Review into the welfare in detention of vulnerable persons

Submission from Bail for Immigration Detainees May 2015

About Bail for Immigration Detainees
Bail for Immigration Detainees is an independent national charity founded in 1998 to offer free legal advice and representation on bail to immigration detainees and to challenge arbitrary detention. As well as legal casework BID is involved in research, policy and advocacy work. BID's work was recognised in 2010 when it was awarded the JUSTICE Human Rights Award.

SUMMARY

Remit of this inquiry

1. BID regularly deals with cases where people are detained despite there being no prospect of their imminent removal. Seriously mentally ill detainees, survivors of torture and trafficking and unaccompanied children are ending up in detention. The most urgent problem in relation to the detention of vulnerable people is the quality of Home Office decision-making on detention.

2. BID's 2013 research *Fractured Childhoods* provides evidence of cases in which parents were detained despite barriers which meant that it was not possible, lawful or in their children's best interests for the parent to be removed. The study found serious failings in the Home Office's processes for assessing risk of absconding and re-offending, and considering the welfare of children.

3. The Home Office has a history of reluctance to engage with stakeholders on the issue of decisions to detain vulnerable people. This is plainly unacceptable as there are urgent problems which need to be addressed, and stakeholder engagement should form part of this process.

Mental health & securing release from detention

4. Getting released from detention takes longer and is more complex if you are mentally ill.

5. Mental illness makes it more difficult for detainees to seek and receive legal advice on the substantive immigration case but also the fact of ongoing detention.

6. Statutory and process barriers exist which stop vulnerable detainees exercising their right to apply to the immigration tribunal for release on bail.

7. A statutory ground which dates back to the 1971 Immigration Act allows immigration judges to refuse release on bail on the grounds of mental illness.

8. Mentally ill detainees who seek to rely on their ill-health to secure release face additional delays in an already-lengthy process of securing a Home Office Section 4(1)(c) bail addresses while the Home Office seeks medical advice.

9. There are difficulties in identifying mental health support packages in the community to support applications to the immigration tribunal for release on bail, because the Home

Office does not cooperate with this process, despite the duty of care owed to detainees by the SSHD.

Access to immigration legal advice in detention

10. There are unacceptable delays for detainees who wish to obtain an initial appointment at IRC legal advice surgeries. In May 2014 two out of three of the detainees BID spoke to had waited more than one week to see a duty solicitor, and of these one in six had waited three weeks or more.

11. Poor communication by legal advice provider firms after initial appointments leaves nearly 20% of detainees BID spoke to unsure of whether or not they have a legal advisor.

12. Longer-term detainees with arguably the greatest need for legal advice on the fact of their detention are commonly left without ongoing legal advice due to contradictory elements in current legal aid contracts.

13. Transfers around the IRC estate are common, and disrupt the ability of detainees to retain a legal advisor and progress their case.

Detainees held in the prison estate

14. Detainees held in the prison estate suffer from multiple, systemic, and compounding barriers to accessing justice, with an often crippling effect on their ability to progress their immigration case, seek independent scrutiny of their ongoing detention from the courts and tribunals, and seek release from detention, as well as on their physical and mental wellbeing.

15. The manner and conditions of detention of immigration detainees in the prison estate take place entirely outside the scope of the statutory Detention Centre Rules, the Detention Services Operating Standards, and Detention Service Orders.

16. Mechanisms to identify and consider for release vulnerable detainees in IRCs are entirely absent for detainees in the prison estate.

17. Immigration detainees in the prison estate have no routine access to immigration legal advice, unlike detainees held in IRCs who have access to regular surgeries organised by the Legal Aid Agency.

18. Immigration detainees should not be held in the prison estate.

Detention of children

19. BID urges the Government to fulfil the 2010 commitment to end the immigration detention of children. While detention continues, children should be held in Cedars rather than Tinsley House wherever possible, and the Home Office should publish statistics on the numbers of children detained in all locations.

PREAMBLE

Consequences of the restricted Terms of Reference provided for the review by the Home Office

20. The Terms of reference drawn up by the Home Office for this review exclude any examination of Home Office decisions to detain, stating that the review "shall focus on policies applying to those in detention, not the decision to detain".[1] The review is limited to consideration of "the appropriateness of current policies and systems", and may comment on "how policies are being applied".

21. We note with regret that this restriction means that a complete picture of detention will not therefore be available to Sir Stephen Shaw and his Home Office staff, and the review will be unable to consider all factors relevant to the welfare of detainees. The findings of the review on that basis must therefore be considered similarly incomplete and partial. In BID's view this is a missed opportunity for meaningful engagement by the Home Office with many of the concerns raised by the recent parliamentary inquiry into the use of immigration detention in the UK.[2]

22. Immigration detention is not compulsory or a duty on the Home Secretary; it is in the gift of the Home Secretary not to detain in the first place or to release from detention where evidence suggests that continuing detention is harmful. The Home Office's own policy is that detention should be used as a last resort after all alternatives have been properly considered. The evidence is now overwhelming that despite this policy detention is too often used as the default position by the Home Office.

23. As is set out below, the High Court has found in six cases that seriously mentally ill detainees have been detained unlawfully and subjected to inhuman and degrading treatment in breach of Article 3 ECHR.[3] Survivors of torture and unaccompanied children are also ending up in detention.[4] BID is aware of instances where trafficked people have been detained *after* the Home Office has recognised that there are reasonable grounds to believe that they are victims of trafficking.[5]

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[1] Home Office, (2014), '*Review into the welfare in detention of vulnerable persons: Terms of reference*' Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/402206/welfare_in_detention_review_tors.pdf

[2] *The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom. A Joint Inquiry by the All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration*. (2014). Available at https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf

[3] R (S) v SSHD [2011] EWHC 2120; R (BA) v SSHD [2011] EWHC 2748 (Admin); R (HA) v SSHD [2012] EWHC 979; R (D) v SSHD [2012] EWHC 2501 (Admin); R (S) v SSHD [2014] EWHC 50; R (MD) v SSHD [2014] EWHC 2249 (Admin).

[4] For example, in 2013, the High Court found that four torture survivors were detained unlawfully for lengthy periods in the case of *EO & Ors, R (on the application of) v SSHD* [2013] EWHC 1236 (Admin); for further information on the detention of unaccompanied children see: Refugee Council (10/01/2014) Press release: 'Unlawful child detention must end' http://www.refugeecouncil.org.uk/latest/news/3905_unlawful_child_detention_must_end

[5] See Centre for Social Justice (2013) *It happens here: equipping the United Kingdom to fight modern slavery*, p98 for a case study on this which was provided to the authors by BID.

24. BID has dealt with many cases where people are detained despite there being no prospect of their imminent removal and scant evidence of an absconding risk. In the year January – December 2013, the First-tier Tribunal (Immigration & Asylum Chamber) received 12,373 applications for release on bail. Of these, 2717 (22%) were granted, 4538 (37%) were withdrawn, and 4973 (40%) were refused.[6] The fact that significant numbers of people were detained and subsequently released on bail raises serious questions about why these people were detained in the first place.

25. In BID's view the Home Office decision to detain or maintain detention, or conversely to release from detention is often the single thing that makes the greatest difference to the welfare of vulnerable detainees. We sincerely hope that the review can find a creative way to address this fact within the Terms of Reference it has been given.

Decisions to detain parents

26. Examples of problems with Home Office decision-making on detention, which BID sees regularly in our casework, are set out in BID's 2013 report *Fractured Childhoods*.

27. This study examined the cases of 111 parents who were separated from 200 children by immigration detention between 2009 and 2012. Most, but not all the parents were held in immigration detention after completing criminal sentences. In 92 out of 111 cases parents were eventually released, raising serious questions about why they were detained in the first place.

28. Parents in this study were detained for long periods for the purpose of being deported or forcibly removed from the UK. However, data from our small quantitative sample of 27 parents shows that, in most cases, these parents were detained despite barriers which meant that it was not possible, lawful or in their children's best interests for the parent to be removed. In 18 out of 27 cases, directions were never set for the removal of parents during their detention.

29. The Home Office did not contact any of the 53 children in the small quantitative sample of 27 families to ascertain their wishes and feelings before or during their parent's detention. Home Office documents including Monthly Progress Reports, bail summaries and, where these were available, detention reviews, were analysed for the qualitative sample of 12 families. In the majority of these cases, the Home Office failed to take basic steps to safeguard children. In 11 out of 12 cases, the Monthly Progress Reports produced during parents' detention made no mention whatsoever of their children's welfare. Where evidence was presented to the Home Office that children were experiencing extreme distress or neglect, this did not lead to decisions to release parents from detention in any of the cases surveyed.

30. The cases surveyed in this research also revealed very serious problems with the methods used by the Home Office to assess parents' risk of absconding or reoffending.

[6] HM Courts & Tribunals Service, '*Bail management information period April 2012 to March 2013'* and '*Bail management information period April 2013 to December 2013*', produced for HMCTS Presidents' stakeholder meeting.

Within the small quantitative sample of 27 families, post-detention data were collected for the 15 parents who had been released for more than six months at the end of the data collection period. All 15 parents complied with the terms of their release and maintained contact with the Home Office. This was confirmed by their legal representatives in the 14 cases where parents were represented. The BID files of the 12 parents in the qualitative sample showed that the Home Office routinely failed to take into account factors which indicated that parents posed a low risk of absconding, such as long histories of reporting regularly.

31. In 14 out of 27 cases in the small quantitative sample, information was obtained about how the National Offender Management Service had assessed parents' risk of reoffending or risk of harm to the public on release. In 10 cases, parents were assessed by the National Offender Management Service as posing a low risk of reoffending or harm on release, and four parents were assessed as posing a medium risk. However, the Home Office repeatedly argued that these parents needed to be detained as they posed a 'significant' and 'unacceptable' risk.

Recommendations – Separation of families

32. Families should not be separated by immigration detention.

33. While this practice continues, a time limit should be introduced, and detention should be reviewed more frequently.

34. Before individuals enter immigration detention, the Home Office should, without exception, take proactive steps to find out whether they have children, and what the care arrangements for the children are.

35. Family welfare forms should be filled out from the outset of *every* case involving parents and children.

36. Before a parent enters immigration detention, when their detention is reviewed, and when a decision is made about their removal from the UK, a Government-funded best interests assessment should be carried out with their children. This assessment should be carried out by a child welfare specialist who is independent of the Home Office, and shared with parents, children and legal representatives.

37. The Home Office should publish management information on the numbers of families who are separated by immigration detention.

38. The Home Office should take steps to facilitate contact between parents in detention and children outside detention, by providing financial assistance where required so that children can visit parents in detention and speak to them on the phone.

39. The Home Office should urgently address the way that caseowners are seeking and using risk assessment information on foreign national ex-offenders from the National Offender Management Service. Caseowners should always seek such information where

it is available, and should no longer substitute their own opinions for assessments produced by the National Offender Management Service.

Home Office stakeholder engagement

40. The Home Office has a history of reluctance to engage with stakeholders on the issue of detention, including the detention of vulnerable people. In January 2011, the Home Office decided to close down the Detention User Group, which was the main Home Office stakeholder meeting on detention. In 2012, the Home Office also disbanded the Detention User Group Medical Sub-Group, at which matters including mental health had been discussed. BID welcomes the fact that the new National Asylum Stakeholder Forum Detention and Enforcement Sub-Group has recently been established and provides an regular arena for discussion of operational issues relating to detention. However, we are troubled that this forum is not attended by Home Office officials with responsibility for policy on decisions to detain, as this is our primary area of concern.

41. In the intervening years since 2011, there have been long periods where the Home Office has refused to engage with stakeholders on matters of serious concern in relation to the detention of vulnerable people. For example, since 2013, BID has repeatedly requested as discussion on the issue of mental health in detention at various stakeholder meetings including, most recently, the NASF Detention and Enforcement Sub-Group meetings in August 2014 and January 2015. The Home Office has variously cancelled meetings or refused to have this item on the agenda. For several years, there has been an urgent need for the Home Office to address the problems which have led to repeated instances of inhuman and degrading treatment. As part of this, the department ought to have been in ongoing consultation with stakeholders, including organisations with medical expertise, about how improvements could be made.

Recommendations – Home Office stakeholder engagement

42. The remit of the National Asylum Stakeholder Forum Detention and Enforcement Sub-Group should be expanded to include policy matters, including decisions to detain.

43. The Home Office should routinely engage with and consult stakeholders on their plans to address the unlawful detention of vulnerable people.

MENTAL ILL HEALTH IN DETENTION: GETTING RELEASE IS MORE DIFFICULT

Getting released from detention is harder if you are mentally ill

44. Putting to one side Home Office decisions to detain and maintain detention, which are out of scope of this review, somewhat counterintuitively it is BID's experience that mental illness may make it more difficult for detainees to seek and obtain release, or get released in a safe way. BID would like to highlight the additional barriers to release from detention faced by people who are mentally ill, with or without legal advice or representation. Once a person is in detention, it can be significantly more complex, and take more time, to secure their release if they are severely mentally ill, for reasons that are directly related to their illness.

45. BID is a legal charity not a specialist healthcare organisation. However, as a matter of course a proportion of our client group is mentally ill, and some are severely mentally ill.[7] BID's legal managers routinely work with clients who are distressed and anxious as a result of being detained or being refused release, or who self-harm. Most of our clients are longer term detainees (for BID's purposes any period over six months detention), and many are ex-offenders, who are of course as susceptible to mental illness as anyone else.

46. Some of our detained clients may have entered detention with a mental health diagnosis, only for their condition to worsen either through failure of the Home Office and healthcare contractors to properly recognise and manage their condition, or the effect of long-term indefinite detention on their mental health, or both. Others may develop mental distress, mental ill-health, or begin to self-harm while in detention.

47. It is not credible to view detention on an indefinite basis as a therapeutic environment. As the Royal College of Psychiatrists' Working Group on Mental Health for Asylum Seekers makes clear, "detention centres are not designed to be therapeutic environments" (RCPsych, 2012: 8).[8] Nor are detention centres "appropriate therapeutic environments to promote recovery from the mental ill health due to the nature of the environment and the lack of specialist mental health treatment resources" (RCPsych, 2012: 10). However, the Home Office currently takes the view that it is acceptable to detain even severely mentally ill people, so long as their condition is being "satisfactorily managed" in detention".[9] Since the introduction by the Home Office of a new policy in 2011 there have been six cases[10] in which the Home Office has been found by the courts to have detained severely mentally ill people in a manner that was both inhumane and degrading (in breach of their Article 3 rights) and unlawful. Public law firms report greater numbers of recent similar cases which are settled by the Home Office before they reach court. No such findings have been made in the UK in respect of custody in the prison estate.

48. The power to detain is not a duty but merely an option for the Home Secretary, but under current practice even severely mentally ill detainees cannot rely on the Home Office releasing them from detention, even where their continued detention has been found by an independent doctor to be likely to lead to further deterioration in their mental state. As a result, in the absence of automatic, regular judicial oversight of immigration detention

[7] In 2010 BID and the Association of Visitors to Immigration Detainees (AVID) jointly set up the Mental Health in Immigration Detention Project, a policy initiative that aimed to secure the humane and lawful treatment of immigration detainees The project was started in 2010 in response to policy changes made by the UK Border Agency, without consultation, which had the effect of widening the scope for detention of certain categories of vulnerable people. See Ali McGinley & Adeline Trude, (2012), '*Positive duty of care? The mental health crisis in immigration detention: A briefing paper by the Mental Health in Immigration Detention Projec*t'. Available at http://bit.ly/1DJmpoC

[8] The Royal College of Psychiatrists, (2012), *'Position statement on detention of people with mental disorders in Immigration Removal Centres'*.

[9] This policy is laid out in Home Office, '*Enforcement Instructions and Guidance, Chapter 55 Detention & Temporary Release'*. See section 55.10. Persons considered unsuitable for detention. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/400022/Chapter55_external_v19.pdf

[10] R (S) v SSHD [2011] EWHC 2120; R (BA) v SSHD [2011] EWHC 2748 (Admin); R (HA) v SSHD [2012] EWHC 979; R (D) v SSHD [2012] EWHC 2501 (Admin); R (S) v SSHD [2014] EWHC 50; R (MD) v SSHD [2014] EWHC 2249 (Admin).

in the UK, moderately and severely mentally ill detainees are responsible for seeking legal advice on the fact of their detention, and must initiate their own applications for release from detention. BID's experience of representing detainees at bail for many years is that perhaps counterintuitively, getting released from detention via a bail application to the immigration tribunal is more difficult for mentally ill detainees.

Mental illness makes it more difficult for detainees to seek and receive legal advice

49. Mental illness makes it more difficult for detainees to seek and receive legal advice for the following reasons:
    - BID's legal managers and caseworkers report that it is significantly more difficult to advise and represent someone in detention who is mentally ill.

    - Mental illness and mental distress may make communication more difficult. It can be harder to obtain documents or take instructions from a client with disordered thinking.
    - It can take more time to gain someone's trust, and their capacity to instruct a legal advisor may be difficult to determine.

    - Mental illness can make it more difficult for detainees to give statements, and more challenging for bail applicants to appear via videolink at their bail hearings.

    - Where mentally ill clients have been segregated as a means of behaviour control, segregation can complicate legal work to obtain release, and stops detainees from accessing legal surgeries to find a legal advisor.

    - Where a detainee's mental state deteriorates as a result of detention, or because their mental illness has not been identified or "satisfactorily managed" in detention, BID caseworkers report that it becomes harder for people to help themselves progress their case (for example making their own bail application) when we are unable to represent them and they must initiate their own application for release.

    - Ironically, actions that might result in release from detention such as applications for bail can create a cycle of expectation and disappointment that can be impossible to bear for long term detainees, affecting their willingness to take further steps towards their release.

Statutory and process barriers to vulnerable detainees exercising their right to apply for release on tribunal bail in a timely fashion.

50. BID's legal managers report that where a detainee with severe mental illness seeks to rely on the fact of their ill health as part of an application for release from detention, the fact of their illness adds complexity and delay, meaning that it can take several weeks longer for them to be in a position to lodge an application for release on bail.

51. In the provision of bail addresses by the Home Office (Section 4(1)(c) bail support)

- A significant proportion of detainees are reliant on a grant of Home Office Section 4 bail accommodation before they can lodge a bail application with the First-tier Tribunal (IAC). In 2013 53% of BID's represented clients who were bailed went to live in Home Office accommodation.

- In BID's experience, detainees with severe and enduring mental illness may become estranged from family or friends who could otherwise stand surety at bail or offer bail accommodation on release; their illness or behaviour arising from their illness may have alienated those who are closest to them. Detainees in this position will often be reliant on Home Office Section 4(1)(c) bail accommodation if they wish to seek release on bail.

- The Home Office routinely takes weeks or months to provide a Section 4 (1)(c) bail address in certain cases.[11]

- Mentally ill detainees reliant on Home Office bail accommodation typically face additional delays while the Home Office seeks its own medical advice on what type of accommodation is most suitable. The Home Office has no policy on the timescale for medical input to be concluded. In BID's experience the provision of medical advice can take several weeks to conclude.

- Enquiries made by the Home Office Section 4 bail team and the medical advisor are not directed, so far as we can see, to ensuring the ongoing duty of care of SSHD to detainees in her custody who are seeking release or ensuring that if released by the FTT it will be in a safe manner. Typically the Home Office does not take proactive steps to liaise with local mental health services in the Section 4 dispersal area of the UK, where the individual is almost certainly not previously known to local mental health services.

- Very ill detainees who need a package of support and treatment on release must therefore wait even longer than detainees without support and treatment needs before they can lodge applications with the First-tier Tribunal (IAC) for release on bail.

52. The statutory ground for refusal of immigration bail on ground of mental illness, dating back to 1971 Immigration Act.

- Para 30(2), Schedule 2 of the Immigration Act 1971 contains a statutory ground for refusing release on bail on the basis that a tribunal judge finds that "the applicant is suffering from mental disorder and continued detention is needed in his interests or for the protection of others".[12]

[11] See Bail for Immigration Detainees, (2014), '*No place to go: delays in Home Office provision of Section 4(1)(c) bail accommodation*'. Available at http://bit.ly/1DqTEQL

[12] This statutory ground is one of 5 listed on the first page of the standard FTTIAC 'Refusal of Bail' notice.

- This statutory restriction on the grant of bail implicitly relies on the assumption that the First-tier Tribunal will be provided by the Home Office with case-specific evidence on treatment options for a mentally ill detainee both in detention and outside detention. In BID's experience this evidence is rarely provided to the FTT by the Home Office, despite the ongoing duty of care of the SSHD to those in her custody until release, and must instead be provided by any representative for the detained applicant.

- This statutory ground is relied on by First-tier judges in only a small number of cases each year known to BID. Clearly certain compassionate FTT judges consider it to be in the best interests of the individual to be refused release using the statutory mental health ground. Indeed, that is the spirit of this ground. This is surely not what was intended by parliamentarians when the Immigration Act 1971 was drafted, nor would it be now. There can be no justification for keeping a person in detention on the grounds of their ill health where, were it not for that factor, the applicant would be released. In BID's view the statutory ground for refusal of bail due to mental illness should be repealed.

- It is entirely inappropriate to assume that the Home Office is capable of providing better mental health treatment in IRCs than that available in the community, in the light of the six findings of Article 3 breaches by the Home Office in detaining severely mentally ill detainees such that their continued detention was found to constitute inhuman and degrading treatment.

- The RCPsych Working Group on Asylum Seekers and Migrants has expressed an interest in providing expert training for First-tier judges hearing bail cases on mental health treatment currently available in the community. BID has been in correspondence (2013 & 2014) with the FTT President about this expert training, but it is not known whether such training has yet taken place.

53. Difficulties in identifying mental health support packages in the community to support applications to the FTT for release on bail – no duty of care exercised by SSHD

- The Home Office always opposes applications for release on FTT bail. Where release is being sought in part on mental health grounds the Home Office will typically state in opposing release that "*it is not clear what medical treatment will be available for them on release*", or words to that effect. In a number of the bail cases where BID provides full legal representation, where a client has severe mental ill-health we often engage in significant amounts of investigative work and correspondence with clinicians and local support agencies in advance of a bail hearing to line up support and treatment in order to reassure FTT judges that there will be continuity of care for the individual.

- Bail applicants who are severely mentally ill are, in BID's experience, unlikely to be able to make these arrangements and then marshal this information themselves in order to put it before the Tribunal.

- Under the new National Health Service (Charges to Visitors) Regulations (2015) provisions5 which came into force in April 2015, there will no longer be free secondary healthcare for severely mentally ill detainees on release to Section 4(1)(c) support or on Temporary Admission, unless other exclusions apply. This is an illogical, ill-thought through, and harmful measure on the part of the Department of Health. It will in BID's view be significantly more difficult for detainees to satisfy First-tier judges in this regard.

- If bailees are no longer eligible for free secondary healthcare for severe mental ill-health it will be difficult for legal representatives to put together such a support package. Again, bail applicants who are severely mentally ill are, in BID's experience, unlikely to be able to marshal this information themselves.

Recommendations in relation to mental health and detention

54. An end to the detention of people with mental health problems under immigration powers

55. The statutory restriction on the grant of bail that relates to the mental health of the bail applicant should be repealed. Immigration detention should never be used for the purpose of medical treatment.

56. Home Office policy (and practice) in relation to the detention of people with mental health problems, contained in Enforcement Instructions & Guidance Chapter 55.10, should be revised to reflect that immigration detention is not an appropriate place for people with mental health problems.

57. The Home Office should introduce into policy guidance a maximum timescale for the conclusion of medical advisor input into applications for Section 4(1)(c) bail accommodation so as to reduce time spent unnecessarily in detention.

58. Foreign national residents in Home Office Section 4 (1)(c) bail accommodation should not be charged for secondary healthcare. Bailed detainees should retain the exclusion from charges for secondary healthcare, as currently enjoyed by residents of Home Office Section 4(2) accommodation under the new National Health Service (Charges to Visitors) Regulations (2015) provisions.

IMMIGRATION DETAINEES IN PRISONS: ADMINISTRATIVE DETENTION WITHIN A CRIMINAL JUSTICE FRAMEWORK

59. The Terms of Reference[13] of this Review make no reference at all to immigration detention in the prison estate: a worrying omission given that the number of detainees held in the prison estate reached 1214 or around 30% of the entire detained population as recently as December 31 2013.[14] We therefore welcomed your comment at a meeting with medical and legal NGOs on 30th March 2015 to the effect that while detention in prisons is not mentioned in the Review's Terms of Reference, in your view that does not mean these detainees will not be included in the scope of the inquiry.

60. At that meeting BID pointed out that in relation to the hundreds of immigration detainees held in the prison estate this Review cannot consider "the appropriateness of current policies and systems", nor "comment on how policies are being applied". For immigration detainees held in prisons it is not a question of polices that are not functioning, there simply are no policies.

Instruments governing the conditions and treatment of immigration detainees in the IRC estate

61. The prison estate is used by the Home Office as a place of immigration detention entirely outside the scope of its published detention policies and guidance, namely the statutory Detention Centre Rules, the Detention Services Operating Standards, and Detention Service Orders.

62. We make the overarching point that in BID's view prisons are not appropriate places to hold immigration detainees, including those who have previously served a custodial sentence. This view is one which is shared by HM Prison Service[15], by HM Inspectorate of Prisons, and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).[16]

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[13] The Home Office Terms of Reference make reference to detention in immigration removal centres, short term holding facilities, and port holding rooms, but not Border Force custody suites, as being in scope of this Review. See Home Office, '*Review into the welfare in detention of vulnerable persons: terms of reference*'. Available at http://bit.ly/1cICGSr

[14] At 31 December 2013, 2,796 people were held in immigration detention in immigration removal centres, in short-term holding facilities (STHF), and in pre-departure accommodation (PDA) (Source: Home Office 'Immigration statistics, October to December 2013'. Published 27 February 2014. Available at https://www.gov.uk/government/publications/immigration-statistics-october-to-december- 2013/immigration-statistics-october-to-december-2013#detention-1). A further 1214 people were being held as immigration detainees in the prison estate (Source: 9Hansard 9 April 2014, c249W.)

[15] The National Offender Management Service (NOMS)/ HM Prison Service view, as outlined in Prison Service Instruction 52/2011 Immigration, Repatriation and Removal Services' (2011) is that: "*Immigration detainees should only remain or be moved into prison establishments when they present specific risk factors that indicate they pose a serious risk of harm to the public or to the good order of an Immigration Removal Centre, including the safety of staff and other detainees, which cannot be managed within the regime applied in Immigration Removal Centres. This regime derives from Detention Centre Rules and provides greater freedom of movement and less supervision than prisons, as well as access to the internet and mobile telephones*" (Source: NOMS, (2011), 'Prison Service Instruction 52/2011 Immigration, Repatriation and Removal Services'.

[16] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its standards on the treatment of persons deprived of their liberty sets out its position that holding immigration detainees in prison is "fundamentally flawed". "In those cases where it is deemed necessary

63. In January 2014, HM Inspectorate of Prisons stated at BID's AGM[17] that an inspection expectation for establishments in the prison estate in the UK is that: "Immigration detainees held solely under administrative powers are not held in prisons other than in exceptional circumstances following risk assessment" (HMIP, 2014).[18] In the case of HMP Pentonville which held 67 immigration detainees in November 2013:[19]

> "*The prison was not an appropriate place in which to hold a large number of immigration detainees*" (HMIP, 2013: 6)[20], "*S20.. …Overall, Pentonville was not an appropriate place in which to hold immigration detainees*" (HMIP, 2013:15).[21]

64. Detainees held in the prison estate suffer from multiple, systemic, and compounding barriers to accessing justice, with an often devastating effect on their ability to progress their immigration case, seek independent scrutiny of their ongoing detention from the courts and tribunals, and seek release from detention, as well as on their physical and mental wellbeing.

65. Detainees held in the prison estate who are vulnerable face even greater barriers to seeking and achieving release if they have not been removed from the UK within a reasonable period. The additional barriers to seeking and achieving release on tribunal bail that we have outlined above are compounded by the extreme difficulties in communication that immigration detainees held in the prison estate are subject to.

Mechanisms to identify and consider for release vulnerable detainees in IRCs are entirely absent for detainees in the prison estate

66. Any comparison of the treatment of immigration detainees in the UK removal centre estate, which is managed by the Home Office, and those detainees held in the prison estate, which falls under the overall management of the National Offender Management Services, must consider the operating instructions relied on daily by managers and custodial staff in these establishments. Such instructions and guidance are entirely different, and reflect the overall control of these two separate custodial estates, the one operating within the criminal justice system and the other providing custody for administrative purposes.

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to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel." (Council of Europe, (2013), 'CPT standards. CPT/Inf/E (2002) 1 - Rev. 2013 English', Strasbourg. Available at http://www.cpt.coe.int/en/documents/eng-standards.pdf 65)

[17] BID Annual General Meeting, Tuesday January 21st 2014, London. See http://bit.ly/1nKZz6c

[18] HM Inspectorate of Prisons, PowerPoint presentation 'Immigration detainees in prisons', given at BID's AGM January 2014, slide 3.

[19] Source: Home Office management information provided to NASF stakeholders.

[20] Available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-andyoi-inspections/pentonville/Pentonville-2013.pdf

[21] HM Inspectorate of Prisons, (2013), 'Report on an unannounced inspection of HMP Pentonville by HM Chief Inspector of Prisons 27 August–6 September 2013'. Available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoiinspections/pentonville/Pentonville-2013.pd

67. Conditions of immigration detention in the immigration removal centre estate are governed by various instruments. The Detention Centre Rules (2001), a statutory instrument laid before Parliament, sets out rules governing admissions and discharge, welfare and privileges, religion, communications, healthcare, maintenance of security and safety (control or restraint, use of force, temporary confinement), duties of custody officers, access to detention centres, and visiting committees. These Rules are supplemented by a set of Detention Services Operating Standards (2002) [22] which set out minimum auditable standards across a wide range of services, procedures, and functions of the operation of an immigration removal centre.[23]

68. Detention Service Orders (DSOs) are instructions outlining procedures to be followed by Home Office UK Visas and Immigration staff[24], for example Detention Service Order 06/2013 'Reception and Induction Checklist and Supplementary Guidance'. These instructions are updated from time to time, though we note that some DSOs, for example DSO 10/2007 'The issuing of travel warrants to detainees attending asylum and immigration tribunals has not been updated for eight years, and are of limited value because the IRC and tribunal hearing centre infrastructure and practice to which they relate has changed significantly since the date of publication eight years ago.

69. A number of HM Prison Service Instructions (PSIs) and Orders (PSOs) relate to the criminal justice aspects of foreign nationals in the prison estate, and prison staff liaison with officers of the Home Office (including UKBA and its predecessors), but these instructions have not been written to cater to the unique status of immigration detainees facing lengthy stays, possibly of some years in a few cases, in the prison estate. Regardless of any contractual agreement between NOMS and the Home Office governing the use of beds in the prison estate, the work of prison governors and prison staff is governed by Prison Service Instructions and Orders, and governors and prison staff are accountable to NOMS and the Ministry of Justice not the Home Office.

70. Clearly DSOs cannot be binding on prison staff in their management of immigration detainees in the prison estate as their work practice is instead governed by Prison Service Orders and Instructions. However, BID considers that indicative – rather than binding – guidance for prison staff in Detention Service Orders would help clarify where responsibility lies within the Home Office in such circumstances, and could provide appropriate assistance to prison staff in prisons both with and without on-site Home Office staff.

Detention Services Order 10/2008 Charges for copies of Medical Records.

A number of BID's clients held under immigration powers in prisons are being charged £50 by prison staff to obtain their medical records for the purposes of a bail hearing.

[22] Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257352/operatingstandards_manual.pdf

[23] For example, detainees' cash, detainees' property, disabled detainees, female detainees, and handling a death in detention.

[24] An incomplete list is available at https://www.gov.uk/government/collections/detention-service-orders

The Home Office DSO on charging for medical records makes it clear that a standard charge of £10 applies in the IRC estate, whether the request is made by a detainee, their legal representative, or an independent clinician.

Detainees in prisons who are unrepresented or otherwise unable to pay £50 for a copy of their medical records will be unable to offer evidence of their mental state and current healthcare needs in a bail application to the immigration tribunal, putting them at an obvious disadvantage.

Indicative – rather than binding – guidance to prison staff in a DSO may assist detainees in getting medical records from prison staff at a reduced rate if those staff understand that it is the intention of the Home Office that detainees should only pay £10 for records.

71. Practices that are fair and just in the context of a custodial sentence may be unfair and even unlawful when applied to individuals held in administrative detention that could, or may need to be, ended at any point at the discretion of the SSHD for a variety of reasons. Conversely the absence of the policies and practice prevailing in IRCs may lead to unlawful practices in prisons.

72. For example, Rule 35 of the Detention Centre Rules 2001, on paper at least, is an essential safeguard for vulnerable people held in immigration removal centres, including those who have been tortured. Rule 35 requires that the doctor at any immigration removal centre "shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention." Rule 35 also requires that "the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State" and that a copy of the Rule 35 report be sent to the Secretary of State "without delay".[25]

73. Unfortunately, despite the existence of the Rule 35 safeguarding mechanism, there is evidence of systematic failure of the operation of the Rule 35 process in IRCs[26] , and there has been criticism of the Home Office on this issue from, among others, HM Inspectorate of Prisons[27], as well as a number of court judgments.[28] Notwithstanding the effects of the Rule 35 process in IRCs, there is no requirement for an equivalent process in the prison estate, meaning that vulnerable immigration detainees have very little

[25] Home Office Detention Services Order DSO 17/2012 states at paragraph 34 that the Home Office case owner has two working days to respond to a Rule 35 report and must engage with the concerns raised and give reasons for maintaining detention or ordering release. The case owner's name and team must be clearly identified. The medical practitioner should be sent a copy of the Home Office response (para 26) and if the Rule 35 report is considered deficient in some way, clarification must be sought from the medical practitioner (para 32).

[26] See for example, Medical Justice, (2012), "The Second Torture": the immigration detention of torture survivors'. Available at http://www.medicaljustice.org.uk/about/mj-reports/2021-the-second-torture-theimmigration-detention-of-torture-survivors-22052012.html

[27] HMIP and ICIBI, (2012). 'The effectiveness and impact of immigration detention casework: A joint thematic review by HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration'. Available at http://www.justiceinspectorates.gov.uk/hmiprisons/wpcontent/uploads/sites/4/2014/04/immigration-detention-casework-2012.pdf

[28] For example, EO & Ors, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 1236 (Admin) (17 May 2013). Available on BAILLI at http://www.bailii.org/ew/cases/EWHC/Admin/2013/1236.html

chance of being identified and brought to the attention of Home Office caseowners for consideration of their release from administrative detention. Such detainees held in prisons may continue to be detained in breach of Home Office policy.

74. The identification and consideration for release of ill and vulnerable immigration detainees held in prisons is but one aspect of detention conditions that is not currently subject to detention-specific guidance. It is not at all clear to BID that the Home Office properly considered the possibility of contradictions between its own guidance and instructions and the NOMS instructions relied on by prison governors and staff, or ensured that safeguards for vulnerable and ill detainees held in prisons are in place, prior to its decision to use the prison estate to house hundreds of immigration detainees regardless of their risk level, and often in isolated conditions.

Detainees on hunger strike transferred to prison not hospital

75. Home Office policy on detainees who are refusing food or fluids[29] ('hunger strikers') is that at the point at which an individual is deemed to require inpatient treatment they may be considered for transfer to a prison medical facility.

> "*Such a transfer may be appropriate or necessary for clinical reasons in order to access the more extensive medical facilities available in the prison estate and to ensure the better care and management of the individual in question*." (Home Office, 2013: para 60).

76. There is no reference anywhere in this policy document of transfer to a hospital for assessment and medical treatment. Prison is not a suitable environment for any immigration detainee, let alone a person who is refusing food or fluids and has reached a point where they require inpatient medical care. BID's experience with clients who have been on hunger strike is that transfer to a prison regime introduces a set of restrictions on communication that delay and frustrate timely communication with legal advisers, the courts, and the Home Office.

77. Given that the use of detention by the Home Secretary is optional not a duty, it is not clear why custody must be maintained in such extreme cases.

Challenge to the Home Office policy of using prisons as a place of immigration detention

78. In the recent case of Idira[30] before the High Court the claimant challenged the legality of the Home Office policy of routinely holding immigration detainees in prisons without individual risk assessment and "Operation 1000" effective between November 2012 to Spring 2014. The High Court found the approach of the Secretary of State was a "systemic" public law error, and that the Secretary of State's reason for this policy was

[29] Home Office, (2013), '*Detention Services Order 03/2013: Food and Fluid Refusal in Immigration Removal Centres: Guidance'*. See paragraph 60. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257740/fluid-food-refusers.pdf

[30] R on the application of Idira v Secretary of State for the Home Department [2014] EWHC 4299

"Nothing to do with assessment of risk or the interests of immigration detainees, but everything to do with administrative convenience"[31].

79. In his judgment Mr Justice Jay commented that

> "*A policy which either systematically or invariably...has a consequence of holding those in the Claimant's position in prison, rather than in an IRC, cannot be properly justified. Moreover, the implementation of such a policy severs the requisite link which must exist in cases such as these to justify detention under Article 5"*[32]

80. He declined to make a declaration that the policy was unlawful in the circumstances of the Claimant's case as the Claimant had been released. Mr Justice Jay granted permission to appeal to the Court of Appeal in order that the Article 5 issue can be further considered.

Recommendations in relation to immigration detention in the prison estate

81. Immigration detainees should not be held in the prison estate.

82. For as long as detainees continue to be held in prisons we make the following recommendations:

83. The Home Office should include indicative content in relevant DSOs for the purpose of reference for prison staff in establishments where immigration detainees are held. Ideally these would be circulated via NOMS to establishments holding detainees, but in any case this provision would allow detainees or their legal representatives to point prison staff to the guidance.

84. People who are held in IRCs under immigration powers and who are refusing food or fluids (on 'hunger strike') should never be transferred by the Home Office into the prison estate for inpatient care, but should rather be released from detention and transferred to hospital.

ACCESS TO IMMIGRATION LEGAL ADVICE IN DETENTION

85. The use of immigration detention - the deprivation of liberty for administrative purposes - now forms a key plank of immigration enforcement policies of successive UK governments. But the use of immigration detention in the UK without any upper time limit has never been accompanied by the provision of adequate immigration legal advice for all detainees throughout the period of their detention.

86. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) introduced a new round of cuts to immigration legal aid, removing from scope all general immigration

[31] Ibid. paragraph 26.
[32] Ibid. paragraph 75.

work, including preparing and presenting claims to the Home Office, and appeals including deportation appeals. In 2015, only asylum and asylum appeals, immigration bail, detention-related matters, and certain immigration Judicial Review work remains within scope of legal aid.

BID's detainee surveys on access to legal advice in detention

87. Since November 2010 BID has been asking detainees held in the UK to tell us about their experiences of seeking immigration legal advice during their time in detention. Since then we have carried out ten surveys, one every six months, across the IRC estate, a total of nearly 1500 separate interviews. Summary findings from BID's first eight IRC surveys can be found at Annex A of this submission.[33]

88. Our surveys reveal barriers to immigration legal advice that we believe have the greatest potential to affect the ability of immigration detainees to progress their case and access the safeguards against unlawful detention offered by the courts and immigration tribunal. All but one of these barriers are a function of current contractual arrangements and funding levels of legal aid in the UK.

The proportion of IRC detainees who have an immigration advisor has fallen since the LASPO cuts

89. BID's survey findings show that across the IRC estate the proportion of those interviewed for the survey who told BID that they have a legal advisor grew steadily from 51% in November 2010 to 79% in November 2012, before dropping to 43% in May 2013 (immediately after the introduction of LASPO cuts to legal aid), with a small rise subsequently to 55%. Since November 2010 the overall trend in the level of detainees interviewed who have a legal representative is downwards.

The proportion of detainees with a publicly funded (legal aid) immigration advisor has fallen since LASPO

90. Prior to the devastating reduction in scope of public funding for legal advice introduced via LASPO which came into force in April 2013, between 68% and 75% of respondents to BID's survey who had an immigration advisor were in receipt of legal aid. Since April 2013 the proportion of survey respondents held in IRCs with a legal advisor and who are in receipt of legal aid has dropped. In November 2013 just 52% of detainees interviewed for BID's survey who had a legal advisor were in receipt of legal aid, while in May 2014 the proportion was 54%. Both of these are the lowest rates of publicly funded legal representation since BID began these surveys.

[33] BID's quantitative survey findings should not be taken as representative of the position of the detained population as a whole across the IRC estate, but only of BID's client group at the time of the survey. We do however make greater claims for the qualitative findings of the survey, and believe they represent the view of detainees on seeking and receiving immigration advice in the IRC estate.

Fee paying clients often have insufficient means to pay for enough immigration advice to progress or conclude their case

91. Some detainees are clearly able to find and pay for immigration legal advice quickly after being detained. Others who are either unaware of legal aid, or who have at some point failed the statutory means test for legal aid advice, must pay for immigration advice. Survey responses suggest that an obvious but fairly brutal equation is at play: the less money you can muster the less immigration advice can be purchased, with obvious implications for outcomes. Essential disbursements (e.g. expert reports) and evidence collection may be unaffordable for detainees with few means. This handicaps the instructed legal advisor, rendering the advice and representation given partial at best, less than effective, less likely to fully resolve any legal matter, and generally unsatisfactory for all parties including the Home Office.

> *"It was hard to get a solicitor, and… I had to settle for a private solicitor rather than a solicitor using legal aid. As a result of this I cannot afford a second bail application".*
>
> *"I ran out of money, I had £700"*

92. A refusal of legal aid in the past does not of itself imply that a detainee will be refused again on an application of the means and merits tests, but we suspect this point is not universally understood by detainees. IRC staff acting as gatekeepers for legal surgery appointments may be cultivating such thinking by refusing appointments to detainees who have already had an appointment, or who have had a legal representative in the past (see below).

Waiting times are too long for a legal surgery appointment

93. Waiting times for detainees to meet with a solicitor are too long, and despite the incremental addition of additional surgery slots in many of the removal centres by the Legal Aid Agency and provider firms, too many detainees still report having to wait for more than one week to see a solicitor in the legal advice surgery.

94. When asked "how long did you have to wait to get an appointment?", in May 2014 60% of the detainees BID spoke to had waited more than one week, and of these respondents 26% had waited two weeks or two weeks to date (i.e. they were still waiting when we spoke to them), while 13% had waited three weeks or three weeks to date to see a solicitor. In BID's surveys the trend has been towards a gradual increase in the number of people waiting for a legal surgery appointment for over one week. In May 2011 when we first asked this question only 32% of respondents had waited more than one week for an appointment.

Delay in getting DDA appointment	Survey 2 May 2011	Survey 3 Nov 2011	Survey 4 May 2012	Survey 5 Nov 2012	Survey 6 May 2013	Survey 7 Nov 2013	Survey 8 May 2014
Respondents who waited more than one week for a DDA appointment (all delay periods)	32%	29%	47%	61%	69%	62%	60%
Of these, % delayed 2 weeks or 2 weeks to date	11%	12%	20%	31%	38%	30%	26%
% delayed 3 weeks or 3 weeks to date	10%	4%	15%	19%	21%	10%	13%
% delayed 4 weeks or 4 weeks to date	6%	8%	8%	8%	8%	3%	3%
% delayed more than 4 weeks	4%	5%	4%	5%	2%	2%	1%

IRC staff reported to be preventing detainees from getting appointments at legal advice surgeries

95. Detainees tell us that they are sometimes prevented from having an appointment at all by welfare or library staff at the IRC. Some IRC staff are reported to be triaging the need for immigration legal advice in individual cases, making ill-informed and arbitrary decisions that could have life changing consequences for individual detainees.

> *"I spoke to the welfare officer [at Colnbrook IRC] who looked at my case and said I can't be helped by a legal aid lawyer as my case is not an asylum case"*

> *"When 'Jane' put her name down to see a solicitor [at Yarl's Wood IRC] the officer in charge of arranging the meetings did not arrange one for her as he did not feel she was eligible due to the advice she had previously been receiving from Wilson & Co.".*

96. In other cases, IRC staff are preventing detainees from having legal surgery appointments because they had already had a legal surgery appointment on an earlier date. This can never be acceptable. Library staff, welfare officers and other staff employed by the IRC management company should not question detainees about their immigration case and should never filter or triage requests for an appointment for the legal surgery. Only solicitors and relevant staff from provider firms attending the legal advice surgeries can determine whether the presenting detainee i) has an immigration or detention matter requiring advice and ii) apply the legal aid means and merits test to the specific case and individual.

Very poor communication by legal providers leaves detainees unsure whether or not they have a legal advisor

97. A notable feature of more recent BID surveys on access to legal advice in IRCs has been the proportion of respondents who have had a 30 minute appointment with a provider firm at the legal surgery in their IRC, but still do not know whether or not they have a lawyer. In May 2014, 19 % of those detainees we interviewed were still waiting for their initial appointment or, if they had already attended a legal surgery appointment

were still uncertain whether they had been taken on as a client or not by the contracted advice provider, or were waiting to hear back. Nearly one in five detainees we interviewed in May 2014 was therefore in limbo.

98. Detainees increasingly describe how they never hear again from the firm they met in the legal surgery, or they don't hear back for weeks or months. When they do hear they are generally told their case will not be taken on. It may take so long to hear back from the firm they first saw that a detainee will approach a second or even third provider firm via the legal surgeries, only adding to the capacity and delay problems at surgeries. Detainees report that they have no contact details for and therefore no means of contacting the firm they saw in the surgery if they don't hear back from them.

> *"I had an appointment with a female lawyer from [provider firm]. She said my case looked good and she would return to visit me with an interpreter - but she never came back. I thought she had taken my case, and tried to contact her repeatedly, but got no response - no call, letter, nothing. It's been 6 months since I saw her. It's happened to me twice now, with two different lawyers".*

99. The consequences of this poor communication by provider firms include:
    a) For the individual's substantive case or the fact of their detention: waiting in limbo to hear back from a provider firm may stop detainees from pursuing other options, such as persuading family and friends to try to find some funds for at least a minimum of legal work (however unsatisfactory this is), attempting to mount an appeal themselves (equally unsatisfactory), or even approaching another provider at the legal advice surgery DDA (this may in any case be required if the provider they met at the surgery has reached full capacity at that time).
    b) For the mental health of the detainee: Uncertainty may trigger or exacerbate anxiety or depression, and undermine resilience.
    c) Potentially wasted public funds on extended detention where resolution of a substantive case or release could have been achieved at an earlier stage.
    d) Congested legal advice surgeries.

Transfers around the IRC estate affect ability to retain a legal advisor & may increase detention periods

100. From our legal casework we know that the Home Office often transfers detainees repeatedly between IRCs, and our legal advice survey findings also reflect this Home Office practice. Of the respondents to our Survey 5 (November 2012) 14 people had been transferred once between IRCs, 5 people had been transferred twice, and 2 people had been transferred by the Home Office three times. In Survey 6 (May 2013), 18 detainees had been transferred between IRCs once, 8 transferred twice, and 4 people transferred three times.

101. Over all eight IRC surveys between 2010 and 2014, an average of 19% of those we spoke to had lost their legal representative at least once as a result of transfer by the

Home Office from one IRC to another during their detention to date (range 6% in Survey 7 to 32% in Survey 2).

> *"[Firm A] and then [firm B] took me on as a client. New representatives each time as I moved from Dover, to Oakington[34], then Campsfield."*

> *"I've changed solicitor three times, never able to keep the same solicitor when I was transferred to a different IRC".*

Longer-term detainees commonly left without ongoing legal advice on the fact of their detention

102. Detainees may or may not have a substantive immigration case at the point at which they seek legal advice through the Detention Duty Advice scheme legal surgery. But they have all lost their liberty, and the fact of their ongoing detention and the need for periodic representations for release requires legal attention, including regular review of their circumstances, and regular applications for release to both the Home Office and the First-tier Tribunal (IAC).

103. In BID's experience, longer term detainees are more likely to have complex cases as a result of intractable travel document issues, unresolved family court or other family-related issues, challenges to the lawfulness of their ongoing detention, and mental illness. Yet our survey suggests that these are often the detainees who have no immigration legal advisor, because their file has been closed by a legal aid provider or they are appeal rights exhausted and unable to get a new advisor.

> *"It is difficult to get a solicitor who will represent me. I want representation, I have been detained for almost two years."*

> *"There are three [firms of] solicitors that attend the legal advice clinics at the IRC. The first is [provider firm], who will not reopen my case. The second is [provider firm], who will not take my case on. And I have not heard anything back from the third firm. I've been in detention for 18 months. Nobody is giving me advice. Nobody takes me seriously. Nobody listens to me."*

104. There appears to be a tension between, on the one hand the Legal Aid Agency instruction to provider firms to periodically apply i) a merits test for substantive issues and ii) a separate merits test for bail, either or both of which could lead to file closure; and on the other hand the obligation on provider firms with exclusive contracts for IRC work to continue to act for the client.

105. At present, exclusive contractor firms bear the cost of keeping client files open for extended periods if a person is not released from detention for months or years. There is no stage billing for the type of work that in BID's view should be carried regularly for as long as a person is detained, namely case planning, advice letters to clients, receiving calls from clients, reviews of their ongoing detention, making temporary admission applications and representations to the Home Office for updates on a case, including in relation to travel document applications.

[34] Oakington IRC is now closed.

106. Poor communication by provider firms around the closure of files leads many detainees to spend lengthy periods in detention without legal advice, as some are unaware that they can re-visit the legal surgeries if their circumstances change, or fail to understand that even though their substantive case may be exhausted they should still receive advice on detention and bail. Detainees commonly do not understand why their file has been closed, and are not in a position to challenge closure where this may have been done incorrectly.

107. In BID's view the Legal Aid Agency should take whatever steps are necessary to ensure that longer term detainees are not left unrepresented on the fact of their detention for weeks or months, and certainly not while there is no upper limit on the length of immigration detention in the UK. Detention is a matter of urgency, and legal advisors should be in a position to engage with the detainee and escalate contact with the Home Office, rather than winding down engagement and closing files.

Recommendations in relation to the provision of immigration legal advice

108. Detainees should not have to wait for more than one week from the date they make an appointment for the legal advice surgery in their IRC before they see a solicitor. Surgery capacity should be increased by the Legal Aid Agency and IRC management contractors until waiting times decrease to an acceptable level.

109. The Legal Aid Agency and the Home Office should jointly review contractual arrangements and guidance for IRC contractors which relate to the provision of legal advice and the role of custody officers and other centre staff in the booking and management arrangements for legal advice surgeries. Preventing a detainee from making a legal surgery appointment should be a disciplinary offence.

110. The Legal Aid Agency should cooperate with contracted advice providers to monitor appointment numbers and waiting list numbers. Legal Aid Agency contract managers responsible for IRC surgeries should visit IRCs on at least an annual basis to observe practical arrangements in action.

111. Under new Legal Aid Agency contracts for IRC work to be tendered in 2015, if a detainee is transferred between IRCs and out of the contract area of the instructed provider firm that firm may continue to act for their client if they wish to.

112. Prior to agreeing new exclusive contracts for IRC immigration advice in 2015, the Legal Aid Agency should review arrangements for stage billing for Legal Help work, so that provider firms are not financially disadvantaged by keeping a Legal Help file open for a detained client for extended periods.

113. The Home Office and the Legal Aid Agency should make provision for the immigration legal advice to be provided to immigration detainees held in the prison estate; via ta telephone service if necessary, as a matter of urgency.

DETENTION OF CHILDREN

114. In 2010, the coalition Government committed to ending the detention of children for immigration purposes. Since then, the numbers of children being detained and the length of their detention have both reduced significantly, and the conditions children are being held in have improved. However, BID is gravely concerned that the commitment to end child detention has not been met. Furthermore, a number of problems remain with the Family Returns Process. These were vividly illustrated by a recent case in which a mother with serious mental health problems and her son were removed unlawfully and subsequently returned to the UK.[35] A May 2015 report by the Prisons Inspectorate on Tinsley House found that:

'We were not persuaded that sufficient consideration was always given to alternatives to detention for families and why many could not just be accommodated in an airport hotel.'[36]

In cases where decisions are made to detain parents and children, BID's key recommendations in relation to detention conditions are set out below.

Recommendations

115. Children should not be held in immigration detention.

116. Cedars offers better conditions for families than Tinsley House. Wherever possible, families should be held in Cedars.

117. The Home Office should publish statistics on the numbers of children detained at all locations, including at port and in the children's secure estate under Immigration Act powers. This would enable better oversight of the conditions children are detained in.

[35] The Independent (22 April 2015) 'Nigerian mother and son unlawfully deported by home office set to return to the UK' http://www.independent.co.uk/news/uk/home-news/nigerian-mother-and-son-unlawfully-deported-by-home-office-set-to-return-to-the-uk-10196879.html

[36] HM Inspectorate of Prisons (28 May 2015) 'Report on an unannounced inspection of Tinsley House Immigration Removal Centre 1 – 12 December 2014'

Annex A

Summary: BID surveys of levels of legal representation for immigration detainees across the UK detention estate carried out between November 2010 and May 2014

	2014 May (125)	*2013 Nov (141)*	*2013 May (111)*	*2012 Nov (93)*	*2012 May (144)*	*2011 Nov (131)*	*2011 May (147)*	*2010 Nov (134)*
Proportion of detainees with legal representation								
% of all detainees interviewed with a legal representative at the time of the survey	**N=69 55%**	49%	43%	79%	69%	69%	65%	51%
• % of those who have a rep who are using a private (fee-paying) solicitor[37]	**N=30 44%**	48%	33%	25%	25%	30%	27%	32%
• % of those with a rep who are using a legal aid solicitor[38]	**N=37 54%**	52%	67%	75%	75%	70%	73%	68%
• % of those with a rep who are using a mixture of legal aid and private[39]	**N=2 3%**							
% of detainees interviewed with no legal representative at the time of the survey (*though they may have had a representative at a previous point in their detention*	**N=56 45%**	*51%*	*57%*	21%	31%	31%	35%	49%
% of the sample that had never had a legal representative while in detention	**N=19 15%**	23%	26%	9%	14%	9%	12%	19%
Awareness of the Legal Aid Agency legal advice surgeries								
% of detainees interviewed who were aware they could apply for free immigration advice in their IRC	**N=115 92%**	89%	90%	89%	88%	84%	42%	53%
% of detainees interviewed who had taken part in at least one 30 minute session with one of the contracted advice providers[40]	***N=80 64%***	*75%*	*77%*	72%	69%	65%	49%	61%
% of those who had a DDA appointment who were subsequently taken on as a client by the contracted advice provider.	**N=34 43%**	48%	27%	67%	52%	52%	64%	14%
% of those who had a DDA appointment who were still uncertain, when interviewed, whether they had been taken on as a client or not by the contracted advice provider, or were waiting to hear back, or were still waiting for their initial appointment.	**N=15 19%**	7%	24%	9%	7%	8%	11%	
% of those who had a DDA appointment not taken on as a client by the contracted advice provider (OR who chose not to take up the service e.g. because they already had a solicitor).	**N=31 39%**	35%	40%	19%	41%	40%	25%	77%
% of the entire sample that was taken on as a client by the contracted advice provider after their DDA advice session	**N=34 27%**	36%	21%	48%	36%	34%	31%	8%
% of detainees we interviewed who were unaware of the DDA scheme[41]	***N=10 8%***	*11%*	*10%*	11%	12%	16%	57%	47%

[37] This group does not include those detainees who report they are reliant on a mixture of legal aid and private advice for their immigration matters.
[38] Ditto.
[39] This was the first time detainees reported to us that they are reliant on both legal aid and fee paying advice providers.
[40] Some detainees had met a legal aid provider at the legal advice surgery but were unaware of it as a scheme, hence the possibility in these surveys of a lower awareness rate than appointment rate, while other respondents were aware of the scheme but had chosen not to use it because, for example, they paid for legal advice.
[41] Some respondents explained that they knew of the legal surgery in a previous IRC where they had been held, but were unaware that the same scheme operated in all IRCs and/or were unaware of it operating in the IRC where they were currently held.

Delay in getting appointment at legal advice surgery								
% of those detainees who made a DDA appointment who waited more than one week to see an advisor[42].	**N=48 60%**	**62%**	69%	61%	47%	29%	32%	
Of these: % delayed 2 weeks or 2 weeks to date	**N=21 26%**	**30%**	38%	31%	20%	12%	11%	
% delayed 3 weeks or 3 weeks to date	**N=10 13%**	**10%**	21%	19%	15%	4%	10%	
% delayed 4 weeks or 4 weeks to date	**N=2 3%**	**3%**	8%	8%	8%	8%	6%	
% delayed more than 4 weeks	**N=1 1%**	**2%**	2%	5%	4%	5%	4%	
Bail applications								
% of detainees interviewed with a legal advisor at the time of interview that had had one or more bail applications made for them by their legal advisor.	**N=32 46%**	30%	44%	34%	42%	32%	42%	44%
• One bail application	**N=18 26%**	13%	25%	18%				
• Two bail applications	**N=12 17%**	12%	15%	12%				
• Three or more bail applications	**N=4 6%**	7%	4%	6%				
% of detainees with a legal advisor at the time of interview whose legal rep had not made a bail application made for them[43]	**N=37 54%**	74%	56%	66%	58%	68%	58%	56%
Losing a legal representative as a result of transfer between IRCs								
% of detainees interviewed who had lost their legal representative on one or more occasion as the result of a transfer between IRCs.	**N=12 10%[44]**	6%[45]	27%[46]	23%[47]	12%	20%	32%	23%
Immigration advice in prison								
% of detainees interviewed who came to detention from serving a sentence in prison	**N=46 37%**	26%	32%	62%	59%	53%	65%	60%
Of these % who received immigration advice while they were in prison (includes only advice from immigration lawyer, CAB, DAS, BID)	**N=6 13%**	24%	23%	26%	21%	32%	58%	22%
% of those detainees who had served a custodial sentence but had received no independent immigration legal advice while they were in prison (this category includes those who told us their legal advice came from UKBA, a prison officer, other prisoners, or a criminal solicitor).	**N=40 87%**	76%	77%	74%	79%	68%	42%	78%

[42] For those responses where an interviewee told us there was a delay in getting a DDA appointment but had cited a period of one week or less, this response was changed to 'no delay'.

[43] This includes those cases where a Section 4 bail address was pending, licence-related approval of the address from the probation service was pending, a legal representative had only recently been instructed, a first bail application was currently in preparation, and cases where a legal representative not willing to run bail without a surety. We decided against a 'not yet' category, even though that was the sentiment of some of the responses, because it is not possible to determine the intention of the advice provider, and given the delays with Home Office Section 4 (1)(c) bail accommodation provision, 'not yet' essentially means 'no'. Some detainees have had applications for Temporary Admission made on their behalf, but these are not counted in this exercise.

[44] In Survey 8, n=7 had lost their representative once following a transfer to a different place of detention, n=2 had lost a legal representative twice on transfer, and n=3 had lost their legal representative three times following transfer.

[45] In Survey 7, n=6 lost their legal representative once following a transfer to a different IRC, n=2 lost a legal representative twice on transfer, and n=1 lost their legal representative four times.

[46] In Survey 6, n=18 lost their legal representative once following a transfer to a different IRC, n=8 lost a legal representative twice after transfer, and n=4 detainees lost their legal representative this way on three occasions.

[47] In Survey 5, n=14 lost their representative following transfer once, for n=5 this happened twice, and for n=2 three times.