**Written evidence from Dr Jo Wilding**

**Introduction**
I am an ESRC-funded postdoctoral researcher based at the University of Brighton. My PhD was on the immigration and asylum legal aid market in England and Wales. I published a report on the same, titled *Droughts and Deserts. A report on the immigration legal aid market* in 2019, funded by Joseph Rowntree Charitable Trust.¹

I then undertook research in Plymouth to try to understand and overcome the barriers to legal aid provision in Devon, which is an advice desert for immigration and asylum law. This involved working with the local authority, Legal Aid Agency lead for the South West and local migrant support groups and legal practitioners. I was also commissioned by Paul Hamlyn Foundation to design a methodology for mapping and understanding supply and demand in immigration law on a national, regional and sub-regional basis. I was previously the legal expert on research commissioned by the Solicitors’ Regulation Authority and Legal Ombudsman on the quality of asylum work by solicitors.²

I therefore have an in-depth knowledge of legal aid sustainability, with a particular focus on asylum and immigration work but extending into civil legal aid more broadly. This response is based on my research and structured around the questions asked in the Terms of Reference. My recommendations are summarised on the final page.

1. How LASPO has affected access to justice

1.1. LASPO has to be understood in the context of earlier changes, most importantly the Carter reforms in 2007, which placed not-for-profits on the same terms as private providers, imposed fixed fees for most civil legal aid work and provided for payment in arrears on closure of cases, even in categories where practitioners have little or no control over case length.

1.2. LASPO’s removal of many cases from the scope of legal aid had an important impact on the case mixes available to providers. For example, removing non-asylum immigration cases from scope meant that providers no longer had access to cases which were likely to close relatively quickly. Although these were typically not very profitable, their shorter duration made an important contribution to cash flow. The case mix now available consists mainly of case types which tend to be long-running. Delays in the asylum system and in trafficking work are outside the control of providers and barristers. Similarly for housing providers, the fixed fee fails to take into account the average case length since LASPO, where typically shorter case types have now been excluded from scope.

1.3. Unless these cases are to be returned to scope, re-assessment of fixed fee levels is urgently needed, to reflect the duration and demands of the (more complex) case types which remain in scope. (NB, this cannot be done by simply looking at average costs recorded, since there is evidence that many providers cap their work at the level funded by the fixed fee.)

¹Available at
https://www.researchgate.net/publication/333718995_Droughts_and_Deserts_A_report_on_the_immigration_legal_aid_market

²Available at: https://www.sra.org.uk/sra/how-we-work/reports/asylum-report/
1.4. As a result of LASPO’s cuts to fees and scope, immigration providers have limited the kinds of cases they will do (especially those who are not willing to reduce the quality of the work they do). Many have prioritised cases which attract hourly rates, complex cases which will escape the fixed fee, or judicial review and higher appeals work where they will receive costs at (near) market rate from the opponent if they succeed. That means people with cases funded on fixed fees face serious difficulties in accessing good-quality lawyers, who cannot afford to undertake fixed fee work.

1.5. For similar reasons, the Exceptional Case Funding (ECF) scheme introduced by LASPO is not working effectively as a safeguard. Numerous providers I have interviewed say they cannot afford to do ECF work, both because of the low fees and because of the amount of at-risk work they have to do before receiving a grant of funding. Some (non-legal aid) organisations obtain ECF for clients and then attempt to refer them to lawyers, but describe it as ‘impossible’ to find a lawyer who will take on the case, both because of the fees and because of serious capacity shortages in many areas.

1.6. These LASPO-related changes also have to be understood in conjunction with increased risks on providers. Judicial review funding has been placed at risk, despite a lack of evidence that judges’ permission decisions are predictable. Lawyers have told me they are able to continue doing judicial review work because, when they succeed, they recover costs at inter partes (private) rates instead of legal aid rates. This covers the cases where they are not paid because permission is not granted or (more commonly) the client loses contact with them before the permission decision, compelling them to withdraw. It also cross-subsidises loss-making areas of practice like fixed fee work.

1.7. That is particularly important in light of proposals to impose fixed recoverable costs for judicial review. That would eradicate the main self-generated source of cross-subsidy for not-for-profits and some private firms, leaving them unable to continue in legal aid work. I therefore encourage the Committee to treat LASPO not (only) as a discrete entity but as a part of a series of events. The remaining providers and barristers have adapted, but have limited leeway for further adaptation.

1.8. The Post-Implementation Review’s conclusion that the market is ‘sustainable at present’, thus fails to take account of the fact that providers’ and barristers’ adaptations to LASPO have limited clients’ access even in respect of matters which ostensibly remain in scope.

1.9. It is important to note that LASPO intensified pressures which began with the Carter reforms, which were intended as part of a transition to Best-Value Tendering. BVT has now been abandoned for the most part, for very good reasons. Yet the fixed fee schemes, escape thresholds, unified contract and other elements of the Carter review remain in place. We can think of this as the ‘debris’ of an abandoned policy direction. To formulate coherent and sustainable policy for the future, it is necessary to rethink those elements.
2. The role of the Legal Aid Agency

2.1. There are three important points I would like to draw to the Committee’s attention.

2.2. First, the LAA does not have any mandate or resources to research need or demand. This is a bizarre situation which leaves it poorly equipped to understand the market it administers. The number of providers with contracts, or the number of matter-starts available, tells us nothing about actual capacity for supply in the system. The LAA receives information about the work that is done, but no information about which kinds of cases or which kinds of clients are not being taken on by providers, for the reasons set out in sections 1 and 3. It has little understanding of geographical barriers to provision.

2.3. I have found the officials I have dealt with to be willing to listen and keen to understand what is going wrong, but they are hampered by a lack of systematic information – about geography as well as economics. The powers in LASPO section 2, to take measures to ensure fulfilment of the duty in s1, are meaningless without robust empirical evidence on demand and supply.

2.4. Second, auditing is poorly focused, creating costs which are disproportionate to its benefits. The LAA receives a great deal of information about whether the provider has the correct evidence of means on file, and has correctly ticked boxes to show the client’s partner’s means, even if there is no such partner. It receives very little information about whether the client received correct advice. The cost to both sides is disproportionate to the risks presented by higher-quality providers. There is no earned autonomy (in the form of reduced audit activity) for providers receiving the highest marks on peer review. I explained in my Droughts and Deserts report that auditing can even, unintentionally, protect the position of poorer-quality providers while punishing high-quality ones, when compared with outcomes on peer review.

2.5. Audits are narrowly focused on issues of payment, as a result of the LAA’s predecessor, the Legal Services Commission, having its accounts qualified for four successive years. There is an urgent need for a reassessment and accord between the LAA and National Audit Office to enable movement away from the current auditing regime towards something more constructive and proportionate.

2.6. Third, the transaction costs of doing legal aid work are too high, and create a threat to supply. Transaction costs are the costs of running or participating in a market, as compared with those of actually providing the service (production costs). Space does not permit a detailed discussion of transaction costs here but, for legal aid providers, they include the costs of dealing with audits, billing, all unpaid administration, complying with contractual pre-requisites such as obtaining Lexcel or the SQM accreditation, and using the online Client and Cost Management System (CCMS). These are the costs in addition to those for organisations carrying out private-only work, like professional indemnity insurance, practising certificates, training and continuing professional development, and so on.

2.7. These costs have not been factored in to the pricing for legal aid work, though they are outside the control of legal aid providers. If fixed fees are to continue (and I argue that they should not) then they need to factor in the transaction costs, not only
the estimated production costs. At the same time, the LAA should carefully review transaction costs which it has placed on providers, and consider how these can be reduced.

3. Recruitment and retention problems among legal aid professionals

3.1. I would like to emphasise that recruitment and retention difficulties are in some cases directly causing the loss of legal aid provision in certain areas of the country.

3.2. Many providers I have spoken to in different parts of England and Wales talk about a recruitment crisis. This applies across different categories of legal aid and amounts to a threat to access to justice. For example, Wiltshire Law Centre in Swindon has been unable to do any immigration legal aid work since obtaining a contract in September 2018 because it cannot recruit a (self-supervising) solicitor to do the work. It is the sole provider in its access point, leaving an entire asylum dispersal area with no legal aid advice. The sole provider in Devon and Cornwall has a single caseworker and cannot recruit a supervising caseworker, possibly because the salary it can afford is too low to attract applicants. An immigration provider in the North closed an office in an area of high demand because it was unable to recruit a replacement solicitor for that office.

3.3. There is no clear evidence about how many providers with contracts are unable to undertake legal aid work in practice, or operate at reduced capacity, because of recruitment difficulties. However, a Freedom of Information response I obtained in 2019 showed that there are ‘dormant’ contracts throughout the country across all areas of civil legal aid – ie contracts under which (in the first year) no matter starts were opened. In some categories, this is because there is a mandatory telephone gateway, so that only limited face-to-face advice was envisaged. In other categories, it is unexplained. For example, in housing, 498 contracts were awarded in September 2018. By November 2019, 133 had not opened any matter starts. These probably overlap with the 73 contracts which were terminated (by either party) by August 2020, but it appears that at least some were dormant because providers were unable to recruit or retain staff to do the work. This information is only available by piecing together Freedom of Information responses.

3.4. The problem of recruitment interacts with that of advice deserts. For example, Citizens’ Advice in Plymouth has obtained funding to pay for a trainee solicitor, partnering with other organisations to provide supervision. They had hoped to be able to train this person to do immigration law, among other categories, but there is no supervisor available for over 100 miles. Similarly, in Wales, organisations interested in access to justice explain that new law graduates cannot find training contracts or pupillages in North or Mid Wales. They move away to qualify and gain experience, develop ties in other places, and rarely move back to where they graduated.

3.5. This means that it is extremely difficult for supply to recover in areas of advice desert or lesser advice shortage. In effect, they reach a tipping point beyond which recovery is not viable. There is no realistic possibility that markets in those geographical areas will recover through market-based procurement. In my opinion they can only be restored through targeted government intervention in the form of
grant funding, accompanied by action to support the longer-term sustainability of the sector by increasing funding, reducing legal aid transaction costs, reducing risk on providers and improving cash flow in legal aid payments.

4. The impact of Covid-19 on legal aid services and clients

4.1. The core of the problem is that payment for cases is in arrears, on closure of the case. Since there have been limited opportunities to progress cases, many have seen their income stop altogether, especially in asylum. One provider told me it had received only two decisions in the six months from March 2020.

4.2. The furlough scheme was a poor fit for legal aid providers which still had work for many of their staff but were unable to pay them because they could not bill for cases. The business interruption loan scheme was untenable for many since they could not take a risk on incurring debts. This has to be seen in the context of my earlier comments that providers and barristers have very limited scope for further adaptations to survive shocks like the pandemic.

4.3. More tailored support is required, including grant funding to tide providers over the period in which they are unable to bill, rate relief on offices which they are required to keep under the terms of their legal aid contracts, and a tailored version of the new Job Support Scheme to cover staff wages while billing is not possible.

5. What the challenges are for legal aid over the next decade, what reforms are needed and what can be learnt from elsewhere?

5.1. Legal aid has to be viewed as an integral part of several other systems – the criminal justice system, the family justice system, the asylum system, the immigration system, the welfare benefit system, and so on. In any category where legal aid costs are seen as too high, government should look first at the substantive system.

5.2. Where a high percentage of appeals are successful, in welfare benefits for example, the first step should be to reduce need by improving the quality of benefit decisions in the DWP. Funding for welfare benefits legal advice should be restored for the remaining decisions which need to be appealed, which is likely to reduce demand for housing legal aid in homelessness cases.

5.3. In asylum law, the need for legal aid work could be reduced by improving the decision-making system, including by triaging cases effectively. Those which are likely to succeed based on the applicant’s nationality should be considered quickly and either granted or, if there is good reason to think they might not succeed, routed back into the main asylum caseload. This should apply to any nationality where the success rate after appeals is 75% or more (eg Syria, Yemen, Eritrea, South Sudan). It would remove a substantial number of cases from the asylum system quickly, reduce the distress of those applicants, lower the cost of asylum accommodation because applicants could move quickly onto mainstream support, and reduce the need for legal aid spending on cases which should be granted quickly. The immigration rules already allow for positive decisions to be made without an interview, where sufficient information is available.

5.4. These are piecemeal examples but the important point is that legal aid needs to be woven into the fabric of every administrative decision-making system that bears
directly on individual legal rights. Where legal aid costs are a concern, the first instance solution should be to reduce need, not to ration supply. I believe it would be a useful exercise to have a joint review, perhaps through the Constitutional Affairs Committee, of administrative decision making, covering both the systems of decision making and the quality of decisions.

5.5. Regarding lessons from elsewhere, I suggest that England should look at the more proactive approach of the Welsh government towards advice, which has ensured there is at least one adviser in each local authority area. In England, loss of local authority funding has led to significant loss of provision. Local authority budgets are clearly too stretched to resume funding advice at present, but the Lord Chancellor has a legal duty to secure the availability of legal aid in in-scope categories (LASPO s1) and as-yet unused powers to achieve this (LASPO s2). I therefore suggest that government funding should be provided to ensure the availability of legal advice, potentially via the local authority as a ring-fenced grant. That money could come not only from the Ministry of Justice but also from the budgets of relevant government departments (Home Office, DWP, DHSC) perhaps on a ‘polluter pays’ formula related to how many appeals each department generated in previous years. This should fund advice agencies or private firms doing legal aid work in every part of England and Wales to ensure provision, instead of relying on market forces to meet capacity gaps.

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Summary of suggestions

i) Introduce a geographically-based programme of grant-funding new and existing providers in categories of law where there is a shortage, using the powers in LASPO s2 to fulfil the duty in s1. The Welsh government offers an example of a proactive approach.

ii) Support a national training scheme, including funded legal aid apprenticeships, supervisor apprenticeships and secondments and second-tier advice, to build legal aid capacity across England and Wales and address the recruitment crisis.

iii) Mandate and resource the Legal Aid Agency to collect information about demand and functional supply of legal aid work. Without understanding demand or supply, it is impossible to know whether the duty in LASPO s1 has been met and, if not, how to deploy the powers in s2.

iv) Restore funding levels and restructure payment schemes, including abandoning the fixed fee structure, bearing in mind that fixed fees were conceived in part as a stepping stone towards the now-abandoned Best-Value Tendering system.

v) If the fixed fee is to be retained, re-assess funding in light of the types of case which now remain in scope, bearing in mind that reported average costs will be misleading since some providers cap their work at the level which will be paid for.

vi) Review transaction costs in legal aid work, with a view to reducing them and shifting the burden away from providers or factoring them into the price paid to providers.

vii) Rethink the auditing regime, and replace it with a more constructive, proportionate, less punitive system.

viii) Undertake a meta-level review of the generation of demand for legal aid work through substantive quality of administrative decision-making and the procedures through which decisions are made, so that legal aid costs can be controlled by reducing demand instead of rationing supply, in a way which most likely shifts demand onto other services.