficking expertise or being able to afford to run a trafficking case with the investment of time and disbursements it needs. This means that where trafficking cases are taken, many providers deliver poor quality advice, often failing to run important trafficking arguments, not spending the time to explain a victim's case properly and not incurring costs or taking the time necessary to present the right supporting evidence. Concerns about the quality of legal advice are frequently raised by support providers through ATLEU's advice line, with lawyers showing reluctance to challenge negative trafficking decisions, not running important trafficking arguments as part of the asylum claim, not helping the survivor with advice about applications for discretionary leave to remain or supporting evidence and representations to

[13] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/308903/LAA-2010-payment-annex-2.pdf
[14] Bank of England, 'What is inflation?' (last updated 17 June 2022) <https://www.bankofengland.co.uk/knowledgebank/what-is-inflation> accessed 3 August 2022.
[15] Graeme Wearden, 'Bank of England says inflation will hit 11% after raising interest rates to 13-year high – as it happened' *The Guardian* (16 June 2022) <https://www.theguardian.com/business/live/2022/jun/16/bank-of-england-interest-rate-decision-markets-pound-ftse-business-live> accessed 3 August 2022.
[16] Response of ILPA and PLP to the Ministry of Justice's Consultation, Immigration Legal Aid: A consultation on new fees for new services, (August 2022)
[17] *Access to legal advice and representation for survivors of modern slavery*, May 2021, available at https://modernslaverypec.org/assets/downloads/Legal-advice-report.pdf

secure it, not spending the time to explain a victim's case properly and not incurring costs or taking the time necessary to present the right supporting evidence. Support providers note that lawyers are not always aware of the discretionary leave provisions available to a victim of trafficking and modern slavery, and there is a lack of specialist understanding of the rights of EEA nationals. This can result in poor outcomes for victims and an ongoing need for legal advice as victims are given negative decisions, are disbelieved and wait long periods in destitution, struggling to find advice on making a new claim.

Research by the University of Liverpool, University of Nottingham Rights Lab and ATLEU notes that within larger firms, with a number of different legal departments, there is an acceptance that trafficking cases would run 'at a loss' but be offset by gains in different departments. This strategy enabled them to run the case in a more expansive way than otherwise would have been possible. Clearly, however, this is not an option available to those lawyers in smaller, less diversified law firms. As a consequence, practitioners in smaller firms report that they work long hours on client cases involving trafficking and modern slavery, often at weekends and on an 'unpaid' basis. This came at a personal cost and many shared their misgivings about the effect and sustainability of their work with such clients, from a financial and emotional perspective. [18]

The billing system: complex, time consuming and burdensome

The legal aid billing process for immigration cases is the most complex in civil legal aid at controlled work level. ATLEU employs a dedicated billing team member for controlled work with considerable experience on immigration files, due to the complexity and time consuming nature of legal aid billing. An immigration legal aid case at controlled work level includes: checking different rates of pay that may exist on the same file (if there is hourly rates pre action work), checking if there is the correct evidence on file to prove someone is a victim of trafficking, checking large numbers of invoices, ensuring VAT is correctly selected. The Legal Aid Agency recently released a document that is 11 pages long[19] detailing the *"most serious, numerous and costly claiming errors identified by the LAA"* in the last financial year. It goes through the different risk areas where it comes to billing. This guidance shows the potential for providers to get things wrong, because of the number of issues to remember. As the document confirms, the LAA: *"adopts a strict approach towards legal aid claiming errors in line with that of the National Audit Office. This is important to help manage financial risk and its potential impact on the wider legal aid fund. Claiming errors also present both financial and resourcing risk to Providers, as costs claimed for work that is not compliant with the 2018 Standard Civil Contract will be recouped by the LAA and may result in further action being taken under the 2018 Contract."*

We understand the need to operate a system where claims are properly made. However, adding complexity to an already complex system, where providers have recently been updated on how often they get things wrong, suggests the system should not be made more complicated, but less.

[18] *Access to legal advice and representation for survivors of modern slavery*, May 2021, available at https://modernslaverypec.org/assets/downloads/Legal-advice-report.pdf

[19] Immigration and Asylum Common Errors Document v 1.0 04.08.22, p1

Sometimes work to process a large immigration case can take a full day of time, to ensure all the components needed for billing are in place. The overhead of employing a billing team member that can focus on these issues is met by the legal aid provider. As legal aid rates have not gone up in many years, but other costs of running offices have, the overheads are not fully met by legal aid. There is also a risk that cases are called for audit, and if issues are picked up on over compliance with Legal Aid rules, that could result in further audits and cost reductions on high value files. This is mainly because high value cases tend to have a number of cost extensions. It is extremely time consuming to check that time, invoices and counsel costs are not over the limits within those extension periods. Most case management systems are not set up to deal with such highly complex cases so we have to resort to exporting documents to an excel spreadsheet and making cost limit calculations accordingly. The Legal Aid Agency agrees about the high margin of error: *"Incorrectly reporting SFS [Standard Fee Scheme] claims as hourly rates matters or failure to obtain prior authority from the LAA to exceed Immigration and Asylum Controlled Work costs limits are some of the most costly errors identified by the LAA."* [20]

The LAA introduced electronic assessment of escape claims during the pandemic. Providers submitted a running record of costs, the legal aid form and evidence of means, disbursement vouchers and other key documents that could assist the decision maker. Decisions were swift and payments could be quickly realised. Since 21 June 2021, a requirement has been introduced to submit every attendance or preparation note for 1 hour of time or more.[21] We have noticed a slow-down in the processing of escape claims, with paper files being processed more quickly than those submitted electronically. ATLEU has bills submitted electronically in April which are outstanding, with others submitted later which have been processed. Paper files submitted by courier have been turned around in 14 days. It would be very helpful to explore why this is, to increase efficiencies within the LAA and see if there is a way to reduce the administrative burden if staff capacity is low for the LAA, as well as for providers. We would welcome a return to the requirements for billing in the pandemic, which enabled quicker turn around and better cash flow.

In addition, the nature of the client group means a large disbursement load of interpreter and translation invoices, in addition to any other supporting evidence needed like medico legal expert reports. The LAA has detailed requirements for invoices to be acceptable, and for interpreters/translators to be considered quality compliant. Justification from the last 12 months from three different local providers must be provided if an interpreter charges a "minimum" fee (which almost all interpreters do in practice). In the experience of ATLEU's billing coordinator for controlled work cases, who works across several different providers and areas of work, immigration escape fee claims are more likely to be rejected than other civil escape fee claims. One of the main reasons for rejection is with expert invoices. Often expert reports are issued years before the final claim and sometimes LAA requirements have changed during that period. We have had to go back to suppliers asking them to revise invoices to meet the current requirements. This often causes problems as the expert can't be contacted or they aren't willing to respond or assist.

Immigration legal aid work has two different rates for work done on a fixed fee file and work done on a non-fixed fee (hourly rates) file, which are marginally different. A lawyer may do work on hourly rates on a file that is a fixed fee file, for example, when giving pre action advice, so must remember

[20] Immigration and Asylum Common Errors Document v 1.0 04.08.22 p.5

[21] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/990111/Guidance_for_electronic_submission_of_Escape_Case_Claims.pdf

to charge at the different applicable rates, and record the time separately so it will not get mixed up. There is also a marginal difference for time charged on a London file compared to a non-London file. In addition to the two different rates in and outside London for legal help and CLR work, there are also different rates of pay for legal help, CLR and Upper Tribunal (where not on a certificate) work.

The report "*No access to Justice: How legal advice deserts fail refugees, migrants and our communities* "also addresses the impact of the high administration burdens for legal aid providers. Finding, "The legal aid auditing regime was the primary reason that several firms in England and Wales gave for having withdrawn from legal aid, and the reason that several non-legal aid organisations gave for choosing not to apply for a legal aid contract. The overall unpaid administrative burden of doing legal aid work was cited as an obstacle by almost every legal aid provider in England and Wales who participated. This is a significant threat to provision."[22]

The Immigration and Asylum capacity exercise 2021

We understand the Ministry of Justice is aware of these pressures. The LAA conducted an Immigration and Asylum capacity exercise, surveying legal aid providers through their Contract Managers in September 2021. The exercise was informed by, among other factors, information from providers and independent reports that capacity was extremely low, the emergence of advice deserts, an increase in migrants coming to the UK, a substantial increase in initial asylum application between 2018 and 2021, delays in Home Office and Tribunal processing meaning providers had to carry a large volume of cases, and the introduction of the-then Nationality and Borders Bill. We understand that the exercise found that immigration providers doing legal aid work had reduced since the 2018 contract was awarded, partly because people had chosen to cease doing the work as well as because of LAA sanctions and findings through Peer Review. A key barrier to existing firms expanding was the inability to recruit new staff (for several reasons including large funds tied up in work in progress due to Home Office and court system delays, inability to offer competitive compensation packages, needing to train up people because firms had to recruit below the level they were looking for, the accreditation and re-accreditation process). Legal aid immigration work was no longer viewed as being profitable, which was not helped by the narrowing of scope in 2013. If our understanding of the findings is incorrect, we would welcome clarification by the Ministry of Justice. It would be very helpful if a headline findings document could be made public for clarity.

It's important that such findings are used to inform government proposals on changes to immigration legal aid, but the proposals contained in this consultation regrettably do not address the systemic challenges the Immigration and Asylum capacity exercise found.

Conclusion and recommendations

Trafficking and modern slavery cases are too complex and lengthy to operate on a fixed fee basis. The system as it stands deters providers from taking on trafficking and modern slavery cases. It is leading to a market failure at the same time as placing a huge and unacceptable financial burden on

[22] Dr Jo Wilding, *No Access to justice: How legal advice deserts fail refugees, migrants and our communities* (May 2022), Refugee Action, p13

small and often impoverished providers who are in effect being penalised for specialising on a complex issue.

We do not believe it is possible to resolve these issues on a piecemeal change basis, and we urge the MoJ to seize the opportunity to redress this. We therefore recommend:

Immigration legal aid funding for trafficking and modern slavery cases must be tailored to the complexity of these cases:

Immigration and asylum cases funded by legal aid for potential and confirmed victims of trafficking and modern slavery should be paid on an hourly rates basis, in line with Unaccompanied Asylum Seeking Children cases. This should be accompanied by a day to day cost management and billing system that is streamlined and more user friendly.

- Rates of remuneration should be urgently reviewed and increased for civil legal aid, taking into account and linking these to account for inflation. We endorse the submissions of ILPA and PLP in this regard.
- Hourly rates costs thresholds should be increased.

Should our recommendation for funding of trafficking and modern slavery cases on hourly rates basis not be supported and implemented, and fixed fees remain in place, then at a very minimum we recommend:

- The level at which you can "escape" the controlled work fixed fee should be lower and more achievable than it is now, across legal help and Controlled Legal Representation.
- Providers should not suffer detriment and complication by navigating additional "bolt on" areas of work that cannot be used to achieve the escape threshold. Work that is designated as "bolt on" should be included within the standard fee, to help providers reach the escape threshold and support them spending time on a case.

Additionally, we recommend the following to address the current substantial administrative burden on legal aid providers:

- Hourly rates files should be requested as part of audits by Contract Managers only where the value exceeds a certain threshold e.g. the equivalent escape claim threshold for a fixed fee case or over £1000.
- The "self grant" scheme which certain providers are permitted to use, be extended to all legal aid providers for legal help and CLR cases, or all providers be given information about how they can apply, with transparency over the process and access to it. Self grant funding thresholds should be increased. Using these schemes would decrease the burden on providers and the LAA presented by needing to make cost extensions. Providers should be able to self grant profit costs and disbursements up to new increased limits, and the risk would lie with them, so this is a low risk strategy to increase access to an existing scheme familiar to the LAA.
- Legal aid providers should be allowed to claim for the hours of advice undertaken in line with the existing rules for payment on account that are in place for certificated work, where profit costs can be claimed after 3 months and 4 times in a 12 month period.[23]

[23]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1058499/Civil_Finance_Electronic_Handbook_V3.2.1.pdf 15.2

- Legal aid providers should be reimbursed for any expenses incurred on a trafficking and modern slavery case as incurred, in line with the existing rules for payment on account that are in place for certificated work[24], which reflects the same time period in which a legal aid provider is expected to pay suppliers within 30 days of a valid invoice, such as interpreters or experts, under the terms of a legal aid contract[25].
- The threshold should be increased for the expenses that a provider can incur on a case without having to seek permission first. There should be transparency around the criteria for and how providers can access the "self grant" scheme and more should be enabled to do this.

We will now proceed to respond specifically to the detail of the six proposals, across the 12 consultation questions. We urge however, that these responses are read in line with the detail of this executive summary.

[24]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1058499/Civil_Finance_Electronic_Handbook_V3.2.1.pdf 15.1

[25]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948256/2018_Standard_Civil_Contract_Standard_Terms__1_January_2021__Clean.pdf 3.3 (b)(i)

CONSULTATION RESPONSE: Remuneration for immigration and asylum appeals in the First-tier Tribunal

Introduction

In this section, *Remuneration for immigration and asylum appeals in the First-tier tribunal,* we respond specifically to Questions 1 to 3, which relate to these three proposals:

> 'a) The introduction of new fixed fees for online system appeals at the First-tier Tribunal which do not reach a hearing; we are proposing a fee of £669 for asylum cases and £628 for non-asylum cases.
>
> b) The introduction of new fixed fees for online system appeals at the First-tier Tribunal which do go to hearing; we are proposing a fee 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.

These responses should be read alongside the evidence contained in the executive summary.

RECOMMENDATIONS

Our overarching recommendation in response to these proposals in this section is:

- Advice in trafficking and modern slavery cases must be remunerated on an hourly rate basis, and an hourly rate that is sustainable. Rates of remuneration must be urgently reviewed and increased for civil legal aid. This should be accompanied with the introduction of a billing system that is streamlined and more user friendly.

However, in the event that this proposal is not supported and fixed rates are maintained, a compromise model would be:

- Lowering the escape fee threshold for all immigration legal help work to a lower and more achievable level. This would achieve the aim of remunerating providers for work done without increasing the administrative burden placed on them and without incentivising bad practice.
- The MoJ should monitor the system and collect evidence on a much wider basis and over a much lengthier period before considering whether to set fixed fees, with transparency over the process of information gathering.
- The MoJ should publicly consult on remuneration for external counsel before changing the current funding structure of the online appeal system.

1. Remuneration - fixed fees

Question 1: 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.

No we disagree with these proposals. Fixed fees are the wrong funding model due to the complexity, length and cost of appeals in trafficking and modern slavery cases. This work must be remunerated on an hourly rates basis and rates of remuneration should be urgently reviewed and increased for civil legal aid. Counsel need to be paid appropriately and in full for their work. This also should be accompanied by a billing system that is streamlined and more user friendly.

We have read and endorse the submission by the Immigration Lawyers Practitioners' Association (ILPA) and Public Law Project (PLP) in relation to concerns about the way that evidence was gathered to inform a new fixed fee and lack of sufficient data to do this, the distinction drawn between asylum and non asylum appeals, how external counsel will be paid for actual work done and the limitations of the fixed fee model.

We have evidenced in detail in the executive summary that trafficking and modern slavery cases are uniquely complex, lengthy and costly, and unsuitable to funding on a fixed fee basis.

Fixed fees incompatible with the complexity and length of cases

All respondents to the call for evidence conducted by the MoJ between November and December 2021 felt that the existing fixed fee structure would not be appropriate for the new online system at First Tribunal. We agree. In ATLEU's response to the call for evidence in 2021 we said:

> *"We do not consider the fixed fee model to be suitable for appeals under the current system and support hourly rates payment for legal aid providers, including counsel, particularly when considering the complexity and level of work involved in cases for survivors of modern slavery and the need to involve counsel early to provide a good and better value service to narrow issues and reduce re-traumatisation by that narrowing, if the case does continue to a full hearing.*
>
> *We are very concerned that a return to a fixed fee model for appeals will leave a sector that already struggles to recruit and retain experienced and quality lawyers without lawyers willing or able to sustain legal aid work to protect our vulnerable client group."*

We continue to have those concerns. We ask if the MoJ can confirm how many of the appeals in the sample of 17 offices reporting on their last 5 cases involved a survivor of modern slavery. In our experience, it is common for appeals for survivors to involve a much wider slate of legal arguments, evidence and authorities than those in other appeals. The arguments around a risk of re-trafficking, which arise in asylum and non asylum appeals, involve a multi-faceted approach to vulnerability. There are a number of individual and situational factors that can lead to vulnerability to re-trafficking, going back to a survivor's childhood and upbringing. These aspects need to be evidenced and explained, both in a statement and supporting documents directly relating to the client but in the country and medical evidence.

In our response in 2021, ATLEU gave an example of how the online process works in practice and the amount of work involved:

> *"We took on a case for a victim of modern slavery where the appeal was lodged in April 2021. The Respondent's bundle was due at the end of May. They failed to lodge this. Further directions were given for it to be lodged by the end of August and the Respondent again failed to comply. We came on record in November 2021 after taking over the file from another firm, with no background paperwork with the level of detail that would allow us to assemble a bundle sufficiently addressing the issues in the case, that would be available to and expected from the Respondent. It was only at that point that the case began to move.*
>
> *Wherever there is delay in a system and difficulty obtaining relevant disclosure, it becomes more difficult to deliver a legal service within the boundaries of a fixed fee. The therapeutic needs of clients change as well as their life circumstances, so updated information must be sought. They may become more anxious and experience a deterioration in mental health because of the delay, and require more time from their adviser to scaffold their understanding and go over advice."*

ATLEU then needed to work with the client to prepare a statement and instruct experts. This was very upsetting for the client, who could not face revisiting her history at this point in time, but having a statement was essential for her evidence to be before the Tribunal.

Problems with delays in the system and immigration providers needing to deal with case preparation in the absence of any action by the Home Office, persist. This is shown in this example of a survivor of modern slavery who has filed a non asylum appeal against a refusal of leave to remain:

> *Client B filed an appeal on 25.05.22. The Secretary of State for the Home Department, as the Respondent, was due to file their disclosure by 24.06.22. They failed to do so. They have not been directed to do so by the Tribunal or criticised in any way.*
>
> *We have been directed to proceed with filing our bundle and ASA. Although we have information on file that we can refer to as we represented client B at legal help stage, we do not have any unpublished documents that the Respondent may wish to rely on. We also know that, as in other cases, the Respondent may raise arguments about the validity of the appeal as it is an appeal against a refusal of discretionary leave to a survivor of modern slavery.*
>
> *We can prepare against this argument, drawing on our own experience of past conduct in other cases, but this is not how appeals should be run.*
>
> *The Respondent's conduct, as tolerated by the Tribunal, prevents the fair and efficient processing of appeals, making it likely that we will need to amend our evidence at a later stage to respond to documents or arguments raised when the Respondent chooses to meaningfully engage with the appeal and increasing costs.*
>
> *We will need to involve counsel for this round of preparation of the ASA and bundle, and the amendments that will be required when the Respondent engages. Under a fixed fee, counsel is not guaranteed to get paid for any of that time.*

The cost of counsel's advice prior to preparing the ASA so far has been one hour, but was incredibly valuable as they gave key recommendations for how to formulate the bundle to tie into how they wished to run the arguments in the case."

ATLEU's ability to front load the appeal as in the example of client B is only possible due to our expertise in working with survivors as a specialist organisation that has seen how the Respondent has behaved over more than one case where similar arguments are run. If providers had less experience, they would have fewer time savings as they could not pre-empt what is to come.

Witness statement changes incompatible with a fixed fee structure

We also agree with the concerns raised by ILPA and PLP about the MoJ's failure to account for changes required in the Tribunal in the formulation of witness statements. As all of our clients are foreign nationals, this will bring a huge change in, which seems incompatible with the fixed fee, and is further support for changes to the online system being proposed too soon. The Practice Direction of 13 May 2022[26] explains the importance of statements:

"5.1 A witness statement should be capable of standing as the totality of the evidence in chief of the person giving that statement."

We ask the MoJ to note the specification that only in "exceptional circumstances" will additional evidence be permitted to provide additional evidence.[27]

The witness statement changes came in during 2022 in the Tribunal. With the new requirements for translation, we anticipate this will lead to much more work than undertaken by the 17 offices which the MoJ consulted in October 2021 about their last 5 cases in order to inform the new proposed fixed fee. The changes require not just a read-back of a statement from English into another language, but (assuming the client has not prepared their own statement in their own language which, in our experience, is highly unlikely), taking instructions in the client's own language, writing the statement in English, translating this into the client's language, then the client reading (if able to read) the translation and having the English version read back to them in their own language. This will affect the majority of our clients, who would not give evidence in English in a matter as important as their appeal, even if they have some level of English proficiency. ATLEU lawyers representing survivors of modern slavery have needed to adjust to this process in the higher courts since 2020 but have been able to do so at hourly rates, under a certificate, and without the restrictions of the fixed fee regime when it comes to obtaining cost extensions for disbursements. The Ministry of Justice should have been aware of these changes but have not reflected them in the decision to set fixed fees, or considered how these changes will play out, on top of the online appeal system which is still in relative infancy.

Disbursements (which will increase and be essential to get quickly when translating statements are required) are not easy to obtain quickly for those not chosen by the LAA to use the Self Grant scheme. An example of recent experience:

[26] https://www.judiciary.uk/wp-content/uploads/2022/05/20220513-Practice-Direction-FtT-IAC.pdf
[27] Ibid, para 5.3

"ATLEU requested an extension of costs in an appeal on 15 July 2022, with a deadline to meet to file the ASA of 5 August 2022. A response was not provided until 1 August 2022, a full 14 working days had elapsed between the response times."

Hourly rates

It is unclear why the MoJ has decided to set fixed fees for online appeals, contrary to the evidence of all respondents to the call for evidence, and the information from the MoJ's internal capacity survey of providers in September 2021 which considered the sustainability of the sector as a whole.

We agree with the recommendations of ILPA and PLP that the MoJ should monitor the system and collect evidence over a much longer period before considering whether to set fixed fees.

We agree with the recommendations of ILPA and PLP on an urgent increase and index linking for hourly rates to account for inflation, reform of Legal Help rates because the system works as a whole, parity between Legal Help and CLR when it comes to escape thresholds and reducing the administrative burden in hourly rates cases (including adjustments to extensions of the upper costs limit and the Self Grant Scheme). We would also be happy to work with the LAA on how to reduce the administrative burden for processing hourly rates work.

Counsel

We agree with the recommendations of ILPA and PLP on the need to consult on how external counsel will be appropriately remunerated for their time. We also agree with the recommendation of remunerating counsel by way of hourly rates payments at appeal stage. There should be no changes to the current online appeals payment system pending a proper review of counsel remuneration.

We have represented many survivors of modern slavery who have been poorly represented at appeal stage and have seen how this leads to years of increased cost to the public purse in support for the individual while they are destitute, and in legal aid fees while cases are unravelled and rebuilt. It is vital to get it right first time. As specialists in working with survivors of modern slavery, we know the importance of finding experienced counsel who know how to run a trafficking case and can work collaboratively, proactively and be alive to the multiple overlapping issues such as the use of Article 4 ECHR as well as Article 8 ECHR, the other immigration applications that a survivor may have brought because of the funding under para 32 and 32A of Schedule 1 and Part 1 of LASPO and the nature of NRM decision making.

The amount of work involved in running cases for survivors of modern slavery means that we regularly instruct external counsel to add specialism when it comes to Tribunal stage, as we regularly focus on building the case and relationships with the client. We can speak to the importance of involving counsel from an early stage in the online system, right from the moment of lodging an appeal, to ensure there is sufficient time to get their opinion on the direction of travel for the case in strategy over how it is presented, including review of witness evidence and expert reports. In our opinion, this is cost saving, because it will ensure a more effective use of public funds for counsel to be involved early, meaning the right approach is taken, questions are asked for the statement which

must be before the Tribunal, and a litigation strategy takes account of expert evidence from the point of formulating instructions.

In our response to the call for evidence in 2021 we said:

> *"In relation to timing of instruction, we instruct Counsel early on in our cases as it is best practice. In our last peer review conducted in line with our legal aid contract we were advised by the independent peer reviewer that it would be good practice to have conferences with our client and counsel before the appeal took place because "the appellant is likely to be able to focus better and when there is time available to benefit from tactical and evidential input from counsel." The same principle applies to counsel's ability to review and input on evidence, for example, an expert report while the expert is being instructed, and their involvement early to have consistency of tactical approach leading up to the ASA and in future steps for the hearing. All of this is consistent with the aim to encourage early conclusion of the appeal, better value for money in terms of legal aid spend and a better outcome for the client."*

We ask the MoJ to take into account the recommendation from its peer reviewer to us and their peer review guidance for immigration cases[28] which says:

> *"Conferences between the Client and/or witnesses with external or in-house advocates should be considered where it is proposed to call oral evidence. This is particularly the case when outcome is likely to turn predominantly on the credibility assessment."*

The Nationality and Borders Act 2022 has detrimentally changed the definition of a victim of modern slavery[29], changes the requirements for someone to get support[30], and introduces disqualification clauses. Survivors will find it harder to navigate the NRM and to achieve successful identification. This means there will potentially be more survivors going into their asylum appeals with negative findings by the Home Office (as Competent Authority) against them, increasing the need for conferences with those representing, as advised in the peer review guidance.

We are very concerned that the proposed changes could lead to more dedicated and experienced counsel leaving the sector, meaning survivors will be at risk of poor or no representation. ATLEU cannot afford to pay counsel for time spent on the ASA and preparation from the start of the case from any other source than legal aid. If counsel is not willing to work pro bono, which we do not consider they should have to do if payment is not achieved, the pool of barristers may dry out. This presents the unattractive choice of clients having no advocate in their appeal hearings or to prepare the ASA or their cases put at risk by the funding mechanism forcing them to accept someone without experience to take the case, if that barrister is willing to work with the risk of non payment.

ATLEU operates an office in the north of England and ask the MoJ if they have given geographical consideration to the availability of counsel as well as legal aid providers outside London, particularly when it comes to counsel with sufficient expertise on complex cases involving survivors of modern

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[28] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966103/Immigration___Asylum_Guide_Quality_February_2021.pdf p.11

[29] for example, narrowing the type of exploitation that can be considered sexual exploitation by tying it to certain offences

[30] which is likely to impact on their ability to be successfully identified if they have inadequate or no support

slavery. In our experience, the pool of external counsel currently willing to work at legal aid rates outside London, with experience in representing survivors of modern slavery, is very small, and it is dangerous to set conditions that have the potential to reduce it dramatically because of non-payment, particularly at a time where the cost of living is rising, and barristers are self-employed so cannot rely on an employer to help cushion the blow.

We agree with the reservations expressed about a bolt on fee for the Appeal Skeleton Argument (ASA) by ILPA and PLP. We do not consider it fair that counsel should lose out on payment by the existence of a bolt on (if one is introduced) for actual time spent or dependence on lawyers to request escape assessment even if there is no cap on the bolt on and it could be "escaped". We ask the MoJ to look holistically at plans to change funding, which include external counsel as part of the picture.

2. Remuneration - escape fees

Question 2: do you agree with our proposal to change the escape fee threshold? If no, please explain why and suggest an alternative.

Partially. We propose an alternative funding model which is that this work should be remunerated on an hourly rates basis. This would negate the need to access escape fees and would also ensure better sustainability of the sector.

However, in the event that this proposal is not supported and hourly rates are not implemented, **then a compromise option would be to reduce the escape fee threshold for all immigration legal help work to a lower and more achievable level.**

In a market where we need to encourage lawyers to do this work and support them to do it well, the fixed fee model is outdated and no longer appropriate for the environment in which immigration law is practised today.

It is positive to see movement towards a more achievable escape fee threshold but we do not accept that setting the escape fee threshold at two times the fixed fee is reasonable. Why has this limit been chosen? Please can the MoJ explain why a lesser multiplier has not been selected?

We also ask the MoJ to bring the legal help escape threshold down. We are not clear on the rationale for changing the CLR escape threshold and not the legal help one.

Question 3: do you agree with our proposal to change the escape fee mechanism? If no, please explain why and suggest an alternative.

Partially - As above, if our proposed model of funding on an hourly rates basis is not supported, decoupling the legal help and CLR stages will help providers to achieve the escape threshold so we therefore support that mechanism.

While it is technically possible to charge for the actual time spent on trafficking and modern slavery cases if the work carried out escapes the fixed fee, this involves high risk for legal aid providers as there will often be uncertainty as to whether the threshold will in fact be met, for example depending on the way in which the legal case unfolds. A legal representative may spend a considerable period of time working on a case to a high standard but still not meet the threshold required to unlock the escape fee and thus only be paid the fixed fee. Some lawyers surveyed in the course of research by the University of Liverpool, University of Nottingham Rights Lab and ATLEU reported that relying on meeting the escape fee was deemed too risky for their firms. Given the risk involved in relying on escape fees, the funding model drives a pressure to remain within the fixed fee which, in turn, can influence the approach to the case work. For example, a legal adviser may decide not to take a witness statement, or, may do so but take it in such a hurried way that the result is of a poor quality and is ultimately not helpful for the client's position.

We reiterate that fixed fees are not appropriate in today's market. Decoupling the LH and CLR stages is welcome but we ask for the escape threshold for LH to be lowered, for fairness but also recognising the cases where a more slight LH cannot now benefit from a larger amount of work on the CLR to reach the escape threshold overall. As ILPA and PLP have noted, measures to improve cash flow are very welcome, especially when the market is made up of a large number of smaller practices.

CONSULTATION RESPONSE: Immigration legal aid changes within the Nationality and Borders Act

Introduction

In this section, *Immigration legal aid changes within the Nationality and Borders Act*, we respond specifically to Questions 4 to 12, which relate to these three proposals:

> 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 introduced through the Home Office's new asylum differentiation process at hourly rates and gather data to inform a future fixed fee for this work.'

Before doing so, we put on record our deep regret that the Nationality and Borders Act (henceforth the Act) has made extensive and harmful changes to the identification, protection and support of victims of trafficking and modern slavery in the UK. In doing so, it has seriously undermined the ability of survivors of trafficking and modern slavery to be able to access protection, rights, status, justice and remedy.

The Act has introduced a much higher level of complexity that support workers and legal aid providers will have to respond to in order to ensure that survivors are identified, supported and safeguarded rather than disbelieved, disqualified and ultimately cut out of protection, facing detention and/or removal. Good quality and early legal advice for trafficking and modern slavery is more critical than ever.

There are some interesting principles and assumptions underlying the four specific proposals related to the Nationality and Borders Act. For example, we welcome recognition in the narrative on funding Priority Removal Notices (PRN) that legal aid providers need to be confident that the hours that are spent on a case will be fully remunerated, and that hourly rates are the way to reflect work done, incentivise providers, and therefore increase supply. We also welcome the tacit recognition that pre-NRM legal advice is important and needed.

Nevertheless, it is our position that these proposals are an attempt to improve the legal aid system in a piecemeal fashion, which will not address the many current difficulties with the system, and instead risks further complicating in some areas.

We believe the sustainability of the system overall needs to be considered and addressed, offering a structure that gives more security for providers to take on, and hopefully retain, staff, and the legally aided legal support survivors need.

RECOMMENDATION

Our primary recommendation in response to the proposals in this section is that:

- Advice in trafficking and modern slavery cases must be remunerated on an hourly rates basis, and an hourly rate that is sustainable. Rates of remuneration be urgently reviewed and increased for civil legal aid. This should be accompanied with the introduction of a billing system that is streamlined and more user friendly.

However, in the event that this proposal is not supported and hourly rates are not implemented, **then a compromise option would be:**

- Lowering the escape fee threshold for all immigration legal help work to a lower and more achievable level. This would achieve the aim of remunerating providers for work done without increasing the administrative burden placed on them and without incentivising bad practice.

Proposal One: remuneration for the Priority Removal Notice

Question 4: 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.

Partially: In general, we welcome the use of an hourly rates basis model here which is non-means tested and non-merits based. However, we query the logic of paying hourly rates for this service and not across all immigration and asylum legally aided work in trafficking and modern slavery cases. We also have concerns about the implications of this model for quality and consistency of advice.

The consultation document sets out the rationale for paying hourly rates for this service as 'attracting high quality providers'.[31] Implicit in this statement is the recognition that hourly rates are a fairer funding that allows providers to be paid for all of the work that they do and incentivises high quality work. We therefore query why this rationale is not being applied to immigration legal aid funding for all trafficking and modern slavery cases, as we propose that it should.

Priority Removal Notices are envisaged as covering advice "not just on the PRN itself, but on the individual's immigration status, on the lawfulness of the individual's removal from the UK and, where the individual is held in immigration detention, on detention and bail." We note that this is broad with wide-ranging serious consequences for the individual in receipt of the PRN. It most certainly requires a skilled lawyer with a specialism in trafficking and modern slavery cases and who can support people with very complex needs that often the support of a caseworker or independent advocate to be able to engage with legal advice.

We therefore highlight the following concerns:

[31] Ministry of Justice, 'Immigration Legal Aid: A consultation on new fees for new services' (13 June 2022) , para 48

Low rates of remuneration

While we welcome that the seven hours of legal assistance and advice are remunerated on an hourly rates basis, the rates of remuneration for this work set out in table 7(d) of the Civil Legal Aid (Remuneration) Regulations 2013 are low.

We also seek clarification on what evidential basis it has been calculated that advice on a Priority Removal Notice (PRN) will only take up to a maximum of seven hours.

Risk of a two-tier system

We understand that the Ministry of Justice intends to tender to encourage new entrants to the market to provide this work alongside existing providers. If new providers would be able to do hourly rates work on PRN advice plus any follow on work at hourly rates, this creates a two tier system of people seeking advice, encouraging a shift to this work by providers away from other essential work that needs to be done where someone has not received a PRN. We would be concerned if new entrants will not be required to meet existing capacity needs in the sector more broadly.

Any changes to the immigration contract or deficiencies in capacity should be addressed by looking at the sustainability of the sector as it exists now, and making changes that allow experienced, quality representatives to stay and grow, and encourage new providers to expand into all areas of work including those considered to be less attractive. It does not seem justified to tender for new entrants to provide advice on PRNs but not to provide advice on other areas where providers are sorely needed, and where the funding model is less attractive to encourage people to do the work. We would be grateful for more explanation about this approach.

Quality of PRN advice

We seek clarification about how quality of advice will be assessed, particularly at the early stages of this plan and where new entrants to the legal aid market are encouraged to take on the work, to ensure that individuals who are provided with advice are given the appropriate level of detail and confirmation of advice. This would be to avoid problems that have arisen with the Detained Duty Advice Scheme and quality concerns within that system, particularly where legal aid work is isolated to just one funding stream.

We would appreciate clarification on what system will be put in place to protect providers if someone has already received advice and has not disclosed this to a provider, but also to protect clients if they receive poor quality advice from one provider and wish to seek help elsewhere, particularly if they need advice within short timescales. We also do not wish to add to providers' administrative burdens with this suggestion.

Question 5: 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.

Partially: We agree with the approach to remunerate follow-on work on an hourly rates basis, but query why this approach is not being taken to the funding of all legal aid immigration and asylum advice in trafficking and modern slavery cases.

The consultation document states a policy aim of properly incentivising providers to "...deliver follow-on work where it is necessary to the PRN recipient's claim, ensuring the success of this new legal advice offer in promoting efficiencies within the immigration and asylum system"[32].

In common with our response to question 4, we have concerns about the potential impact of this proposed approach:

A two-tier system of advice that could drive poor practice

While in general we welcome the use of an hourly rates basis model here, we query why this is not being proposed for all immigration and asylum advice.

We consider this approach to recruit and fund a certain type of work in a more desirable way to be misconceived when the whole immigration sector is in a critical state. If it is possible to fund work at hourly rates for follow on from PRNs, it is possible to allow this measure for all immigration advice now, and immediately improve the prospects of a failing immigration advice sector.

Only remunerating advice on PRNs and follow-on work at hourly rates is highly likely to lead to differential treatment of migrants, and for providers to understandably cherry pick cases to allow their practice to survive. Survivors who are not currently being prioritised for removal as they are in the NRM so do not receive PRNs, will continue to find it difficult to find a lawyer. Very regrettably this proposal seems likely to be another example of the funding model encouraging bad practice, as it already does through the fixed fee system with high escape claim thresholds, meaning working within the fixed fee with a minimal amount of work and high turnover of cases is the best way to be sustainable. When the Ministry of Justice knows that survivors of modern slavery with complicated cases already struggle to find quality legal aid lawyers, and to find them quickly, this seems like a dereliction of duty to certain groups of migrants (without PRNs) and the sector as a whole, to approach the issue in this way.

Case example from ATLEU demonstrating poor quality advice*:*

> *In 2021, ATLEU assisted a client pro bono, with pre NRM advice, which was out of scope for legal aid. We did not have capacity to take on the substantive immigration case but the survivor contacted us from time to time while she had no lawyer in place, seeking reassurance or information. The client obtained a positive reasonable grounds decision in July 2021 and was connected to a support provider in the NRM who was based in London in August 2021. The client was located in London. This survivor would not be given a PRN as someone in the NRM.*
>
> *In November 2021, the client was contacted by her NRM support provider with only the back page of a legal help form and authority form from a legal aid firm in northern England, with the request to sign the documents. When we questioned the support provider about this they said:*

[32] Ministry of Justice, 'Immigration Legal Aid: A consultation on new fees for new services' (13 June 2022), para 54

- *The firm is one they had worked with in similar circumstances in the past and they were outside London.*
- *The support worker had tried to find the survivor solicitors in London but said the responses they were getting were that providers were either no longer taking on legal aid cases or the waiting list was too long.*
- *We sent them a list of other lawyers in London to try and the support provider had made contact with over half of them before trying the firm in northern England.*
- *If the survivor was to have a face to face appointment with them, if the appointment was about her trafficking case/NRM the cost would be covered by the Salvation Army but if it was about her asylum case then she would have to cover that herself.*

The legal aid lawyer was almost 4 hours away from the survivor by public transport, one way. This is an inappropriate distance for a survivor to have to navigate, being unable to find advice closer to home. However, in any case, the legal aid lawyer should have funded travel by the survivor to them for face to face appointments, permitted under the immigration specification as she could reasonably have been said to be destitute, or the Salvation Army should have covered this as the asylum claim was about trafficking.

We explained that survivors should not be sent the back page of a legal help form and advised the survivor not to sign anything until she had seen the entire form. This was never sent to her.

The survivor spoke to the lawyer in the north. She does not remember ever signing anything agreeing to opening a file or emailing the lawyers to say she consented to them doing this. The lawyers proceeded to register an asylum claim for the client without her consent. The first she knew about this was having a phone call from the Home Office about an asylum claim that had been registered on her behalf.

This was poor practice on the part of the legal aid provider. We can only assume that the legal aid lawyer registered an asylum claim without the survivor's consent to help get a bigger fixed fee, as a lawyer working in line with their professional duties, or with knowledge of paragraph 32 of Schedule 1 Part 1 of LASPO would spend time talking to the client to take instructions before approaching the Home Office, and respect informed consent. (This assumption is based on feedback we receive through our referrals and advice line that lawyers will not take on asylum cases until an asylum claim is registered, even for survivors of modern slavery.) This example also shows how support providers, desperate to find lawyers, might seek advice at long distances away from where the individual lives.

Low rates of remuneration

As raised in response to question 4, the rates of remuneration for this work as set out in table 7(d) of the Civil Legal Aid (Remuneration) Regulations 2013 are low.

Decisions on follow-on work

We are also concerned that the Consultation does not explain what will happen to providers who provide the (up to) seven hours of advice and assistance but do not have capacity to undertake the follow-on work, for example if an ECF application is required which is considered too risky and financially unviable for many. We recommend that the MoJ and LAA make clear that there will be no penalties.

We also seek clarification about how PRNs intersect with open cases, whether a second opinion can be sought if a provider decides that there isn't a case with merits at the end of the seven hours, among other issues. We understand that guidance will be drawn up and published on this, and we strongly recommend that such guidance is drawn up in consultation with civil society organisations working on trafficking and modern slavery to ensure that it works in practice

Budget

We note in the Impact Assessment it is assumed that "11,000 people per year would receive a PRN and take up legal aid funded advice. In practice, the number of PRNs is likely to be initially lower before ramping up to full capacity and may also depend on external international events."[33] This is a very large number of PRNs and we would appreciate information on whether there is a specific budget allocation for this. If so, we would like to query why resourcing is not similarly being allocated to address the sustainability of the sector as evidenced.

Proposal Two: remuneration for advice on the National Referral Mechanism

Question 6: 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.

No: We do not agree. A bolt on is an inappropriate way of funding the good quality early legal advice that is sorely needed on referral into the NRM. This work also takes significantly longer than 90 minutes.

The case for properly funded advice on referral into the NRM

Since the inception of the NRM, the anti-trafficking sector has called for legal advice before entering the NRM to be in scope for legal aid for all survivors. While this is the case in Scotland and Northern Ireland, it is not in England and Wales, and this is a huge gap.

It is a requirement that adults who are considered to be potential victims of trafficking and modern slavery provide informed consent to their referral into the NRM. Informed consent is widely acknowledged as a critical component in empowering survivors. For example, in the *Principles that underpin early support provision for survivors of trafficking*, produced jointly by the British Red Cross,

[33] Impact Assessment, para 46

the Human Trafficking Foundation, the Anti-Trafficking Monitoring Group, and Anti Trafficking and Labour Exploitation Unit."[34]

Yet, there are concerns about the extent to which survivors are genuinely given the opportunity to give informed consent at present. NRM referrals are often done in stressful and overwhelming contexts, such as Home Office asylum interviews or following police raids, and have the potential to re-traumatise survivors. Without the First Responder adequately explaining the NRM or adopting a trauma informed approach, the risk of survivors of modern slavery being unable to give complete and accurate statements, or the transcripts of this information containing errors, is high.

Legal advice prior to entering the NRM is therefore crucial for survivors to make a genuinely informed decision about whether to enter into the NRM or not. A lack of advice at the pre-NRM stage may leave victims unwilling to enter the NRM if they are not clear about its impact on immigration status and the support they are entitled to. In 2021, the Home Office received 3,190 reports of potential adults victims of trafficking and modern slavery that had not given consent to be referred into an NRM, a 47% increase from 2020.[35]

A recognition of the importance of pre NRM advice: but limited

We welcome that, by providing for pre NRM advice if a survivor is already accessing another in scope matter, the Nationality and Borders Act recognises the importance of pre NRM advice. We regret however that legal aid funding for advice prior to entering into the NRM is only being opened up to a small number of survivors. It will not reach many people in need, such as survivors who are in or have recently escaped exploitation and may be destitute or highly vulnerable, who are unable to find a legal aid lawyer, cannot articulate an in scope matter in the absence of legal advice (for example, cannot identify themselves that they have an asylum claim) or those who do not have a need for immigration advice that falls within LASPO.

A joint report from UNHCR and the British Red Cross[36] published in August 2022 recommended that the Ministry of Justice should "seek amendments to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 so that potential victims of modern slavery are eligible for legal advice funded by civil legal aid prior to entering the NRM."

A £75 bolt-on: insufficient in scope and funding

Scope

The consultation document outlines what is envisioned as in scope for this advice, which is not exhaustive[37]. This includes a factual explanation of the NRM, an explanation of support surrounding the NRM, an explanation of how the NRM interacts with the immigration system, and an explanation of the referral process itself. The consultation document also provides a non-exhaustive list of what is out of scope. Work that would be out of scope includes identifying whether the individual is

[34] https://static1.squarespace.com/static/599abfb4e6f2e19ff048494f/t/5c08f8f54ae2375db96f6713/1544091902062/Places+of+Safety_BRC_ATLEU_HTF_ATMG.pdf

[35] Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary, 2021

[36] British Red Cross and UNHCR, *At Risk: Exploitation and the UK Asylum System,* (August 2022), para 4.4

[37] Ministry of Justice, 'Immigration Legal Aid: A consultation on new fees for new services' (13 June 2022), para 63

showing trafficking indicators. It states[38]: *"The NRM advice is likely to be largely factual and procedural in nature, focusing on what the NRM process is and the support it can offer, and is therefore unlikely to require specific tailoring to an individual."*

This is not realistic, practical or workable. Advice on the NRM and the immigration case is interwoven. In practice, it will be difficult to separate out what is allowed under the bolt on and what is not allowed. Every client will want to know, is it a good idea for me to enter the NRM and will it harm my immigration case? Responding to those questions requires the adviser to refer to the facts of the case and the indicators (which fall under the substantive immigration matter, not the bolt on). To advise the client what they will be asked during a referral, this will relate to the particular facts of their exploitation, and what they have not yet disclosed, which is naturally what an interviewer will draw out if a survivor has not volunteered information about a particular aspect of treatment or about their experience. The concept of trafficking itself may be new to some victims, some will not self-identify immediately and will need time to process this and to understand which aspects of their experience are relevant to disclose. Clients will often have a wide range of questions depending on their personal circumstances.

In our experience, advice on the NRM must be tailored to an individual, just like any other advice, 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. If someone claims to be a victim and is disbelieved by the SCA, this has huge implications for their asylum claim if it is related to trafficking. It is very likely the asylum claim will also be refused at first instance. ATLEU has the experience of working with survivors in this position, who have spent years with negative findings against them that needed to be overturned with the CA and through the asylum system.

With the introduction of Part 5 of the Nationality and Borders Act, and the elevation of the threshold to obtain an RG decision and the standard of proof required to reach this, it will be all the more important to offer tailored advice to someone about entering the NRM. We are concerned that this appears to be conceived of as a tick box and formulaic approach that can be adopted with clients.

Part 5 of the Nationality and Borders Act also significantly changes what victims of trafficking and modern slavery can expect through the NRM so there is a lot to cover which relates to the indicators in someone's account.

Time and value of the fee

We query on what basis the MOJ determined that 90 minutes of advice, with a fee of £75, is an adequate amount of time to provide pre-NRM advice.

In a meeting with the MoJ about this consultation, we were advised that some providers had fed back they were doing this work for free. We are concerned that any provider should have been doing such work for free, because it is already within the scope of LASPO if it relates to the substantive matter. We hope that goodwill in doing work for free should not be a justification for a negligible payment.

[38] Ministry of Justice, 'Immigration Legal Aid: A consultation on new fees for new services' (13 June 2022), para 66

The LAA's fee is premised on the assumption that pre-NRM advice is "limited in nature", presumably due to the misconception that what is considered 'in scope' and 'out of scope' can be neatly divided as such.[39] We disagree that this is the case.

It is ATLEU's experience that giving pre-NRM advice can be very lengthy, involve multiple appointments and require going back to the client to ask for more detail after initial disclosure.[40] Many of our clients require interpreters and the time taken to take instructions and give advice while using an interpreter is double that of working with a native English speaker. It is work that needs to be done in a trauma-informed way, in line with the Trauma-Informed Code of Conduct (TiCC)[41] which is endorsed in the Statutory Guidance on the Modern Slavery Act.[42]

We imagine that in practice, the fee earner will either have to artificially advise the client, in a discrete appointment about the NRM process with no personalisation, providing them with pro forma advice in a leaflet or letter (which is not good client care and does not meet the aims of this proposal or informed consent), or will need to do an appointment where they cover the crossover between what is envisaged on the non exhaustive bolt on list and everything else the client wishes to discuss and needs to be advised on.

Payment structure and risks

We have described in detail in the executive summary that immigration billing is very complicated. Having an additional bolt on adds to the number of items to consider when billing a file. If there will be any negative impact on the ability for providers to reach the escape threshold, this is not a change that will bring overall benefit to providers or encourage them to do work for survivors.

As immigration work has two different rates of pay, for the time you charge at hourly rates (under the bolt on) and the time you charge under a fixed fee is at a different rate, we would be concerned that even though you can claim a bolt on fee, when it comes to escape assessment, an LAA decision maker would look at the attendance note to parse out how many minutes were on the items under the non exhaustive list for bolt on work and how many items they consider should not have been covered there. We have had this experience before where work charged in an appointment that was to do with the outcome of a substantive application (fixed fee) with related advice on pre action work (hourly rates) led to an escape claim being rejected because items were considered inappropriately logged against either type of work.

We also fear that the bolt-on would be tricky to navigate, with the risk that providers would be penalised if they were considered to have given out of scope NRM advice.

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[39] Ministry of Justice, 'Immigration Legal Aid: A consultation on new fees for new services' (13 June 2022), para 66

[40] In a document where four specialists from the anti trafficking sector developed principles to underpin the operation of Places of Safety (Principles that underpin early support provision for survivors of trafficking) we recommended for those survivors that: 'To ensure that adult victims of trafficking and slavery are able to give informed consent to a referral into the NRM, potential victims should be entitled to up to five hours of legally aided immigration advice prior to making a decision as to whether to enter the NRM." The advice needs for survivors outside Places of Safety is yet to be assessed against an evidence base.

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

[42] 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

CONCLUSION AND RECOMMENDATIONS

We are pleased by the acknowledgement that advice prior to a NRM referral is important. We therefore propose an alternative model capable of fulfilling this need and specialism:

- Immigration work is charged at hourly rates and pre-NRM advice is chargeable at hourly rates within the overall matter, without artificial separation out from the substantive case. Hourly rates are increased and the administrative burden of working on an immigration file is reduced.

If this preferred recommendation is not supported, we would propose a compromise of:

- Pre NRM advice is chargeable within the overall matter to help providers to reach the escape threshold and support providers to do quality work, knowing they are more likely to be paid if they can reach the escape threshold. The escape threshold should be reduced to a lower and more achievable level, for example 1.5 x the fixed fee.

Both of these suggestions would mean adapting or working within existing systems for the LAA. There is already work funded under hourly rates, and the immigration specification could be amended to reflect additional work that can fit under the existing scheme. If work was part of the overall escape fee matter, this would require no work at all for providers to fold it within that existing fixed fee structure.

At a very minimum:

- If the LAA proceeds with a bolt on fee, which we oppose, we ask for assurances in writing that providers will not be penalised if they provide work deemed to fit within the bolt on pre NRM advice within their substantive matter, or if they exceed 1.5 hours of pre NRM advice, both when files are audited, and at escape claim billing stage. We also ask for the assurance that work done on pre NRM advice can count towards the escape threshold.

This is in the spirit of reducing administration and the potential of file rejects at escape claim stage and time taken to bill, and encouraging people to do legal aid work and do it well.

Question 7: 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.

Partially

As detailed in response to question 6, we believe that a bolt-on fee fixed at £75 is an entirely inappropriate funding system for work as important as pre-NRM advice. We have therefore proposed an alternative funding model.

However, if this is not taken on board, and the bolt-on proceeds as planned, in response to this question we would agree that the fee for the advice should be able to be claimed irrespective of whether an individual enters the NRM. Providers should not be required to carry out this work at risk, as it is valuable in and of itself. They cannot be accountable for their client's decision of whether to

enter the NRM. It would be harmful to incentivise NRM referrals, if it is not in fact beneficial for a particular individual.

Proposal Three: Remuneration for age assessment appeals

Question 8: 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.

No - We do not agree with the proposal to have age assessment appeals sit within immigration, public and community care categories of law as this will further reduce capacity for immigration and asylum work and the overall sustainability of the sector.

Age assessment work is currently undertaken by providers with either a public law or community care contract. It is proposed that this work also be undertaken by legal aid providers with an immigration contract. Introducing this change without first addressing the rates of remuneration and payment structure currently in place for immigration work will exacerbate the advice droughts and deserts that already exist across England and Wales. The woeful lack of capacity in this area of legal aid work bites hardest against survivors of trafficking and modern slavery due to the length and complexity of their cases.

The proposed rates of remuneration, at the rates set out in Table 10c of the Civil Legal Aid (Remuneration) Regulations 2013 are in practice significantly higher than those paid to immigration legal aid providers undertaking legal help or CLR work within this contract category as this is done on a fixed fee. As such, age dispute appeals, which will be licensed work, will be financially attractive when compared to other immigration and asylum work undertaken on a fixed fee. Whilst the case for parity for those undertaking identical work is acknowledged, failing to address the poor rates of remuneration for complex immigration work will lead to desperately needed capacity within immigration legal aid providers being potentially diverted to work that is more lucrative, quite understandably given the financial unviability of these contracts. The result will be a deepening of the advice crisis that survivors of trafficking and modern slavery already face.

The discrepancy between legal help rates and those proposed for age dispute appeals shines a light on the problematically low levels of remuneration for this area of work. Survivors of trafficking and modern slavery present with complex immigration and asylum cases and, as set out above, do require sophisticated and specialist legal advice. The low level of remuneration combined with a fee regime which means immigration legal aid providers assisting survivors of trafficking are left without payment for their advice work sometimes for years demonstrates how the fixed fee structure is not fit for purpose for such cases.

Question 9: do you agree with our proposed approach to remunerating age assessment appeals? If not, please explain why and suggest an alternative

No - While we agree that the work should be paid at hourly rates, we do not agree with the proposed reduction to the rates of remuneration for age dispute cases as this will be a further financial blow to the sector.

It is suggested that the creation of an appeal right will make the process for challenging an age assessment decision simple, cheaper and more accessible. We do not agree. The removal of a permission stage will mean many more cases are not subject to judicial scrutiny at such an early stage and are therefore less likely to be conceded at this point, with a significantly higher number proceeding to a full hearing. Preparation for a full hearing will require more, rather than less preparation and evidence. The nature of the work involved in preparing the case will not be manifestly different to that being undertaken at present. The proposal to change the rates of remuneration from those set out in Table 10(a) to those in Table 10(c) will result in a very significant financial reduction to providers that undertake this work.

It is not uncommon to encounter an age dispute in cases involving survivors of trafficking and modern slavery, due to the nature of this crime. An age dispute challenge would previously have been undertaken via judicial review, which not only attracts a higher rate of remuneration to that proposed, but if successful also brings the prospect of costs at *inter partes* rates. The ability to recover *inter partes* rates on some survivors' cases plays an important role in helping to sustain the legal aid providers serving survivors of trafficking and slavery. The removal of this type of work, without at the same time addressing the overall rates of remuneration for immigration work for this group, will further undermine the sustainability of legal aid providers assisting survivors of trafficking and modern slavery.

We are extremely concerned that the proposal to lower these rates will lead to issues retaining experienced and quality practitioners. Legal aid providers struggle to recruit and retain experienced professionals to undertake immigration legal aid work.

Proposal Four: remuneration for differential treatment of refugees

Remuneration for new differentiation rebuttal mechanism

Question 10: do you agree with our proposed approach to remunerating work on the rebuttal mechanism? If not, please explain why and suggest an alternative.

No - we do not agree to the proposed approach to remunerating work on the rebuttal mechanism as it is unworkable, will encourage bad practice and create an additional administrative burden in what is already an excessively bureaucratic and inadequately funded system.

As highlighted throughout this response, we welcome a move towards the use of an hourly rates basis model but query the logic of paying hourly rates for specific 'new' services brought in by the Nationality and Borders Act and not across all immigration and asylum legally aided work in trafficking and modern slavery cases when this model is desperately needed for these cases**.**

The rebuttal mechanism

We understand that this proposal means providers open a free standing matter start to respond to notification from the Home Office that they are minded to class someone as a Group 2 refugee, and if you already have a legal aid matter start open for an asylum claim, you will need to open a new matter start to rebut the "minded to" notification.

A "Group 1" refugee is one where they have met these requirements:

- They have come to the UK directly from a country or territory where their life or freedom was threatened (in the sense of Article 1 of the Refugee Convention[43] where a refugee is defined)
- They have presented themselves without delay to the authorities
- Where they have entered or are present in the UK unlawfully, they can show good cause for their unlawful entry or presence.

All other refugees will be seen as "Group 2". This classification has serious consequences as it can affect the length of an individual's leave, how they could obtain indefinite leave to remain, whether they will be able to access public funds and if their family will be given leave to remain (e.g. through refugee family reunion).[44] Survivors can spend many years without their families, due to years spent working for exploiters, and the delays in the asylum system and the NRM after you come forward after escaping. Having access to family reunion is important. Access to public funds is essential too, for example, when a survivor needs space to access therapy when their immigration status is secure and they feel subjectively safe, and are not yet in a position to work. Or because they are reliving the trauma of their experiences in a compensation claim against a trafficker, which can take years to resolve. Or if their English does not give them the same opportunities to access the labour market as other migrants, especially for survivors who have been denied education and may have suffered childhood exploitation, preventing their chance to advance to compete with others for safe and secure work.

Victims of trafficking will frequently enter or be in the UK illegally, will not self-identify as a victim of trafficking and therefore not present themselves promptly to the authorities and will often arrive in the UK via a third country (for example, domestic workers from South East Asia who have worked in the Gulf and may not have been exploited there but are brought to the UK for exploitation, or a survivor from Albania who is trafficked via Italy in transit to the UK, a survivor from Vietnam who is brought through Eastern Europe on the journey to this country without treatment reaching the threshold of Article 1 of the Refugee Convention). It is highly likely that many survivors will be placed in Group 2. There is no special carve out or recognition of the factors that could place a modern slavery survivor in Group 2 in the current Home Office guidance[45]. It cannot be taken for granted that

[43] https://www.unhcr.org/uk/3b66c2aa10

[44] https://www.legislation.gov.uk/ukpga/2022/36/section/12/enacted

[45]https://www.gov.uk/government/publications/permission-to-stay-on-a-protection-route-caseworker-guidance/permission-to-stay-on-a-protection-route-for-asylum-claims-lodged-on-or-after-28-june-2022-accessible#differentiated-refugee-permission-to-stay

someone who was moved without their consent, by force, or abuse of their vulnerability, or kept in exploitation and allowed to overstay leave without their control, will be "excused" categorisation in the second class status group of refugees.

A flawed funding proposal

The proposal for funding work on the rebuttal mechanism demonstrates a fundamental lack of understanding of how differential treatment will relate to a trafficked persons case. Advice to ensure that an individual is not categorised as a Group 2 refugee should start from the moment of instruction. From the outset of the case a practitioner will need to be gathering evidence to demonstrate why the individual should not be treated differently. This proposal incorrectly presumes that work on the rebuttal mechanism can be isolated. Work on differential treatment will be integral to the entire case and should start at the outset. When preparing evidence - a witness statement or expert report - the practitioner should address issues relating to differential treatment. To seek to carve them out and deal with them separately would require practitioners to prepare separate witness statements and separate and additional expert reports. Not only would this be financially wasteful but it will incentivise bad practice, as practitioners seeking to maximise costs will minimise work on the fixed fee and seek to isolate and maximise work on the rebuttal mechanism. Such an approach is particularly detrimental to survivors of trafficking and slavery, where early work on the case is paramount.

In our experience, it serves survivors best to front load a case to secure successful outcomes. Waiting to be responsive to requests from the Home Office is not advisable. That puts you on the back foot, means that you may need to request more time after a case has already been delayed, and does not let you build a case with a survivor over time, taking instructions as they are ready to disclose, and gathering appropriate evidence in advance. ATLEU is a Level 1 classified immigration provider, so we ask for our opinion on securing good outcomes for clients to be given weight as the quality of our work has been independently assessed by the LAA's own Peer Review process. We refer to the LAA's guidance on peer review for immigration work[46] which says that being proactive is recommended, giving this example of a common issues arising in the peer review process: *"Insufficient investigation of Client's journeys to the UK and the risk of third country action being taken, e.g. a failure to apply for asylum in the first safe country reached. It is important that if there is a risk that a Client's claim for asylum may not be substantively processed in the UK that any possible grounds for resisting third country action are investigated and progressed at the earliest possible opportunity."*

This learning is applicable to the new situation posed by differential treatment of refugees, where setting up the arguments early to prevent negative consequences for the client should be seen as good practice.

We also refer to the peer review guidance[47] when it recommends that statements be prepared early:

*"• **In an asylum claim, obtaining sufficient detail about the claim is usually best achieved by the taking of a statement at the earliest possible stage.** This is likely to assist the Client to present the claim clearly, chronologically, and **comprehensively** and will also be a **useful process in terms of***

[46]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966103/Immigration___Asylum_Guide_Quality_February_2021.pdf p15

[47] Ibid pp3-4.

preparing the Client for the asylum interview process and the likely focus of questioning at the substantive interview.

• *Consideration should always be given as to whether to submit a statement prior to the substantive interview. It is accepted that there is a range of opinion amongst immigration and asylum lawyers about the benefit of submitting a full witness statement in an asylum claim prior to the full asylum interview and the Home Office decision.* ***It nevertheless remains essential that a representative has a detailed understanding of their Client's reasons for applying for asylum****, and that the Client has an opportunity to provide* ***a full account of their experiences before attending their full asylum interview so that they can understand the relevant issues, and any aspects of their account which may attract particular attention****. This is particularly important when representing* ***children or vulnerable individuals who may struggle to provide a clear account of their experiences to a stranger on first meeting.*** *It is a question of professional judgement as to whether any statement should then be submitted to the Home Office in a particular case, and Providers should record their reasoning for their decision on the file as appropriate."* ***[our emphasis]***

These funding proposals seem to have been developed contrary to the Ministry of Justice's quality guidance. We do not consider it appropriate to do a statement in isolation about one particular issue such as differential treatment, or wait to prepare a client to deal with this until they receive a "minded to" notice (knowing their responses in any interview, whether screening, NRM or substantive, will be taken into account by the Home Office when making any decision).

An administratively burdensome proposal

Where a practitioner seeks to address what will be core issues, around differential treatment, from the outset of the case, it will become administratively burdensome and likely impossible to isolate work which relates only to the rebuttal mechanism and record it on a separate matter start. We would be concerned about criticism at the point where escape claims have been submitted, with LAA decision makers potentially arguing that some work should have been charged under a different "rebuttal only" matter start. Separating out the work like this will also make it harder to reach the escape fee threshold, where every unit counts. Billing immigration cases is already significantly more complicated than other category areas. This proposal will add significantly further complication, requiring providers to review large files (trafficking cases will likely have run for at least 3 years and can involve up to a hundred hours of work and include multiple documents of supporting evidence) in order to try to determine whether work should be included under the fixed/escape fee element or under the separate hourly rates element for the rebuttal mechanism. This will act as a further punitive measure against providers that take on cases for survivors of trafficking.

We are disappointed to see a funding structure introduced without the consultation period being completed (as this proposal is already in force, within the immigration specification), with the way work is funded again driving the quality of how individuals are advised. We strongly urge the Ministry of Justice not to introduce piecemeal change and take this opportunity to make changes to the funding of immigration cases as a whole, working within the existing system for all immigration matter starts which would not require radical measures but an extension of existing funding structures, and better enable quality work.

Question 11: 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.

No - we do not agree with the proposal to use data gathered by hourly rates to inform future legal aid fixed fees as this approach does not include a mechanism to differentiate between cases that involve survivors of trafficking and slavery nor one which considers how this impacts on the quality of work.

The proposal set out presumes that payment via a fixed fee for work carried out on the rebuttal mechanism is appropriate. For the reasons stated above we do not think payment via a fixed fee should be adopted for remunerating work on this issue in isolation nor do we think cases involving survivors of trafficking and slavery should be carried out on a fixed fee basis. This proposal is concerning as the focus is solely on setting an arbitrary figure for remunerating work on a specific issue, rather than looking at the scheme as a whole, and seeking to encourage good quality practice across different types of cases and clients.

If the Ministry of Justice disagrees with our submission that proactive work from the start of a case is the best way to serve migrants, addressing all potential issues that can arise in a holistic way, we respectfully submit that responding to the differential treatment of refugees through a funding structure that is a testing ground, is not the best solution either. If we are wrong, and it is right to wait to be responsive to the Home Office identifying someone as a potential Group 2 refugee without anticipating this could happen early on, then it is not clear what Home Office practices will look like. This measure has only been in force since 28 June 2022. It would be better for providers to be paid at hourly rates for all work, or by folding work into the substantive matter and make it easier for them to achieve the escape fee, rather than taking it out of consideration and making it harder to reach escape, which creates yet more administration with form filling and processing of a separate matter. Then if there is a need for a separate funding structure early on, that can be assessed after seeing how the Home Office operates in practice.

The rationale given for introducing this trial method of funding the work required is that the rebuttal mechanism will not be part of every asylum claim[48]. Differential treatment of refugees will affect a large number and we understand this to have been behind the intention of the government in introducing the measure. We refer to the government's own factsheet[49] which says this plan was introduced to impact the majority of asylum claimants:

- *"….**More than 60% of claims in the year ending September 2019 were from people who are thought to have entered the UK irregularly, many of whom have passed through numerous safe countries such as Greece and Fran**ce before making dangerous journeys – including by small boat – to reach the UK.*
- *The purpose of the power to differentiate being introduced through the Nationality and Borders Bill is to influence the choices that migrants may make when leaving their country of origin, seeking to encourage them to claim asylum in the first safe country they reach*

[48] Ministry of Justice, 'Immigration Legal Aid: A consultation on new fees for new services' (13 June 2022), para 85

[49] https://www.gov.uk/government/publications/nationality-and-borders-bill-differentiation-factsheet/nationality-and-borders-bill-differentiation-factsheet

and discourage them from travelling to the UK by means of dangerous journeys and instead use safe and legal routes." ***[our emphasis]***

As an island, it is difficult to come here directly from a country where you have fled persecution and enter or remain here legally. The majority of people will not be in this position. Every asylum claim presents with different factors and you adapt to those within the case and we do not consider the differential treatment of refugees sufficiently niche to justify taking it out of scope of the substantive work on the case.

Implementation of remuneration for differential treatment

Question 12: do you agree with our proposal that remuneration for the rebuttal mechanism will be part of the new immigration contract?

No - we do not agree with the proposal to bring in remuneration for the rebuttal mechanism as a temporary measure or as part of the new immigration contract. It will result in further unworkable and unnecessarily bureaucratic administrative processes for billing.

The proposal to bring in an hourly rate payment for work on the rebuttal mechanism as a stand-alone measure is unhelpful. It is too soon to know how the rebuttal mechanism will operate in practice and this approach is based on an assumption that this work will easily be hived off. It is our view that this will be impossible in cases involving survivors of trafficking and slavery, with the end result being additional and unnecessary administration for the provider.

Despite this, we understand that the intention is to adopt the same approach, isolating work on the rebuttal mechanism, under the new immigration contract with payment ultimately being made on a fixed fee. These two changes will require immigration legal aid providers to change their administrative and case management systems twice potentially over the course of the next 1 to 2 years. The costs involved in these administrative changes have been overlooked and sit entirely with already financially-strapped providers.

We are also concerned that the proposals are so uncertain as to the timescale in which the changes will be implemented. This creates further financial uncertainty for providers operating in a fragile market. It will inevitably impact their ability to forward-plan, which only serves to further undermine the stability, security and ultimately the sustainability of legal aid providers and the immigration advice market. Given the dire state of affairs we are in with survivors frequently being unable to access advice for periods as long as 6 to 12 months due to the lack of capacity within the sector, largely fuelled by the financial unviability of the fee regime, this approach is reckless.

Equalities Impact

Question 14: 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?

As highlighted throughout this submission, we believe that these proposals will negatively impact survivors of trafficking and modern slavery. This is because the proposals will not change the role that legal aid funding plays in driving the current gulf in expert and available legal advice for trafficking and modern slavery survivors. Many survivors of trafficking and modern slavery have protected characteristics including sex, race/ethnicity, and disabilities including mental health problems and learning difficulties.

The Equalities impact considers the impact on legal aid providers and barristers. It notes that there is an over-representation of men. At ATLEU, the majority of the immigration team are women and half have childcare responsibilities. We are mindful of encouraging carers to be able to stay in the legal aid workforce and not lose their expertise. As noted in our response to earlier questions, it is becoming increasingly hard to retain and recruit staff in the legal aid sector. The proposals in the consultation will not assist these challenges in any way, which is a big missed opportunity.

Question 15: 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.

This consultation fails to make proposals which will address the systemic failings of immigration legal aid funding, and therefore the huge gulf between demand for legal advice on trafficking and modern slavery, and the available supply, will continue. These proposals will therefore negatively impact survivors of trafficking and modern slavery. Survivors of trafficking and modern slavery are an acutely vulnerable group of people. They are a group where there is a high representation of people with protected characteristics including sex, race/ethnicity, and disabilities including mental health problems and learning difficulties.

Question 16: 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

We endorse the position of PLP and ILPA that various proposals in this Consultation will affect families: in particular, those relating to immigration and asylum appeals, and the rebuttal mechanism as Group 2 refugees have diminished family reunion rights. The proposals will impact the ability of appellants and persons seeking asylum to find high quality legal aid advice and representation.