

The Detention Duty Advice scheme: research summary

Dr Anna Lindley, SOAS, University of London, A.Lindley@soas.ac.uk,

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Immigration detention remains in scope for publicly funded legal assistance: indeed the argument that detention is legitimate rests partly on the claim that people can challenge it. Key safeguarding principles to ensure the immigration detention complies with the rule of law include access to 'prompt, continuing, adequate legal assistance, state-funded if unaffordable'.² The Detention Duty Advice (DDA) scheme was set up to provide prompt access to free legal assistance and continuing advice to those eligible under legal aid rules. However, analysis of available evidence raises concerns regarding variation in detainees' access to legal assistance and the quality of said assistance.

This submission is based on research exploring access to legal assistance in detention, carried out in autumn 2017 and summer 2020, including: (1) Review of relevant material published by government, parliamentary committees, independent inspectors, civil society groups, legal media and academic researchers; (2) Analysis of relevant data from the Her Majesty's Courts and Tribunals Service (HMCTS), Legal Aid Agency (LAA) and the charity Bail for Immigration Detainees (BID); (3) 31 interviews, focusing primarily on legal professionals working with detained clients, but also including some people on immigration bail, migrant support workers, three immigration judges, and people involved in managing and monitoring legal aid services.

The DDA scheme has been a vital tool in ensuring people detained under immigration powers have some access to legal advice. Prior to 2010, although any legal aid solicitor could represent people held in Immigration Removal Centres (IRCs), it could be hard for people to make contact with solicitors. Since 2010, the DDA scheme has provided more structured access to legal advice in Immigration Removal Centres. It has survived a decade in which the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) radically cut the scope of immigration legal aid. Alongside their immigration legal aid contract, a number of firms hold additional contracts to run advice surgeries in designated centres, providing up to ten advice appointments per day.³ From September 2018 to June 2020 nearly 19,000 such appointments were made with DDA providers by people in detention.⁴ The LAA expects that providers will take on all eligible cases, although they can decline for 'good cause' (explored more below).⁵

In Sept 2018, some important changes were made to the DDA scheme. Prior to this, surgeries were run by around 8 providers, with the largest Duncan Lewis responsible for around half of the surgery weeks in 2017/18.⁶ There were a combination of pressures to modify the system: access to justice concerns about waiting times and quality issues; commercial complaints about a small number of providers having exclusive detention contracts; and public sector contracting concerns about dependency on those few providers. In Sept 2018, the LAA awarded contracts to all eligible bidders, dividing surgeries among some 75 firms.⁷ The DDA scheme still does not extend to prisons, a major issue dealt with elsewhere – this submission focuses on IRCs.⁸

Waiting times remain an issue for people with urgent cases or acute vulnerabilities. Given the gravity of depriving someone of their liberty on administrative grounds, prompt contact with a legal advisor is important. Moreover, if someone is refused asylum or given a deportation order, they have 14 days to appeal the decision, and if they are given notice of a removal window, they have 72 hours before the removal could take place. While waiting times seem to have moderated (consistent with reduction of the number of people detained in IRCs), for people with urgent removal cases a few days can have serious consequences. While there are policy provisions that in removal cases individuals need to have reasonable opportunity to access legal advice and recourse to the courts, asserting this requires individuals to know their rights.⁹ For instance, at the time of writing, there is

an intensification of efforts by the Home Office to remove people under the Dublin III Regulation to other EU member states, before this possibility ceases with the end of the Brexit transition period. Despite the LAA increasing the number of surgeries at Brook House, solicitors were concerned that people due for removal on charter flights were not all getting access to legal advice.

Lawyers interviewed were unanimous that it is hard to fit what they need to do into the 30 minute appointment, i.e. ascertain the basic facts of the person's case, offer some advice and decide whether the detainee qualifies for legal aid. People have to first be brought to the legal visits area by IRC staff, may be distressed and/or mistrustful, may need a telephone interpreter, may show up with bags full of documents or none at all. BID's Legal Advice Survey respondents generally did not describe the advice they received at this appointment as useful in itself, which points to the challenge at hand; in this context, it is particularly concerning that the same respondents reported appointments generally lasting less than 20 minutes and sometimes being extremely brief.¹⁰ Since March 2020 legal visits have been cancelled (except in exceptional circumstances) and the DDA has run as a telephone service; this makes it harder to examine detainees' documents, with solicitors reporting variability between detention centres in terms of how effectively IRC staff facilitate the transmission of necessary information.

Concerns were raised that solicitors sometimes fail to recognize the merits of people's cases.¹¹ Interviewees noted that while there are some cases with no merit, the test for Legal Help (LH) is 'sufficient benefit', which is easily passed by a lot of people. The test for Controlled Legal Representation (CLR) is moderate (50%+) prospects of success, and on this basis many people in detention qualify for CLR for bail applications, something underscored in legal aid guidelines.¹² In addition, many people in detention have substantive immigration cases that are in scope, or eligible for Exceptional Case Funding (ECF), and have merit. But interviewees raised concerns that DDA solicitors are not consistently identifying where people in detention are eligible for legal aid on merits, citing a tendency to overlook the merits of (a) bail applications suggesting a poor understanding of the process, (b) more complex and challenging cases (e.g. 3rd country cases, trafficking, urgent removals) where lacking expertise and (c) eligibility for ECF owing to the additional paperwork burden and poor awareness of the (now) rather high success rates. Migrant support organisations try to address these gaps by signposting detainees to other DDA providers, preparing ECF applications to help convince potential solicitors, referring them to pro bono providers and firms with public law legal aid contracts for judicial review work.

Concerns were also raised about the means test for legal aid.¹³ While people in detention on asylum allowances may be 'passported' through, others must gather necessary proof of means. Practitioners commented that people who fail the means test often do so by very little and still struggle to pay for a lawyer privately. Gathering evidence of means can be challenging, particularly if a partner's income must also be assessed, or a landlord has disposed of the person's belongings.

Variation in take-up rates between firms is dramatic. FOI data suggests that collectively DDA providers carrying out surgeries in Sep 2018 – Jun 2020 opened Legal Help matters for around a *quarter* of the people seen.¹⁴ What is particularly striking, given the random allocation of detainees to appointments, is the variation between providers: 8 firms opened Legal Help for more than 50% of people seen in surgery, but many had much lower rates, some appearing 'to be operating a blanket practice of avoiding taking on clients at the surgery'.¹⁵ While sometimes individuals rejected for legal aid or receiving poor service will manage to secure another legal aid provider, this underscores the 'hit and miss' quality of the process.¹⁶

Where clients *are* taken on, representation can fall short. An HMIP survey in Brook House IRC showed that only one third of those who *did* have a solicitor had received a legal visit.¹⁷ One solicitor

interviewed had recently taken on a couple of clients who had been with other DDA solicitors for 4-6 months who had not done a bail application for them. Another shared a list of eligible cases they had picked up after other DDA solicitors had failed to act, for people who were vulnerable and had unlawful detention and urgent removal cases.

In the community, low legal aid fees pose issues for solicitors, but this seems to be somewhat less of an issue in relation to taking on work for people in detention. The LAA pays for CLR work started while the client is in detention on hourly rates; for Civil Representation, although investigative work 'at risk' is often required to apply for funding, if approved then payment is on higher hourly rates and there is possibility of winning costs at commercial rates and bringing damages claims.¹⁸ The DDA issue seems to be more about knowledge and human resources.

Knowledge is critical to providers' ability to deliver. Detention is a specialist, fast-changing area of law. DDA firms no longer need to have an Advanced/Supervising caseworker (Immigration and Asylum Accreditation Scheme Level 3)¹⁹ but must deploy to surgeries a Senior Caseworker (Level 2), formally accredited to carry out the full range of immigration and detention legal aid work. But 'Running a surgery is *hard*, you have people coming with all kinds of problems, their lives are literally in your hands...'²⁰ Another solicitor noted 'A feature of detention is that the cases are more urgent, and people are more vulnerable.'²¹ With surgeries spread among so many providers, new practitioners may have limited opportunity to build up that expertise and there is a risk of deskilling more experienced lawyers.²²

Capacity is also critical to providers' ability to deliver. Until Sept 2020 the rota was organized on a weekly basis, such that the duty solicitor might encounter up to 50 potential clients in a surgery week, including urgent removal cases, indeed potentially a large number of urgent removal cases detained in the same IRC prior to a charter flight. The Immigration Law Practitioners' Association (ILPA) commented the many newer, smaller providers did not seem to have appreciated the capacity they might need to deliver on their obligations. Sole providers and consultants are also inevitably under more cashflow pressure than salaried solicitors to close matters and bill, which may act as a disincentive against taking on lengthy complex individual matters.

The LAA does have monitoring mechanisms in place, but its audit and contract management processes focus on procedural compliance rather than the quality of legal work. Practitioners complain that the LAA picks up on very minor errors, to the point where some interviewees felt that the aim of audits is to trip them up, arguing that the process imposes a discipline that goes beyond assessing eligibility and has the effect of deterring lawyers from taking on less-than-straightforward clients, for fear of not being paid.²³ The LAA emphasizes that complaints about the substantive quality of legal aid work should be directed to the Solicitors Regulation Authority and the professional bodies, although it might also trigger referral of the provider for LAA's peer review system.

The carefully designed peer review system focuses squarely on the quality of legal aid work carried out, but there is considerable room for manoeuvre in how the results are used. Providers must maintain a threshold competence rating to retain their legal aid contract. When they fail (as was the case for 5% of immigration providers peer-reviewed in 2017-18 – relatively high compared with other categories of legal aid work),²⁴ there is a chance to improve their performance ahead of a second review, and few of the more severe penalties have been imposed on DDA providers in recent years.²⁵ Recognizing the pressures on the legal aid industry and scarce capacity in some geographic areas/categories of work, the focus is on ascertaining basic competence and ensuring provision. Having scored a *high* rating at peer review does not seem to put a firm in a stronger position vis-à-vis the contract bidding process in the context of the current public procurement practices.

Thus the LAA's monitoring mechanisms focus on procedural compliance and basic competence of legal aid work that is carried out, with few means of monitoring what is *not* done. As things stand, although providers are required to fill out some basic paperwork for each appointment, the LAA does not check whether people are correctly *rejected* for legal aid – it works on the basis that if a detainee is eligible, the provider will take them on. Some interviewees pointed to the Civil Contract Specification which allows providers to decline eligible cases for 'good cause', including if they lack the capacity or skill/expertise to take on the case. But DDA providers are supposed to liaise with the LAA if they lack capacity, and are required to be accredited at IAAS Level 2 which implies that they are able to undertake the full range of legal work with detained clients.

Across the professional spectrum, legal professionals have reached some pretty damning conclusions about legal aid in detention. A solicitor told a government committee: 'Everyone who works in this field knows that most instances of unlawful detention go unchallenged.'²⁶ A barrister remarked: 'It is nonsensical to say there is legal aid for detention, because [of] the hurdles you have to go through... Loads of instances of unlawful detention are going by without any applications being made.'²⁷ An NGO worker commented: 'The whole myth of legal aid, and "we're OK detaining people because they have access to legal remedies" just doesn't play out in practice.'²⁸ A judge stated: 'Legal aid cuts are having real consequences on quality. If you want to sneeze, a quality representative needs permission from the LAA but many people are having to fall back on their communities and it makes it easier for the charlatans.'²⁹

Many people turn to private solicitors or pro bono services. Some people get a good service from private advisors, but ILPA noted: 'There are people who are doing their incompetent best and it is not good enough.'³⁰ Welfare officers and visiting projects often refer people to charities and pro bono law clinics like BID. But this support has been squeezed, as lawyers are already often doing so much unpaid work within legal aid cases; and voluntary sector clinics are struggling to make ends meet.³¹

Some people have no professional legal support. A judge noted that since LASPO: 'We see far more litigants in person. It is shocking when you consider that this is about liberty, a key human right.'³² Many may not make it to court in the first place, but when they do the adversarial nature of the court system is a challenge. BID has a self-help guide for bail applications translated into key languages.³³ But access to legal help organisation websites is frequently blocked.³⁴ In the absence of a statistically representative survey of the legal needs of immigration detainees, we have a limited understanding of the extent of unmet demand. In BID's twice-yearly Legal Advice Survey, rates of representation dropped after LASPO to around 50%, with around 20% private and 30% legal aid; although legal aid representation improved somewhat to around 40% in 2019.³⁵ According to HMCTS data, in 2017-mid 2019, around 20% of bail applicants lacked legal representation – but many without representation will not make it to court in the first place.³⁶

There is limited evidence on the impact of legal assistance. Represented applicants' odds of securing a grant of bail averaged 36% in 2017-19, compared with 21% for unrepresented applicants.³⁷ We do not know what proportion of these outcomes were secured with a legal aid solicitor. More research would be needed to ascertain causality.³⁸ Indeed one might well ask why, given the purported advantages of legal representation, outcomes are not *more significantly* better for represented applicants. It is also quite plausible that it is not just having representation that counts, but having *good* representation: 'In this system... poor quality representation is not going to tip the balance.'³⁹ The impact of (lack of) representation has wider human costs as well as public finance implications in terms of detention estate spending, court time, and scope for unlawful detention compensation claims.

The LAA has engaged with external stakeholders and has made some adjustments. Pre-Covid it agreed to prioritise peer review of immigration legal aid providers that hold IRC contracts; and initiated discussion with the Law Society regarding if/how the IAAS Level 2 qualification might be adjusted to ensure appropriate expertise for detention work. In July, it published an 'Immigration Removal Centre Practical Guide' for DDA firms, underscoring key points, noting that while there are no KPIs for conversion rates contract managers will be reviewing low take-up rates. In September, the DDA scheme shifted from a weekly to a daily rota, which should mean small providers are having to deal with up to 10 instead of 50 potential new clients at one time, making the workload more manageable.⁴⁰

But this is not enough. It is important to note that it is problematic immigration, detention and removal decision-making by the Home Office that makes recourse to the courts so frequent and necessary, triggering the need for legal assistance.⁴¹ But given this context, better access to competent, free immigration advice could help many people resolve their immigration status or make plans to leave the UK, letting people get on with their lives sooner and avoiding costly detention.⁴² Indeed '[T]he first contact some migrants have with a lawyer is after they are detained, at which point it may finally emerge that they have a good case for remaining in the UK.'⁴³ The DDA scheme thus plays a vital role, but there are indications of people falling through the cracks. The analysis above particularly suggests there needs to be (1) some form of check on negative eligibility assessments worked into the system, to ensure that detainees eligible for legal aid are not left high and dry by overstretched providers; and (2) a modification of future IRC contract requirements in terms of firms' capacity and qualification / quality indicators, more realistically to reflect what is needed of detention solicitors, to ensure access to justice.

¹ This submission is excerpted from a draft research paper. The first phase of research in 2017 was supported by the Bar Council of England and Wales.

² M. Fordham, J. Stefanelli, and S. Eser (2013) [Immigration Detention and the Rule of Law](#)

³ Only solicitors with an IRC contract are allowed to take on detained cases as part of their immigration legal aid work; where another immigration legal aid solicitor has already done at least five hours work on a case they may continue to represent them, although distance from the detention centre may make this impractical. The system is different in Scotland, where one removal centre is located.

⁴ LAA Information Governance, Freedom of Information Act Responses 200911028/28.09.2020 and 190917019/15.10.2019, to Mr Rudy Schulkind of Bail for Immigration Detainees

⁵ LAA (2020) [2018 Standard Civil Contract Specification Category Specific Rules: Immigration and Asylum](#)

⁶ DDA surgery rota 10.2017-03.2018 downloaded from www.aviddetention.org.uk 1.10.17.

⁷ DDA surgery rota 10.2017-03.2018 and 09.2018-08.2020 downloaded from www.aviddetention.org.uk 1.10.17 and 24.07.20 respectively.

⁸ e.g. Joint Committee on Human Rights (2019) [Immigration Detention. Sixteenth Report of Session 2017–19](#)

⁹ H. Meghji (2018) [Home Office further amends removals policy](#)

¹⁰ Bail for Immigration Detainees (2020) Autumn 2019 Legal Advice Survey. Research Paper.

¹¹ See also S. Grant (2020) [An overview of immigration advice services in England and Wales](#), J. Wilding (2019) [Droughts and Deserts: A Report on the Immigration Legal Aid Market](#), Public Law Project (2018) [How to Get Exceptional Case Funding for Immigration Cases](#), Amnesty (2016) [Cuts That Hurt: The Impact of Legal Aid Cuts in England on Access to Justice](#)

¹² LAA (2020) [2018 Standard Civil Contract Specification Category Specific Rules: Immigration and Asylum](#)

¹³ Echoing research by S. Grant (2020) [An overview of immigration advice services in England and Wales](#) and J. Wilding (2019) [Droughts and Deserts: A Report on the Immigration Legal Aid Market](#)

¹⁴ LAA Information Governance, Freedom of Information Act Responses 200911028/28.09.2020 and 190917019/15.10.2019, to Mr Rudy Schulkind of Bail for Immigration Detainees

¹⁵ Bail for Immigration Detainees (2020) Autumn 2019 Legal Advice Survey. Page 15.

¹⁶ Interview with barrister 07.09.17

¹⁷ Joint Committee on Human Rights (2019) [Immigration Detention. Sixteenth Report of Session 2017–19](#)

¹⁸ Legal Aid Statistics Oct-Dec 2019, Table 8.2

¹⁹ Except for the Detained Asylum Casework scheme.

²⁰ Interview with solicitor 18.08.20

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- ²¹ Interview with solicitor 23.09.20
- ²² Wilding (2019) [Droughts and Deserts: A Report on the Immigration Legal Aid Market](#), BID (2020)) Autumn 2019 Legal Advice Survey.
- ²³ See also Civil Contracts Consultative Group (2019) '[Civil Contracts Consultative Group \(CCCG\) Minutes v2 13 March 2019](#)' and Wilding (2019) [Droughts and Deserts: A Report on the Immigration Legal Aid Market](#)
- ²⁴ Analysis by Wilding (2019) [Droughts and Deserts: A Report on the Immigration Legal Aid Market](#)
- ²⁵ <https://www.gov.uk/government/publications/contract-terminations>
- ²⁶ Duncan Lewis Solicitors (2018) [Written Evidence from Duncan Lewis Solicitors \(IMD0047\)](#).
- ²⁷ Interview with barrister 15.08.17
- ²⁸ Interview with Bail for Immigration Detainees (BID) 10.08.17
- ²⁹ Interview with judge 03.10.17
- ³⁰ Interview with ILPA 05.09.17.
- ³¹ James and Killick (2012) [Empathy and Expertise: Case Workers and Immigration/Asylum Applicants in London](#); Wilding (2019) [Droughts and Deserts: A Report on the Immigration Legal Aid Market](#)
- ³² Interview with judge 02.10.17a
- ³³ <https://righttoremain.org.uk/toolkit/detention/>; <https://www.biduk.org/pages/95-self-help-materials>
- ³⁴ McKinney (2019) [Immigration Detention Centres Continue to Block Legal Websites](#).
- ³⁵ See Footnote ix on sampling. This is consistent with more ad-hoc evidence cited in Joint Committee on Human Rights (2019) [Immigration Detention. Sixteenth Report of Session 2017–19](#)
- ³⁶ HM Courts and Tribunal Service (2019) Freedom of Information Act Response 191114010 to Mr Rudy Schulkind of Bail for Immigration Detainees
- ³⁷ HM Courts and Tribunal Service (2019) Freedom of Information Act Response 191114010 to Mr Rudy Schulkind of Bail for Immigration Detainees
- ³⁸ Ryo (2018) 'Representing Immigrants: The Role of Lawyers in Immigration Bond Hearings'. *Law & Society Review*.
- ³⁹ Interview with barrister 15.09.17.
- ⁴⁰ DDA surgery rota 09.2020 onwards downloaded from www.aviddetention.org.uk 16.09.20
- ⁴¹ Home Affairs Committee (2019) [Immigration Detention. 14th Report of Session 2017-2019](#)
- ⁴² Grant (2020) [An overview of immigration advice services in England and Wales](#)
- ⁴³ Yeo (2020) *Welcome to Britain: Fixing Our Broken Immigration System*. London: Biteback Publishing. Page 240.