

36 PUBLIC & HUMAN RIGHTS

CIVIL LEGAL AID: TOWARDS A SUSTAINABLE FUTURE

CONSULTATION RESPONSE FOR 36 PUBLIC AND HUMAN RIGHTS (PART OF THE 36 GROUP)

21 MARCH 2025

**For further information contact
36 Group c/o Rowan Caffull
Chief Executive Officer
4 Field Court, Gray's Inn, London WC1R 5EF
Email: rowan@36group.co.uk
Tel: 020 7421 8000**



Section 1: Introduction

- 1.1 This is the response by 36 Public and Human Rights ('36 P&HR') part of the 36 Group of barristers, mediators, and arbitrators, to the Ministry of Justice consultation '*Civil legal aid: Towards a sustainable future*'. It has been filed on 21 March 2025.
- 1.2 The 36 Group is a large and long-established barristers' chambers, originally named for a former address at 36 Bedford Row, now situated within Gray's Inn in central London and at an annexe in Singapore. Members of the 36 Group practice domestically and internationally, combining formidable strengths in Commercial, International Trade and Shipping, Family, Public & Human Rights, and Crime, with state of the art facilities and a friendly, solution-driven approach to client service. The 36 Group is widely recognised as a leading Chambers across numerous fields, with 188 members including a substantial number of King's Counsel and other senior advocates. Our roots extend back more than 150 years. Many of our members are recognised as leaders in the profession.
- 1.3 Members of the 36 Group are relatively unusual in the modern Bar in the breadth of the work we do. This extends from high value international commercial and shipping work, contributing to London's eminence as a centre for resolution of international commercial disputes, to publicly funded work in fields such as criminal law, child law, immigration and asylum, and housing and homelessness. We have been able to do this successfully through supporting strong teams internally, which have substantial autonomy balanced with responsibility to the whole. 36 P&HR, with 18 members, is our team focussing on public and broad human rights work. A number of members of 36 P&HR practise in immigration, asylum, and nationality law and a smaller number, presently, in housing and homelessness. Some practice in both. As typically of the Bar, this work is generally in advice and advocacy, often but not always in some of the most difficult cases. Often our members practice across more than one area, and accept a mixture of privately funded instructions and legal aid work. Some members of 36 P&HR hold a leading place in their fields of practice in the jurisdiction and internationally, and have been involved in numerous leading cases.
- 1.4 The members of 36 P&HR believe that both the rule of law and access to justice are critically important concepts vital to the maintenance of a healthy democracy. Legal practitioners, and indeed judges, have in recent years sometimes been targeted by some politicians, and by parts of the press and others, in a way which goes beyond legitimate criticism to challenges those values of the rule of law and access to justice. Over many years cuts to legal aid have contributed to weakening

access to justice. In light of these very unhealthy phenomena, and without complacency, we welcome the tone of the consultation, including the recognition of the importance of legal aid and of practitioners involved in it. We agree with the statement that legal aid *'is the cornerstone of our justice system'* which *'underpins the rule of law in this country, helping to ensure that everyone, including the poorest and most vulnerable, can access justice and enforce their legal rights'* (report, p4). We are happy to acknowledge the statement in the Foreword of the Minister for Courts and Legal Services thanking *'all of those who work in the legal aid sector, and who contributed to the Review of Civil Legal Aid'* and acknowledging that they *'play a vital role in the justice system, and in wider society'* (consultation paper ('CP'), p5).

- 1.5 Members of 36 P&HR file this response seeking to address relevant aspects of the consultation. We anticipate separate responses in particular on behalf of the Immigration Law Practitioners' Association ('ILPA') and Housing Law Practitioners' Association ('HLP'), to which our members in each area of practice belong. These are likely to address broader matters- most obviously because our members are members of the Bar and do not operate or work in solicitors' firms or other civil legal aid providers. Where a matter is not expressly addressed herein, we anticipate that it is likely to be addressed in the separate responses by practitioner groups already cited.

Section 2: Executive Summary

- 2.1 Our response in summary is set out as follows:

36 P&HR is very supportive of the aims underlying the consultation. Addressing questions 1-7 we agree strongly with the principles and proposals tested by questions 1-3. We are neutral on question 4 as this goes beyond the parts of proceedings in which our members are involved. We strongly agree with the proposal under question 5. We are neutral on question 6 and 7(a) for the same reason as on question 4.

Section 3: Responses

Question 1) Do you agree with our principles for setting fee levels within civil legal aid? Please state yes/no/maybe/do not know and provide reasons.

- 3.1 We agree fully with the principles cited, and wish to add what we believe is an important observation at the close of our remarks addressing this question. To begin, the starting point is that the current hourly rates for civil non-family work were last altered in 1996, and fixed fee levels were set in 2006 using the 1996 hourly rates. The effect of low fees rates is exacerbated by often slow payment of publicly funded work, through no fault of instructing providers in most cases.
- 3.2 The effect over time of deterioration in fee levels has cumulatively been dramatic. Increasingly, practitioners involved in this area moved to a mixed model in which private fee work sustained publicly funded work continued from a sense of ethical commitment or public value or variegation of practice. However solicitors in particular often chose to leave publicly funded work after a period as the cost of supporting a franchise to do publicly funded work increased both in relation to the rates of remuneration and the reduced caseloads. This is consistent with the experience recorded in the consultation paper, that *‘the difficulty in tendering for civil legal aid provision in Housing and Immigration, combined with the high levels of demand and the evidence on profitability suggests that, for some providers, Housing and Immigration fees are no longer at the right level to incentivise them to do legal aid work.’* (CP, p 18). As quality providers of instructions in publicly funded cases became less numerous, the scope for skilled instruction of the Bar, and the experience of dealing with cases, was affected. Legal practitioners of talent- both solicitors and barristers- seeking to do publicly funded civil work and sustain this by taking private work as well often found that the latter increased and gradually took up more and more of the time which could be given to the former. Deterioration in practice in publicly funded areas has been exacerbated in recent years by, among other reasons, diversion of resources to address consequences of the decision to depart from the European Union (particularly to what is now known as the European Union Settlement Scheme), the Covid-19 pandemic which disrupted Home Office decision making and the related advice, appeals, and judicial review around which most work is generated, and reduced or delayed legal education and professional qualification for new lawyers and discouraged growth by providers, and inflation, which has dramatically diminished values which earlier were declining more gradually, if substantially over time.
- 3.3 In addition we note changes in other aspects of life in the United Kingdom which have an effect on civil legal aid capacity. An important feature of this is that young people and others whose ambition it is to become a lawyer, will, in most cases, by the time this has become a reality have faced serious expenditure, or be carrying substantial debt from tuition fees and sustenance. In general accession to the legal profession today requires a good law degree or a good non-law degree with a one-

year conversion course, a one or two year master's degree, a one year professional qualification course, probably a substantial amount of unpaid or not well paid work experience, for example volunteering in a law centre or Citizens' Advice Bureau, before they reach a period as a trainee or pupil when they can expect some remuneration. At the Bar and in the solicitors' branch of the profession, a new lawyer today will likely start with substantial debts to pay off. Doing so has become increasingly inconsistent with maintaining a practice as a lawyer in which underpaid publicly funded work has a dominant role.

- 3.4 The effects just related coincide with the problems identified in the consultation document. We believe that substantial correction of the path is necessary, for there to be sufficient value and security in publicly funded work for new practitioners to enter and established practitioners to take more publicly funded work. We hope that the proposals elsewhere in the consultation, some of which we address, allow this to happen.
- 3.5 We wish to add however that legal aid has a wider relevance- to enabling effective and credible government. An immediate example is the existence of large backlogs of appeals and other proceedings, both in housing and immigration, in particular asylum. Focussing on asylum, between 2018 and 2022 the UK's asylum backlog increased sharply from 27,000 to 132,000 applications, then measures from 2023 began to reduce this.¹ However the increase in executive decision making has to be followed through resolution on appeal of those cases in which the Home Office refuse protective status, a considerable proportion of which succeed before independent judges. This has resulted in a backlog of nearly 42,000 appeals.² Realistically, dealing with this effectively will only be possible with an adequate pool of legal aid capacity to provide representation and advice to those who qualify for it. An absence of this represents a source of friction and consequent expense and uncertainty- appeals are delayed or adjourned for representation or in the hope of it, and many individuals are unrepresented or have representation of lesser quality. In these circumstances decisions are weaker because of lesser professional contribution, and so may not provide a firm basis resolving the issue between the parties, but lead to cycles of further submissions and decisions and proceedings.
- 3.6 The UK has addressed large backlogs successfully before- indeed, public funding of representation in asylum appeals from 2000 was designed in part to aid the fight to reduce large numbers of outstanding claims and appeals which had developed

¹ <https://migrationobservatory.ox.ac.uk/resources/briefings/the-uks-asylum-backlog/>

² <https://www.bbc.co.uk/news/articles/cn4837w4z2vo>

then, and those were successfully addressed by this and other measures.³ By Q2 in 2014, 87% of asylum applications in the UK were decided within 6 months (contrasting with 12% in Q2 in 2023).⁴ Anecdotally some members of 36 P&HR active at the time recall cases of decisions being made within 6 weeks from arrival and claim, and the appeal being heard 6 weeks after that. The reduction of delays increases justice and diminishes public cost. But it can best be brought about and progress sustained with the contribution of a healthy body of legal aid practitioners of good quality

Question 2) Do you agree that we should increase the fees paid for Housing and Immigration work? Please state yes/no/maybe/do not know and provide reasons.

3.7 We do agree, strongly. Our reasons are that we believe this is absolutely necessary to the important principles and objectives discussed above in relation to Question 1. We believe these are of critical importance. The increase in fees anticipated by the consultation paper shows constructive engagement and, so far as relevant to 36 P&HR, demonstrate a willingness to take realistic action to begin to repair the damage done to legal aid over a substantial period of time.

Question 3) Do you agree that fees for Housing and Immigration work should be increased to a minimum hourly rate of £65.35/£69.30 (outside London/inside London)? Please state yes/no/maybe /do not know and provide reasons.

3.8 We do agree, strongly, for reasons set out in answer to Question 2. As regards specific increases and rates we would add one point, emphasising the need for increases to allow for expanded practice by both branches of the legal profession working towards positive outcomes. This response on our behalf is provided from the perspective of members of 36 P&HR who are members of the Bar, where the cost structure for self-employed practitioners and Chambers is different in many respects from that of solicitors' firms and other primary providers. The latter in particular generally have higher fixed costs. It is vital that immediate reforms make it possible for both branches of the legal profession to join in moving forward the positive goals identified in the consultation paper. We would respectfully mark the importance of looking to other responses by primary providers which may

³ See the House of Commons Home Affairs Committee Second Report of 2003-2004, <https://publications.parliament.uk/pa/cm200304/cmselect/cmhaff/218/21802.htm#evidence>

⁴ <https://migrationobservatory.ox.ac.uk/resources/briefings/the-uks-asylum-backlog/> Table 7.

provide views of specific increases and rates informed by the different but vital position they are in.

Question 3a) If the fee is already above this rate, do you agree that rates should be increased by 10%? Please state yes/no/maybe /do not know and provide reasons.

3.9 We agree that rates should be increased by atleast the proposed 10%, as we believe this would contribute to serving the principles and objectives set out in answer to Question 2. But we note what we have said in relation to Question 2 regarding the importance of considering responses from all parts of the sector including both branches of the legal profession, given the need for all to be carried forward.

Question 4) Do you agree that the minimum hourly rates for Controlled and Licensed Work should be the same? Please state yes/no/maybe/do not know and provide reasons.

3.10 We are content with this as a measure of simplification, and agree on this basis.

Question 5) Do you agree that our proposed rates will enable legal aid providers to undertake increased volumes of legal aid work? Please state yes/no/maybe /do not know and provide reasons.

3.11 We do agree, strongly, that measures such as those proposed, which start to address in a substantial way the accrued diminution of civil legal aid over many years, are likely to enable increased volumes of work to be taken. We note again that it will be important to consider the position of all parts of the sector including primary providers, so that synchronised progress towards the goals of the consultation paper is made possible. We have discussed, with instructing solicitors, professional bodies, and others, the scope for cooperation amongst us to ensure that more legal aid work is done and that qualitative standards are maintained and increased. If the proposals are enacted we will be able to take more concrete steps, for instance in recruiting to pupillage and into probationary tenancy, the initial limbs of professional life within the 36 Group (and in particular, as relevant here, within 36 P&HR), with a view to expanding commitment to publicly funded work. We would hope however that the present steps will form part of a pattern of broader focus upon the rule of law and access to justice in the UK, with recognition of those who contribute to it. We will also maintain our hope, circumstances allowing, that the proposed changes will not then be left isolated and a new deterioration of legal aid permitted.

Question 6) Do you agree that increases to Immigration should be implemented first? Please state yes/no/maybe /do not know and provide reasons.

3.12 We are not aware of any reason in principle why either area should be prioritised over the other. We believe that unless absolutely necessary, a delay in implementation of up to six months (CP, p 21) would be regrettable, because important decisions to engage in publicly funded work or to prepare to do this or do it to a greater degree, may also be delayed pending implementation.

Question 7) Do you agree with simplifying the fee system by harmonising the fees identified? Please state yes/no/maybe/ do not know.

Question 8) Do you agree that we have correctly identified the range and extent of the equalities impacts for the increases in fees for providers set out above? Please state yes/no/maybe/don't know and give reasons. If possible, please supply evidence of further equalities impacts as appropriate.

Question 9) Should we remove or reduce limits to the number of Controlled Work Matters where the client does not attend the provider's office to make an application for Controlled Work? Please state yes/no/maybe/do not know and give reasons.

Question 9a) Thinking about the limit on Controlled Work applications that can be delivered remotely, in what ways does this affect your ability to deliver face-to-face and remote advice, based on client need?

Question 10) RoCLA evidence included feedback that providers are best placed to determine when clients need face-to-face advice, and where remote advice is appropriate. However, there is a risk that providers may move towards remote advice provision in a way that leaves clients who need face-to-face with difficulty finding a provider. When ensuring greater flexibility to provide remote advice, what measures or safeguards would help ensure that clients are not turned down or de-prioritised, because they require face-to-face?

Question 11) Which categories or areas of law do you practice in (or have experience in), that you have drawn from when answering questions 9 and 10?

3.13 As to Question 8 we do not believe we can contribute usefully. As to Questions 7 and 9-9a these appear to be fees (Question 7) and issues (Questions 9-9a) typically

related to solicitors rather than the Bar, and so whilst we are supportive of all the broad aims expressed in the consultation paper, and have addressed other issues, including simplification, above, we are content to leave it to others with direct knowledge and experience, in particular those able to speak as or for primary providers, to contribute considered responses.

- 3.14 As to Question 10, as part of a referral Bar providing advice and advocacy we have long been looked to by instructing solicitors and clients. We are not direct ‘providers’ in terms of the enquiry. On this basis we leave it to others to provide fuller answers. But like colleagues across the Bar we have in positive co-operation with primary providers and others adapted flexibly to remote working where this is justified, and we anticipate that members of the Bar including our members would continue to provide appropriate support through providers whenever so instructed and by all appropriate means. Going to Question 10, our members practice in both immigration and housing.

Questions 12-14

- 3.15 We believe these questions are not relevant to us and so we do not seek to respond to them.

Section 4: Conclusion

- 4.1 As already stated, we are gratified by the positive tone of the consultation paper and the desire to move forward to improve legal aid in the public interest. As set out above, we agree with many of the questions asked- in fact with every question where we feel competent to offer a response. We have identified the importance in our submission of considering views from all parts of the sector including in particular primary providers.
- 4.2 We also note that the problems which have been created by years of neglect are serious ones which impede dealing with imperative current issues effectively and undermine public trust in fairness and the state. We very much hope therefore that the consultation is followed by concrete action.

*For 36 Public and Human Rights (Part of the 36 Group)
21 March 2025*