

Written evidence submitted by JustRights to the Joint Committee on Human Rights inquiry into the implications for access to justice of the Government's proposed legal aid reforms

September 2013

The impact of civil and prison legal aid cuts on Children and Young People

"[The proposals will have a] profoundly negative effect on affected children and young people by curtaining their access to justice...children and young people are likely to be disproportionately affected by the proposals."

The Children's Commissioner¹

1. Executive summary

- 1.1 The proposals and decisions that form the subject of the Committee's scrutiny will deprive children and young people of vital legal assistance when facing problems with accommodation, support, education, family contact and prison.
- 1.2 The decision to introduce a residence test and scrap almost all prison law cases will have a devastating effect on young people, potentially placing them beyond the protection of the court and at risk of on-going abuse.
- 1.3 The proposal to change the rules for payment in judicial review cases, which are often the last best hope of the most vulnerable, are likely to restrict access to expert public law practitioners best placed to help young people.
- 1.4 **The blanket imposition of restrictions on access to justice will disproportionately affect young people.**

¹ Response of the Children's Commissioner to Transforming Legal Aid, page 5, available at http://www.childrenscommissioner.gov.uk/content/publications/content_669

2. About JustRights

- 2.1 Founded in 2009 by Youth Access, Law Centres Network, Howard League for Penal Reform and Children's Rights Alliance for England, JustRights is a coalition of children's charities and youth organisations campaigning for fair access to advice, advocacy and legal representation for children and young people.
- 2.2 JustRights believes that children and young people are a uniquely vulnerable client group with legal needs and advice-seeking behaviour that are distinct from those of all other client groups.
- 2.3 It is well established that young people require a different approach to enable them to access justice in a meaningful way. JustRights considers that current arrangements do not provide the legal services needed by children and young people if they are to enjoy the rights and protections the law affords them.
- 2.4 We are submitting evidence as we hold deep concerns that the Government's new plans for legal aid will have a further, highly negative impact on children and young people's access to justice.

3. Context of change

- 3.1 The new changes need to be seen in the wider context of recent changes to legal aid that have already been implemented and further proposals to change the rules for judicial reviews to be brought by interest groups.
- 3.2 The Ministry of Justice (MOJ) estimated that 75,000 children and young people (including 6,000 children under 18) would lose entitlement to legal aid each year as a result of LASPO.² Recent research showing a huge fall in the uptake of legal aid since April 2013³ suggests that these figures are likely to be substantial underestimates. We note that the Children's Commissioner has just issued a tender for an impact assessment of the current changes on children and young people to be carried out⁴. We recommend that any further changes should be delayed until this work is completed.
- 3.3 The new further cuts to fees for lawyers and experts are likely to leave many specialist providers working with children and young people, already reeling from the impact of LASPO, unable to continue.
- 3.4 The proposals, published in September 2013, to restrict the ability of interest groups to bring judicial review proceedings⁵ will make it harder for landmark cases affecting children and young people's rights to be brought. Recent examples include the Children Act case brought by the Howard League for Penal Reform in 2002 which established the applicability of the Children Act to children in prison service accommodation and the CRAE case which considered whether

² Figures supplied to JustRights by Ministry of Justice on 10/10/11 in response to a Freedom of Information request

³ Legal Action Group (Sept. 2013) *Civil Legal Aid – the Secret Legal Service?*

⁴ http://www.childrenscommissioner.gov.uk/content/publications/content_718

⁵ <https://consult.justice.gov.uk/digital-communications/judicial-review-reform>

or not there was a duty on the state to inform children of their right to compensation following unlawful restraints.

4. The Residence Test

- 4.1 The 'residency test' will have a particularly adverse effect on children and young people who may not be lawfully resident and will result in unlawful discrimination against non-nationals.
- 4.2 The government's response to the consultation has conceded that the residence test will not apply to "categories of case which broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children". It is unclear how the Government will be able to administer the exemption. The administration of exemptions for domestic violence victims under the changes brought in by LASPO has been fraught with difficulty. The experience to date is that the requirements mean that vulnerable women are failing to access justice.
- 4.3 ***Disproportionate impact:*** The Government has been unable to provide figures on the number of young people likely to be excluded on account of the residence test. However, new immigrants tend to be disproportionately young and it is clear from reported cases that unaccompanied minors have some of the most pressing legal needs. Even where children and young people would technically qualify under the test, from our experience it is clear that young people are less likely to be able to provide proof of lawful residence. Young people who have the greatest level of legal need often come from the most chaotic backgrounds and will have the greatest difficulty in providing documentary evidence of lawful residence, even if they qualify for it. There appear to be no special considerations as to how children who qualify will be assisted to jump through the residence test. The burden of proof will be on the provider. Overstretched legal aid providers are unlikely to have the time and resources to go the extra mile (without payment) to assist young people to obtain proof of residence. Those that do not qualify will be without any assistance or access to justice. It should be noted that children and young people are a protected group and at risk of discrimination⁶⁶.

Case study: G

G aged 6 settled (lawfully) in the UK with her mother, who is married to a member of the Brigade of Gurkhas. Her father subjected her mother to a vicious assault (for which he was charged). She and her mother fled the house and then accessed legal assistance to secure an injunction and then divorce. The combination of the rules under LASPO and the residence test would provide two difficult hurdles for G's mother to overcome in order to protect herself and her 6 year old child from witnessing domestic violence.

5. Judicial review

- 5.1 Being able to challenge decisions by state authorities is crucial for young people – a wrong decision that goes unchallenged by the local authority can have a

⁶⁶ Equalities Act 2010 Chapter 1 Section 4

devastating impact on young people, with consequences that can impact well into their adult lives. The government proposals would mean that providers would not get paid for work on judicial review cases unless permission is ultimately granted by the High Court. This would transfer all the financial risk of an application for judicial review to the provider, so that all the initial work they do on the judicial review case is at risk.

- 5.2 Very few young people can afford to bring a judicial review claim without the assistance of legal aid. Penalising lawyers who act for legal aid claimants if permission is not granted will lead to far fewer meritorious and important judicial review cases being brought – to the disadvantage of society as a whole and the most vulnerable in particular.
- 5.3 Limiting access to judicial review means that homeless young people and care leavers will find it harder to challenge the decisions of the local authority.⁷ It is often in the best interests of the young people that their cases are settled early or before they get to court. The proposals provide a perverse incentive for cases not to settle before the permission stage, as otherwise there will be no payment for bringing them.
- 5.4 The landmark case of R (G) v London Borough of Southwark had a significant impact on the way local authorities are expected to operate in relation to homeless 16 and 17 year olds as well as young people leaving custody. However, it is unlikely that this case would have been funded under the new proposals as permission was initially refused and only granted by the Court of Appeal who dismissed the claim (2:1). It is unlikely that it would ever have made its way to the House of Lords.
- 5.5 The amended proposals to allow the LAA discretion to pay lawyers in certain circumstances where permission is not granted provide little comfort as there remains too much uncertainty for providers to be able to take the risk.
- 5.6 ***Disproportionate impact:*** In response to a Freedom of Information request made by The Children’s Society, the MOJ has confirmed that in 2011/12, 37% of all actual or prospective judicial review cases, where legal aid was granted, and 39% of cases that ended before applying for permission to the Court or before the Court made a decision, related to children and young people aged 0-25, with 19% relating to 19-25 year olds. According to the 2011 census, 31% of the population is under 25⁸; 19-25 year olds comprise just 9% of the population. Thus, the impact of the cuts is likely to be felt disproportionately by young adults.

Case study: E

E was kicked out of home when he was 17 and he was placed in a hostel. Social Services made an assessment but only referred him to a hostel and to benefits. E was evicted from his hostel and he had been sofa surfing for approximately one year, having at times spent nights on the street. E contacted the organisation Voice and he was referred as a matter of urgency to a solicitor as he had nowhere to stay that night and negotiations with the local authority had been unsuccessful. The solicitor contacted Social Services and E was provided with

⁷ The Howard League for Penal Reform has been included in many of these kinds of cases. A list of judgements is available at: <http://www.howardleague.org/judgements/>

⁸ Available at <http://www.ons.gov.uk/ons/guide-method/census/2011/index.html>

accommodation by social services on the same day he saw the solicitor. The solicitor also requested that E's leaving care status was recognised and backdated to the time of the assessment, which the Local Authority agreed approximately 10 days after the initial meeting. Although E's solicitor sent pre-action letters to the Local Authority, both when requesting that E was accommodated as a matter of urgency and when asking that his leaving care status was recognised, both matters were resolved before the case was taken to court.

6. Prison Law

- 6.1 The changes to legal aid for prison law will virtually cut out almost all the legal help currently provided to young people under criminal legal aid. Only the young people convicted of the most serious crimes will be entitled to legal aid, and only then if they are going through a parole hearing where there is a possibility of release or where they are faced with disciplinary proceedings before an external judge who may add extra days to the sentence.
- 6.2 As evidenced by the Howard League for Penal Reform, children in custody are extremely vulnerable and face a wide range of legal problems including the need for a release package and access to offending behaviour courses. None of this will be available.
- 6.3 The Justice Secretary has explicitly addressed why no exception will be made for children and young people with prison law needs (see page 67 of the Response to Transforming Legal Aid published on 5 September 2013). It is suggested that the complaints systems either are or will soon be adequate to deal with any problems faced by children. This suggests a deep misunderstanding of the complaints system and the work lawyers currently do for children under criminal legal aid. Lawyers working for children seek to use the law constructively to achieve practical and meaningful results for young people rather than simply insist on an apology or an investigation into what went wrong. At present, lawyers are not allowed to do cases that could be resolved without legal assistance through the complaints system.
- 6.4 It is suggested by the government that the advocacy services available to children in prison mitigate the need for legal advice, but it is well known that these services are very clearly not contracted to be a substitute for legal advice: rather, where necessary, they should facilitate it. However, without legal aid, there will be nowhere for advocates to signpost children to when issues cannot be resolved without legal intervention.
- 6.5 It is also suggested that prison law is not necessary because prisoners, including children and young people, will still have access to judicial review in principle. As noted above, this fails to take into account the drastic restrictions posed by the judicial review changes and the residence test.
- 6.6 ***Disproportionate impact:*** it is clear that children and young people will be particularly affected by the changes to prison law legal aid. First, young people are disproportionately represented in the prison population. Second, the only areas that appear to remain in scope of legal aid rarely affect children, i.e. additional days at prison disciplinary hearings or parole hearings where release is

being considered. Therefore, children will simply not encounter prison law specialists or have any cause to contact a lawyer who might be able to identify public law or other forms of unmet legal need arising in the course of their detention.

Case Study: D

D was sentenced to a long extended sentence for public protection aged 17. He had been a looked after child and has Asperger's syndrome. D has never been in custody before. He will need to address his offending behaviour while in prison so he can be safely released. Courses are identified on this sentence plan but there has been no consideration as to whether he will be able to understand the courses in light of his diagnosis. Until he has addressed the reasons behind his offending, he will not be able to progress and he will not achieve release on parole. Under the new funding proposals he would not qualify for legal aid for any advice as to this sentence planning or recategorisation as he attempts to progress towards release. He will not be eligible for any legally aided advice or assistance until the eighth year of his sentence when his parole window opens. Unless he has managed to get himself on the right courses by that time, bearing in mind the needs of his diagnosis, it is unlikely that his parole will be successful.

7. Impact on access to specialist providers

- 7.1 Working with young people requires lawyers who are experienced in dealing with their problems, and being able to build their trust. Often young people may initially seek advice but then find it hard to engage with their legal advisor until they have built up a relationship of trust. If it is not possible for solicitors specialising in young people's work to continue to operate, then there will be no way for young people to bring legal challenges in order to get the support and services they need. Fee cuts across the board are likely to mean that good quality, child-centred providers cannot continue to practice.
- 7.2 In family law, since the last cuts, at least 23% of experts have already stopped doing publicly funded work. A third of the membership of The Consortium of Expert Witnesses to the Family Courts have withdrawn from publicly funded work altogether⁹. Children in care proceedings require specialist legal help as the most monumental decisions about their life are made. The same considerations apply to criminal and prison lawyers who specialise in youth work and face a 17.5% cut in fees. We note with dismay that the only specialist Law Centre for young people in England closed its doors last month.

⁹ Dr Judith Freedman, Convenor, The Consortium of Expert Witnesses to the Family Courts, 30/8/13 letter to the Lord Chancellor

8. Impact on child protection

“Children and young people’s very safety and well-being would be jeopardised if the proposals were to be implemented. In other words, the changes would have major implications for child protection as well as for access to justice.”

Baroness Howe of Idlicote¹⁰

8.1 We are alarmed by the potential impact of the legal aid changes on the welfare of children and young people at risk of abuse, exploitation and harm. See our briefing on this subject for further information.¹¹

9. Cost-benefits

9.1 Any restriction on young people’s access to legal advice is highly unlikely to be good value for money for the tax-payer. Robust research has shown that a typical young person with a civil legal problem costs local health services, housing services and social services around £13,000 if they cannot receive early advice.¹² In addition, clear links have been established between young people’s unresolved civil legal problems and increased criminal offending.¹³

9.2 A recent detailed analysis on behalf of local authorities has shown that the residence test is likely to cause a cost shift of at least £26m a year to local councils.¹⁴

10. Recommendations and further information

10.1 In light of the above, we recommend that the Committee:

- Considers the specific impact on children and young people, seeking evidence as appropriate from specialists including the Children’s Commissioner;
- Considers recommending that the Ministry of Justice await the outcome of the impact assessment of the current changes to legal aid on young people to be commissioned by the Children’s Commissioner before proceeding with its current plans;
- Requests evidence from the Ministry of Justice as to the impact on children and young people, both in terms of the numbers likely to be affected and the logical consequences of its plans including:

¹⁰ Hansard, 11 July 2013, Column 475-476 – debate on Legal Aid in House of Lords

¹¹ http://justrights.org.uk/sites/default/files/Legal_Aid_-_Child_Protection_Implications_sept_2013_FINAL.pdf

¹² Balmer, N.J. and Pleasence, P. (2012) *The Legal Problems and Mental Health Needs of Youth Advice Service Users*. Youth Access.

¹³ Pleasence, P. (2011) *Civil legal problems: Young People, Social Exclusion and Crime*. Youth Access and Law Centres Federation.

¹⁴ No Recourse to Public Funds Network (Sept. 2013) *Shadow Impact Assessments for the Proposed Residence Test*.

- How it can be confident that its plans for prison law are compliant with the UNCRC as it states in the Response and in light of any evidence before the committee to the contrary;
- How it can be confident that its proposals concerning the residence test will not disproportionately affect young people and how that meets the requirements of the UNCRC;
- How it can be confident that the public law rights of children and young people will be adequately upheld in light of the proposed changes to Judicial Review.

Should the Committee wish to receive oral evidence on the impact of the changes to legal aid for civil and prison law on young people, we would be willing to assist.

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