

Droughts and Deserts

A report on the immigration legal aid market

Dr Jo Wilding

Acronyms and Glossary

BSB	Bar Standards Board
ECHR	European Convention on Human Rights
LAA	Legal Aid Agency
LSC	Legal Services Commission (predecessor of LAA)
MoJ	Ministry of Justice
OISC	Office of the Immigration Services Commissioner
SRA	Solicitors Regulation Authority

Matter starts	The number of new cases a provider is permitted to open in the contract year. For example, a provider may have 100 matter starts, meaning they can open 100 new matters in the year (though in practise they can request supplementary matter starts).
Monopsony	The situation where there is only one buyer, and multiple sellers. The term was coined by the economist Joan Robinson, to differentiate from monopoly, where there is only one seller, and many buyers. Either situation results in an imperfectly competitive market and potential market failure, because the single buyer or seller has excessive power.

Acknowledgements

I am grateful to all of the practitioners and others who took part in this study. I was acutely aware that an hour spent with me was an hour not billed, yet some of the most brilliant and hardworking lawyers in the country gave me their time and expertise in interview, out of commitment to legal aid and their clients.

Thanks are also due to the many organisations with an interest in legal aid or immigration issues which helped me to compile and refine the recommendations in this report.

The input and generosity of my academic supervisors at the University of Brighton was invaluable: Professor Marie-Bénédicte Dembour, Professor Phil Haynes and Dr Alex Newbury. Thanks especially to Professor Dembour who obtained the funding to make it possible for me to work on this research full-time from the beginning of 2016.

I would also like to thank the Joseph Rowntree Charitable Trust, who funded the writing of this report so that I could turn the research I had already done into something which I hope is more accessible than the 100,000+ words of academic thesis.

I appreciate the interest and engagement of a number of policy officials in various ministries and statutory organisations, and look forward to working with you in the future.

On a practical note, thanks to Karen Hood for the map design (karen@karenhooddesign.com), Dawn Sackett for excellent proofreading, and Dr Lars Schuy for taking over the layout and formatting, which was far beyond the call of duty.

Executive summary

The supply side of the immigration and asylum legal aid market in England and Wales includes all providers (not-for-profits and private firms) under contract to the Legal Aid Agency and all barristers (most of whom are self-employed) and chambers undertaking publicly funded immigration and asylum work.

There are many excellent practitioners and organisations doing immigration and asylum legal aid work but they are hampered by the existing systems of funding, contracting and auditing, which perversely protect the market position of poorer-quality providers, create advice deserts and droughts, and drive up demand and cost in the asylum and legal aid systems.

The aim of this report is not to ‘bash’ any organisation or entity involved in the legal aid or asylum system but rather to demonstrate where problems have arisen and to propose ways forward, taking a systemic and holistic view that facilitates all parties obtaining the value they need from the system.

Understanding demand and supply

Demand and supply in immigration legal aid have been misunderstood at policy level. This has caused not only advice deserts, where there are no legal aid providers at all, but also advice droughts, where there appears to be a supply but clients cannot access advice or representation.

Reviews which focus on unused matter starts in the system (the notional supply) fail to feed back this critical information about functional supply – i.e. providers’ and barristers’ capacity to take on new cases.

All demand for immigration legal aid services can be analysed through the four-square demand matrix. There are two stages of demand: potential-client demand from individuals who would like the practitioner or organisation’s services, and in-case demand for work on existing clients’ cases. Demand can also be divided into value demand (for the stated purpose of the service) and failure demand (for work caused by a failure elsewhere in the system or from a system which is badly set up).¹ Therefore there are four types of demand: potential-client value demand, in-case value demand, potential-client failure demand and in-case failure demand.

All demand has cost consequences, and costs may be generated, escalated and / or shifted.

¹ Seddon J, *Systems thinking in the public sector: the failure of the reform regime – and a manifesto for a better way* (Triarchy, 2008)

The evidence from this and other studies suggests that a large volume of failure demand is pulled into the system by poor-quality decision-making, particularly by the Home Office. However, failure demand is also created by poor-quality providers mishandling cases, which then demand 'rescue' work by another lawyer, or are recycled into the system as fresh claims work.

This means that the auditing and fee regimes which incentivise and protect poor quality work provide particularly poor value for money, compared with contracting only with high-quality providers, reducing audit activity and paying hourly rates for the work done.

Lawyers mediate the demand for their work according to a variety of factors, some of which apply equally to all providers (macro-mediating factors) and others which arise at organisation or individual level (micro-mediating factors). Not all practitioners respond in the same way to the macro-mediating factors. The way in which demand is mediated determines the quality of services provided.

Funding

The standard fee is inadequate for high-quality work, across all branches of the legal profession. High-quality practitioners and organisations lose money on their standard fee cases and depend on cross-subsidy or external subsidy for survival.

Not-for-profits rely on grant-funding (including for non-casework projects) and firms, chambers and barristers rely on privately-paying clients and / or higher-paid areas of law. Barristers' chambers rely heavily on the goodwill of a small number of high earners who (for the most part) no longer do legal aid work.

There are limits to subsidy, so high-quality practitioners and organisations limit their capacity and their legal aid market share in order to cap their losses.

Quality, financial viability and clients' access to justice

It is impossible to reconcile quality, financial viability and client access on the standard fee. High-quality providers reconcile quality and financial viability by reducing access for clients or by prioritising work which is paid at hourly rates.

The auditing regime carries heavy transaction costs for providers but fails to give the funder meaningful information about substantive quality. Peer review is the only means of assessing substantive quality, and is under-used. Its effectiveness is also compromised because level three (out of five) has been treated as sufficient to hold a contract. The Legal Aid Agency does not differentiate between providers with the highest peer review scores and those with level three.

There is some evidence that some providers deliberately cap the amount of work done on cases at the amount they will be paid on the standard fee. They avoid exceeding that level of work because there is a high risk of not being paid. From a business perspective this is difficult to criticise since it is financially rational; however, it appears that this work-capping particularly limits the extent and detail of instructions taken from the client and put into a witness statement. The lack of detail is said by practitioners, judges and support workers to harm the overall case.

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

As a result, poor-quality providers maintain or increase their market share, while high-quality providers reduce their market share.

Market failure

Contrary to the view in the LASPO Post Implementation Review (paragraph 52) that ‘the market is sustainable at present’, this research concludes that there is already a market failure in immigration and asylum legal aid, both in terms of geographical availability of services and the ability to ensure adequate quality. The supply side of the market is precarious, despite robust demand, because of the contract and fee regime. Urgent policy action is required if this is not to become a catastrophic market failure.

Recommendations

The recommendations in green boxes throughout and summarised at the end of this report range from the ‘umbrella’ or macro-level issues to detailed and specific rule changes, but they are all aimed at better understanding demand and supply, maintaining functional supply and reducing failure demand, to both ensure clients (or would-be clients) have access to high quality advice and representation and ensure taxpayers’ money is well spent on value demand. Neither the clients nor the lawyers involved in publicly funded asylum and immigration legal services receive unmitigated public sympathy, but it is firmly in the public interest to ensure that the systems in which they operate are effective.

Table of Contents

Executive summary	1
Understanding demand and supply	1
Funding	2
Quality, financial viability and clients' access to justice	2
Market failure	3
Recommendations	3
Table of Figures	5
Introduction	6
What is the 'supply-side' of the market?	8
The asylum process	10
Demand	11
What is demand?	11
Drivers of potential-client demand	12
Drivers of in-case demand	14
Exponential increase in complexity	16
Evidential requirements	17
The battle over policy and legislation	19
Precedent proliferation	20
The cost consequences of demand	21
The Fee Regime	24
Standard fees and the incentive to cut costs	25
Judicial review	27
Unpaid administration and transaction costs	28
Auditing and quality control	31
Performance targets and standards	33
Peer review	34
Market forces and quality control	36
Protection of poor-quality providers	36
Driving down quality	37
Supply	39
Advice deserts and droughts	39
Supply in detention	41
Boom and bust	43
Lawyers mediating supply	45
Conclusion	46
Summary of recommendations	49
Quality and auditing	49
Scope and client access	49
Fees and payment systems	49
Provision in detention	50
Advice droughts	50
Understanding and reducing demand	50
Systemic understanding and evidence gathering	51

Table of Figures

Figure 1	Legal aid supply map	9
Figure 2	The UK asylum procedure	10
Figure 3	Domestic appeals structure	11
Figure 4	The demand matrix	12
Figure 5	The demand matrix plus cost consequences	22
Box 1	Case study – asylum and trafficking case	23
Figure 6	Analysis of demand and costs in the Box 1 case study	24
Figure 7	Hourly rates for appeals work (CLR stage) for barristers	25
Figure 8	Illustrative fees for a barrister on hourly rates in a straightforward case	25
Figure 9	Peer review outcomes in civil and family law, 2017–18	35
Figure 10	Boom and bust cycle in the number of immigration legal aid providers 2004–2019	44
Figure 11	The Lawyer-Mediated Supply model	46

Introduction

This was a study of the supply-side of the immigration and asylum legal aid market, with a particular focus on quality of services, financial viability for practitioners and organisations, access for clients, and the effective matching of demand and supply.² The research was carried out over a three-year period from January 2016–December 2018. This report is intended to share the key insights from the research with relevance to legal aid policy and practice. In particular, it attempts to give a more robust and detailed understanding of demand and supply in immigration legal aid provision than has previously been available, and to explain how practitioners and organisations attempt to balance quality and financial viability.

Neither legal aid lawyers nor their clients enjoy the highest levels of public sympathy, perhaps least of all in immigration and asylum. Policy since the 1990s has been dominated by the idea that suppliers induce demand for their services, either by doing more work at public expense than the client needs, or by treating problems as legal ones when an alternative solution might have been more appropriate. Alongside this, to justify cuts, some politicians have publicly described legal aid lawyers as ‘fat cats’ who are ‘on a gravy train’,³ backed by misleading claims about lawyers’ income and the cost of the legal aid system compared with other countries.⁴ In immigration, politicians have also accused lawyers of ‘playing the system’ when acting appropriately in the client’s interests, while clients are derided as ‘bogus’ and ‘abusive’, all in the context of very limited public understanding of who gets asylum, why, and how many ‘layers of appeal’ there are.

But there is a public interest in having systems run effectively and in paying only for reasonable quality; there is a public interest in a functional administrative system; there is a public interest in having the UK comply with its international obligations, including on asylum. There is, for people seeking asylum, an obvious interest in ensuring both access to and quality of advice and representation. And there is an interest for the state authorities in making sure the asylum and immigration system and the court system run smoothly. Legal aid is the fulcrum on which all of this balances.

In this report, I draw on concepts from economics which I hope will speak to those in policy positions tasked with trying to design policies which work, within the budgets they are given. Although the report is critical, in places, of various aspects of the current system, it is not about apportioning blame but about identifying what can and must be improved. The recommendations in the report range from the ‘big picture’ to the finer detail and are formulated to try to help both policy makers and campaigners to see a path to a more positive, more effective immigration legal aid system.

² Many of these terms are controversial: they are drawn from economics and have been applied to public services over a period since the 1980s. Legal aid law is about access to justice, not about access to services, and lawyers seek to uphold human and constitutional rights rather than selling services to consumers in a market. I accept these arguments, but have adopted the economic, market-focused language in order to analyse the central issues.

³ Being on a gravy train is defined in the Cambridge English Dictionary as ‘a way of making money quickly, easily, and often dishonestly’.

⁴ The Secret Barrister, *The Secret Barrister* (MacMillan, 2018)

The word 'system' is important. The report attempts to show how interdependent the different parts of the system are, including immigration authorities, courts and tribunals, prisons and detention centres, asylum accommodation and support services, the legal aid authority, and the network of legal aid practitioners and organisations. Too often, reforms shunt costs around the system, or reduce costs at the expense of effectiveness, or fail to produce the change they were intended to produce, because each part of the system was treated in isolation. For this reason, some of the policy recommendations are directed at bodies other than the Legal Aid Agency (LAA) and Ministry of Justice (MoJ), which are nevertheless crucial participants if meaningful change is to be achieved.

The MoJ expressly adopted 'market based procurement' of legal aid services at the time of the Carter Review in 2006.⁵ Market theories predict supply would equal demand where price is adequate. Yet there is data clearly showing a reduction in the number of organisations doing legal aid work in asylum and immigration, especially among not-for-profits.⁶ There is also data showing areas of the UK in which there is no legal aid provision at all in some areas of law, and the LAA's contract tender in 2018 failed to find provision in several geographical areas for particular areas of law.⁷

Lord Carter's review in 2006 also identified elements of legal aid provision which defy explanation through market and economic analysis, as have other key authors.⁸ Carter noted the failure of previous attempts to reform legal aid, and that actual spending defied forecasts for reasons he could not identify. An international comparison offered some answers to the reasons why England and Wales appeared to have higher legal aid costs, showing that system factors (the type of justice system, number of crimes prosecuted and their seriousness, level of demand for divorce) were primarily responsible, though contractual incentives might also play a role.⁹ The data also suggest that higher legal aid costs are offset to a large extent by lower spending on courts and other parts of the justice system.¹⁰ In 2004 Richard Moorhead, one of the main authors on law firms and legal aid, wrote about the 'absence of good quality published data on the economics of law firms and the operation of profit making organisations within the [legal aid] system.'¹¹

⁵ Lord Carter of Coles, *Legal Aid: A market-based approach to reform* (2006)

⁶ Refugee Action, *Tipping the Scales. Access to Justice in the Asylum System* (2018)

⁷ For example, 39 procurement areas, covering 61 local authorities in England and Wales, received insufficient bids for housing and debt advice; the education and discrimination tender was abandoned in February 2018: Legal Action Group, *Civil legal advice education and discrimination tenders abandoned* (Feb 2018) <https://www.lag.org.uk/article/204486/civil-legal-advice-education-and-discrimination-tenders-abandoned>; Legal Action Group, *Advice deserts set to grow as LAA tenders fail to attract bids* (April 2018) <https://www.lag.org.uk/article/204777/advice-deserts-set-to-grow-as-laa-tenders-fail-to-attract-bids>

⁸ Cape and Moorhead, *Demand induced supply? Identifying cost drivers in criminal defence work: A report to the Legal Services Commission*; Goriely, 'The English Approach to Access to Justice', Paper presented to a World Bank Workshop, Washington, 11 December 2002; Alastair M Gray, 'The Reform of Legal Aid' (1994) Oxford Review of Economic Policy vol 10 issue 1, p51

⁹ Roger Bowles and Amanda Perry, *International comparison of publicly funded legal services and justice systems* (Ministry of Justice Research Series 14/09, 2009)

¹⁰ Ibid

¹¹ Richard Moorhead, 'Legal aid and the decline of private practice: blue murder or toxic job?' (2004) International Journal of the Legal Profession vol 11 issue 3, p186.

Yet despite a number of government-commissioned reviews of legal aid, ten years after Moorhead's paper, the House of Commons Public Accounts Committee published severe criticism of the MoJ and LAA for their lack of knowledge and understanding in respect of the cuts to remuneration rates and scope of legal aid under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012:¹²

The Agency's own quality assurance processes indicate that the quality of face-to-face legal advice is unacceptably low, with almost one in four providers failing to meet the quality threshold. This has serious implications in terms of both value for money for the taxpayer and access to justice for legal aid claimants. The Agency could not explain why these results were so bad, or whether they are related to the reduction in fees paid for civil legal aid. It seems to have done nothing to understand why some providers are falling short of the quality standards expected.

There is an urgent need for a more detailed, more accurate and more nuanced understanding of the market, on which to base policy. What drives demand? How does that demand manifest itself for particular suppliers and services? How can demand be mapped or monitored? How do lawyers decide which services to supply and to whom? How well is supply matched to demand? How do demand and supply interact with quality and financial viability? The purpose of this report is to give a much more detailed, evidence-based picture of what is happening in the 'market' of practitioners and organisations doing immigration legal aid work, to identify the gaps in data, and to draw out the implications for policy.

What is the 'supply-side' of the market?

Legal services in immigration and asylum are not 'reserved' to solicitors, barristers and legal executives, but it is a criminal offence to give immigration advice unless either exempt, by virtue of one of these professional qualifications, or registered with the Office of the Immigration Services Commissioner (OISC). An OISC-registered caseworker need not have a professional legal qualification, but is registered at level one (the entry level) to three (the most skilled) which determines the types of work they can undertake.¹³

For legal aid purposes, solicitors and OISC-registered caseworkers mainly work in private law firms or not-for-profits such as law centres and other charities, and provide advice directly to clients under contract to the LAA. In this report I refer to these as 'providers'. Barristers provide advocacy in court and other services on referral from solicitors and caseworkers, and are mainly self-employed individuals working in sets of 'chambers' with other barristers. Where I refer to 'lawyers' or 'practitioners' I include solicitors, caseworkers and barristers.

The map below shows where there are providers of publicly funded asylum legal services under contract to the LAA. The thick dark lines show the (approximate) boundaries of 'access points' – the

¹² House of Commons Public Accounts Committee, *Implementing reforms to civil legal aid. Thirty-sixth Report of Session 2014–15* (2015) HC784

¹³ Note that the Law Society also operates an accreditation scheme, IAAS, which likewise has levels one to three, which is required for those carrying out legal aid work. This requirement for accreditation to do legal aid work is unique to immigration.

geographical areas into which the country is divided for legal aid procurement purposes. The numbers in the blue areas refer to the number of offices providing services in that access point.

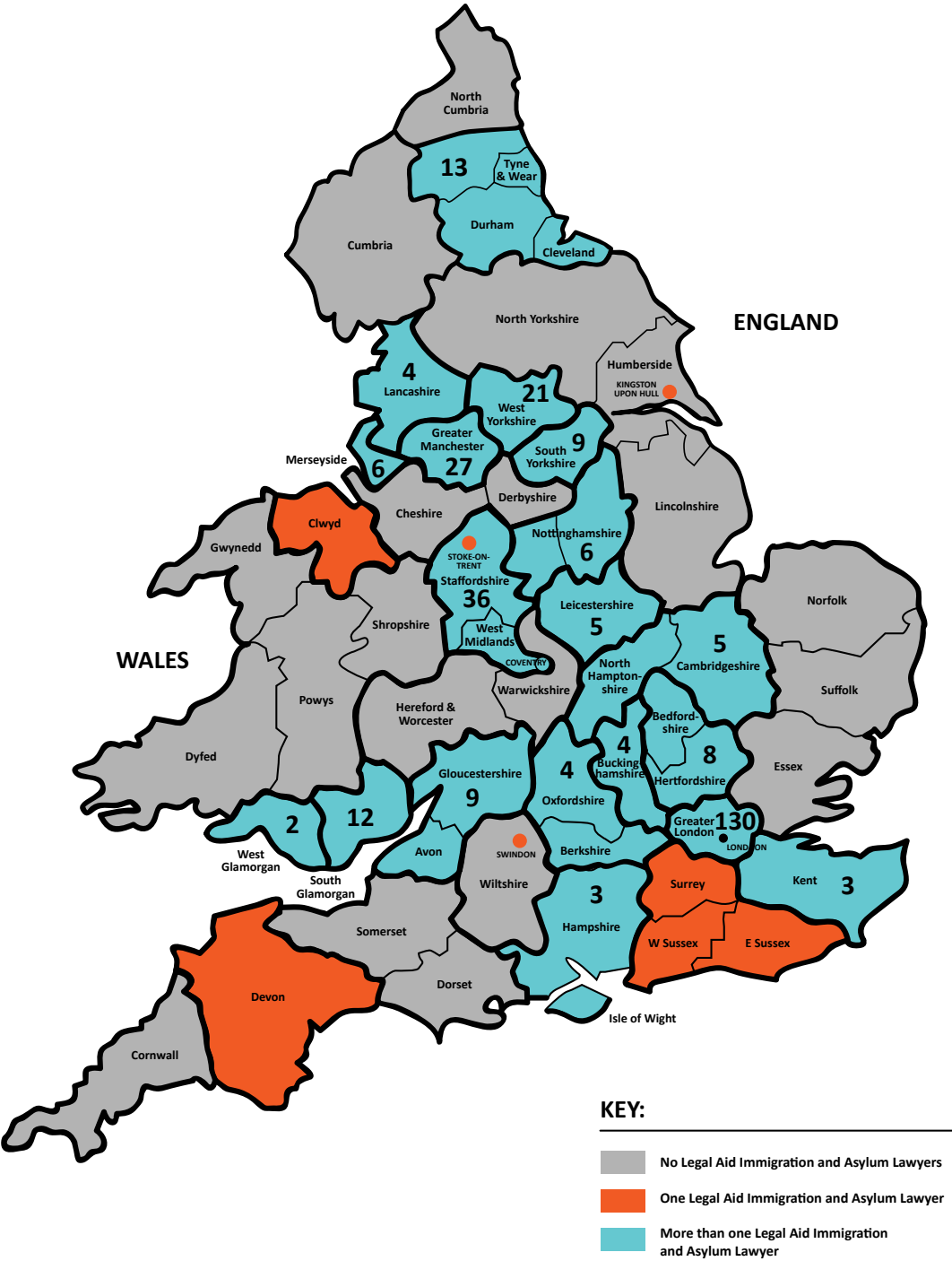


Figure 1: Map showing supply of immigration and asylum legal aid lawyers in England and Wales as of 14/02/2019. (Source: Freedom of Information Request to Legal Aid Agency)

The ‘dots’ on the map are small access points – Swindon, Stoke-on-Trent, Kingston-Upon-Hull and Coventry. The first three have one provider each while Coventry has two.

Since barristers operate independently, supply cannot be mapped in the same way, but a review by the Bar Standards Board found that around 700 barristers declared immigration as one of their main practice areas in 2017.¹⁴ This gives no indication of the number doing publicly-funded work but it compares with at least 1,923 practitioners doing some family work in 200–220 sets in 2009,¹⁵ and a total of 16,435 barristers in practice in 2017,¹⁶ suggesting that the specialist immigration bar is comparatively tiny. These 700 were heavily concentrated in London and, to a lesser extent, Birmingham and Manchester, with very few specialists practising elsewhere and this appeared to cause problems for organisations trying to instruct counsel for certain Tribunal hearing centres, especially in Newport (South Wales).

The asylum process

The design of the asylum system shapes the demand for asylum-related legal aid services. Figure 2 shows the system at the time of writing, up to appeal to the First-tier Tribunal.

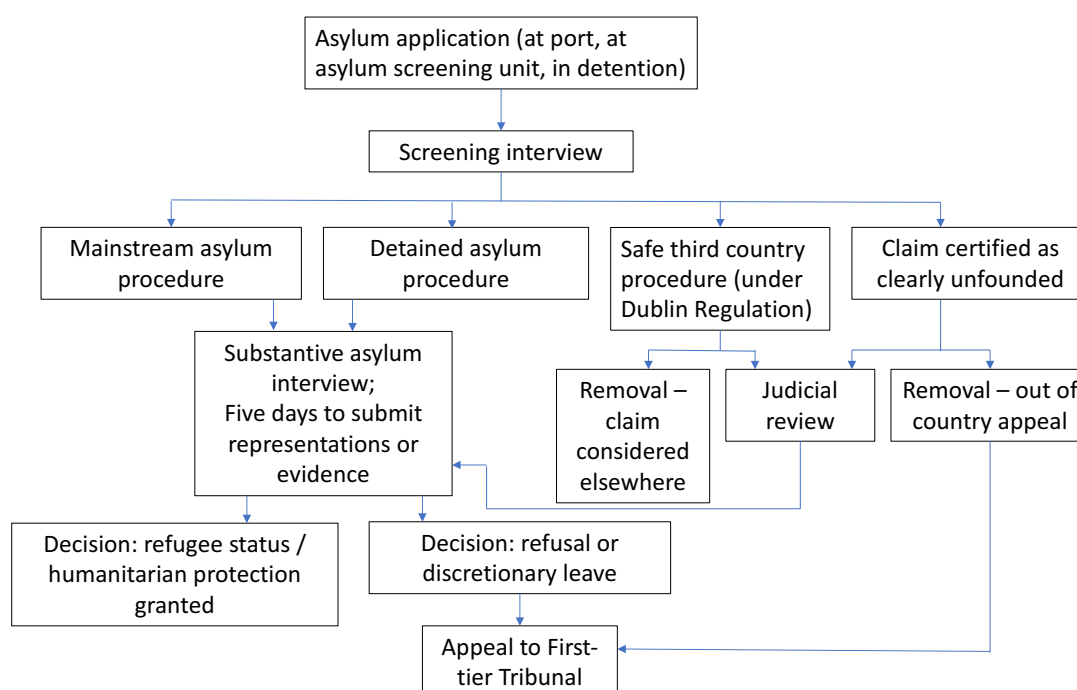


Figure 2: The UK asylum procedure

Legal aid remains available for people seeking asylum or protection from inhuman or degrading treatment under Article 3 of the ECHR. It is also available for liberty cases (bail or unlawful

¹⁴ Bar Standards Board, *Immigration Thematic Review Report* (BSB, 2016)

¹⁵ Maclean and Eekelaar, *Family Law Advocacy: How barristers help the victims of family failure* (Hart Publishing, 2009) p12–14

¹⁶ Bar Standards Board: <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/>

detention), for some stages of trafficking cases¹⁷ and for judicial review (at risk until permission is granted). It is available, subject to a means and merits test, at application stage (called 'Legal Help') and appeal stage (called 'Controlled Legal Representation' or CLR). For onward appeals beyond the First-tier Tribunal,¹⁸ and for judicial review work, the provider obtains a legal aid certificate, which details the time and spending limits. Figure 3 below shows the appeals structure.

As can be seen in Figure 3, only the First-tier appeal is an automatic right. Any further appeals are by permission only, which means any party wanting to appeal must obtain permission from either the court which made the decision or the one to which the appeal would be made.

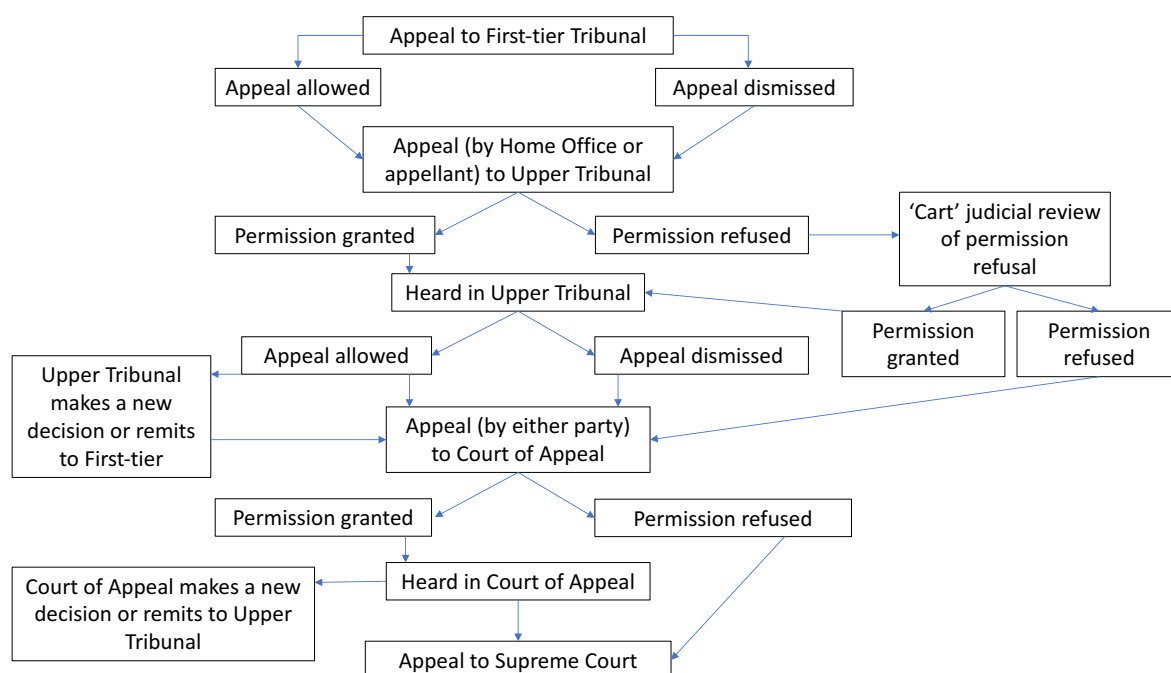


Figure 3: Domestic appeals structure

Demand

What is demand?

Demand arises in two main stages – demand from the potential clients who would like the lawyer to take on their case ('potential-client demand'), and demand from existing clients for services on their open cases ('in-case demand'). It also arises in two main types: value demand, for what the service is supposed to do, and failure demand.¹⁹ Failure demand is any work which is required because the value demand has not been met or the purpose of the system has not been achieved. It arises either

¹⁷ See R (on the application of LL) v Lord Chancellor, Aire Centre intervening (CO/3581/2017)

¹⁸ Until 1 September 2018, Upper Tribunal appeals work was within the scope of Controlled Legal Representation; since that date it is within the scope of Licensed Work. This affects which providers can do the work.

¹⁹ The concepts of value and failure demand come from the work of John Seddon on public services: see *Systems thinking in the public sector: the failure of the reform regime – and a manifesto for a better way* (Triarchy, 2008)

when an actor in the system fails to do its job properly or when a system is badly set up or becomes distorted by, for example, performance targets and measures.

Therefore, all demand for asylum or immigration legal aid services can be placed into one of the four squares of the matrix in Figure 4 below. Examples include:

- Potential-client value demand: demand for a lawyer to advise or represent a first-time asylum applicant; demand for fresh-claim asylum advice from a lawyer after a change in home-country conditions. Borderline legal cases are always value demand, regardless of the outcome.
- In-case value demand: taking a detailed witness statement from the applicant; obtaining a medico-legal report in evidence.
- Potential-client failure demand: need for a fresh asylum claim because a previous lawyer handled the case badly; need for a bail application or judicial review because the Home Office made an unlawful or unnecessary decision to detain.
- In-case failure demand: need for a lawyer to challenge a poor-quality decision by the Home Office, Legal Aid Agency or Tribunal; additional demand for the lawyer's services because of delays in receiving a decision from the Home Office.

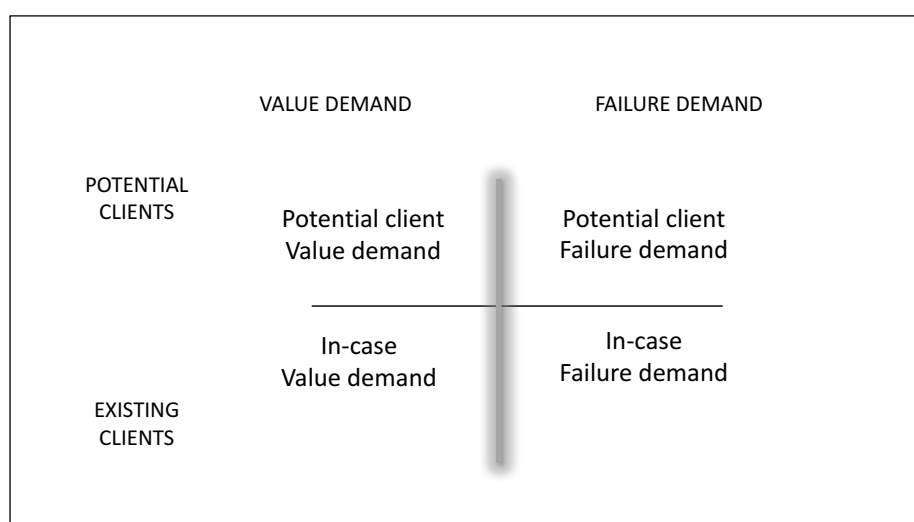


Figure 4: The demand matrix

Drivers of potential-client demand

The main driver of potential-client demand for asylum legal advice is the arrival of people wishing to claim asylum. The number of people seeking asylum rises sharply during times of global conflict, such as the wars in Syria and South Sudan, Iraq and Afghanistan and, historically, the Balkans or Somalia, as shown in the Home Office's quarterly statistical releases.²⁰

The UK government's policy of dispersing asylum applicants on a no-choice basis throughout the country, since 2000, largely determines where in the country potential-client demand manifests. Until 2016, the fact that unaccompanied children were not dispersed meant that some areas of the

²⁰ Available at <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release>

UK, particularly Kent and Croydon,²¹ received sometimes large numbers of unaccompanied children. Children may now be placed anywhere in the country. All of these applicants are likely to require advice and representation for an asylum application and, if refused, for an appeal. For children, there may be a parallel demand for representation in a challenge to a local authority age assessment.

A second driver of potential-client demand is immigration detention and the number of people detained. Legal aid remains available for detention cases (regarding liberty, though not for the detainee's substantive case, unless it falls within the scope set out in LASPO 2013). Advice is provided through 'surgeries' provided by the firm which is on the rota for that centre for that week, meaning detainees have no choice of legal aid provider. Difficulties in obtaining evidence of detained clients' means may prevent the provider taking on meritorious cases. Detention particularly drives demand for bail applications in the Tribunal and claims for unlawful detention in the High Court.

A third driver of potential-client demand is 'fresh' asylum claims. These are applications made after a first application has been refused and any appeal rights are exhausted. They cannot be made without new evidence which, taken together with the material previously submitted, creates a 'realistic prospect of success'.²² Potential-client demand for fresh claims work is particularly high when, for example, a conflict erupts in the applicant's country of origin or the country guidance case-law changes so that asylum claims are more likely to succeed, as happened for Zimbabwean nationals in 2008,²³ generating a sudden spike in value demand for first-time and fresh asylum claim work. Sometimes, during the limbo period when a person has been refused asylum but still cannot return (or be forcibly returned) to the home country, the individual's circumstances change because of a religious conversion, same-sex relationship, or political activity against the home country government while in the UK, which would put them at risk on return, again creating demand for work on a fresh claim.²⁴ Fresh claims work also arises where an earlier adviser has done poor-quality work so that a client with a meritorious case nevertheless loses their appeal, creating potential-client failure demand.

Geographical patterns of potential-client demand, then, depend on dispersal, detention, and the location of national, ethnic or religious communities, while the existence or absence of local competition has a bearing on potential-client demand for a particular provider. Where only one provider is available in an access point,²⁵ clients must try that provider first, and only then can they seek a provider outside the area. The location of potential-client demand for barristers' services depends partly on the same factors, but also on the location of Tribunal hearing centres, some of which (Newport and North Shields for example) are a long way from where immigration barristers are concentrated.

²¹ Kent because it has the main ports of arrival, and Croydon because it houses the Asylum Screening Unit, meaning these are by far the most common places where unaccompanied children first come to attention.

²² Immigration Rules paragraph 353

²³ *RN (Returnees) Zimbabwe* CG [2008] UKAIT 00083

²⁴ Individuals' circumstances can of course change in other ways which do not engage asylum law, like forming a relationship with a British national or having children who are British.

²⁵ An access point may include several counties.

Some legal need never manifests as potential-client demand, for example in an area where there are no providers or when word goes around that help is not available.²⁶ This was reflected in the comments of providers and barristers who said they had no record of the number of cases turned away by receptionists or clerks due to lack of capacity – one solicitor said that ‘hundreds of people a week’ were turned away but believed that still others did not come because the news travelled that they would not take on new cases. For barristers, potential-client demand is filtered first through the solicitor or caseworker and then through the barrister’s clerk. As a result, barristers had no idea of the scale of unmet demand for their own, their chambers’, or the immigration bar’s services. All interviewees, across the sector, described having more potential-client demand than capacity. There was no real competition for clients, meaning lawyers had to make decisions about which demand to meet. These decisions are discussed later.

There is an urgent need for effective monitoring of demand, but this cannot be done effectively at individual provider or profession level. It is recommended that the LAA implements feedback loops or research programmes which will provide it with meaningful information about patterns and levels of demand, geographical and legal areas of unmet demand, and drivers of demand.

Drivers of in-case demand

‘In-case demand’ means all of the services which must, should or could be provided on an open case, whether directly to the client or to any other body involved, including the funder. In-case demand is difficult to describe in the abstract. Both barristers and solicitors characterised it as essentially reactive or responsive: they ‘do what needs doing’, while acknowledging that there are different ways of dealing with a case. They had a framework of steps which might be needed in a case and exercised their judgement in deciding which to take. These steps were learned through experience, supervision and ‘water cooler chat’ with peers. The high-quality provider organisations in my study identified detailed witness statements as an essential, but reported (as did barristers) that some providers produced very brief statements which did not always deal with the real issues in the case – an assertion which was supported by the file reviews I carried out for earlier research.²⁷

Similarly, depending on the facts of the case and the country involved, country background research may take much longer than the hour the Legal Aid Agency has deemed generally necessary for doing it. This attempt to standardise ‘reasonableness’ obscures the difference between cases and means that the lawyer may (depending which individual official assesses the file at the end) experience higher in-case demand in justifying why the research took longer than the presumed standard time.

Although poor-quality providers were outside the scope of this study, some lawyers gave examples of previous workplaces. A solicitor described ‘generic’ attendance notes from a colleague on Eritrean cases which had been refused on application and passed to this solicitor for appeal. Each attendance note recorded one hour of country background research on the issue of forced military service. Although the risk of forced military service, or punishment for leaving the country without having

²⁶ Robert Thomas, ‘Immigration and Access to Justice: A Critical Analysis of Recent Restrictions’ in Palmer E and others (eds), *Access to Justice Beyond the Policies and Politics of Austerity* (Hart Publishing, 2016)

²⁷ MigrationWork, Refugee Action and Asylum Research Consultancy, *Quality of Legal Services for Asylum Seekers* (Solicitors Regulation Authority, 2016)

completed it, is often sufficient for Eritreans to get asylum, these cases had been refused. Yet the solicitor explained that these were especially strong cases with unique features which were not mentioned in the file at all:

You apparently did an hour's research here about conscription, which is exactly the same hour you did on this other case. You haven't mentioned that he was a political cartoonist! Solicitor, private firm

It is impossible to verify this with the caseworker involved, but the claiming of one hour's work for country background research, which appears to be 'the same hour', at least raises the inference that in some firms, caseworkers see these standards as limits or caps on in-case supply.²⁸ Some support for this comes from the MigrationWork data, in which a government official stated that suppliers claiming the fixed fee had to report the actual time / cost spent on the case and 'most come in within the fixed fee.' The official in question cited this as evidence that the fixed fee was sufficient, but it is at least equally consistent with the inference that some suppliers cap their work at the amount they will be paid for. Further support comes from the accounts of two lawyers who were told in job interviews with other firms that they 'don't go over the fixed fee'.

There is a real risk that, far from inflating demand, some providers are capping the extent of in-case demand they will meet for each client. It is difficult to criticise this, since providers are businesses (even those which are also charities) and need to cover their costs. There is a gulf between the standard fee and the escape threshold which places on providers an unacceptable level of financial risk – particularly since they must wait until after the case to find out whether an unknown assessor will deem the work done to have been justified or not. Reducing the escape threshold to double the standard fee (instead of triple) would mitigate the level of risk, though providers would still face potential losses of almost 100% on any standard fee case.

Not all in-case demand becomes supply: a practitioner may believe a particular service would be useful but lack the time to do it or think the cost would be disproportionate. The best practice might be impractical, for example where using a telephone interpreter instead of a face-to-face one might be 'not ideal, but the most workable solution'. Equally, certain steps might be required, even though they were not best practice in terms of client care, like obtaining robust evidence of means at the outset, even if that distorted the lawyer-client relationship. Deciding how to run a case and how to balance tactical, financial, or other resource considerations is a matter of judgement, based on experience, knowledge, priorities and skill.

This highlights the opportunity for a funder to abuse its monopsony power in relation to in-case demand. In pursuing its objective of cost-cutting, it standardises casework, representing a level at which quality will be limited in all but the simplest cases, unless the provider either subsidises the work from other resources, or does the work at-risk and spends extra (unpaid) time justifying it retrospectively. Yet as the only purchaser, it is able to dictate terms both to providers and eventual service users, who have no private spending power to influence the market. This drives down the

²⁸ It is also possible that the caseworker did two hours' research, using the same material for both cases, and billed one hour against each file. However, this explanation does not address the criticism that the research failed to deal with the distinctive and important features of the particular cases.

quality of services overall (See below on 'lemon markets') but also, when providers cap their in-case supply in response to the standard fee, reinforces the monopsony purchaser's belief that the price is adequate.

Recommendations

LAA / MoJ:

- Implement a system for monitoring and mapping potential-client demand, which focuses on functional capacity and not unused matter starts. In doing so, be mindful of the existing unpaid administrative burden on providers and avoid increasing this.
- Where there are multiple bidders, contract only with providers receiving levels one or two on peer review, to avoid spending public money on work which adds little value to the case.

Home Office:

- Improve the quality of decision making in the Home Office. Existing efforts to do this, as recommended by the Independent Chief Inspector of Borders and Immigration and the Justice Working Party, are welcomed.
- Carefully monitor the quality of decisions and demand for judicial review work emanating from the reformed National Referral Mechanism.
- Continue reducing the number of people detained and the length of detention (without increasing short-notice removals, which would increase demand for urgent work). I endorse the recommendation made by the Joint Committee on Human Rights for independent decision making and oversight on immigration detention.

All parties:

- Any changes to the process should be systemic. For example, if the Home Office proposes to implement a policy of re-examining cases before hearing, Tribunal listing times must be sufficiently predictable for representatives to obtain further evidence in time for the review and the LAA must be willing to fund timely evidence gathering.
- This report endorses the recommendations of the Justice Working Party on reducing demand in the immigration appeals system without reducing appeal rights.

Exponential increase in complexity

Part of the increase in overall legal aid spending in the 1980s was attributable to an increase in the number of cases, as the Police and Criminal Evidence Act increased the number of people who were eligible for legal assistance at different stages. But, as of 1996, around three-fifths of the total increase came from cost per case.²⁹ Researchers have noted the effects of procedural

²⁹ Derek Wall, 'Legal Aid, Social Policy, and the Architecture of Criminal Justice: The Supplier Induced Inflation Thesis and Legal Aid Policy' (1996) Journal of Law and Society vol 23 issue 4 p549

requirements,³⁰ which affect the in-case demand in any given case. The comparative cost of legal aid in the UK and abroad is also affected by the structure of the legal system, which determines who carries out what tasks:³¹ when more tasks are delegated to claimant lawyers, the legal aid costs will be higher (and the court costs lower) than when the same tasks are delegated to a lawyer employed by the court.

But this research also shows, at least in immigration law, an exponential increase in the complexity of cases. I use 'exponential' to mean that the increase is greater than a directly proportional increase. Of course, legal complexity is not amenable to numerical measurement, but the effect can be inferred from other evidence. There are three key issues: first, the nature of asylum means that cases are often difficult to evidence, and evidential requirements are constantly shifting; second, the politicised nature of the issue means that frequent changes to law and policy, often aimed at imposing a harsher regime on migrants, drive legal challenges which have to deal with the lawfulness of policies and other provisions, not merely the facts of the individual case; third, the UK's precedent-based legal system requires legal argument about previous cases, not only the law itself, and when precedent cases proliferate, complexity increases.

As a result, asylum and immigration work is characterised by a greater volume of new case law and faster pace of change than perhaps any other area of law, and its specialist Tribunal is characterised by a complexity and technicality which is in excess of other Tribunal jurisdictions.³² Both the legislation and the policies drafted to guide their implementation add to the volume of detail which must be argued in each case.³³ Practitioners cited the Immigration Act 2014 as an example, creating an interaction between immigration status and the right to rent accommodation, generating a new sphere of housing issues which demanded primarily immigration expertise.

This matters because the increased cost per case had been attributed to lawyers inflating demand, driving a move towards standard fees and other measures to contain cost. Costs per case rise in response to complexity, but these costs are largely outside the control of lawyers, meaning that simple measures aimed at limiting the cost per case will either incentivise poor quality work, disincentivise lawyers from doing certain cases at all (like fixed fee cases) or shift the cost of doing the job properly onto lawyers for as long as they are willing and able to subsidise the system.

Evidential requirements

Sexuality-based claims provide an example of how shifting evidential requirements drive up in-case demand. Practitioners explain that, in the past, the Home Office position had frequently been to accept that an applicant was gay or lesbian but to argue they could avoid persecution by relocating to an area where they were unknown and keeping their sexuality hidden. The Supreme Court in *HJ*

³⁰ Ed Cape and Richard Moorhead, *Demand induced supply? Identifying cost drivers in criminal defence work: A report to the Legal Services Commission* (2005)

³¹ Tata C and Stephen F, "'Swings and roundabouts': do changes to the structure of legal aid remuneration make a real difference to criminal case management and case outcomes?' (2006) *Criminal Law Review* 722

³² Robert Thomas, 'Immigration and Access to Justice: A Critical Analysis of Recent Restrictions' in Palmer E and others (eds), *Access to Justice Beyond the Policies and Politics of Austerity* (Hart Publishing, 2016)

³³ John Flood and Avis Whyte make a similar point, referring to crisis-response policy-making without considering the cost implications, 'What's wrong with legal aid? Lessons from outside the UK' (2006) *Civil Justice Quarterly* vol 25 p80

*Iran*³⁴ held that a person who was at risk of persecution on the grounds of sexuality could not be expected to return to their home country and be 'discreet' about their sexuality. Since then, the Home Office tends to dispute that an applicant is genuinely gay.³⁵ For obvious reasons, sexuality is not susceptible to proof, particularly shortly after arrival from a country where homosexuality is illegal and there is unlikely to be a subsisting same-sex relationship as evidence. Medical evidence is not applicable. Fear of stigma or harm may prevent an applicant disclosing their sexuality to a stranger immediately on arrival.³⁶

Intrusive and inappropriate questioning by Home Office officials was revealed³⁷ amid an emerging picture of pervasive disbelief of any person claiming to be gay.³⁸ These are not necessarily consistent: one solicitor I interviewed had two appeals pending for gay Bangladeshi men. In one, the Home Office accepted that gay men were persecuted in Bangladesh, but disputed that the applicant was gay; in the other, the Home Office accepted that the applicant was gay, but argued gay men were not persecuted in Bangladesh. For the solicitor, it was much easier to prepare the evidence of the background situation in Bangladesh for the latter appeal than the evidence of sexuality for the former.

Detention cases provide another example. An analysis of all unlawful detention cases reported in 2017 showed that each case involved extensive reference to rules and policy material: this included Detention Centre Rules, Detention Service Orders, the process guidance in respect of Detention Centre Rule 35, the Immigration Rules, various chapters of the Enforcement Instructions and Guidance (a Home Office policy document) and the Home Office Policy on Assessment Care in Detention and Teamwork (regarding food refusal). In respect of each of these provisions, the parties referred to relevant personal evidence including claimants' medical records, detention reviews, Home Office computerised records, medical reports prepared under Rule 35 and the Home Office's responses to those reports. In some cases,³⁹ the evidence included standard prison and probation records and multiple witness statements about the possibility of voluntary or enforced return to the claimant's country of origin at different points in their detention. Painstaking line-by-line review of medical notes and Home Office records may be required. The evidential requirements created by the complex framework of law and policy, combined with the ever-finer distinctions derived from the growing body of case law, undoubtedly drive up in-case demand.

³⁴ *HJ Iran v SSHD* [2010] UKSC 31

³⁵ See also Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) *International Journal of Human Rights* vol 13 issue 2–3 p391

³⁶ Jane Herlihy, Kate Gleeson and Stuart Turner, 'What assumptions about human behaviour underlie asylum judgments?' (2010) *International Journal of Refugee Law* vol 22 issue 3 p351

³⁷ Colin Yeo, *Questions to a bisexual asylum seeker in detention* (Free Movement blog, 2014) <https://www.freemovement.org.uk/questions-to-a-bisexual-asylum-seeker-in-detention/> accessed 1 May 2018; Paul Dillane, *LGBT asylum seekers: a toxic mix of homophobia, misogyny and ignorance corrupts the asylum system* (Free Movement blog, 2015) <https://www.freemovement.org.uk/lgbt-asylum-seekers-a-toxic-mix-of-homophobia-misogyny-and-ignorance-corrupts-the-asylum-system/> accessed 1 May 2018

³⁸ John Vine, *Inspection Report on Asylum Claims on the Grounds of Sexual Orientation* (Independent Chief Inspector of Borders and Immigration, 2014)

³⁹ See for example *R (on the application of Issa Mursal Botan) v SSHD* [2017] EWHC 550 (Admin)

The battle over policy and legislation

There is a pattern of harsh new legislative and policy provisions or operational decisions being challenged in the courts and frequently declared unlawful: most recently, the Right to Rent provisions from the 2014 Immigration Act were found to be discriminatory;⁴⁰ in other examples the Court declared unlawful a Home Office attempt to drastically cut subsistence payments to victims of trafficking awaiting decisions on their immigration cases,⁴¹ and ordered the admission of four young people from the demolished Calais 'Jungle' camp to join relatives in the UK despite Home Office insistence that under the Dublin Regulation they should claim asylum in France first.⁴² There are also examples of excessively harsh use of existing provisions, like the refusal of numerous applications for further leave to remain by skilled migrants because of minor discrepancies in tax returns.⁴³

This argument is supported by practitioners' accounts of an ongoing struggle since the days of the Refugee Legal Centre and the beginning of the proliferation of immigration and asylum legislation, when the Home Office first obtained the power to certify certain asylum claims as unfounded. Claimant lawyers must, as a matter of professional obligation, seek to limit the effect of harsh provisions on their own clients, while government lawyers seek the opposite.⁴⁴

The same applies to legal aid: it took judicial review challenges (if not always full hearings) to establish that the legal aid residence test was unlawful,⁴⁵ to clarify that legal aid was available for trafficking cases where there is no concurrent asylum claim,⁴⁶ and to restore legal aid for immigration matters for unaccompanied and separated children.⁴⁷ Most recently, court challenges (not always reaching a full hearing) have resulted in concessions to the refusal of payment to claimant lawyers where a public body withdraws a decision before the permission hearing, so that the claimant succeeded substantively but never received permission.⁴⁸ On all of these matters, policy advocacy and campaigning preceded the court actions, but it took judicial review applications to bring about change, at much greater public expense.

The case law also suggests a battle over interpretation. 'Torture' first fell to be defined (in the unlawful detention context) in the case of *EO & Others*,⁴⁹ with the High Court adopting a broad definition including severe mistreatment by non-state agents where the state failed to protect, which was more inclusive than that in the United Nations Convention Against Torture (UNCAT). A

⁴⁰ *Joint Council for the Welfare of Immigrants v SSHD (Residential Landlords Association, Equality and Human Rights Commission and Liberty intervening)* [2019] EWHC 452 (Admin)

⁴¹ *K & Anor, R (on the application of) v Secretary of State for the Home Department* [2018] EWHC 2951 (Admin)

⁴² *Secretary of State for the Home Department v ZAT and others* [2016] EWCA Civ 810

⁴³ See *Dadzie* [2018] CSOH 128 and *Oji* [2018] CSOH 127

⁴⁴ Phillips and Hardy, 'Managing multiple identities: Discourse, legitimacy and resources in the UK refugee system' (1997) *Organization* vol 4 p159

⁴⁵ *Gudaniviciene and Others (R on the application of) v The Director of Legal Aid Casework* [2014] EWCA Civ 1622

⁴⁶ *R (on the application of LL) v Lord Chancellor, Aire Centre intervening* (CO/3581/2017)

⁴⁷ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-07-12/HCWS853/>

⁴⁸ James Packer, *More relief for legal aid lawyers: government gives ground on judicial review work*, Free Movement 14 March 2019 <https://www.freemovement.org.uk/legal-aid-judicial-review-duncan-lewis/>

⁴⁹ *R (on the application of EO, RA, CE, OE and RAN) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin)

later case in the High Court considered what amounted to ‘independent evidence of torture’: a report prepared by a doctor in the detention centre, pursuant to Rule 35 of the Detention Centre Rules 2001, could amount to such evidence, depending on the circumstances.⁵⁰ Several cases therefore turned on the adequacy of the health services provided in detention and the ability of doctors there to identify potential victims of torture,⁵¹ before a Home Office-commissioned review by Stephen Shaw highlighted ‘systemic failings’ in detention centre health care.⁵² In 2014–15, three separate cases were decided differently by different judges in the High Court on the interaction between Rule 35 and the policy in Chapter 55.10. Two of these came before the Court of Appeal as a joined appeal in 2016,⁵³ producing a 21-page judgment detailing precisely how the policy in Chapter 55.10 should be applied.

Shortly afterwards, the Home Office replaced that policy with a new one, called the Adults At Risk policy, effectively meaning that all of the work of interpreting policy had to begin again. This policy replaced the inclusive definition of torture established in *EO* with the much narrower UNCAT definition. The charity Medical Justice, the Equality and Human Rights Commission and seven individual claimants challenged the lawfulness of the re-definition of torture, which was (for a second time) found to be unlawful.⁵⁴ The case meant that an unknown number of other people could potentially claim for unlawful detention which had been based on the recycled misdefinition of torture.⁵⁵

Of course, there are also provisions which have been upheld in spite of challenges. But the point remains that the implementation of numerous unlawful provisions, in pursuit of a hostile or compliant environment or of legal aid savings, have generated demand and escalated costs to the public.

Precedent proliferation

Arising from the proliferation of policy material and legislation, and the resulting battle over interpretation, comes an increase in the number of precedent cases, or authorities, which each party’s lawyers need to cite in argument. There were 49 substantive unlawful detention judgments reported in 2017, compared with six in 2007. A random sample of five judgments from each of those years shows that the 2007 judgments cited an average of just under six cases each, compared with an average of just under 15 cases per reported judgment in 2017.

Citing a case in argument requires the lawyer to read the case, consider its relevance, write legal argument on it and copy the official version of it as part of the bundle of authorities for the court and the other party. Every case is factually different, so there is scope for argument over which precedent cases are most relevant, and it is easy to see how a growing body of case law, relating to

⁵⁰ *R (D & K) v Secretary of State for the Home Department* [2006] EWHC 980 (Admin)

⁵¹ Notably *Detention Action v SSHD* [2014] EWHC 2245 (Admin); *RE & others v SSHD* [2015] EWHC 2331 (Admin)

⁵² Stephen Shaw, *Review into the welfare in detention of vulnerable persons* (Cm9186, 2016), p178 / para 9.1

⁵³ *SSHD v BA Eritrea and ST Sri Lanka v SSHD* [2016] EWCA Civ 458

⁵⁴ *R (on the application of Medical Justice and Others) v SSHD* [2017] EWHC 2461 (Admin)

⁵⁵ Diane Taylor, ‘Torture victims were wrongly imprisoned in UK, high court rules’ *The Guardian* (London 10 October 2017) <https://www.theguardian.com/uk-news/2017/oct/10/torture-victims-were-wrongly-imprisoned-in-uk-high-court-rules>, accessed 4 October 2018

an ever-changing body of law and policy, creates an exponential growth in complexity of individual cases. It can therefore be seen that every extra case the lawyer cites almost certainly amounts to in-case value demand, but adds to the amount of work required and the cost of doing it.

These three factors – evidential demands, struggles over interpretation, and precedent proliferation – drive up the complexity and therefore the in-case demand of many cases, from first-time asylum claims through to judicial review and higher court appeals. In every case, the lawyer has a duty to the client to put forward the case in the most favourable and effective way possible. This means although the lawyer has to interpret or determine the in-case demand, in the context of the procedural, legal and evidential rules, the actual increase in complexity is not attributable to lawyers but to the system structure, the publication of policies by the Home Office, legislation and the decisions of judges.

The recommendations which follow therefore involve ‘big picture’ issues because these are not matters which can be changed in a fragmentary way. Numerous reports have criticised the ‘culture of disbelief’ which continually intensifies the evidential demands. Many of the harsher provisions have turned out to be discriminatory, otherwise unlawful, or simply excessively expensive and the recommendations below aim at systemic change.

Recommendations

Home Office and LAA:

- Reduce the hostility of the system in order to reduce both in-case and potential-client demand while maintaining fairness.
- Undertake or commission an evidence-based whole-system analysis, in partnership with others, of the asylum process from arrival to the grant of settlement or removal from the UK.

The cost consequences of demand

All demand has cost consequences. As shown in Figure 5, cost may be:

- 1) Generated, where there was no cost previously;
- 2) Escalated;
- 3) Shifted, to another body or individual within the system.

Even the cost of value demand can be shifted where the funder does not pay the full cost of the value demand. For example, when the standard fee does not cover the cost of the work done on the case, the cost of in-case value demand is shifted from the LAA to the lawyer. When asylum decisions are delayed, this generates in-case failure demand and typically the costs are escalated, with the escalated cost being shifted to the provider, unless the total cost is either below the standard fee or

the case escapes the standard fee scheme.⁵⁶ In the latter case, the costs escalated by the Home Office are shifted to the LAA.

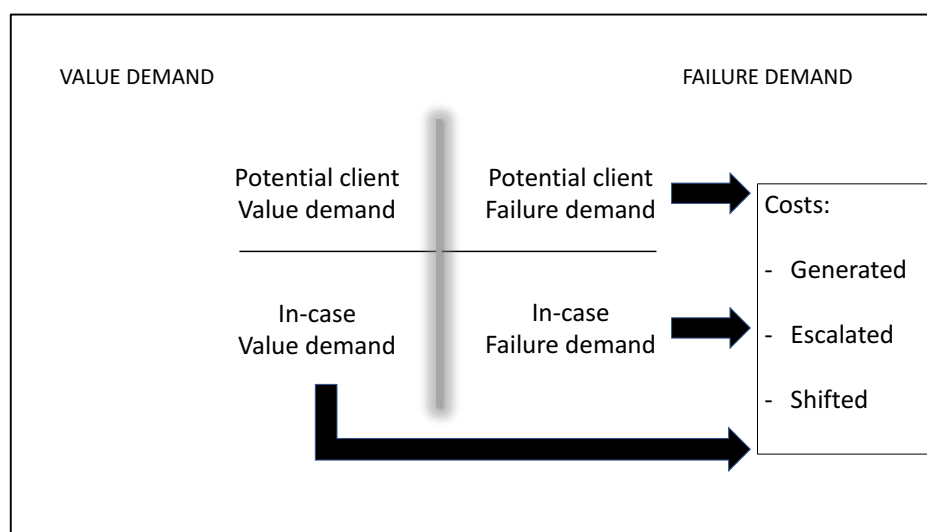


Figure 5: The demand matrix plus cost consequences

Analysis of the cost consequences of demand provides the clearest demonstration of the need for a systemic approach and of the inherent problems with a fixed fee system of payment for legal representatives. Within the complex, multi-party asylum justice system, including lawyers, the Ministry of Justice and Home Office, and their various agencies, as well as privately-run detention centres, some demand results from a target clash between different parties.

For example, the Home Office has a target of deciding 98% of ‘straightforward’ cases within six months means those which are not decided within six months are re-classified as complex cases and ‘go to the bottom of the pile’ according to practitioners, because they can no longer contribute to meeting the target.⁵⁷ The delay increases the cost of the case to providers, who still have to keep in contact with the client throughout and may even have to start judicial review proceedings in relation to the delay, adding to the overall costs of the case and, potentially, to the judicial review workload of the Upper Tribunal. Interviewees believed that the Tribunal was more reluctant to grant adjournments before the day of hearing because of its own targets for case closure within a fixed period of time. This causes wasted costs in sending a representative, often a barrister, to the hearing which is then adjourned by the judge at court, or leads to onward appeals, at further cost, on the basis that the first hearing was procedurally unfair. Often the reason for requesting the adjournment was the representatives being unable to (promptly) obtain legal aid funding for an expert report or other evidence.

Advocating a whole-system view of demand in the asylum system is not necessarily unorthodox: even the Carter review emphasised the need to look at police, prosecutors and judiciary as well as legal aid, for the causes of rising costs. On this basis he argued that fair pricing, which recognised that other parts of the system also drove up costs, was essential for maintaining a supplier base. Yet

⁵⁶ Because it costs more than triple the amount of work paid for on the standard fee.

⁵⁷ Independent Chief Inspector of Borders and Immigration, *Inspection Report on Asylum Intake and Casework* (2017)

there is no evidence that pricing or policy on legal aid are in fact informed by a detailed understanding of the drivers of demand. The story in Box 1 is a genuine case which illustrates drivers of demand and their cost consequences.

Case study: Asylum and trafficking case

Ms A is a Vietnamese national. Vietnam is the country of origin for a large number of victims of human trafficking and is known to provide very little protection for its nationals against trafficking.

Ms A was trafficked to the UK for cannabis cultivation. She was arrested in a raid on a cannabis factory and served a prison sentence, before being deported to Vietnam. She was then re-trafficked, this time to another Asian country, before arriving in the UK again. She claimed asylum, and the Home Office had to decide 1) whether she was a victim of trafficking (under the Trafficking Convention) and 2) whether she was a refugee (under the Refugee Convention). These are separate processes, but closely related because a risk of re-trafficking and a lack of protection from the Vietnamese authorities would likely mean she qualified for asylum.

The Home Office accepted that Ms A had been trafficked from Vietnam twice but nevertheless concluded that she was not a victim of trafficking ‘for the purposes of the trafficking convention’ because she was not trafficked into the UK on the second occasion. This decision was unlawful – the courts have already decided there is no such distinction in law. Since the trafficking decision was critical to the asylum application as well, Ms A’s lawyers had no choice but to challenge it.

There is no right of appeal against a negative trafficking decision – only judicial review. When Ms A’s lawyers wrote to the Home Office, under the Pre-Action Protocol for judicial review, the Home Office insisted on maintaining that flawed decision, meaning the lawyers had to apply for judicial review.

That means the solicitor has to instruct a barrister to draft grounds for judicial review, and to lodge a claim form and all the key evidence. At this point, the case passes to the Government Legal Department (GLD), acting as legal representative to the Home Office.

The GLD conceded the case at the earliest opportunity, correctly recognising that the decision was legally indefensible. That meant the Home Office had to withdraw the decision and pay the applicant’s legal costs.

Meanwhile the asylum application was still outstanding. The costs had been increased by the delays, but the lawyers did not ‘bump up’ the work to escape the fixed fee scheme.

The story in Box 1 is broken down by demand type and cost consequences in Figure 6, showing how these can be analysed in any individual case according to the demand matrix.

Stage	Cost	Demand type	Costs destination/s
Asylum application	£1,020 profit cost + £498 disbursements £1,518 total	In-case value demand for provider's services; some in-case failure demand caused by Home Office in failing to recognise trafficking, prolonging the process.	LAA pays provider (£413 + £498 disbursements); Provider sustains loss of £607. Escalated and shifted costs.
Judicial review pre-action	£300	In-case failure demand caused by Home Office for provider's services; also for Home Office's own services and LAA's administrative work.	LAA pays provider £300. Generated costs.
Judicial review application	£3,770 full cost; final payment likely £2,600–2,850	In-case failure demand caused by Home Office for work by lawyers, Government Legal Department, LAA (administration only) and Administrative Court.	Home Office pays costs it generated for lawyers; Other parties absorb other generated costs.

Figure 6: Analysis of demand and costs in the Box 1 case study

Using the demand matrix and cost consequences, it is possible to analyse every instance of demand and to understand the drivers of demand. Clearly, there will be some 'grey areas', for example where lawyers find that clients are unable to engage in the process at all without a level of support which the LAA may view as 'excessive hand holding', or over-provision of services, so different analysts would assess the same work as value or failure demand. These contested instances are represented in the blurred borderline at the centre of the matrix. This nuanced and detailed understanding of demand is a crucial foundation for the formation of more effective legal aid and asylum policy.

The Fee Regime

Having discussed demand, the next section addresses the fee regime, developing in more detail the explanation of how financial factors in the contract affect practitioners and organisations involved in legal aid work. Some of the recommendations in this section concern fees for lawyers – a topic which may never generate a lot of public support. However, a sustainable immigration and asylum system depends on having a sustainable base of advice providers and advocates of sufficient size and quality to keep it functioning effectively and ensure that accurate decisions are reached.

Standard fees and the incentive to cut costs

The standard fee has been much criticised elsewhere, as noted in the Public Accounts Committee report,⁵⁸ but this section aims to show precisely why it is problematic. The standard fee for asylum appeals work does not cover the work high-quality practitioners and organisations do on the case. For barristers in an asylum appeal, the standard fee is £302 (gross).⁵⁹ Taking the hourly rates as a reference (see Figure 7), the standard fee covers as an example, three hours of preparation and attendance,⁶⁰ including a discussion with the client before court; one-and-a-half hours' travel and waiting and an 80 minute hearing, amounting to £303.92.

Hourly rates (escape fee cases – appeal stage)	London	Non-London
Preparation and attendance	£57.83	£54.09
Travel and Waiting	£28.62	£27.81
Advocacy	£65.79	£65.79

Figure 7: hourly rates for appeals work (CLR stage) for barristers

However, barristers said that this would be an exceptionally short time in all three sections, even in the simplest cases. As a minimum, they would spend three to five hours on preparation in a case which presented no special legal or factual challenges, plus half an hour in conference with the client at court before the hearing. Travelling and waiting would rarely be less than two hours and hearings generally lasted at least two hours. On hourly rates, this would be paid as in Figure 8, below. Therefore the barristers in the study said the simplest cases cost around 1.5 times the standard fee paid for doing them. The private firms and not-for-profits in this study said the average case cost double the standard fee paid for their work.

Preparation and attendance (four hours)	£260.23
Travel and waiting (two hours)	£57.24
Advocacy (two hours)	£131.58
Total	£449.05

Figure 8: Illustrative fees for a barrister on hourly rates in a straightforward case

The possibility of escaping the fixed fee scheme did not mitigate the risk of doing unpaid work for barristers. This was partly because they depended on the instructing solicitor or caseworker to bill

⁵⁸ House of Commons Public Accounts Committee, *Implementing reforms to civil legal aid. Thirty-sixth Report of Session 2014–15* (HC784, 2015)

⁵⁹ Civil Legal Aid (Remuneration) Regulations 2013 SI/2013/422

⁶⁰ 'Attendance' means the discussion (or 'conference' with the client and / or instructing solicitor before and / or after the hearing.

the case as an escape fee file. Often barristers did the most work on cases where the caseworker had done the least work, particularly where advisers were poorly supervised or had a business model which relied on standardising work, using low-qualified staff or capping work at the standard fee level. That means the caseworker's own work is unlikely to escape the fixed fee scheme and the barrister would only receive the standard fee.

The same applies to solicitors, as shown in the example in Figure 6, earlier. Costs were frequently between two and three times the standard fee, meaning they would not escape the standard fee scheme and would be paid for half or two-fifths of the work done. One provider showed me that their cheapest cases cost just over the standard fee, meaning the 'swings and roundabouts' idea that providers would make up the losses on one case by being paid extra on another, simply does not work. It only works for providers who either cap their work at standard fee level or who receive large numbers of first-time asylum applicants relatively late in the process, such as those in dispersal areas. This in turn means complex cases which are underworked are often recycled into the system as fresh claims.

The result of this was that high-quality lawyers lost money on every standard fee case they did. They subsidised this from other sources: grant-funding, wider charitable funding and non-legal work for the not-for-profits and private client work for barristers and firms. Not-for-profits, however, found that grants brought their own transaction costs (in applying for, managing and monitoring awards or contracts, for example). In all cases, there were limits to subsidy, and each practitioner and organisation limited its legal aid work in order to cap its losses at the amount it could raise from other income sources. This meant they reduced or limited their legal aid market share.

Many organisations made prioritisation decisions about which demand they would meet, choosing to focus on cases which would be paid at hourly rates (such as unaccompanied children's cases) which did not subsidise other work but enabled them to be paid for the actual hours worked. Some took clients only by referral, and only with complex cases that would escape the standard fee scheme, turning away all 'walk-up' enquiries. This raises the question whether these providers are 'cherry-picking' or 'cream-skimming' the better paid work. However, hourly rates work only allows them to be paid for the hours worked, not to claim for more than the work done. Further, the decision to pay hourly rates for certain types of work is intended to reflect the greater complexity of that work. Cherry-picking could only apply to standard fee work, where providers took on the simplest cases, anticipating that they would cost less than the standard fee to do.

Barristers, meanwhile, did not prioritise in the same way, considering themselves bound by the cab rank rule, though clerks said they tended to offer the most junior counsel for standard fee cases. However barristers also replaced legal aid work with private clients or with work in other areas of law or outside legal practice. In particular, they were less willing to travel to more distant Tribunal hearing centres because travel costs were not paid, and several were reducing their availability for pro bono work because they already did so much unpaid work.

At barrister level, the overall picture was one of chambers, and immigration teams in particular, being very heavily subsidised by small numbers of high earners, most of whom no longer did any legal aid work but remained in the same chambers despite paying disproportionately high

contributions compared with what they would pay elsewhere. One set had folded largely because a small number of high earners resigned, leaving the rest of chambers too precarious to continue operating. This is not a sustainable model for training and supply of barristers to ensure that publicly funded advocacy work can be covered.

The result of this appears to be a threat to supply (at least at the high-quality end of the spectrum) for First-tier Tribunal appeals work and for those with standard fee cases, as lawyers reconcile quality with financial viability by reducing client access. For Refugee and Migrant Justice, the attempt to maintain quality on the large scale on which they operated (regardless of funding type) resulted in catastrophic loss of financial viability. Other providers have chosen to reconcile financial viability and client access by reducing quality. This research strongly suggests that it is impossible to reconcile all three.

Judicial review

All practitioners and organisations in the study said they were continuing to do judicial review work despite changes to funding which meant payment was at risk. Barristers said they had been paid for ‘most’ of their judicial review cases though some solicitors and caseworkers had been ‘stung’. Because they usually won costs against the Home Office at *inter partes* or private rates, this enabled them to cross-subsidise some of the losses from standard fee work.

However, sometimes this had involved a great many hours of work at risk since permission had only been granted by the Court of Appeal, following refusals on the papers and at oral hearing in the Administrative Court. More junior barristers believed that being unpaid in only a small number of such cases would put them off doing legal aid judicial review work. The risk was heightened by the fact that the prospects of permission depended heavily on which judge decided the application. This made it particularly difficult to predict which cases would succeed at permission stage. Accordingly, it is unfair to place all risk on the lawyers in judicial review work.

The changes also cause cash flow problems because, when lawyers lodge applications on issues where the law or facts are yet to be clarified (like safety of returns to a particular country or lawfulness of a new policy), numerous applications are often ‘stayed’ behind a small selection of test cases. Because the law was undecided when the claim was made, it is likely that the lawyers will eventually be able to claim payment under the exceptions to the regulations,⁶¹ regardless of the outcome. But because permission has not (yet) been granted, the lawyers cannot claim payments on account from the Legal Aid Agency, so must wait months or even years for their fees.

Further, when claimant lawyers won costs against the Home Office, the delays in receiving payment for judicial review caused serious cash flow problems. Junior barristers described having to move in with friends or take on other work because they could not pay their rent, despite working full-time at the bar. More senior barristers described having tax bills which were only £14k lower than their total gross earnings for the year, because they were taxed on money billed but not yet received from government bodies.

⁶¹ Civil Legal Aid (Remuneration) (Amendment) Regulations 2015

Having won costs against the Home Office, barristers described routinely losing at least 20–30% of the money billed in the negotiation process. While negotiation over the bill may be a normal part of litigation, barristers are effectively prevented from challenging low offers because the receiving party pays the costs of assessment if they fail to beat the paying party's offer by at least 20% across the solicitor's and barrister's bill. This is arguably too high a threshold, since it is very difficult for each lawyer to be certain that the other has prepared their own bill carefully. It means the Home Office is unfairly advantaged in that it can make low offers without particularising or justifying its assertions that the work was excessive.

Many barristers also explained that they avoided taking on judicial review work from certain (often very large) legal aid firms which were known to have less robust 'merits filters', or to fail to include or flag up vital documents relevant to the merits of the case because work was delegated to inexperienced and under-supervised staff. In that scenario the barrister would need to do more work to identify the possible arguments and evidence for judicial review. By not volunteering for work from those firms, they protected themselves from doing many hours of work unpaid on weak cases. This, though, meant that cases with real merit would go unrepresented, 'hidden' behind weaker cases where supervision had been inadequate.

Unpaid administration and transaction costs

'Transaction costs' are the costs of running markets,⁶² such as bidding for work, drafting and negotiating contracts, compliance monitoring and reporting. The economist Oliver Williamson argued that, for a market to be successful, transaction costs should be minimised – but that market failures were caused by wrongly assuming that zero-cost transactions were possible.⁶³ There is a heightened risk of market failure when 'prices lie' because they ignore transaction costs.⁶⁴ The Carter review in 2006 did suggest that awarding fewer and larger contracts would lower transaction costs for the LSC – despite acknowledging the high level of client service provided by smaller firms.⁶⁵ But as Whitfield pointed out in 2007, there has been little discussion of the transaction costs in the legal aid market.⁶⁶

Many of these costs arise through the auditing system, which is discussed in the next section. But at the time of the fieldwork, the online Client and Cost Management System (CCMS) was generating very significant transaction costs to providers. CCMS had been in mandatory use since 1 April 2016 for all funding applications, case-specific communications between providers and the LAA, and some billing. It was causing severe stress to providers across civil legal aid because it did not work effectively. Interviewees described forms which would not accept most forms of punctuation so that, for example, it was impossible to enter an email address or to copy and paste a legal argument; forms which gave no means of entering a particular piece of information; slowness; instability such that users would lose their connection to the system mid-session; inability to access the information

⁶² Oliver E Williamson, *Markets and hierarchies* (Macmillan New York, 1975)

⁶³ Oliver E Williamson, 'The new institutional economics: taking stock, looking ahead' (2000) *Journal of Economic Literature* vol 38 p595

⁶⁴ Barry Bozeman, 'Public-Value Failure: When Efficient Markets May Not Do' (2002) *Public Administration Review* vol 62 p145, at p146

⁶⁵ Lord Carter of Coles, *Legal Aid: A market-based approach to reform* (2006)

⁶⁶ Dexter Whitfield, 'Marketisation of legal aid' (2007) *Legal Action* 6 March 2007

previously submitted; the lawyer-user seeing different information from the LAA-user; a message system which was inefficient because of the time it took for responses to appear; no means of notifying the LAA that an application was urgent, meaning caseworkers had to submit an application through CCMS and then telephone a high-level official (because CCMS had replaced telephone lines to lower-level officials) to request urgent consideration, and so on.

The additional unpaid time in which providers were not doing casework because of CCMS and the frustration and stress of dealing with it emerged as the single most significant problem for providers, and a real threat to survival for some who felt they were already 'on the brink' because of the fee cuts. It may be that, over time, problems with CCMS will be resolved but two important points were made: first, the system was released and imposed on providers while still known to have significant problems, which providers felt showed a disdain for their time and viability; second, given how tight the financial margins are, providers felt they were ill-equipped to bear the additional costs of dealing with CCMS. Although the LAA had allowed for the possibility of *ex-gratia* payments, on application, for time lost to CCMS, this required providers to spend yet more time applying for such payments and providing evidence, with no clear criteria for when they would be granted.

Trude has called this the 'opportunity cost' of administration of legal aid.⁶⁷ There are numerous practical examples of inefficiency being forced upon providers. When commissioning an expert report, suppliers are required to get three quotations, even if they know exactly who is the right expert for the specific case, wasting their own and the unwanted experts' time and souring relationships with people who dislike being 'part of an auction'. This struggle to obtain expert evidence is echoed in research with family practitioners where lawyers explained that the LAA rates and maximum hours were too low to obtain the expert evidence needed, compelling them to go to court without that evidence and try to establish crucial points in a less efficient way.⁶⁸

Related to this, there are two other key points of departure from the assumptions of standard market models. First, research has already shown that many legal services are not scalable, particularly in social welfare law, including immigration.⁶⁹ As discussed earlier (under 'Drivers of in-case demand'), standardised country background evidence does not fulfil the needs of the client, the courts or the case and, in providing work of little value, self-evidently fails to provide value for money, despite being cheap. This means assumptions about economies of scale are misleading and dangerous.

Secondly, the most efficient choice is often unpredictable. A partner in one firm explained that it is largely down to luck whether it is more economical for his staff to present appeals themselves or instruct a barrister. If their case is heard early and they are back in the office by lunchtime, then it

⁶⁷ Adeline Trude, *Cost of Quality Legal Advice: Literature Review* (Information Centre about Asylum and Refugees, 2009)

⁶⁸ Hilary Sommerlad, 'Access to Justice in Hard Times and the Deconstruction of Democratic Citizenship' in Mavis Maclean, John Eekelaar and Benoit Bastard (eds), *Delivering Family Justice in the 21st Century* (Onati International Series in Law and Society (Hart Publishing, 2015)

⁶⁹ Mayson S, *Legal Services Reforms and Litigation* (College of Law Legal Services Policy Institute, 2007)

was more efficient for them to keep the case in-house; if they are held up at court until mid or late afternoon, it would have been more efficient to instruct a barrister.

Recommendations

LAA/MoJ:

- Abandon standard fees and pay for all cases at hourly rates, auditing a sample of files and bills for each organisation or barrister. If the standard fee is adequate in most cases, this should not lead to a significant increase in costs; if it does lead to an increase in costs, it suggests the standard fee was not adequate.
- As an alternative to abandoning the standard fee, reduce the escape threshold to double the standard fee.
- Restore judicial review funding to the pre-2013 position, as the justification for placing all risk on lawyers in judicial review applications is flimsy.
- As an alternative, if there are evidence-based concerns that some lawyers are carrying out unmerited judicial review work on legal aid (rather than privately funded) then award separate schedules on contracts allowing only the higher quality providers (levels one and two on peer review) to do judicial review work.
- Alternatively, if funding is to remain at risk, solicitors should be given a delegated function to grant conditional funding, and the costs limits on certificates should be removed, to save wasted administration time where there is no risk to the fund.
- Pay barristers directly for appeals work, rather than via the provider claiming them as disbursements. This works in other areas of law, would remove a source of cash flow difficulty for barristers (if they bill promptly) and would also relieve solicitors of an administrative burden.
- Amend the procurement practices and contract terms to reduce the boom and bust pattern and reduce unnecessary transaction costs.

HMCTS:

- The courts should grant permission in judicial review or appeal cases before staying them behind test litigation.
- The disincentives to lawyers requesting court assessment of costs should be reconsidered, to allow for fair assessment of the work done.

HMRC:

- Legal aid lawyers should be taxed on the income basis, not on work in progress, in respect of cases where money is owed by the state. This could be achieved by making the income basis available to any lawyer whose billing is more than, for example, 30% legal aid.

The combination of these points about transaction costs, economies of scale and efficiency which underpin markets mean that there is a heightened risk that prices in this sector will, and do, lie when fixed by a monopsony purchaser. Transaction costs must be factored into the fee regime as a matter

of urgency. The next section develops this point by exploring the auditing and quality control regimes in more detail.

Auditing and quality control

The LAA lists ten different types of audit which apply to immigration and asylum providers.⁷⁰ The annual visit from the Contract Manager and the ‘core testing’ of a random sample of files by the Fund Risk File Review team, apply to all providers. All files billed at the escape fee (triple the fixed fee) are also assessed, along with a sample of the cases where providers appeal onward to the Upper Tribunal (UT) – despite the fact that they are only paid if the UT grants permission. This means those who do the more advanced or complex work are likely to receive more audit attention overall.

An issue arising on one audit triggers various extra audits, as well as contract sanctions. Providers explained that minor errors in core-testing files lead to them having to ‘self-review’ a number of files, followed up with a further audit and a contract notice – three of which could mean loss of their contract. All of the provider organisations had experienced this process on multiple occasions, despite all but one being peer-recognised as quality providers. One had had to self-review 200 files, which was negotiated down from an initial instruction to self-review 600 files. Another had to self-review 1,200 files. A third had to self-review 50 cases and received a contract notice, plus a follow-up audit, all triggered by an error worth £6.40 (because a caseworker had billed travel costs from home instead of the office).

Providers argued that there was ‘zero-tolerance of human error’, leading to ‘petty reasons’ for assessing down the payments, nil-assessing files (refusing to pay at all) and issuing contract notices, all of which wasted time for both providers and the LAA. Examples included forgetting to tick ‘nil’ for each item of income or capital on the means assessment form, not for the client herself but for a non-existent partner. Although the client was clearly eligible for legal aid and the solicitor had done the work claimed for, the file was nil-assessed and a contract notice given, triggering a follow-up audit as well as the provider having to challenge the nil-assessment.

A further source of errors was that files had to be billed with codes which interviewees described as ‘massively complicated’, representing the stage of the case, the type of case and the outcome. A not-for-profit solicitor explained, however, that there was ‘no code for “I got refugee status for this client”’ because the codes reflected the outdated position where applicants granted asylum were given Exceptional Leave to Remain, a status which no longer exists. All providers interviewed had experienced problems with wrong billing codes.

Solicitors in this study were frustrated that they still had to apply to the LAA for funding before starting a judicial review, even though the work is at risk. Only the court fee, disbursements and any applications for interim relief are covered unless permission is granted, therefore the application process was seen as a waste of both lawyers’ and LAA time for no apparent policy reason. A related frustration explained by one solicitor was that, regardless of the costs she applied for, even when the work was at risk, she was given a default costs limit of £1,350, after which she had to apply to

⁷⁰ Legal Aid Agency: <https://www.gov.uk/guidance/legal-aid-agency-audits>

amend the scope of the funding certificate, despite the fact that nothing would be paid at all unless she obtained permission (or met one of the exemption categories) and, if she obtained permission, the costs would likely not come from the legal aid fund. Lawyers argued that they should be given a delegated function to grant this funding to themselves for at-risk work, saving resources for both LAA and providers.

The auditing and assessment meant a constant 'low-level back and forth' between providers and the LAA, which was unpaid. Limits on the amount which could be billed for various tasks were not consistent with the time these actually took, meaning it was difficult to make files 'look perfect' as the case went along, yet they needed to look perfect if called for core testing, suggesting that the LAA wanted files in a condition which was not consistent with the price it paid for them.

In legal aid contracts, the extensive compliance auditing regime and the 'low-level back and forth' between providers and the LAA add greatly to the transaction costs on both sides. Providers explained that they had adapted to the audits by changing procedures to avoid problems – 'we've tightened up' - but that was 'hugely time-consuming' and had a cost in terms of time available for clients and casework. This has been described elsewhere as an 'evaluatory trap' whereby audits increase the unit-cost of providing public services, without clear evidence that the audits add value.⁷¹ In some organisations, a partner or senior member of staff had stopped or almost stopped doing legal casework in order to manage the contract; in others a practice manager had been employed for that task, because the risk of errors and contract sanctions was otherwise too high. It is difficult to square these practices with a rhetoric of increased efficiency and reduced cost in the market-based procurement system.

The unpaid time providers spent on the 'low-level back and forth', 'protecting work' against the funder's 'unreliable' decision-making and dealing with 'forensic investigation of the client's means' was not envisaged in the Carter review of legal aid; rather Carter's recommendations were based on the assumption that the procurer would trust the supplier, subject to quality pre-requisites underpinned by peer review scores in the top two levels.⁷² Instead, practitioners argue that the LAA contracted with all bidders and then micromanaged and mistrusted all providers equally.⁷³ One provider criticised the LAA for a 'kneejerk reaction to its own incompetence', so that when a large firm, Blavo and Co, was closed down by regulators for serious legal aid fraud,⁷⁴ there was a 'sudden suspicion' that other firms were committing a similar fraud.

No provider I interviewed questioned the LAA's right and responsibility to audit. But overall, they described the relationship as 'hostile', 'punitive' and as having lost all pragmatism since the LSC had

⁷¹ Olov Olson, Christopher Humphrey and James Guthrie, 'Caught in an evaluatory trap: a dilemma for public services under NPFM' (2001) *European Accounting Review* vol 10 issue 3 p505

⁷² Lord Carter of Coles, *Legal Aid: A market-based approach to reform* (2006)

⁷³ Alison Harvey, 'Legal aid: welcome to Laa Laa land' (2013) *Journal of Immigration, Asylum and Nationality Law* vol 27 p102

⁷⁴ The firm was accused of having made 24,658 claims for Tribunal attendance, 94% of which had never taken place: Nick Hilborne, 'High Court ruling outlines extraordinary scale of allegations against Blavo and Co' (Legal Futures blog, 2 February 2016) <https://www.legalfutures.co.uk/latest-news/high-court-ruling-outlines-extraordinary-scale-of-allegations-against-blavo-co>, accessed 4 October 2018

its accounts qualified for four successive years by the National Audit Office.⁷⁵ One said it was, 'A nightmare. You can quote me on that. My relationship with the LAA is a nightmare.' Another, who had just given up their contract, described it as 'like an abusive relationship' while a not-for-profit solicitor said the work had 'never been more stressful, because of dealing with the LAA' – so much so that he had reduced his working days and 'would like to leave legal aid altogether'.

These issues are reflected in other public services, which have been subject to what Power called the 'audit explosion' or the 'audit culture'.⁷⁶ Shore argues it is not the auditing itself that is problematic but rather the 'slippage... [from] audit as a method of financial verification and bookkeeping, [to] audit as a generalised model (and technology) of governance.'⁷⁷ The LAA officials I interviewed agreed that criticism from the National Audit Office was responsible for the change in approach. This suggests that auditing bodies now play a significant, if hidden, role in policy-making and the interpretation of the contract.

There has been a shift, in legal aid, from a position of (arguably too) minimal bureaucratic control and surveillance, to one where surveillance is costly in terms of both money and time, both to the funding agency and the providers, but nevertheless fails to provide any information about substantive quality. The 'correct' level and type of auditing will always be a subjective judgement but it is doubtful whether such an intensive and expensive, yet superficial, surveillance system either reduces the costs or ensures the substantive quality of the service. Reforming this will require co-operation between the LAA and National Audit Office, as well as practitioner representative bodies, to identify a compromise position.

Performance targets and standards

Audit-related targets can also be seen to have created perverse incentives which might not be in the service user's interests. This seems to happen in two main ways. Firstly, the 'gaming' of targets has been much discussed in public services literature – changing behaviour to meet the target and avoid sanctions, even where this results in a worse service. Secondly, John Seddon has explored how targets often create extra work to comply with standards which are set up to manage the wrong thing.⁷⁸

Behaviour aimed at meeting targets can be seen in response to the Key Performance Indicator for immigration providers, who must maintain a 40% success rate on appeals (notwithstanding that this information is no longer collected from providers). Interviewees said the requirement led some

⁷⁵ Each year from 2008–09 to 2011–12 inclusive: Legal Services Commission, *Annual Report and Accounts* (2012–13)

⁷⁶ Cris Shore, 'Audit culture and Illiberal governance: Universities and the politics of accountability' (2008) *Anthropological Theory* vol 8 issue 3 p278; Martin A Mills, Cris Shore and Sue Wright, 'Audit Culture and Anthropology' (2000) *The Journal of the Royal Anthropological Institute* vol 6 issue 3 p521; See also Marilyn Strathern (ed), *Audit cultures: Anthropological studies in accountability, ethics, and the academy* (Psychology Press, 2000)

⁷⁷ Cris Shore, 'Audit culture and Illiberal governance: Universities and the politics of accountability' (2008) *Anthropological Theory* vol 8 issue 3 p278, at p290

⁷⁸ John Seddon, *Systems thinking in the public sector: the failure of the reform regime – and a manifesto for a better way* (Triarchy, 2008); John Seddon, *Freedom from command and control: a better way to make the work work* (Vanguard Education, 2003)

firms to refuse funding for appeals in complex cases which would need more work to succeed. Unaccompanied children seeking asylum suffered particularly from this practice, since those refused asylum were usually granted short-term leave to remain until adulthood. Wishing to avoid the risk to their success rates, many solicitors were advising children to accept the limited leave and not appeal their asylum refusal decisions, meaning the child lost the opportunity to have an appeal on the somewhat more favourable view afforded to minors.

Interpreters provide a good example of misconceived standards. Regulatory reports had shown that some providers were making unethical use of interpreters, either to bring in clients for the interpreter's financial benefit, compromising the provider's independence, or to do work which should have been done by caseworkers.⁷⁹ One solicitor gave me numerous examples of poor practice at a previous firm, including an interpreter attempting to falsify evidence in respect of a child the interpreter had brought to the firm, and the firm failing to stop working with that interpreter; interpreters demanding (successfully) to be paid for a full hour of interpreting for each of four clients brought to the firm, for whom the interpreter did one hour of work in total; interpreters being left to read back interviews to clients with no caseworker present; and so on. The Solicitor's Regulation Authority's report contained similar concerns about inappropriate influence of interpreters.⁸⁰ The problem is not simply an interpreter who works for a firm taking potential clients to that firm, but rather that the interpreter should not then benefit financially (by receiving paid work) for doing so. An independent interpreter should be used.

In response, the LAA added a new standard into the specification for the 2018 contracts, relating to interpreter qualifications. A representative of ILPA explained that this added yet another administrative burden on providers, to check the qualifications of the interpreter and stop working with some experienced and expert interpreters, since many did not obtain qualifications. Yet the new standard did not address the actual problem: an interpreter could still behave unethically despite having the required qualification; a provider could still use interpreters inappropriately despite the interpreter's qualification. The new standards were therefore seen as reactive and not effective, adding extra work without a clear link to improved work or protection for clients.

Peer review

The only substantive quality monitoring comes in the form of peer reviews, which are carried out by a panel of reviewers who are specialists in the area of law. Interviewees generally considered peer review the best available method. The Carter recommendations in 2006 envisaged peer review as a basis for determining who would receive a contract, with a minimum threshold of level two (the second-highest, out of five) on peer review. It is relatively little used, possibly because of cost, and its effectiveness is compromised by the fact that level three (threshold competence) is sufficient to obtain or retain a contract.⁸¹ There is no priority at all given to those achieving higher quality.

⁷⁹ MigrationWork, Refugee Action and Asylum Research Consultancy, *Quality of Legal Services for Asylum Seekers* (2016); Solicitors Regulation Authority, *Asylum Report: The quality of legal service provided to asylum seekers* (SRA, 2016)

⁸⁰ Solicitors Regulation Authority, *Asylum Report: The quality of legal service provided to asylum seekers* (SRA, 2016); MigrationWork, Refugee Action and Asylum Research Consultancy, *Quality of Legal Services for Asylum Seekers* (SRA, 2016)

⁸¹ Jane Hickman and Sue Pearson, 'The Legal Aid Market' April 2007 Legal Action 6

Providers are selected for peer review in a mixture of random sampling and targeted concerns. The LAA's list of contract terminations shows that some firms have had contracts terminated for receiving two peer reviews at the lowest levels (four or five), but they are not routinely carried out in the period before a contract tender. A high percentage of immigration and asylum providers, compared with other legal aid areas, received level four (below competence) on peer review.⁸²

Even were this to be taken as evidence that the system is successful at targeting 'problem' providers, it still suggests the Legal Aid Agency (LAA) is contracting with too many poor-quality providers. In 2017–18, 12 providers scored below competence (level four). This amounts to 5% of the 234 providers who had a contract in August 2017.

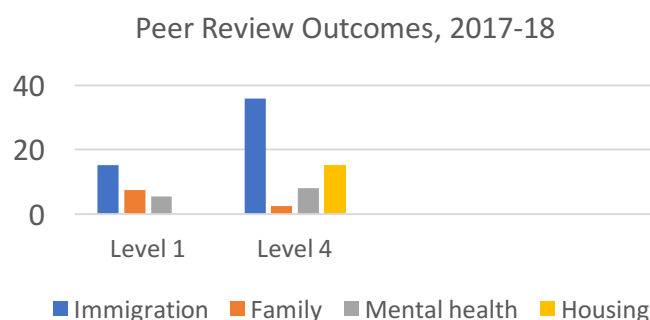


Figure 9: Peer review outcomes in civil and family law, 2017–18⁸³

Peer review in the formal sense is not used with barristers but, as barrister interviewees put it, 'you get one chance' and if the solicitor is not satisfied, they will not instruct the barrister again. Both barristers and solicitors said that, for barristers, the market is generally capable of ensuring quality and compelling poor-quality barristers to leave the market. Choice based on reputation, exercised by the (usually) well-informed solicitor or caseworker, appears to be a reasonably effective quality control mechanism, though this may be in doubt where there is a limited supply of specialist barristers in a geographical area. This is also subject to the caveat that the instructing solicitor or caseworker must be sufficiently skilled to discern quality in the barrister's work.

As the next section shows, however, there are limits to the extent to which market forces are capable of ensuring quality.

⁸² It is important to note that immigration also had the highest percentage of providers attaining the highest level on peer review.

⁸³ Minutes of the Civil Contracts Consultative Group (CCCG) meeting 24 January 2018 available at <https://www.gov.uk/government/publications/contracts-consultative-groups>, accessed 13 February 2019

Recommendations

LAA

- Increase the minimum peer review score for contract holders to two, underpinned by either payment of hourly rates or reducing the escape fee threshold to double the standard fee.
- Take a more pragmatic approach to auditing which differentiates between providers on grounds of quality and which avoids punitive sanctions and minimises transaction costs in cases of human error or minimal risk to the legal aid fund. This should be developed in partnership with the National Audit Office and providers to ensure a collaborative approach.

Market forces and quality control

Protection of poor-quality providers

The idea of markets for public services is that they should control both price and quality.

Competition between 'suppliers' should keep price down and quality up, because of the need to attract customers. According to Public Choice Theory, when parents have a choice of school, or when patients have a choice of hospital or family doctor, when clients have a choice of legal aid lawyer, they will choose one which has a good reputation. They will complain or campaign for improvements when the quality is not good enough, and they will leave for an alternative 'supplier' if quality doesn't improve. These strategies are called 'choice, voice and exit'.⁸⁴

But the existing system protects the market position of poor-quality providers in four main ways.

First, clients with asylum legal aid cases are most often newly arrived, accommodated on a no-choice basis in a part of the country where there may be few or no legal aid asylum lawyers, with no information at all about the reputation of the different providers. That means the 'choice' strategy is ineffective.

Second, the auditing regime (by its own admission) is largely unable to discern substantive quality – that is, whether the advice given is correct, whether the instructions taken from the client are detailed enough, whether the lawyer does enough evidence gathering. This is only assessed on peer review, which is little-used. That, combined with the standard fee, means there is a strong incentive to cut quality and work within the guaranteed payment. The risk of losing almost double the standard fee is a strong disincentive to incur costs about that level.

Third, it is already clear that most asylum seekers do not complain about poor-quality representation. The Legal Ombudsman jointly commissioned research on quality and redress because of concerns that the complaints process does not work for this client group. There is no

⁸⁴ Albert O Hirschman, *Exit, voice, and loyalty: responses to decline in firms, organizations, and states* (Harvard University Press, 1970)

legal assistance for the complaints process, and most clients do not feel able to undertake it alone, even if they understand their right to complain.⁸⁵ That means the 'voice' strategy is also ineffective.

Fourth, and perhaps most significantly, even if they discover the existing lawyer is doing a poor-quality job, clients cannot change to another legal aid provider unless they have been through the complaints process and had a complaint upheld. That means the 'exit' strategy is explicitly barred for this group, unless they can obtain money to pay privately.

The level of demand, plus limits on capacity in high-quality providers, mean that poor-quality suppliers are virtually assured of a supply of clients who are unable to move elsewhere once their case is taken on. Far from ensuring quality, the market as currently structured actively protects the market position of poor-quality suppliers. It results in a 'lemon market'⁸⁶ (see next section) in which the 'seller' is most rewarded for providing a below-average-quality service, and is likely to incur financial losses when providing a better-than-average service. The consequence is that high-quality supply is reduced, while poor-quality supply is largely maintained or increased. This, taken together with the availability of contracts to providers peer-reviewed as just-about competent, essentially cancels out any power of the market to ensure quality.

Driving down quality

A much-cited economics paper by George Akerlof in 1970 draws on the used-car market to show how, when quality is not readily inspectable by a purchaser, purchasers treat quality as uncertain and will only be willing to pay the value of an average item.⁸⁷ This means those who have a poor-quality item – 'a lemon' – have an incentive to sell, as the average price is more than the item is worth. Those who have a high-quality item – 'a peach' – have an incentive to withdraw their product from the market, since the average price is below its value. Over time this leads to withdrawal of high-quality goods and the creation of a 'lemon market' characterised by poor-quality goods. As Akerlof put it, 'Both the supply of used cars and also the average quality will depend upon the price.'⁸⁸

Asylum legal services are obviously not the same as used cars, but can this metaphor help in understanding quality in publicly-funded legal services too? A fixed price applies to most cases, which represents the intended or expected average cost. The purchaser (the LAA) chooses not to distinguish between suppliers on the basis of quality, beyond imposing certain minimum standards.

As discussed above, some suppliers appear to cap their work at the fixed fee, akin to the average price.⁸⁹ On one level, this is reasonable, since most businesses are not expected to give out

⁸⁵ The SRA report indicated many did not understand their right to complain, even when it was mentioned in the client care letter.

⁸⁶ George Akerlof, 'The Market for "Lemons": Qualitative Uncertainty and Market Mechanisms' (1970) The Quarterly Journal of Economics vol 84 issue 3 p488

⁸⁷ *ibid*

⁸⁸ *ibid*, p490

⁸⁹ This assertion is supported by a Freedom of Information request reported by the charity Asylum Aid, showing that 73% of providers earned more on fixed fees than they would have received on hourly rates in 2009–10: Deri Hughes-Roberts, *Rethinking Asylum Legal Representation: Promoting quality and innovation at a time of austerity* (Asylum Aid, 2013)

substantial amounts of free goods or services. However, interviewees also believed certain providers used low fees as an ‘excuse’ for doing minimal work or using inexperienced and under-supervised workers, or simply ‘don’t understand how to add value’ in a case. Since substantive quality is not monitored, there was little incentive for a low-skilled provider to improve its work.

Because of the limited use of substantive quality measurement (i.e. peer review) and because peer review data is not directly comparable over time, it is not possible to prove (or disprove) that average quality in the market is going down. The peer review data shows levels of excellence over and above other areas of law, as well as too many poor-quality providers. While my research focussed on the excellent lawyers, carrying out high-quality work for vulnerable clients out of commitment to the client group, it also identified evidence that other providers’ work is minimal, adds no value to the case, and may even harm the case.

Of course, a used car still exists, whether or not it is put on the market, whereas legal services only exist when they are actually performed. But the ‘lemon market’ metaphor nevertheless explains why the legal aid market fails to ensure either supply or quality of services, so long as the purchaser ignores substantive quality. If fewer high-quality services (or matter starts) are put into the market, while the same or a higher number of poor-quality ones are performed, the overall quality in the market goes down. Some of those withdrawn services will be tradeable in other markets, such as privately paid legal services, and most providers studied in this research were choosing either to trade more of their services in the private-client market, or to offer more services into other areas of law or non-casework projects.



However, a key difference exacerbates the lemon market effect in legal aid, namely the LAA’s position as a monopsony purchaser. It uses this power to drive down prices and impose other terms but does not use it to distinguish on grounds of quality, either in terms of access to the market (awarding contracts) or contract terms. In effect it treats all providers as average, implementing a level of monitoring which is disproportionate in resource

terms to the risk posed by the high-quality providers but fails to identify the defects in the poor-quality services.

LAA officials I interviewed pointed out that there are always bids for work when they tender for contracts in asylum and immigration, indicating that the price and other contract terms are adequate for efficient providers. However, this research suggests an alternative explanation, namely that organisations which are determined to remain in the legal aid market find alternative sources of income, such as privately paying clients or charitable grants and subsidies but reduce their market share by limiting team capacity or diverting resources into non-legal aid work to limit their losses. Providers which are willing to deliver a service which makes a profit despite the fixed fee, by doing less than or no more than the work paid for, seek to enter the market or to maintain or increase their market share. In this way, the average quality of services sold in the market declines and the

discrepancy between the best quality and the average quality widens, and the average quality declines to a level which fails to meet the client's or the system's needs.

Recommendations

LAA:

- Increase the minimum peer review score for contract holders to two, underpinned by either payment of hourly rates or reducing the escape fee threshold to double the standard fee.
- Allow clients to change provider if dissatisfied, and take steps to make file transfer easier.

Supply

Advice deserts and droughts

The term 'advice deserts' has become familiar, referring to areas of the country where there is no legal aid provision at all for a particular area of law. But there are also advice droughts – areas where there appears to be provision, because there are unused matter starts in the geographical area, but in practice this is not accessible because providers have no (or limited) capacity to open new cases.

It is important to differentiate between matter starts and capacity – or between notional and functional capacity. Matter starts are the notional capacity – how many new cases a provider is permitted to open within that contracting period. But having a contract for 200 matter starts in a year does not mean the provider has functional capacity to open four new cases in any given week. None of the not-for-profit providers interviewed used all of their matter starts in a year, yet all were turning away potential clients.

In one area, where there was only one provider in the 'access point',⁹⁰ support groups had great difficulty in referring clients to lawyers. The only other provider had left the market, which had removed two-thirds of the matter starts in the access point. The sole remaining provider had effectively unlimited demand. It had already halved the size of its immigration and asylum team in order to keep its legal aid losses to a level which it could subsidise from other income. It had made a decision to prioritise work for unaccompanied children and the most vulnerable adults. This meant all other potential clients had to look outside the area for representation.

But, since this sole provider did not use all of its matter starts in any contract year, a 'capacity review' which focused solely on the number of unused matter starts in the system would fail to reveal the severe capacity crisis in the area. Asked about this scenario, a Legal Aid Agency official suggested that the single provider would be given more matter starts to meet the need, but the provider was unable to afford to increase its capacity, because it had placed a cap on the losses it was willing to subsidise from other resources.

⁹⁰ For legal aid purposes, the country is broken down administratively into five procurement areas – London and South-East; Midlands and East of England; North-East, Yorkshire and Humber; South-West; and Wales – each of which is divided into access points.

Advice droughts, then, are these areas which do not show up as ‘deserts’ on the map but where supply is unavailable or severely limited in practice. A drought can also exist where there are multiple providers. A barrister in Manchester explained that, despite there being a number of providers in Greater Manchester, at one point during the study period, Tribunal cases had to be adjourned because appellants were unable to find representatives. When I followed this up, several providers in that area explained that they had unused matter starts but had no capacity to open new cases.

Advice droughts can apply to a particular type of work: for example OISC-regulated advisers cannot have conduct of judicial reviews, so some organisations have to refer out all judicial review work. In some areas, there is only one provider. If that provider is OISC-regulated, a person in need of judicial review advice or representation has to look outside the area. In Devon, this is particularly acute since there are no suppliers to the south or in the two counties to the north, meaning would-be clients have to travel to Southampton or Wiltshire (which have one provider each) or Bristol for the nearest alternative, although the overall supply map would suggest advice is available. Often, this duplicates work, and cost, as a new provider has to start afresh with the case. And it means that need manifests in a different part of the country from where it originated. In this context, it is seriously problematic that there is no attempt to map demand, nor a clear understanding of where and whether a meaningful supply exists.

Under the new rules, from September 2018, it appeared that there was also a new kind of advice drought for onward appeals to the Upper Tribunal. This work was moved from the Controlled Work category (which all providers could do) to Licensed Work (which OISC-regulated providers cannot do). The LAA informed the sole supplier for Plymouth and Devon that it could continue doing the work; however because it had no way of applying for funding to do Licensed Work, it currently has to contact the LAA and set up the funding manually for each Upper Tribunal case.

The 2018 contracts gave more flexibility around matter starts and, in many cases, gave far more matter starts per provider. For example, Leicester went from four providers holding 326 matter starts between them to five providers with a total of 900 matter starts; the sole provider in North East Wales went from 21 to 300; Hampshire went from two providers and 165 matter starts to three with 600. In the sense that this removes artificial restrictions on client access, it is a positive move.

But it is particularly important to recognise that an increase in matter starts (notional supply) does not mean any provider has increased its functional capacity to take on cases, particularly standard fee cases. Providers who told me they never used all of their matter starts in a year, and had no plans to increase capacity, nevertheless received higher allocations of matter starts from September 2018. There is an acute need for the LAA to implement intelligent feedback loops to give it critical information about functional supply and not to rely on unused matter starts as a measure of capacity under the new contracts. Neither providers nor practitioner organisations can do this: it has to be done at policy level by carrying out or commissioning research into the unmet need in the system.

Recommendations

MoJ / LAA:

- Implement a system for monitoring and mapping potential-client demand, which focusses on functional capacity and not unused matter starts. In doing so, be mindful of the existing unpaid administrative burden on providers and avoid increasing this.
- Consider removing the concept of matter starts from future contracts.

Supply in detention

Home Office statistics show a 30% drop in the number of people detained at the end of December 2018, compared with the previous December, to the lowest number since at least 2009. Some detention support groups confirm the reduced number of people in detention, which the Home Office states, ‘follows the introduction of the new Immigration Bail in Schedule 10 of the Immigration Bill 2016 (15 January 2018), and changes across the immigration system following Windrush.’⁹¹ This fall is to be welcomed, but left 1,784 people in the detention estate as of the end of the year and 24,748 entering detention during the year.

Legal advice in detention is provided through Detention Duty Advice rotas. Until September 2018, each detention centre had two to four providers, each undertaking a week in turn on the rota, providing up to ten half-hour advice slots each day (typically four days a week). Since the new contracts were awarded in autumn 2018, a much larger number of firms (around 75) is involved with provision at each centre, the vast majority of which have no prior experience in doing detention centre advice work. Typically, each has about three weeks in a year on the rota.

This is of concern because detention centre work is often very different in nature from non-detained work. New providers may not only lack the skills and expertise when they enter the market, but may also be unable to build up that expertise with so little detained work. For example, a bail application for a former prisoner who has been detained under immigration powers requires understanding of a complex array of provisions for bail accommodation and engagement with probation officers who (particularly outside London) frequently have limited understanding of the policies and protocols for providing accommodation to a foreign national leaving immigration detention. The number of EU nationals detained rose in 2017, creating extra demand for expertise on EU free movement rules – an area which is now outside the scope of legal aid but has an obvious bearing on the lawfulness of detention. Meanwhile the experienced detention providers are likely to become deskilled in the detention context: one has gone from 50 down to six rota weeks per year, meaning many staff will no longer do any detention centre work.

The new contracts appear to create detention-specific forms of advice drought. Firms which are OISC-accredited cannot take on judicial review work for detainees, as explained in the previous section. Yet judicial review is the only way of challenging some decisions, like removal from the UK, refusal to recognise as a victim of trafficking, certification of a case as clearly unfounded, return to another European country under the Dublin III Regulation, or an unlawful decision to maintain

⁹¹ Home Office Quarterly statistics release March 2019

detention. Detainees may be unable to access a representative with judicial review capabilities in time (an access to justice issue) and public money may be wasted paying for advice which could never meet that detainee's needs (a value for money issue).

Some of the new providers are very small organisations and, even if able to do judicial review work, do not in reality have capacity to both carry out a week of detention advice slots and open the number of cases needed. Some have reportedly asked the charity Bail for Immigration Detainees (BID) to take on bail cases which qualify for legal aid and which the provider is therefore contractually obliged to take on, because the provider does not have capacity to do them.⁹² There is anecdotal evidence that some providers merits-fail potential clients because they do not have capacity to do the work necessary. The problem is likely to be particularly acute when a charter flight is scheduled, meaning that several detainees need prompt assistance with judicial reviews.

Other detention-centric problems with access to representation include:

- Detainees whose cases have merit being unable to obtain legal aid because they cannot provide sufficient evidence of means. Often this is because a landlord has disposed of the detainee's belongings after they were detained, or because a partner has a chaotic lifestyle and is unable to produce evidence in time. Detention providers involved in this study said that they usually had one or two meritorious and eligible cases in each rota week (seeing up to 40 clients in total) which they could not take on because of lack of evidence of means.
- People detained in prisons are often unable to access any immigration legal advice because there are no advice surgeries and communication with lawyers is difficult. This applies to those held on remand, as convicted prisoners and as time-served prisoners held under immigration powers. BID runs an immigration advice project in around seven prisons but has access only at the discretion of the prison. Some prisons have arranged advice from organisations which are OISC-accredited only at level one, meaning they can do little more complex than help fill in forms.

Detainees have no meaningful choice of provider and cannot change providers if they are dissatisfied. Given the short timeslots for advice, it was common under the old system for detainees to be unsure whether a lawyer had taken on their case or not. But with a maximum of four possible providers, support workers said it used to be relatively easy to find out which one a detainee had seen and to try to resolve any communication problems which had arisen. The change to the mode of providing advice in detention centres appears to have been a response to the arguments that the exclusive contract for detention work was unfair and deprived detainees of choice. However, the new system continues to give detainees no choice. A preferable system would be to award contracts for duty advice rotas only to those with expertise in detention work, but to remove the exclusivity so that clients can also seek legal aid advice from external providers (and providers could then build expertise in detention work in order to enter the duty advice market).

⁹² Personal communication with BID, 11/3/2019

It is essential that the functioning of these new contracts is carefully monitored and account is taken of the views of detention support groups, providers and others.

Recommendations

LAA / MoJ:

- Implement intensive monitoring of the effects of the detention advice system.
- Implement unannounced observation-based peer review for detention providers.
- In future procurement rounds, award detention advice contracts only to providers with levels one or two on peer review.
- Abandon the means and merits test for those in detention.
- As an alternative to abandoning the means test, relax the requirements for evidence of means for those in detention.
- Ensure that foreign nationals in prison have ready access to immigration and asylum advice.
- Invite expert organisations such as BID to provide mandatory training for all new detention advice provider on bail accommodation and other key issues.

Home Office:

- Simplify the provisions for immigration bail accommodation so that no detainee ever spends longer than necessary in detention because accommodation (including probation-approved accommodation) is unavailable.
- Ensure all relevant probation staff are aware of and applying the policies and procedures for allocating accommodation for foreign national ex-offenders.

Boom and bust

There appears to be a 'boom and bust' cycle for providers. The number of providers spikes at the time of each new round of contracts, then declines until the next contract tender. The number of legal aid immigration and asylum providers had fallen by 40% from 380 in 2004 to 234 by the time the Carter Review was published in 2006.⁹³ The spike is less marked for the contracting round in 2010, probably because of the closures of all Refugee and Migrant Justice and Immigration Advisory Service offices in 2010–11. However, at the time when Refugee and Migrant Justice went into administration, the Legal Services Commission stated that it had an over-supply of bids for the tender, meaning it gave only 100 matter starts each to most bidders.

As the graph in Figure 10 shows, the number clearly spiked at the time of the 2013 contract round, at 413, falling to 231 by the time of the next contract awards in September 2018 – a loss of 44%.⁹⁴ It then rose to 326 in the 2018 round – albeit there were still six 'access points' which received one or no compliant bids and other areas of advice desert. Already, 15 providers had been lost by mid-February 2019, partly offset by the award of four contracts in the East and West Lancashire advice

⁹³ Grania Langdon-Down 'Knockout Punch?' Law Society Gazette, 3 November 2006
<https://www.lawgazette.co.uk/analysis/knockout-punch/2910.article>, accessed 11/07/2017

⁹⁴ Parliamentary Written Question 139017 response to Richard Burgon MP, 02/05/2018

desert following a further procurement exercise, for a total of 315.⁹⁵ Even so, this is a net drop of nearly 3.37% in five months, suggesting the decline in previous contract cycles may be repeated.

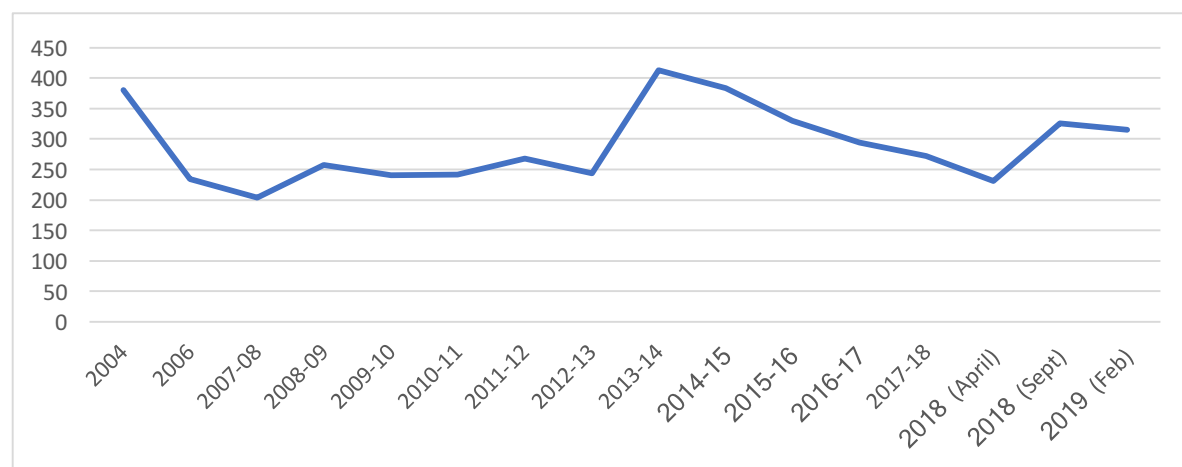


Figure 10: Boom and bust cycle in the number of immigration legal aid providers 2004–2019

Each contract carries transaction costs, including termination costs if the contract ends early. The awarding of numerous contracts which do not last the full contracting period escalates transaction costs. It is not clear why this attrition occurs: while it is possible to find data on the number which were terminated by the LAA, this lacks detail and there are no ‘exit interviews’ or statistics on providers’ reasons for surrendering contracts. It appears, however, that either the LAA contracts with too many providers (which is not an adequate explanation, given the number of advice deserts and droughts), that it contracted with providers which could not perform the contracts, or it contracted on terms on which providers cannot survive.

There is an urgent need for more information on why providers leave the market: how many have contracts terminated for failing on peer review? How many have them terminated for other reasons? Why do providers choose to close offices or withdraw from legal aid entirely? This information should be used to make appropriate changes to procurement procedures (including minimum peer review level) and contract terms if these are confirmed as causing wasted transaction costs.

Recommendations

LAA / MoJ:

- Conduct ‘exit interviews’ with market leavers.
- Publish clearer data on the reasons for contract termination or surrender.
- Compare the data for contract terminations with other areas of law and other public services.
- Amend the procurement practices and contract terms to reduce the boom and bust pattern and reduce unnecessary transaction costs.

⁹⁵ Freedom of Information response 190201020 from Legal Aid Agency, 1 March 2019

Lawyers mediating supply

I have already argued that financial incentives fail to explain the difference in quality between lawyers. Neither the ‘supplier-induced demand’ theory nor the counter theory of state-induced supply explains the differences, either in quality or in cost.

This study suggests that in fact lawyers neither induce nor merely respond to demand but rather mediate it. The model in Figure 11 aims to help in understanding how they do so. The left-hand column includes, in broad terms, the drivers of potential-client demand for lawyers’ services. The right-hand column sets out, again in broad terms, the services which the practitioner must, should or could supply, to the client, the funder or the regulator, either on the individual case or in order to maintain a legal aid practice. The middle column contains the factors according to which interviewees said they decided what to do in any given case – i.e. the factors influencing which potential-client demand is met, how in-case demand is determined and which aspects of it are met.

The mediating factors are divided into

- 1) macro-level ones, which amount to the boundaries of the system and apply to all lawyers and organisations similarly: these include the rights of appeal and court procedure rules which determine whether and how a case comes to court, the case law which influences the merits of cases, the fee regime which determines which cases are in scope of legal aid and how much is payable for them, and so on;
- 2) micro-level ones, individual to the organisation or practitioner, which determine whether potential clients are taken on and what in-case demand is met in their case, and therefore the quality of service provided.

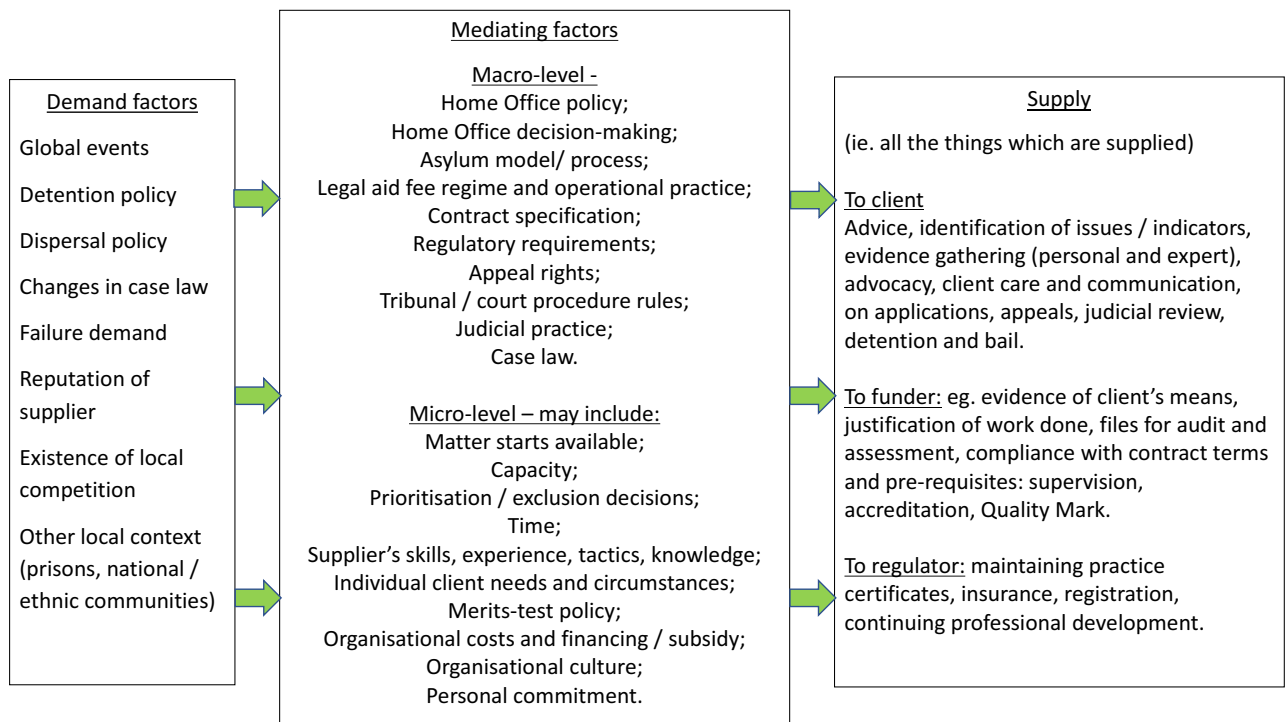


Figure 11: The Lawyer-Mediated Supply model

Although the model was developed with high-quality practitioners, mediation of demand can also lead to poor-quality services – particularly where the financial incentives in the contract are treated as the most significant mediating factor (leading to work-capping). Limited skills and experience are a significant mediating factor in organisations which rely heavily on poorly supervised least-cost labour, and may inform a policy which tends towards merits-failing complex cases.

This model, taken together with the demand and costs matrix, offers a ‘menu’ of points for intervention in the system to affect demand and quality without further damage to the financial viability (and therefore supply) of providers. In the demand column, for example, global events are outside the control of any UK agency, but detention policy and failure demand offer opportunities for both the Home Office and other UK departments to reduce the need for legal services. In the supply column there are, primarily, options for reducing the extent or cost of services to the funder.

Perhaps most importantly, in the macro-level mediating factors column, there are a number of aspects which could be amended to improve the system: the asylum process, Home Office policy and decision-making, the legal aid fee regime and contract specification, judicial practices, and so on. For clarity, I do not advocate any further reduction in appeal rights, since these are an important check on the quality of decision-making, and the alternative is diversion of cases into the more expensive judicial review system.

Recommendations

MoJ and Home Office:

- Undertake or commission an evidence-based whole-system analysis, in partnership with others, of the asylum process from arrival to the grant of settlement or removal from the UK.

Conclusion

The ‘market’ as a mechanism is failing to control for quality or to ensure adequate availability of asylum legal aid services. This market failure is caused by the way in which the market is structured and managed.

Legal aid will not move away from the current market structure of a monopsony purchaser and a range of providers. UK public services have comprehensively shifted away from nationalised, state-run services like the original UK Immigration Advisory Service or the US Public Defender Service. This means a situation of imperfect competition is inevitable: there is no policy innovation which could create perfect competition (even if such a situation were desirable).⁹⁶ Since the monopsony

⁹⁶ The previous proposals for Best Value Tendering would also not amount to a situation of perfect competition. The findings of this and earlier research suggest that BVT would exacerbate the quality and advice drought issues examined in this report.

purchaser holds much of the power, it also bears responsibility for managing the market so as to avoid market failure.

However, other actors in the asylum and court systems also have a role to play in ensuring that their policy is aligned with legal aid policy at least insofar as it affects the viability of provision of legal advice and representation. Genuine improvements will not be made through fragmentary changes which target isolated parts of the system: these are more likely to shift costs around without creating genuine improvement from any perspective.

There is an urgent need for policy which takes a whole-system view and differentiates by quality, supporting the high-quality providers, and sanctioning or excluding poor-quality ones, while also reducing the volume of failure demand pulled into the system through the actions of other agencies. There are significant areas of advice desert and advice 'drought', where there is a false appearance of adequate supply. Demand and supply have been misunderstood at policy level. There is an important difference between notional supply (unused matter starts) and functional supply (providers' capacity to meet potential-client or in-case demand). Currently there are no effective feedback loops in place to obtain critical information about demand or functional supply.

Peer review data show that, compared with other areas of law, there is a disproportionately high prevalence of excellent providers in immigration and asylum, yet also a high prevalence of providers who are below competence. Good-quality practitioners and organisations are either forced out of the 'market' altogether or are compelled to reduce their legal aid market share so as to cap their losses at the amount they can raise in subsidy. Poor-quality providers' market position is protected by the standard fee and the auditing regime, alongside rules and systems which actively prevent clients from escaping poor-quality providers.

It appears impossible to reconcile quality, financial viability and access in the current 'market', except in very limited circumstances. In most cases, the high-quality provider organisations reduced access, meaning individuals with standard fee asylum cases were least likely to be able to access high-quality providers. In turn, this raises the risk of generating failure demand, as people who were poorly represented are left in the asylum system needing advice on (more labour-intensive) fresh asylum claims or legal services relating to detention and removal – not to mention the risk of a person who needs international protection being returned to their home country.

This study sets out a matrix of four types of demand, which allows for analysis of the drivers of demand either at macro (asylum system) level or at micro (individual case) level. This enables a nuanced analysis of the causes or drivers of demand, and of the consequences on costs, which may be generated, escalated or shifted onto another part of the system.

A significant volume of overall demand is failure demand, particularly caused by Home Office decision-making and LAA control practices and decision-making, resulting in escalated and generated costs, as well as cost-shifting which particularly burdens legal aid providers, including barristers, and has led to some organisations and practitioners withdrawing from the asylum legal aid market altogether. Failure demand is also generated by poor-quality lawyers, with whom the LAA continues contracting, and exploitation or poor-quality work by some privately paid lawyers.

There is an exponential relationship between legal complexity and cost, which drives in-case demand and explains why overall costs increase out of proportion to the number of cases. Factors in that relationship include the number of relevant previous case authorities, frequent changes in law and policy in immigration and asylum, the constant struggle over interpretation, and escalating evidential demands.

The research also offers a model for considering how lawyers mediate demand for their services. There is a conflict for all lawyers and organisations wishing to do high-quality immigration legal aid work: in an era of standard fees, where auditing focuses almost exclusively on procedural rather than substantive quality, there are strong economic incentives to carry out work to a minimum quality standard. Yet, in spite of operating within the same system of incentives, regulation, legal rules, and so on, the organisations and practitioners which participated in my research were peer-identified as providing high-quality work, while some other organisations appeared to respond to the contractual and financial incentives with poor-quality work justified by the fee structure.

Some of the recommendations in this report involve making sure lawyers are paid within a reasonable period of time. These issues may not generate significant public sympathy, but it is increasingly clear that the supply of legal aid services, especially from barristers and high-quality providers, is precarious. The Bar Standards Board identified the dearth of specialist immigration barristers outside London, Manchester and Birmingham and this research identifies the extent to which the publicly funded immigration bar depends on the goodwill of a small number of high earners subsidising their colleagues. This report demonstrates the boom and bust cycle of legal aid contracts, suggesting many providers cannot survive on the existing contract terms. The market has haemorrhaged not-for-profits between 2005–2018, suggesting that the current regime is incompatible with the not-for-profit business model and is not sustainable for providers overall.

If there is not to be a catastrophic market failure, policy-makers will need to make changes which support those lawyers and organisations that wish to continue (or resume) providing good-quality legal aid services.

Summary of recommendations

Quality and auditing

LAA:

1. Increase the minimum peer review score for contract holders to two, underpinned by either payment of hourly rates or reducing the escape fee threshold to double the standard fee.
2. Alternatively, where there are multiple bidders, contract only with providers receiving levels one or two on peer review, to avoid spending public money on work which adds little value to the case.
3. Allow clients to change provider if dissatisfied, and take steps to make file transfer easier.
4. Take a more pragmatic approach to auditing which differentiates between providers on grounds of quality and which avoids punitive sanctions and minimises transaction costs in cases of human error or minimal risk to the legal aid fund. This should be developed in partnership with the National Audit Office and providers to ensure a collaborative approach.

Scope and client access

MoJ / Government:

5. Return immigration cases to the scope of legal aid, subject to the means test.
6. As an alternative to wholesale re-inclusion of non-asylum immigration work, this should include all cases *prima facie* relating to trafficking, refugee family reunion (including those outside the Immigration Rules), domestic violence, and deportation or removal cases where there are British national family members.

Fees and payment systems

LAA / MoJ:

7. Abandon standard fees and pay for all cases at hourly rates, auditing a sample of files and bills for each organisation or barrister. If the standard fee is adequate in most cases, this should not lead to a significant increase in costs; if it does lead to an increase in costs, it suggests the standard fee was not adequate.
8. As an alternative to abandoning the standard fee, reduce the escape threshold to double the standard fee.
9. Restore judicial review funding to the pre-2013 position, as the justification for placing all risk on lawyers in judicial review applications is flimsy.
10. As an alternative, if there are evidence-based concerns that some lawyers are carrying out unmerited judicial review work on legal aid (rather than privately funded) then award separate schedules on contracts allowing only the higher quality providers (levels one and two on peer review) to do judicial review work.
11. Alternatively, if funding is to remain at risk, solicitors should be given a delegated function to grant conditional funding, and the costs limits on certificates should be removed, to save wasted administration time where there is no risk to the fund.
12. Pay barristers directly for appeals work, rather than via the provider claiming them as disbursements. This works in other areas of law, would remove a source of cash flow difficulty for barristers (if they bill promptly) and would also relieve solicitors of an administrative burden.

HMCTS:

13. The courts should grant permission in judicial review or appeal cases before staying them behind test litigation.
14. The disincentives to lawyers requesting court assessment of costs should be reconsidered, to allow for fair assessment of the work done.

HMRC:

15. Legal aid lawyers should be taxed on the income basis, not on work in progress, in respect of cases where money is owed by the state. This could be achieved by making the income basis available to any lawyer whose billing is more than, for example, 30% legal aid.

Provision in detention

LAA:

16. Implement intensive monitoring of the effects of the new detention advice system.
17. Implement unannounced observation-based peer review for detention providers.
18. In future procurement rounds, award detention advice contracts only to providers with levels one or two on peer review.
19. Abandon the means and merits test for those in detention.
20. As an alternative to abandoning the means test, relax the requirements for evidence of means for those in detention.
21. Invite expert organisations such as BID to provide mandatory training for all new detention advice providers on bail accommodation and other key issues.

MoJ:

22. Ensure that foreign nationals in prison have ready access to immigration and asylum advice.

Home Office / Probation services:

23. Simplify the provisions for immigration bail accommodation so that no detainee ever spends longer than necessary in detention because accommodation (including probation-approved accommodation) is unavailable.
24. Ensure all relevant probation staff are aware of and applying the policies and procedures for allocating accommodation for foreign national ex-offenders.

Advice droughts

LAA:

25. Implement a system for monitoring and mapping potential-client demand, which focusses on functional capacity and not unused matter starts. In doing so, be mindful of the existing unpaid administrative burden on providers and avoid increasing this.
26. Consider removing the concept of matter starts from future contracts, to avoid misleading indicators of supply.

Understanding and reducing demand

Home Office and Independent Chief Inspector of Borders and Immigration:

27. Improve the quality of decision making in the Home Office. Existing efforts to do this, as recommended by the Independent Chief Inspector of Borders and Immigration and the Justice Working Party, are welcomed.

28. Continue reducing the number of people detained and the length of detention (without increasing short-notice removals, which would increase demand for urgent work). I endorse the recommendation made by the Joint Committee on Human Rights for independent decision making and oversight on immigration detention.
29. Carefully monitor the quality of decisions and demand for judicial review work emanating from the reformed National Referral Mechanism.

Home Office and LAA:

30. Reduce the hostility of the system in order to reduce both in-case and potential client demand while maintaining fairness.

All parties:

31. Any changes to the process should be systemic. For example, if the Home Office proposes to implement a policy of re-examining cases before hearing, Tribunal listing times must be sufficiently predictable for representatives to obtain further evidence in time for the review and the LAA must be willing to fund timely evidence gathering.
32. This report endorses the recommendations of the Justice Working Party on reducing demand in the immigration appeals system without reducing appeal rights.

[Systemic understanding and evidence gathering](#)

MoJ and Home Office:

33. Undertake or commission an evidence-based whole-system analysis, in partnership with others, of the asylum process from arrival to the grant of settlement or removal from the UK.
34. Conduct 'exit interviews' with market leavers and publish clearer data on the reasons for contract termination or surrender.
35. Compare the data for contract terminations and surrender with other areas of law and other public services.
36. Amend the procurement practices and contract terms to reduce the boom and bust pattern and reduce unnecessary transaction costs.

Appendix 1: Method

The bulk of the fieldwork for this research was carried out over 18 months from June 2016–December 2017. It consisted of case studies of practitioners and organisations which were ranked in Chambers and Partners (for solicitors’ firms and barristers’ chambers) or peer identified as providing high-quality services (not-for-profits). These case studies included three not-for-profits, two private firms, twenty barristers and four staff in six chambers, as well as the now-closed Refugee and Migrant Justice (formerly the Refugee Legal Centre) which constitutes a unique case, as the earliest and largest provider of asylum legal aid services. The research consisted of 74 semi-structured interviews in all, lasting 30–100 minutes, including Legal Aid Agency officials and a representative of the Immigration Law Practitioners Association.

This report also draws on interviews which were carried out for research commissioned by the Solicitors Regulation Authority and Legal Ombudsman on the quality of asylum legal services provided by solicitors (both legal aid and private). These consisted of 42 semi-structured interviews with officials, lawyers, NGO workers and statutory or regulatory bodies’ staff which were carried out by members of the research team, and contained material that was highly relevant to the issues around legal aid but had not been used for the report, which had a different set of research questions. These interviews were thematically analysed but have not been directly quoted in this report, since not all interviewees could be contacted for further consent for the use of their comments.

I also relied on documentary evidence, the websites of the organisations studied, Freedom of Information requests and publicly available information such as Tribunal hearing lists and the Legal Aid Agency’s spreadsheets of providers in each area of law. This information was thematically analysed, initially for the purpose of writing an academic thesis. Since the thesis ran to over 100,000 words, I obtained funding to draft a shorter report with a policy focus and to collaborate with other interested organisations (both legal and non-legal) in formulating policy recommendations.

Dr Jo Wilding, Brighton, April 2019

Droughts and Deserts
A report on the immigration legal aid market

Dr Jo Wilding

