

Firefighting: protecting legal aid funded immigration services in Wales

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“We’re trying to sort of firefight every day. The only way I can describe the way we operate is literally coming to the office and firefighting every single day to try and keep on top of the cases.”

Immigration legal aid practitioner

Summary

Legal aid funded advice and representation for asylum seekers and vulnerable migrants is vanishing. Wales has a very small number of immigration legal aid providers. Their offices are few and far between and concentrated mainly in the South-East of the country. One by one, the lights in these offices are going out. Access to justice for people seeking asylum and other migrants is increasingly difficult. Unless urgent action is taken, there is a very real risk that there will be no immigration legal aid provision in Wales.

Without access to free legal services, people without the financial means to pay for legal representation cannot access justice. People are unable to secure and retain immigration status that they are entitled to. People remain in detention when they could be set free. People are barred from basic economic and social rights and even left undocumented. Restoring legal aid provision is fundamental to justice, equality, and respect for rights. Wales cannot be a Nation of Sanctuary unless it ensures equal and fair access to immigration justice.

Key findings:

- Since the 2018 tender for civil legal aid contracts, Wales has lost nearly half of its premises providing immigration legal services. This restricts points of access for people seeking legal services.
- More provision is at risk and the pace of change is rapid. Providers are struggling financially under legal aid fees and billing structures. It is not financially sustainable to maintain a business delivering services under legal aid.
- The immigration legal aid market in Wales now relies heavily on a single provider. This reduces diversity of provision and heightens market risk.
- An immigration legal aid firm which was forced to close its legal aid office in Cardiff this year opened 47% of matter starts in Cardiff, and nearly a quarter of all in Wales, in 2022-23. They have been unable to refer their caseload to other providers.

- Urgent action is needed to prevent the parts of South Wales that have legal aid provision from becoming an advice desert, and to secure provision in North Wales.
- The collapse of the immigration legal aid sector is having a major impact on access to justice and on the capacity of third sector providers and remaining legal aid firms. Many providers of free immigration advice are currently either closed to, or considering suspension of, new referrals.
- Many legal aid providers will not work for Exceptional Case Funding and availability is scarce. This leaves most non-asylum applicants unable to access justice, even where there is a risk that their human rights will be breached.
- Providers are suffering stress and psychological pressure caused by trying to work in a broken system.
- Client care is suffering.

Solutions

We have identified six areas where action should be taken to address the collapse in legal aid provision and improve access to immigration justice:

Urgent and immediate help for people

- The Legal Aid Agency should prioritise help and advice for providers who are at risk of not delivering contracts.
- The Legal Aid Agency should implement strong contingency planning, anticipating and acting to prevent further provider loss.
- The Legal Aid Agency should give practical assistance and prompt responses to facilitate the reallocation of cases when a provider withdraws.
- The Legal Aid Agency should implement emergency funding to maintain legal aid provision in Wales.
- The Welsh Government should implement an interim crisis fund to facilitate access to immigration legal advice and representation.
- The Home Office should increase the speed of asylum decision-making in a measured and logical fashion, communicating with legal providers and implementing a strategy for planned reduction of the backlog, based on consultation with the sector.
- The UK Government should immediately increase timescales for appeal.

Maintaining and developing provision

- The Legal Aid Agency should act swiftly when providers flag concerns about sustainability or struggles with cashflow.
- The Legal Aid Agency should improve and increase dialogue with contract managers. This would encourage greater understanding of the effects of legal aid rules and systems and may aid in building better and more supportive relationships.
- The Welsh Government should introduce a crisis fund for providers of immigration and asylum legal services in Wales, including private practices operating under legal aid, but limited to support for legal aid-funded services.
- Relevant regulators and industry bodies (the Solicitors Regulation Authority, Office of the Immigration Services Commissioner, and the Law Society, should jointly offer enhanced support and advice to facilitate legal advisors wishing to move between regulatory and funding schemes.
- The Welsh Government should consider introducing a capacity fund to support training and the development of existing and new immigration legal services across the country. Universities, solicitors, the third sector, and community agencies, also have roles to play in developing training and different routes into immigration legal work. There should be emphasis on supporting people with lived experience to work in and lead services.

Facilitating access

- The Wales Strategic Migration Partnership should establish a working group to explore the re-establishment of a referral rota within initial and dispersal accommodation.
- The Welsh Government should provide and fund a contract to implement the above rota system, and contracts for systems to facilitate referrals from key support providers and local authorities at critical points in legal journeys.
- The Welsh Government should explore the development of a public-facing central resource to provide up-to-date information about available legal services, details of provision, their location, and how to refer. An incorporated provider review system would drive quality and inform prospective clients.

Client care, individual agency, and quality of service

- Regulators and industry bodies should make more effort to inform people using legal services of how legal systems work, how to ensure that they are being

given regulated and quality advice, what to expect from an advisor or representative, and how to complain or seek redress.

- More work should be done to tackle unregulated advisors and to inform people seeking immigration justice and their communities of the law, how to identify an unregulated advisor, how and where to access free advice, and to distinguish between charged advice and quality advice.
- The Legal Aid agency should respond quickly to providers requesting clarification around rules, particularly where clients or their cases are at risk. Flexibility around rules to protect clients is essential.
- Providers should give agency to clients wherever possible, informing rather than gate-keeping, information.

Administrative reform

- The Legal Aid Agency should urgently introduce more billing stages for fixed fees. Ultimately, hourly fees claimed monthly would allow for a more sustainable financing of the sector and a fairer system of funding.
- The Legal Aid Agency should reduce the administrative burden of legal work, take a constructive and less invasive approach to auditing, and make the processing of applications less time-intensive and less forensic.
- The Legal Aid Agency should improve and clarify systems for assessment and audit and introduce measures to make the claw-back of payments less likely. This will reduce the extent to which providers complete work "at risk", i.e. work for which they will not get paid and lead to several improved outcomes.
- The Legal Aid Agency should take a flexible approach to restrictive rules where they interfere with access to justice and should take account of specific circumstances surrounding a request for an exception.

Legislative reform

- The scope of legal aid should be widened to include all immigration, asylum, citizenship, and immigration-related work within the National Referral Mechanism (NRM) for victims of modern slavery*.
- The UK Government should immediately increase fees and hourly rates in line with inflation and add an additional uplift of at least 50% for all immigration work*. This is a short-term solution and we recommend a more thorough reform of legal aid. This could include a return to hourly rates or different models for funding and structuring the scheme. Changes should be based on thorough and fair consultation and the principle of increasing access to justice.

1. Introduction

The legal aid crisis across England and Wales is well known. The civil and criminal schemes have been decimated, and systemic problems affect all areas of law. These are compounded by wider cuts to the justice system, backlogs in asylum and immigration decision-making, legislative changes which have restricted rights and shortened timescales for lodging appeals. Furthermore, Wales is an advice desert, with large swathes of the country devoid of immigration legal provision.

Successive reports have highlighted the small and shrinking number of immigration legal aid providers in Wales, and essential legal services to migrants on low or no incomes is in dangerously short supply. Without access to justice people face being stripped of rights, separated from families, or denied life-saving sanctuary in the UK.

This report sets out the key themes and findings of our recent study of first-level legal aid-funded immigration services in Wales. When we began the research, we did not expect to see many changes in provision since the publication of the Welsh Government-commissioned report earlier the same year. What we found was a sector in collapse, with a stark drop in legal aid provision and profound impacts on third sector providers, frontline services, and, most importantly, refugees and migrants in urgent need of legal representation. The alarming trend of provider loss continues and very little appears to have been done to slow or prevent it.

This report outlines the challenges facing legal aid providers in the field of immigration and asylum, presents data on the scale of recent and prospective provider losses, and illustrates some of the impacts of recent service closures. Finally, it offers interim solutions to protect provision in Wales, and longer-term solutions for reversing the trend.

1.1 Devolved responsibilities and legal aid

Legal aid is a scheme administered by the UK Government and this often leads us in Wales to look outwards for solutions. This is particularly the case in the field of immigration and asylum since legislative power in this area is not devolved to Wales. The effects of blocking routes to justice fall on people living within Wales, our families, and our communities. They lie very much within the realm of social justice, and cross boundaries with devolved responsibilities. In addition, the lack of access to legal aid-funded advice is compounded by a shortage of free third sector advice provision and a lack of awareness of migrants' rights amongst local authorities and frontline providers.

We welcome the Welsh Government's stated commitment to "addressing the crisis in access to justice" and "supporting Wales's legal sector"¹. It is incumbent upon all those with responsibilities for social justice and welfare to take an active and determined role in bolstering and funding immigration legal provision. Not to do so is to abrogate responsibility and to abandon people with urgent and compounding needs. It is a stance that is incompatible with a nation that strives to be a Nation of Sanctuary and it

undermines attempts to fight poverty, to move towards equality, and to safeguard children's rights, human rights, and justice.

A guide to legal aid can be found in Annex 3. For a fuller explanation of the immigration and asylum system, an excellent and comprehensive free guide is available from Public Law Partnership².

1.2 The Access to Justice project

This document and related research form part of the Bevan Foundation's Access to Justice Project, funded by Justice Together. This body of work aims to address structural barriers to the provision of free immigration legal advice for all migrants, asylum seekers and refugees in Wales. More information about the project and its work can be found on The Bevan Foundation website³.

2. Key themes

"...the system is so broken there's kind of nothing at all, and clients, obviously they come from countries [where] maybe solicitors have power in the system... they don't really get that like these are our options and they are all gone and unless I take... you know a gun and hold someone hostage, there is nothing else I can do."

Immigration legal aid practitioner

Overarching themes emerging from the research are set out below. Some specific aspects of these are explored further in findings.

2.1 Systemic problems

Fundamental flaws in the system of legal aid in England and Wales have been well documented elsewhere and it is no surprise that these emerged strongly as a theme. Evidence that the current system of legal aid across the UK falls far short of its aim to protect rights and safeguard access to justice is well documented throughout a wide body of literature.

The following concerns featured throughout the research:

- the narrow scope of legal aid, which excludes most non-asylum immigration work;
- the inadequacy of fixed fees in particular, but also of hourly rates when applicable;
- the excessively low rates for Exceptional Case Funding which further reduce availability, leaving many people without access to legal representation which is necessary to avoid breaches of their human rights;
- the general decimation of legal aid across the UK; and
- bureaucratic barriers and unworkable billing structures that prevent access to justice (these are covered as a separate sub-theme below).

Recent data suggests that over 90 per cent of immigration and asylum legal aid practitioners state that fixed fees do not adequately cover the number of hours worked. Immigration and asylum is often associated with complex casework and many practitioners argue for a return to (reasonable, and reasonably administered) hourly rates⁴.

Most immigration cases are excluded from scope. Although Exceptional Case Funding exists in theory to safeguard human rights breaches that may result from this exclusion, fees for this are exceptionally low. This results in such a low level of provision in Wales

that it effectively excludes non-asylum migrants from legal aid access. This is explored further in the Findings section.

Responsibility for the systemic problems with legal aid lies squarely with the UK Government and its executive agency, the Legal Aid Agency, which is responsible for making sure that legal aid services are available to the general public⁵. This duty is implemented, according to the Parliamentary Under Secretary of State for Courts and Legal Services, by reviewing market capacity:

*"...to make sure there is adequate provision of legal aid, in all categories of law, throughout England and Wales. The LAA moves quickly, where issues arise, to secure additional provision and to ensure demand for legal aid services is met across the country."*⁶

This statement sits in stark contrast to evidence from our research and that of other studies, which show that very serious, deep-rooted, and long-lasting issues have arisen with legal aid across the UK. Demand for legal aid-funded services is overwhelming capacity to a major extent and it is difficult to see what steps have been taken to address this.

Anecdotally, we have received reports of asylum seekers being forced to represent themselves at appeal, organisation after organisation has reported that they cannot find a representative to take appeals or pick up urgent casework, and where people are able to access basic initial advice, these advisors are unable to refer onward to more complex casework and representation. We are undertaking further research, working with advocacy and support groups, and engaging with migrants and refugees to explore these impacts further and to gather evidence.

2.2 Home Office decision-making

Extensive delays in decision-making by the Home Office characterise the asylum system, with decision-making having slowed drastically in the past three years, despite a rise in application numbers. Home Office data shows that the numbers of people waiting more than six months for an asylum decision more than quadrupled in the three years between March 2020 and March 2023, while asylum applications only increased by a little over 50 per cent. The resulting backlog of outstanding applications reached 133,607 at the end of March 2023⁷.

Providers reported very delays in initial decisions on asylum cases, with average waiting times of two to four years. One provider had recently received a decision on a case submitted five years previously.

Respondents were concerned about decision times not only because they delay billing, but because of the impact on clients. Delays were so extensive that many could not continue to keep clients updated for long periods during which they were not getting paid.

One respondent described a constant tinkering with the decision-making process, including the addition of extra stages, new asylum questionnaires, and Group 2 refugee status, which was withdrawn after less than a year. They noted that many of these changes have pushed work from the Home Office onto applicants and representatives, while this additional time is not reflected in the fixed fee. Changes include a cut to the length of the screening interview, and questionnaires to collect information which would previously have been gathered at interview or which was only needed because of extensive delays.

At the time of interview, decisions based on the new streamlined asylum process questionnaires had largely not materialised, though these do now appear to have begun to come through. One provider had submitted around 100 questionnaires but had received only one response, which was to invite the applicant to an interview:

"...the whole purpose of the questionnaire was to avoid the interview, to make it more streamlined. All it does is... creating an extra stage of work for us to do so that they can interview and maybe ask a few less questions. So, we're all doing twice as much work for the same amount of money. The Home Office is technically doing less work but still not making decisions."

2.3 Unhelpful administration

The cumbersome administrative rules governing submission and payment of claims is a major issue for providers. Fees can only be claimed at the end of a stage, which until recently meant that providers could not be paid until a decision was made by the Home Office on an application or an appeal determination was received. Even after small changes, extremely long waiting times for Home Office decisions still lead to delays in payments which substantially affect a firm's cashflow.

An additional billing stage has been introduced following an asylum interview, but this has not had a significant effect on cashflow:

"It's now changed slightly in that if we've had an interview and we've done the read back on the interview, we can bill it. That's a problem because there are still very, very few interviews actually taking place."

The combined effect of billing stages and delayed Home Office decisions was described as "the sole reason" for one former provider leaving the legal aid sector. They stated that a change in either would have prevented them from closing their doors. Minor changes to billing stages have the appearance of 'too little, too late'. Providers did not consider that the Legal Aid Agency had made enough effort to respond to changes in Home Office practice and adjust payment stages accordingly:

"...It's like: 'okay, we haven't decided the case for three years. We'll ask you to fill out this form to see if your circumstances have changed. So [now] that's five stages. Still no change to the payment structure."

Providers reported excessive challenges over details of payment claims for Exceptional Case Funding and administrative rules that were rigidly applied even where they impacted negatively on access to justice. Respondents gave examples of Legal Aid Agency decisions that prevented them from reaching people in need of legal services, or which reduced, rather than sustained, provision. Delays in providing access to the online Client and Cost Management System (CCMS) were cited. This system is designed to manage the process for certified work, for example cases before the Upper Tier Tribunal, “from submitting legal aid applications to paying bills”⁸. One provider stated that the online system is so complicated that they could not understand or access it.

All of these issues contribute to making the delivery of a legal aid contract unsustainable for a commercial practice.

2.4 Provider stress and mental health

The level of stress borne by providers was another strong theme running through responses. Respondents spoke of being under unbearable stress from the effort of keeping their businesses afloat financially, juggling applications, billing, uncertainty about payments and challenges, concerns for the future, overwork, and overwhelming demand. On top of all this, the pressure of representing “very distressed” people, being unable to keep them fully informed, and dealing with traumatic cases, all contributed to the mental health of immigration legal aid solicitors being “at rock bottom”.

Provider responses gave a sense of practitioners being caught in the centre of a dysfunctional system within which they were responsible for progressing cases to completion but over which they had no control. Interviewees described feeling assailed from all directions: by the Legal Aid Agency, by the Home Office, by UK Government ministers, but also by their own clients:

“...mental health was always an issue for legal representatives but now... we’re getting battered on all sides... I can guarantee you 99% of anyone in the field would say their mental health is detrimentally affected. It’s a struggle for anyone to get up and go to work... particularly when the people that you are trying to help are getting so annoyed with you, saying that you’re not helping, you know, like the very person you’re helping is kicking you to the ground as well.”

“[I] just look at the map I’ve got up on my wall to remind me daily the area that I cover is huge. Yeah, I think about it quite often, actually. I try not to because it’s... yeah. Not good for the old mental health.”

All providers spoke of being passionate about the work that they do and stated that they chose to provide legal aid because they want to help people who would not otherwise get legal assistance. One firm had set up with the specific intention of providing services under legal aid, stating that “private paying work was not a thing”.

“We passionately believe in legal aid because it is about access to justice and it’s about the most vulnerable being able to access help.”

The lack of alternative options for clients and the satisfaction of giving them future choices motivated another provider:

“There is an element of if I don’t, who will? And if I don’t and there is no one else, then what happens to everybody? There are days when I could pack it in. But then there are other days when I love what I do. I genuinely love... giving people that chance that life... Why do they not deserve any more than I deserve the chances? So I love what I do.”

Even with the desire to do the job well, providers openly admitted that their capacity to take time and to communicate with their clients often fell short of their own standards. Overwork and lack of capacity forced some to practice a kind of ‘tough love’ approach, seeking a complex balance between helping as many as they could, staying afloat financially, and attempting to meet minimum standards of client care.

3. Findings

“...we are completely overwhelmed and on the verge of considering closing our doors for a while, either to all new referrals, or to certain types of cases (e.g. family reunion applications), even though we are the only organisation in Wales *that do them...*”

Third sector legal services provider

Wilding (2023) reported legal aid providers complaining of a “collapse in new referrals”⁹. This was described a paradox, given the level of unmet demand for services. The full causes of this are undoubtedly scattered within the complex relationships between dispersal, NASS and hotel accommodation, asylum decisions, commercial influences, infrastructure and transport, referrals from frontline services, legal literacy, and awareness amongst asylum seekers and other migrants of available services and of their potential eligibility for legal aid. However, the Covid-19 pandemic is likely a significant underlying factor.

Our research found no current shortage of referrals. All the providers we spoke to are at or over capacity and legal services which have recently closed reported being unable to refer cases on. This has a major impact on people seeking legal help and long-term work and investment is urgently needed to enable even basic levels of access to justice.

Another issue highlighted in Wilding’s research is the dramatic loss in legal aid provision, attributed at the time to the sudden drop in referrals combined with administrative and billing issues. Issues with legal aid finance continue to plague providers and impact on sustainability. While our research was in progress, a major legal firm withdrew from immigration legal aid work, with others indicating either their intention to follow suit or their concerns that they would not survive financially for much longer.

Aside from the question of referrals, the fundamental causes of decline in the number of immigration legal aid providers remain the same, and these are predominantly integral to the scope of legal aid, the level and structure of fees, and the way in which it is administered. There are additional factors which, although not entirely specific to Wales, are particularly relevant to its context, population, and geography. The extent of provider loss has increased since previous research and losses look set to continue.

We have used data on “matter starts”¹⁰ to give an indication of how many legal aid cases a provider has opened. There are limitations to this as a source for estimating provision. Matter starts do not show the number of open cases a provider holds or the complexity of the case.

3.1 In the past five years, Wales has lost nearly half of premises providing immigration services under legal aid.

In 2022, Wilding¹¹ used legal aid matter starts to roughly calculate provision in relation to need, and numbers of providers and offices to illustrate decline in points of access. We used figures updated to the end of the financial year 2022-23 and compared this with the official register¹² of legal aid providers to identify which providers were still actively undertaking legal aid work and where offices were located.

In 2018, there were fifteen offices in Wales offering legal aid-funded immigration services¹³. By January 2023 this had dropped to twelve offices, run by nine separate providers. The majority of these were concentrated in South Wales, with only one provider operating outside of this area, from an office base in Wrexham staffed by a sole practitioner. Wilding reported that of these, five had either cut provision or were not accepting referrals.

In the past year, three offices (a quarter of remaining offices in Wales) closed, two in Cardiff and one in Swansea. One provider with an office in Newport did not open any immigration matter starts in the past two financial years. Nationally, provision has now shrunk to seven active providers, with a total of eight offices between them.

In just over five years, Wales has lost 46% of premises providing immigration services under legal aid, nearly halving points of access for migrants and refugees.

One provider closed their immigration legal aid services while our research project was in progress, after 17 years of provision. The firm was one of the largest providers of immigration legal aid services in Wales. They self-reported a caseload at closure of the service of around 800 and in the last financial year (2022-23) accounted for nearly a quarter of all matter starts in Wales.

Another provider reported that they had recently taken the decision to close one of their offices (this is accounted for in the above statistics), and that one practitioner had decided to leave the industry. A third said they were considering giving up their legal aid contract and moving to a different regulatory system.

3.2 The number of legal aid matter starts opened in Wales has dropped by 33 per cent since 2015-16

We analysed matter starts to see whether there was a corresponding decline in the volume of immigration legal aid matter starts across Wales. Published statistics date to the end of March 2023 and are not affected by the most recent changes. Data shows that volumes have fluctuated over the years, with providers entering and leaving the market. An especially steep decline in 2021-22 may be an anomaly caused by the result of the Covid-19 lockdowns, but there is an overall downward trend between 2015-16 and 2022-23. During this period, matter starts in Wales have dropped from 2446 to 1889, a drop of 33 per cent. This is against a backdrop of rising asylum applications across the UK.

The recent closure of a major provider may result in another drop in matter starts in 2023-24 figures. We will continue to monitor, and plan to produce future briefings with updated illustrations of legal aid provision and points of access in Wales.

3.3 The sharp drop in referrals identified in previous research is likely to continue to impacting provider finances over the coming years.

The drop in matter starts in 2020-21 may illustrate the “sharp drop” in referrals highlighted in previous research. This coincides with periods of lockdown which forced many organisations to suspend face-to-face contact with service users. Since then, matter starts have recovered slightly but have not returned to 2019-20 levels.

Given the long delays affecting Home Office decisions, and therefore billing, the financial impact of the drop in matter starts in 2020-21 and the long time taken for figures to rise, may continue to be felt by providers for several years to come. Concerns expressed by providers about the viability of continuing legal aid contracts indicate that they are susceptible to fluctuations in income and that more may be driven out of the legal aid market.

3.4 South-East Wales is in danger of becoming an advice desert

“...you've got in Cardiff now, you've got... two people. That's two people. [One has] currently stopped taking on work because of the volume. [____] are very quiet at the moment, as in I don't hear much about them and [____] and [____]... I don't really know what's going on with them because I think don't think they've got any staff left. So, it's really... does that seem to be functioning?”

Immigration legal aid practitioner

South-East Wales, which is described as having been previously “well served”¹⁴ with advisors, has lost a significant proportion of its provision. Cardiff has lost two offices in the past year. Newport has two active provider offices, but one of these opened only 38 matter starts in the last financial year. Despite this, the volume of matter starts for Newport has increased, rising from 167 in 2018-19, to 393 in 2022-23. Most of these cases sit with a single provider and reports from the local authority and other service providers indicate that capacity in the city is nowhere near enough.

Findings below demonstrate how loss of provision translates into unmet demand and illustrate some of the impact on other legal services providers and support agencies, as well as the resulting loss of expertise from the sector. Some clients in South-East Wales may find representation over the border in Bristol, but it is not possible to determine this from statistics, and it is equally possible that the desperate lack of services in the

South-West of England could be driving referrals in to Wales and compounding the loss of provision. The most recent provider to withdraw from immigration legal aid closed offices in Bristol as well as Cardiff.

South-East Wales has by far the highest demand for immigration legal services. While other areas of Wales have much lower provision, and much of Wales has none, the level of unmet need is still likely to be higher in Cardiff and surrounding areas. It would be useful to do a more thorough analysis of this need.

3.5 A lack of diversity of providers puts immigration legal aid provision at greater risk.

The most recent provider to discontinue immigration and asylum legal aid in Wales accounted for 44 per cent of matter starts opened in Cardiff in 2022-23, and 38 per cent of completed cases. In 2021-22, the figures were 52 per cent and 32 per cent respectively. The provider self-reported a caseload of approximately 800, which they have not been able to refer to other providers.

As is explained in 3.6 below, the impact of withdrawal of provision on this scale sends shockwaves throughout the sector. It illustrates the risks of an unstable and uneven provider base. Data shows that in the last financial year a single provider accounted for nearly half of all matter starts in Wales. Figures provided by the firm estimate a very large open caseload. No criticism of the firm is implied, they are fulfilling a vital need but from a strategic point of view, this is a sustainability concern. Diverse distribution of provision is needed for a sustainable sector, as well as sufficient capacity and flexibility to absorb provider losses. Wales has none of these.

3.6 Unmet demand for legal services is rising

"This is completely unprecedented – there has never been a time when initial asylum applicants, including UASCs, have been unable to find a legal aid solicitor to represent them."

Third sector legal services provider

"The work is out there. There are thousands of people begging for legal advice and assistance."

Immigration legal aid practitioner

It is extremely difficult to gather accurate data on the numbers of people who are unable to find legal representation, since many do not have access to support services that can highlight their existence and their needs. Wilding (2022) estimated a primary

legal aid deficit in Wales of 2,266¹⁵. This represents the number of people who would need legal representation for matters that are squarely within the scope of legal aid, but for whom there is no provision. It does not include people who would be eligible for Exceptional Case Funding. The actual legal aid deficit in Wales (the gap between provision and need) is certainly much higher and includes a significant proportion of the 46,160 people that Wilding estimates have out-of-scope needs for immigration legal advice.

The scale of this unmet need is growing. We have spoken to people offering basic initial advice who are unable to refer on to more specialist work. A former provider reported that on closing their service they were unable to refer cases to other advisors, apart from a few which they could only refer to a provider who was unable to offer any appointments for three months. This particularly affected urgent cases, some of which required a turnaround of 30 days.

A third-sector provider who sent written evidence stated that referrals have more than doubled since the same time last year. Recently opened cases included an increased number of pending appeals, critical and time-sensitive work:

"We are definitely seeing clients with both asylum questionnaires and upcoming appeals increasingly approach us, having been unable to find a legal aid solicitor to help them."

This provider was considering closing its doors to new clients in order to deal with its existing caseload. They referred to an increase in Home Office decisions as a factor, but pointed to displaced demand from the legal aid sector as the main cause:

"...it's predominantly because of immigration firms either completely closing their legal aid departments in recent months (due to not being able to cover their costs with the very low fixed fee...), but also because most of those keeping open their legal aid departments are severely restricting the types of asylum work they will do... [some firms] no longer do initial asylum work or asylum appeals and will only do very specific types of cases, namely those that attract higher legal aid rates, such as judicial review work or bail applications...there has been a huge drop over the last 12 months in the level of capacity available in the sector to represent not only first-time asylum claimants but also with the types of applications done later down the line, such as fresh asylum claims."

Another respondent reported that they were closing to new referrals until November, due to an overwhelming caseload:

"We get inquiries daily. The phone is ringing every day with people from all over the UK basically, because the crisis is real, and people just aren't getting the lawyers anymore."

3.7 Cumbersome administration compounds financial problems

Various aspects of legal aid administration were highlighted by respondents. Below are examples where this had a specific impact in Wales, or where they relate to matters particularly relevant to the Welsh context.

Respondents complained of stringent assessment of applications for Exceptional Case Funding (ECF):

"...they never say yes straight away, there's always a whole heap of questions afterwards and there's just no time for that."

"...you've got to justify to the Legal Aid Agency why it's so important: 'And why can't they do it themselves?' And they want to know the ins and outs: 'What level of education they have. Can they speak English? Why can't they do this, why can't they do that?'"

The Legal Aid Agency was said to use a "fine-toothed comb" when going through paperwork relating to applications for Exceptional Case Funding and when judging whether the Escape Fee threshold had been met. Public money should be managed with care, but providers expressed concern that the correct balance is not being struck. The Escape Fee threshold only needs to be missed by a fine margin for a provider to significantly lose out financially, and until the qualifying level of additional work is completed, they are unable to apply for the Escape Fee. By the time claims are analysed, time has already been committed and costs may not be reimbursed.

Providers also raised concern about the impact on access to justice when applications are rejected. Some suspected that the Legal Aid Agency was under pressure from auditors or was overreacting to past cases of financial abuse. There was also a belief that the Agency holds the power to change its processes if it had the will.

"...I think that that it's to do with their internal auditing and that they've been criticized before for basically not being strict enough. So now they're overly strict and they want to micromanage."

"I do feel that the Legal Aid Agency could actually fix this problem in the short term... by simply saying: 'if your file is six months old, you can bill it'... they have the power to do that without permission... Because they did it. They introduced that you can bill it after interview... then they introduced that you could bill at six months if you've managed to hit the 413¹⁶ - that's the bit that catches everybody out. If they did that, with the volume that's coming in, then we we'd have a steady six-month turnover, it'd be fantastic."

3.8 More constructive relationships with the Legal Aid Agency are needed

Respondents expressed frustration with what they variously saw as poor management, lack of understanding, or obstructive practices of the Legal Aid Agency. They gave examples of how the Agency had failed to be flexible or to act promptly at times when providers believed it would have made a real difference: responding to requests, enabling outreach to people in urgent need of legal services, changing unhelpful practices, even being flexible on contract rules to prevent provider withdrawal.

“We've got no issue with the individuals that work there, but obviously they've got a job to do and they give us contracts, but we're meant to work together. It's kind of like meant to be a... mutually positive... relationship. But it's not, it's kind of like an audit all the time... like: 'what are they doing wrong and how can we catch them out?'”

One provider gave an example of what they considered to be overly restrictive rules preventing people seeking asylum from accessing legal help. Having obtained permission from the Agency to visit a very remote hotel where single male asylum seekers had been accommodated, and overcoming initial resistance from the Home Office, the provider received a welcoming response from on-site security. The hotel was in an area with very scarce basic services and at great distance from any immigration advice services. Such was the scale of need that the provider, with the support of staff on site, asked whether they could post notices signposting people to their services. The Legal Aid Agency refused permission, citing concerns about “preferential services”.

The provider stated that due to the remoteness of the hotel and the lack of legal services in the area, there was no competition to protect. “We could offer it, and we got permission to advertise, but we couldn't,” they said. Ultimately, only ten people out of 90 in the hotel were assisted with their legal cases. One resident eventually managed to contact a solicitor 170 miles away, only to be signposted to the same provider who had attended the hotel months earlier. This raises the question as to whether the Legal Aid Agency should take a more pragmatic view when implementing existing rules, so that in particular circumstances they do not serve as further barriers to accessing justice.

A former legal aid practitioner shared with us their experience of having to end their legal aid contract. They stated that despite being in conversation about the issue for over a year, the Legal Aid Agency had “done nothing” to try to resolve the situation.

“We begged them for options to keep us going so that we did not have to leave these people in the lurch and they were all very much: ‘well... it's like policy... we've got to raise it with the team up there and they've got to speak to this team, they've got to speak to this minister’. There was no attempt whatsoever by the Legal Aid Agency to help us. None whatsoever.”

The respondent alleged that the Agency had not only refused to be flexible by allowing them to end only part of their provision so that they could continue the contract but had placed even more cumbersome administrative structures in their way, changed agreements, and even withheld payments.

This same practitioner spoke of being unable to refer cases to other advisors, while another talked of their frustrated attempts to take some of the cases on:

"... We did have a chat about us potentially taking on around about 100 cases where they've already completed the asylum claim questionnaires. We would basically babysit the case through to decision and then we'd have a remote meeting with the client to run through the decision, which would hopefully be a grant because they're the nationalities that have done the questionnaire..."

"I felt that that's something we could manage- 100 new cases sounds like a lot but they trickle through the months. We put a proposal to their account management, the Legal Agency. And I think it's been about three weeks now. We've not had a response from them..."

3.9 Referral routes are inadequate

All respondents spoke of demand as being very high, with one stating that they had "more people coming... than we can actually cope with." Wales, however, lacks robust frameworks for referral and communication between frontline, support, and legal providers. These are essential in a well-functioning system, though they are of limited use without provider capacity and legal services to refer to.

One provider talked of having previously received appointments with new clients from the Welsh Refugee Council, who several years ago managed a rota system of referrals from NASS accommodation to immigration legal providers in Cardiff. The system was subsequently taken over by Migrant Help, the organisation contracted by the Home Office to support asylum seekers in dispersal accommodation. One provider stated that Migrant Help had dropped the service, and were scathing about the decision:

"They just kind of went well, it's not in our contract. [We] know Welsh Refugee Council did it before, but... we're not doing it."

One provider, based in North Wales, stated that they still received referrals from the Welsh Refugee Council, who are "literally the other side of the wall". But this was a relationship they had built themselves, based on proximity.

Some respondents questioned whether a referral mechanism would make much difference, as there was no shortage of referrals and a scarcity of capacity. Improved routes of communication between providers and the public would, however, be of value to prospective clients. Referral agencies have spoken of time-consuming and often futile trawls through providers looking for one who will accept a referral. One

client whose interview we observed for another piece of research, stated that they had been given a list of advisors but that most did not reply.

Stronger referral routes would also help to highlight and pinpoint need. We know that large numbers of asylum seekers and people seeking asylum and humanitarian protection cannot find legal representation. Given the lack of services for other groups of at-risk migrants, and the invisibility of people without immigration documentation, it is likely that the true scale of exclusion from justice remains hidden.

3.10 The current model of legal aid is unsustainable

"Let's be frank. You can't keep operating at a loss, can you?"

Immigration legal aid practitioner

Even where providers use a mixed funding model and supplement their legal aid provision with fee-paying work, sustaining a business with a legal aid contract is proving to be unfeasible. Legal aid work has become even less financially sustainable due to the failure to increase fees despite sharply rising costs. A joint response by the Immigration Law Practitioner's Association (ILPA) and Public Law Partnership (PLP) to a Ministry of Justice consultation calculated that the value of legal help fees, which were cut to their current level in 2011, have been reduced by inflation to a real terms value of £263 for asylum and £149 for non-asylum immigration¹⁷.

Providers stated that fixed fees for immigration and asylum work are not realistic, and one provider openly stated that they were "running at a loss". One provider stated that they could only continue to practice immigration work because the family firm within which they work is able to provide back-office functions and absorb some of the costs of the immigration practice. In addition, they were able to source an office at a reasonable rent within a third sector organisation, in return for which they accept all referrals from the organisation's service users, which they described as "loss leaders". Even so, the practise was struggling to afford basic equipment.

Delays in Home Office decision-making in recent years and the cumbersome administration of legal aid also have an effect on cashflow. One provider summed up the combined effect of Home Office decision-making, delays in billing, and the cost-of-living crisis:

"When you've got the increased costs that were in the business and the increased cost to you personally, obviously you go into the shops every week, prices have gone up, and your salary's the same. It's difficult.

It's meant we've not been able to invest. I mean, I only just got myself a new laptop recently. My last machine was ... on its... last legs and that was inherited from another member of staff."

Low fees for immigration legal aid work, coupled with administrative delays to claiming payments, do not provide a consistent income at a sufficient level to sustain a law practice. In addition, there are high administration costs, and processes for auditing and reconciling payments carry a risk of providers carrying out work for which they may ultimately not be paid.

3.11 The immigration legal sector is undervalued

Respondents questioned statutory commitment to maintaining immigration legal aid provision. They referred to a sense of being under attack and of the profession, the immigration legal sector, and migrants and asylum seekers, being undervalued and underserved.

"The Legal Aid agency, [I'm] not going to lie to you, they're in a bit of a mess I think at the moment. I think they're kind of a little bit of a rudderless, slipping away, because they are under the current government being told to do certain things. I think there's probably a lot more going on behind the scenes that we don't know about."

"I think the department, like the Home Office, is probably being run by ministerial direction and I think there is an agenda to basically try and get rid of us 'lefty lawyers' as we've been dubbed by the current government."

"I don't want to get political. But I do think there's another agenda going on, and that's not just me saying that. If you read the press... I think about two weeks ago we were getting blamed for the asylum claim questionnaires not being filled in properly... a government source said that the lefty lawyers want to delay the decisions because we get paid more, but we don't. We don't get paid until the case is finished or there's an interview."

"I don't know what the future holds, I think the funding is going to have to come from elsewhere."

The feeling that immigration and asylum legal work is undervalued is bolstered by low fixed fees, especially those for Exceptional Case Funding, and by the exclusion of most non-asylum legal work from within scope. Providers also described being caught in the middle of a broken system:

"We're getting battered on all sides. We're getting battered by the Home Office because they're not making decisions, so we've got no cashflow. We're getting battered by the Government who treat us like scum for doing our job as prescribed by the law... We get battered by third party agencies like support organisations, refugee support groups who are wanting us to do more. We get battered by the clients who are holding us to blame because we are not pushing, we're not making their case move. They can't understand that literally there is no option with the Home Office to make them move."

We found a lack of considered thought about immigration and asylum legal work in reviews of legal aid and the justice system. For example, the Legal Services Board's strategy for the legal sector¹⁸ uses the word "citizens" throughout the document to describe users of legal services. This language excludes people subject to immigration control and brings into question how central migrants and refugees are to the strategy.

Where immigration legal advice is mentioned, there is a narrow focus, with Welsh Government policy often focusing on assistance for refugees and forced migrants or EU citizens and not at wider immigration legal needs. Work is currently being undertaken by the Welsh Government in relation to immigration legal provision, and we hope that this will address the needs of all migrants and result in action to fund and develop immigration legal services and access to justice across Wales.

The consequences of failing to access immigration and asylum justice are so severe that it should be high on the agenda of every event, conference, and discussion about legal aid and access to justice. It is vital, too, that the Welsh Government stresses the urgency of legal aid reform in this area of law when making representations to the UK Government.

3.12 Exceptional Case Funding is not working

"...it's not access to justice if it's not financially viable for someone to help them to do it."

Immigration legal aid practitioner

Exceptional Case Funding (ECF) was introduced as a safety net to prevent violations of human rights where a case falls outside the scope of legal aid. The grant rate for applications is reasonably positive, with 86 per cent of applications currently successful¹⁹. However, cases can be complex and the fixed fee of £234 is so unprofitable that many providers simply do not take on ECF cases. One provider referred to it as "doing hours and hours and hours of work for... the money you can find in the back of your sofa."

Respondents believed that ECF applications attract particularly detailed scrutiny from the Legal Aid Agency. Although the Escape Fee threshold was reduced earlier this year, providers claimed that the level of administrative work generated by the demands of the Legal Aid Agency when approving these claims all but cancelled out the value of the increased payment. One respondent described the process as jumping through "hoops of fire", and the resulting payment as "ridiculous".

Several providers have stopped offering cases that need ECF funding, with one respondent confirming that they had taken the decision to do so the day before interview.

"Because we are so busy, you've got to do essentially a whole application just to get... the tiny amount of money...we don't really have the capacity to do that anymore."

Another confirmed that providers were very unlikely to take on an ECF case:

"I will guarantee you, 75 to 95% of firms, you say the word ECF and they just close those door".

Even in the event that clients came with ECF applications pre-completed, providers were at best ambivalent about whether they would take a case on.

"That obviously takes away all of that initial build and then you're just doing the substantive work, still for a very small amount of money, but at least there's some money in it".

"[That] would be helpful. But the fixed fees are very low obviously, because it's immigration work. So, it depends on what the case is."

"...as a firm we would refuse an ECF case regardless as to whether it's been granted or not, just because it's not financially viable as a case. Even the Legal Aid Agency... have admitted to us they cannot understand why any legal representative would take on an ECF case because it's not financially viable."

A contributor to our round table discussion stated that although ECF is available for particular types of Family Reunion or Article 8 cases, the grant rate on these was low. This introduced a high element of risk for providers, since they were uncertain whether they would get paid. If legal aid providers in Wales are not accepting clients with ECF, then access to legal aid for non-asylum migrants is effectively blocked, even where human rights will be breached. With third sector legal services working at full capacity, the consequences are enormous for vulnerable and at-risk migrants, many of whom are not able to access justice at all.

3.13 Standards of client care are slipping

Immigration legal aid providers in Wales are over-worked and under pressure and there are consequences for clients. Respondents openly admitted that they simply did not have time to apply their usual standards of client care or to meet minimum standards for updating clients set by the Solicitors Regulation Authority (SRA).

"I no longer advise on timescales, other than to say there are extensive delays. The Home Office are unresponsive and absent [unless in] exceptional circumstances (usually medical). There isn't really anything we can do."

"We just haven't got the capacity to be regularly writing to people and saying there's no news.... But you can imagine, my inbox daily has got 'any news?' type of inquiries repeated from the same people...We do keep in contact with the clients. But I'd love to say we're more proactive in our sort of approach in terms of writing to people every six months...but we just can't be."

Aside from this self-confessed slipping of standards, there were suggestions that some poor practice exists. The risky combination of high caseloads and lowering standards of client care should sound a warning note. An environment where there is low provision, low legal literacy, and high numbers of desperate people urgently seeking advice is fertile ground for unscrupulous practice. High quality training, robust regulation, and a strong system of peer review are needed to maintain good standards and good legal outcomes. Public education and schemes to improve legal literacy need to run alongside to ensure that people can make informed, safe choices, and seek redress if they are mistreated.

We are engaging with migrants and refugees in Wales who are seeking, receiving, or being excluded from, immigration legal advice. Future publications will address the effects on individuals, their views, and their ideas for change.

3.14 A recent surge in primary decision-making increases demand and threatens stability

The research showed a legal aid sector caught between the slow decision-making of the Home Office, resulting in long waits for payments and disrupted cashflow, and a sudden and recent surge in decisions. This was not captured in interviews, but verbal and email updates with providers at the end of the research revealed that since the time of interviews there had been a sudden increase in the rate of decision-making. This was echoed in anecdotal and written evidence from the third sector.

As of June 2023, there were 134,036 outstanding applications for asylum in the UK, with nearly 80 per cent of these having waited for more than six months. There are signs that this huge backlog of decisions is beginning to be released onto providers with little capacity to cope. Decisions are said to be inconsistent and sometimes surprising, making it difficult to anticipate what is coming.

One provider stated that they had seen a “huge increase” in numbers of people given interviews over the past three to four months. Many of these were in relation to asylum questionnaires submitted under the streamlined process, though ironically, they had received no decisions on the first set of questionnaires submitted in March.

A third sector provider reported a “sudden return to primary decision-making in asylum claims”. They expected this to rise in coming months and stated that it had led to a “sudden scramble for representation”. The advisor warned of the potential impact on clients, who are looking for legal representation in a diminished sector:

“... although some - or even quite a lot - of these clients will get a positive decision, not all will, by any means – so where asylum claims are now being refused again, after years of almost complete inaction at the [Home Office], this will lead very directly to an increase in people looking for representation in their appeals. We are definitely seeing clients with both asylum questionnaires and upcoming appeals increasingly approach us, having been unable to find a legal aid solicitor to help them.”

3.15 There is a shortage of legal expertise

"Qualified staff are rarer than unicorns."

Immigration legal aid practitioner

Recruitment of skilled staff is something of a moot point in a sector that is in collapse for what are essentially financial reasons. Expertise was nonetheless raised as a concern in the research and it has resonance for other areas of immigration legal advice and representation, and for rebuilding and growing immigration legal capacity. It is also important to flag that the loss of a provider may result in the loss of valuable and difficult to recover expertise from Wales.

Immigration and asylum law is a specialised subject, and in an unattractive market it is difficult to retain and grow skilled legal experts. One provider who had recently closed a branch in South Wales referred to the difficulty of recruiting staff. A former provider lamented the loss of a skilled and experienced team when their practise ended its legal aid contract:

"...what immigration lawyers do is very, very highly skilled...we had a fantastic team, highly qualified, we were able to deal with a high workload and [we're] very good at what we do."

One respondent offers pro bono training to final year law students from a nearby university who in turn help with ECF applications and other casework. They noted that lack of capacity affects their ability to support training placements.

"It's great, but it's finding the time. They only come in for around 6-8 weeks at a time. So it's quite frustrating in a way because we just get to a point where they're getting used to using our case management system and they're getting used to the work, and what they'd have to do as a caseworker... I enjoy helping people and get[ting] people interested in this area of law. But when you're firefighting every day and then you're trying to get a student sort of trained as well, it's tricky."

Financial pressures and lack of equipment have an impact:

"It would be great to have actual infrastructure. An actual computer/laptop they could work off. Gosh, it sounds terrible, doesn't it?"

We plan to explore training and capacity-building in more detail in future research, which will encompass the whole free-to-access immigration legal sector.

3.16 There is a perceived culture of merits failing

We asked providers about the perceived practice of merits failing, since this had been raised in wider work and was referred to in previous research²⁰. Providers in South Wales were said to frequently fail legal aid applications on merits at the point of making a new legal aid application for further legal help or representation, particularly after an asylum claim is refused. This leaves asylum seekers unrepresented at appeal.

It has been suggested that 'merits failing' is a quicker way for providers to bill their cases after the decision, rather than wait until the appeal decision²¹, and that it is a practice prevalent across England as well as Wales. The suggestion is that 'merits failing' is the result of a broken system, where cashflow is prioritised over client care.

One provider explained how the process of deciding the merits of a case should proceed:

"When you get a decision in from the Home Office, it should go to an experienced caseworker to review... they will grant the next stage of legal aid funding if there is sufficient merit, or they will refuse the funding if there is insufficient merit. And the threshold for that assessment is... chances of success of 45 per cent or higher."

The respondent stated that this should be a "very considered decision", but stressed that a case with a below 45 per cent chance of success is not guaranteed to fail:

"... it's a statistical assessment where we're saying: 'well, look, on balance... you're not going to succeed. For these reasons.'"

Respondents strongly denied merits failing cases on financial grounds, though two providers stated that they had heard, though only anecdotally, of it happening in other firms. Interestingly, neither could understand the benefit to a firm of such a practice:

"It's kind of not that beneficial to you to say no because you can build the case and then you move on to controlled legal representation which is different funding obviously for the appeal."

"I don't understand because there's better money... [you] actually make money on appeals."

One third sector immigration legal provider has disclosed an appeal success rate of 70 per cent for clients who have had their cases dropped on merit grounds. This has led some observers to speculate that these cases have been unreasonably refused on merit. However, as stated above, judging a case as having a lower chance of success is not the same as saying that it cannot win.

An assessment of an appeal's chances is subjective and involves an element of predictive reasoning, which is by its nature unreliable. One provider may work more creatively, or spend more time on a case than another, particularly when they do not have to justify each hour and every element of their work to an assessor. Or there may be an element of luck. There is a possibility, too, that a provider with small financial

margins may err on the side of caution if they think that an audit may conclude that they have inflated the chances of a case's success.

One respondent stated that the third sector performs a vital role in taking on cases that fall below the 45 per cent merits threshold. In a functioning system, they suggested, no "good" cases should be going to the third sector, "because, if they've had legal representation already, their legal representative should have granted them legal aid for the next step".

3.17 Attempts to protect provision need to take account of the Welsh context

Issues intrinsic to Wales

Most legal aid provision, and most people who need it, are in the South-East of Wales, but there are growing numbers of asylum dispersals to areas outside of Newport and Cardiff, and to areas where there is no legal provision to be found. The features of Wales' geography and infrastructure make developing new and accessible services costly and challenging. Poor transport systems and the length and complexity of many journeys by public transport make travel to appointments and physical outreach work difficult. Some rural areas have little or no mobile signal for remote services, and WiFi is not always easy to come by.

Wales does not have a robust third sector infrastructure or support networks. Funding and wages are relatively low, making attracting qualified legal professionals from outside of the country difficult, and training and developing skilled and experienced staff from a very small pool of existing practitioners presents a complex and long-term challenge.

Calling for and delivering change

Even if the UK legal aid scheme were reformed quickly and well, improving access to immigration justice in Wales requires a strategic approach, joint working, and creative solutions to build services and put people in touch with legal providers. Statutory bodies need to be committed over the long term to support and fund development and provision, and to encourage funding from other sources.

Strategic agencies, regulators, legal sector representatives, and the Welsh Government, can raise concerns about legal aid with the UK administration and exert pressure for change. Many do, although we would urge more of these voices to be raised within and from Wales, and for more focus to be placed on low-income and vulnerable migrants, and on immigration legal services, amongst wider discussions about justice.

Wales is a Nation of Sanctuary and there are many positives in the Welsh Government approach to migration and asylum. There was an element of hope from at least one

respondent that the Welsh Government might “step up” to supplement legal services where this is necessary to protect access to immigration justice for the most vulnerable. They also expressed disappointment that small and simple hoped-for measures had not yet materialised, and that action was unlikely to be taken quickly. There was recognition of the pressures on Welsh Government budgets especially in an area where central funding has fallen short.

Full, long-term commitment to improving access to justice for all migrants is needed from the Welsh Government at a time when immigration and asylum is coming under increasing focus. As the next General Election draws near, standing by commitments made under the Nation of Sanctuary plan, and to children’s and human rights, will become more challenging and much more vital.

4. Conclusions and recommendations

The scale of withdrawal from immigration legal aid in Wales is alarming. The impact of recent losses on matter starts is unlikely to be seen immediately, but on the ground the effects are already apparent. A capacity crisis is closing the doors of legal aid providers and regulated advisors in the third sector to new referrals. Indications are that more providers are struggling to sustain business under the legal aid scheme in its current form and there are indications that Wales may sustain further losses.

Simultaneously, at a point when provision is at its lowest in Wales and large numbers of people cannot access immigration legal advice and representation, Home Office primary decision-making has suddenly accelerated and looks set to increase. Impacts on providers of immigration legal services, local authorities, and frontline services are severe and there are serious and life-changing implications for people in need of legal services.

The prospect of further provider loss was flagged by Wilding (2022²² and 2023²³), and evidence in the form of matter starts would have been early indicators of a coming financial crisis for providers. At the round table discussion in March 2023, contributors noted that several providers in Wales were on the verge of being unable to fulfil contracts, with little likelihood of new firms entering the scheme. Yet we found little evidence of contingency planning or measures to intervene.

All of this is before the Illegal Migration Bill begins to bite. Changes to appeal timescales, challenges to unaccompanied children's rights, increased detention, and a potential rise in destitution and precarious status, are all likely to increase urgency and drive demand.

The environment is chaotic, but this only makes it more important to chart a way forward. Some of the solutions to the legal aid crisis are simple, and the power to implement most of these lies in the hands of the UK Government. Others are more complex and require strategic and long-term investment. We have identified several areas where the Welsh Government and statutory bodies in Wales could take action to mitigate the effects of the legal aid crisis. Without wider reform of the legal aid scheme and the justice system, people in Wales will continue to be excluded from immigration justice, with profound and lasting effects.

Recommendations are listed from the perspective of Wales outwards, and from direct provision "upwards" to government levels. They focus on immigration legal aid and will sit within a wider range of solutions for increasing access to justice which we are formulating across our work. This includes engagement with people who need and use immigration legal services in Wales, immigration legal providers in the third sector, and first-line advice in frontline services. Recommendations for legal aid reform below align with and in part echo calls from national UK coalitions.

4.1 Urgent and immediate help for people

The need for immigration legal services is significantly outstripping supply. If the speed of Home Office decision-making continues to increase, the number of people excluded from justice is likely to soar. Applicants who receive negative decisions have limited timescales for appeal. Many will have lost their legal representative and will be desperately looking for new representation. There is not the capacity in Wales, or beyond, to meet this demand. An associated increase in destitution and homelessness is likely, particularly in the light of shorter, seven-day notices of eviction from NASS accommodation. Migrants and people seeking sanctuary should be at the heart of any intervention measures, with the focus on facilitating and widening access to justice.

Wilding (2023)²⁴, recommended 'client care grants' to support additional communications not funded by legal aid. Our research found that funding to supplement legal aid is also needed to safeguard provision. Options include payment on a case-by-case basis, with the potential for a lower rate subsidy for people eligible for legal aid, or separate interim financial support to maintain and build the capacity of legal aid and other legal providers – though as Wilding suggested, quality must be safeguarded. The cost of supporting legal aid and other legal services should not fall entirely to the Welsh Government, with the UK Government and other statutory agencies meeting their responsibilities to facilitate justice.

Recommendations:

Legal help

The Legal Aid Agency should prioritise help and advice for providers who are at risk of not delivering contracts.

The Legal Aid Agency should implement strong contingency planning, anticipating and acting to prevent further provider loss.

The Legal Aid Agency should give practical assistance and prompt responses to facilitate the reallocation of cases when a provider withdraws.

The Legal Aid Agency should implement emergency funding to maintain legal aid provision in Wales.

The Welsh Government should implement a crisis fund to facilitate access to immigration legal advice and representation. This should be an interim measure, based on quality of provision, and sourcing advice and representation from as broad a range of providers in the private and third sectors and be designed to meet the needs of vulnerable and at-risk migrants as well as asylum seekers.

The Home Office should increase the speed of asylum decision-making in a measured and logical fashion, communicating with legal providers and implementing a strategy for planned reduction of the backlog, based on consultation with the sector. **Better decision-making and trained and regulated decision-makers** are also needed.

The UK Government should immediately increase timescales for appeal.

Wider sector support

The Welsh Government and local authorities should improve funding for support services for at-risk groups, including migrants with no recourse to public funds, undocumented migrants, and asylum seekers left destitute after eviction from NASS accommodation.

Larger local authorities should fund legal services to provide advice and representation to people they support, and where possible fund legal services in their area, including development support if needed.

Funders should implement crisis funding for legal and other services to at-risk migrants as well as asylum seekers. They should understand and account for the Welsh context (small third sector, problems with infrastructure, inadequate transport networks, population distribution, and geography) when designing funds and assessing applications. The Welsh Government should engage with funders to promote funding to Wales and a greater understanding of the challenges in Wales.

4.2 Maintaining and developing provision

Preventing further provider loss is a priority. The above findings show that the existing arrangements and fees for immigration legal aid cannot sustain adequate legal provision. Most legal aid providers in Wales are commercial businesses and generally not eligible for existing funding sources. However, urgent action is needed to prevent further provider loss. The Legal Aid Agency is currently failing in its duty to make legal aid services available to the general public and it has a key role to play in preventing further loss of provision. Recommendations for **administrative reform** in 4.9 below are relevant to this aim.

Legal aid reform and better training and development support are needed to rebuild the immigration legal sector.

Recommendations:

The Legal Aid Agency should act swiftly when providers flag concerns about sustainability or struggles with cashflow. They should offer support, emergency interim payments, and flexibility around administrative and billing rules to support and aid recovery. Good contingency planning, consistency in decisions, and ongoing, responsive support are essential.

The Legal Aid Agency should improve and increase dialogue with contract managers. This would encourage greater understanding of the effects of legal aid rules and systems and may aid in building better and more supportive relationships.

The Welsh Government should introduce a crisis fund for providers of immigration and asylum legal services in Wales, including private practices operating under legal aid, but limited to support for legal aid-funded services. Evidence of quality, demand for services, and need for financial support, should all be criteria for eligibility.

Relevant regulators and industry bodies (the Solicitors Regulation Authority, Office of the Immigration Services Commissioner, and the Law Society, should jointly offer enhanced support and advice to facilitate legal advisors wishing to move between regulatory and funding schemes.

The Welsh Government should consider introducing a capacity fund to support training and the development of existing and new immigration legal services across the country. Universities, solicitors, the third sector, and community agencies, also have roles to play in developing training and different routes into immigration legal work. There should be emphasis on supporting people with lived experience to work in and lead services.

4.3 Facilitating access

As things stand, a referral rota system may not make a dramatic difference to providers, who generally have too little capacity to take new referrals anyway, and for people seeking justice, there are few services available. Clear information about providers and capacity, however, would prevent a lot of wasted time and frustration for referrers and individuals. An instant resource showing where providers are, what services they provide, and how to refer or self-refer, without having to search or rely on word of mouth, would save time, reduce frustration and facilitate access.

A managed rota or similar arrangement for facilitating referrals from initial accommodation would help facilitate access to justice, particularly as immigration legal services in Wales are rebuilt. Asylum seekers newly arrived in an area should be given fast access to appointments with legal professionals who can take on their case. Similar systems at critical points of need, for example when being moved on from Section 95 accommodation, or when facing deportation, would also be beneficial. This would strongly promote the integration and inclusion of asylum seekers in compliance with Nation of Sanctuary and Anti-Racist Plan commitments.

Recommendations:

The Wales Strategic Migration Partnership should establish a working group to explore the re-establishment of a referral rota within initial and dispersal accommodation. This would need to involve a range of partners, such as local authorities, accommodation providers (Clearsprings), legal aid and third sector legal representatives, and key third sector support agencies, such as Welsh Refugee Council and British Red Cross. Any referral system should involve an element of informed choice for people seeking representation.

The Welsh Government should provide and fund a contract to implement the above rota system, and contracts for systems to facilitate referrals from key support providers and local authorities at critical points in legal journeys.

The Welsh Government should explore the development of a public-facing central resource to provide up-to-date information about available legal services, details of provision, their location, and how to refer. An incorporated provider review system

would drive quality and inform prospective clients. There are a range of options for this resource, some more costly than others.

4.4 Client care, individual agency, and quality of service

All too often, solutions to the legal aid crisis focus on providers rather than the people they exist to serve. In a system which gives little control to the people trapped within it, informed choice, client care, and communication can be easily overlooked. Quality services, legal education, and knowledge of rights, as well as paths to redress, are all key elements of a well-functioning and fair system. Some bodies are engaging in legal literacy projects, such as the Solicitors' Regulation Authority's (SRA) Public Legal Education²⁵ work. Much more needs to be done to inform people seeking immigration justice and the communities in which they live.

Client care is undermined by low fees, overwork, and lack of capacity for training.

Recommendations:

Regulators and industry bodies should make more effort to inform people using legal services of how legal systems work, how to ensure that they are being given regulated and quality advice, what to expect from an advisor or representative, and how to complain or seek redress.

More work should be done to tackle unregulated advisors and to inform people seeking immigration justice and their communities of the law, how to identify an unregulated advisor, how and where to access free advice, and to distinguish between charged advice and quality advice.

The Legal Aid agency should respond quickly to providers requesting clarification around rules, particularly where clients or their cases are at risk. Flexibility around rules to protect clients is essential.

Providers should give agency to clients wherever possible, informing rather than gate-keeping, information.

4.5 Administrative reform

Administrative burdens and red tape compound financial problems, interfere with cashflow, and at times block access to justice. Restrictions on competition, for example, have a role in publicly funded work and can prevent monopolies which stifle diversity of provision and risk sustainability. These must, however, be implemented sensibly and take into account local and regional circumstances and the needs of people seeking justice.

The Legal Aid Agency should urgently introduce more billing stages for fixed fees. Ultimately, hourly fees claimed monthly would allow for a more sustainable financing of the sector and a fairer system of funding.

The Legal Aid Agency should reduce the administrative burden of legal work, take a constructive and less invasive approach to auditing, and make the processing of applications less time-intensive and less forensic.

The Legal Aid Agency should improve and clarify systems for assessment audit and introduce measures to make the claw-back of payments less likely. This will reduce the extent to which providers complete work "at risk", i.e. work for which they will not get paid. This should lead to several improved outcomes, including better financial sustainability, attracting more providers to undertake legal aid work, improved quality, and better client care.

The Legal Aid Agency should take a flexible approach to restrictive rules where they interfere with access to justice and should take account of specific circumstances surrounding a request for an exception.

4.6 Legislative reform

At the heart of the legal aid crisis is a fundamental failure of the scheme to provide access to justice. Reform of the legal aid system is urgently needed.

Recommendations:

The scope of legal aid should be widened to include all immigration, asylum, citizenship, and immigration-related work within the National Referral Mechanism (NRM) for victims of modern slavery*.

The UK Government should immediately increase fees and hourly rates in line with inflation and add an additional uplift of at least 50% for all immigration work*. This is a short-term solution and we recommend a more thorough reform of legal aid. This could include a return to hourly rates or different models for funding and structuring the scheme. Changes should be based on thorough and fair consultation and the principle of increasing access to justice.

Annex 1: Glossary of terms

We have tried to use full names and titles throughout this report, but at times abbreviations and acronyms may be used. Below is a glossary that may be useful for reference, particularly for those who do not work within the legal sector.

ECF - Exceptional Case Funding: legal aid applications for ECF can be made where an immigration case is not within the scope of legal aid but where failing to provide legal aid would result in the breach of human rights.

Escape Fee - When legal costs on a case pass a set threshold, a provider can 'escape' the fixed fee and instead charge hourly rates.

FOI- Freedom of Information (request): a request made under the Freedom of Information Act 2000 for information held by a public authority which is not in the public domain. Where information requested is available, it should be provided within 20 working days.

LAA - Legal Aid Agency: executive agency of the Ministry of Justice, and the body which administers legal aid and is responsible for ensuring that legal aid services are available to the public.

LASPO - Legal Aid Sentencing and Punishment of Offenders Act 2012: this legislation came into force on 1st April 2013. It greatly reduced the availability of legal aid for many people and removed most immigration matters, other than asylum, from within scope. Exceptional Case Funding is available on human rights grounds to some who are no longer eligible for legal aid funding, but it has a very low fixed fee and is, as the title suggests, available only for exceptional cases.

Matter starts – A Legal Aid Agency contracting term used for legal help. Specifically, the first meeting a provider has with a client. These are reported to the Legal Aid Agency and could be interpreted as 'opening' a case.

NASS- National Asylum Support Service

Providers – we use this term to refer to firms or organisations offering legal services and holding a legal aid contract. We use the term 'offices' to refer to individual premises (a single provider may have several of these). We use the terms 'practitioner', 'representative' or 'advisor' to refer to individuals.

Scope - Refers to what, in this context, legal aid covers as a matter of law.

Section 4 support - When an asylum claim is unsuccessful, and all appeal rights are exhausted, a person who does not have accommodation and/or cannot meet essential living costs can claim housing and financial support from the Home Office under Section 4 of the Immigration and Asylum Act 1999. This is conditional on the person demonstrating either that they are taking reasonable steps to leave the UK, or that they

cannot return, or that they have been granted leave to appeal via judicial review, or their human rights would be breached if they were not supported, for example if they have made a fresh claim for asylum.

Section 95 support - Financial and housing support (or financial support or subsistence only) provided by the Home Office under Section 95 of the Immigration and Asylum Act 1999. Provided to people seeking asylum or having made an Article 3 human rights claim, while they wait for a decision on their claim. Section 95 support can be provided where the person does not have accommodation and/or cannot meet essential living costs.

Section 98 support – Emergency financial and housing support (or financial support or subsistence only) provided by the Home Office under Section 98 of the Immigration and Asylum Act 1999, while a decision is being made on their eligibility for Section 95 support.

Annex 2: What we did

Our study was carried out over a six-month period between March and September 2023. Its aim was to build on Welsh Government-commissioned research into legal services for forced migrants published in January of the same year²⁶ and previous research by the same author (Wilding) for Refugee Action²⁷. It was undertaken in the context of our wider work on access to immigration justice. We wanted to gain a fuller and updated picture of legal aid provision in Wales, since some data was by then two years old. We also aimed to identify additional interim measures that could prevent further provider loss.

We are conscious that the fundamental problems with legal aid stem from reserved administration and areas of law, and that there are many organisations and stakeholders campaigning and influencing for change. We wanted to explore the issue from a Welsh perspective and to identify measures that could be taken quickly within Wales to mitigate the immediate crisis, without waiting for change from outside.

We did not include barrister services or judicial review in the research, and focussed on public-facing services, to which people seeking justice should have direct access. This enabled us to keep the size of the project manageable in a very small team and made developing coherent and clear recommendations more achievable.

Methodology

We reviewed studies into legal aid in the UK as a whole as well as those relating specifically to Wales. We utilised a range of publicly available data relating to legal aid provision and made freedom of information requests where further or more specific information was needed.

Our ability to carry out interviews with immigration legal aid providers across Wales was restricted by providers' lack of capacity. We carried out semi-structured interviews with three out of the then nine providers. This was supplemented with written information provided for the research. We also drew on qualitative data gained through the wider work of the Access to Justice project. These included formal interviews for related research; semi-structured conversations with organisations working with migrants and refugees in Wales; and a round table discussion convened jointly with WLGA in March 2023 involving 21 participants. These included immigration legal providers from the private and third sectors, regulators, frontline service providers, and a refugee advocacy group. We requested an interview with the Legal Aid Agency but they did not respond to our requests.

All quotes within this document are drawn from formal interviews specifically carried out for the legal aid research.

We drew analysis from the following data and datasets:

- Casework data from providers (one response received)

- Legal Aid Agency: directory of legal aid providers (updated 25 August 2023)
- Legal Aid Statistics: civil starts by provider area dataset to March 2023
- Home Office: asylum applications awaiting decision datasets March 2023
- Home Office: asylum applications datasets March 2023
- Law Society: list of Immigration and Asylum Accredited members (downloaded 23 September 2023)
- Law Society: list of Immigration and Asylum Accreditation supervising members (downloaded 23 September 2023)

Annex 3: Legal Aid

Legal aid is a statutory fund, first introduced in 1949. Its aim is to ensure that justice is available equally to all, safeguarding a fundamental principle of law. Legal aid enables people with low incomes to access legal advice, mediation, and representation in a court or tribunal, where they otherwise would not be able to afford to exercise their legal rights.

Legal aid is only available where statutory eligibility criteria are met. These include a means test, thresholds relating to capital (savings and other assets), and tests to determine whether the case merits the use of public money and has a realistic chance of succeeding. For some cases, for example assistance with an application, or representation at the First-Tier Tribunal (Immigration and Asylum Chamber), means and merits tests are carried out by providers. For representation at the Upper Tribunal (Immigration and Asylum Chamber), the Legal Aid Agency carries out means and merits assessments and issue a certificate to providers where these are passed.

Administration

Legal Aid is administered across England and Wales by the Legal Aid Agency, an executive agency of the UK Government. It follows, then, that the statutory and administrative factors that affect legal aid provision are not restricted to Wales. The Law Society has found that across England and Wales, 66% of people do not have local access to legal aid-funded immigration advice and representation²⁸.

In Wales, the lack of access to legal aid-funded advice is compounded by a shortage of free third sector advice provision and a lack of awareness of migrants' rights amongst local authorities and frontline providers. Professional legal fees are beyond the financial reach of many. Non-asylum applicants also pay very high visa fees, a compulsory health surcharge which is added to immigration applications, and the cost of biometric residence permits.

The scope of legal aid for immigration and asylum

The Legal Aid, Sentencing, and Punishment of Offenders Act 2012 (LASPO)²⁹ removed most non-asylum immigration law from the scope of legal aid across England and Wales. This created one of the most significant barriers to access to justice for migrants in the UK and has undoubtedly resulted in many migrants being unable to exercise their legal rights. It is compounded by administration, fees, and other issues outlined in this report which have affected provision even for matters in scope.

The following areas of immigration remain within the scope of legal aid:

- asylum cases, including applications, casework, and appeals
- applications and appeals relating to bail and detention

- applications for leave to remain as a victim of trafficking
- applications for leave to remain as a victim of domestic violence
- proceedings before the Special Immigration Appeals Commission (involving matters of national security with proceedings held confidentially)

Legal aid is also available on application for out-of-scope cases where legal aid is needed to prevent a breach of human rights. This is referred to as Exceptional Case Funding.

Financial thresholds for eligibility

Means testing is designed to show whether a person needs financial help through legal aid to pay for legal services. If they have income and/or capital (savings, property, or other assets) above a set limit, they will either not receive legal aid or will have to pay a contribution.

Receipt of certain benefits, referred to as 'passporting benefits', mean that a client is exempted from the income element of the means test, but people subject to immigration control are rarely able to receive these benefits. If a client is an asylum seeker receiving Section 95 support from the National Asylum Support Service, or they are appeal-rights-exhausted and receiving Section 4 support, they too are "passporting" through income means testing, but only for what is known as 'controlled work', which does not include full legal representation.

The prospects of a case are also considered and generally need to be judged as 'very good', 'good', or 'moderate'.

If a client is not receiving a "passporting benefit", they must provide financial information to show that they and their partner have less than £2657 combined gross monthly income, and less than £733 disposable monthly income. These limits remain the same whether a person has no children or up to four children. For a fifth child, and for each child after that, £222 is added to the gross monthly income.

A capital means test is also applied. This is currently set at £8,000, or £3,000 for immigration and trafficking cases at appeal.

Merits tests

The use of public money must be justified when granting legal aid and the merits of each case are therefore tested when an application is made. For immigration cases, merits are mainly judged on 'prospects of success' criteria, which measure the likelihood of an application or appeal succeeding. Other factors may be taken into account, such as costs versus benefits to the individual, and whether the case is of overwhelming importance to the individual (for example, a supported claim that an asylum applicant would otherwise face torture or death).

In order to be considered for legal aid, the prospects of a case need to be judged as 'very good', 'good', or 'moderate'³⁰. If the case is of 'significant wider public interest' or has overwhelming importance to the individual, a 'borderline' chance of success is enough. These standards are somewhat subjective, and our research found some evidence of dispute between different providers as to whether some were applying a reasonable threshold when it came to judging merit.

Fees

Perhaps one of the most controversial aspects of the administration of legal aid is the application of fixed fees. Fees are set according to the type of work completed, in contrast with the hourly rates which were payable prior to 2013. The fee structure takes no account of the complexity of the case or whether more practitioner time is needed to secure a successful outcome.

Current standard fixed fees for immigration work are:

	Stage 1 - legal help	Stage 2(a) - controlled legal representation	Stage 2(b) – controlled legal representation
Asylum	£413	£227	£567
Non-asylum	£234	£227	£454

An hourly fee is payable for a limited list of matters. These include bail applications advice relating to Unaccompanied Asylum-Seeking Children or Separated Children, and advice in relation to age assessment appeals.

An Escape Fee is payable where a specific calculation shows that the provider has worked a number of hours on the case that is equivalent to twice the value of the fixed fee³¹. They are then able to claim for the work at a set hourly rate. The Escape Fee threshold changed on 1st April 2023, before which the threshold was three times the Standard Fee. If a provider falls even a small amount short of the threshold, they receive only the Standard Fee.

Additional disbursements and set payments are payable for specific types of work.

Full tables of legal aid fees can be found in the Civil Legal Aid (Remuneration) Regulations 2013³².

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- ¹⁵ Wilding, n(13)
- ¹⁶ UK Government, Asylum Legal Help, Early Payment For Matters Subject to the Standard Fee Scheme: A Practical Guide (accessed September 2023), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1100751/Early_Billing_A_Practical_Guide.pdf
- Legal aid early payment rules state that a provider can bill early for Asylum Legal Help paid at the Standard (fixed) Fee, if the following apply:
 - It is 6 or more months since the case start date; and
 - The profit costs of the work completed to date have reached or exceeded £413 (the net value of the standard fee)
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