

Transforming Legal Aid

The impact on children and young people

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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 over 30 children's charities and youth organisations representing the interests of children and young people, *not* those of legal aid providers.

1. Introduction

Transforming Legal Aid¹ proposes widespread changes to delivery and payment arrangements for both criminal and civil legal aid work. The proposals make no special arrangements for children and young people and there is no impact assessment setting out how this group will be affected. The Office of the Children's Commissioner is concerned that the proposals will have a "**profoundly negative effect** on affected children and young people by curtailing their access to justice" and that "children and young people are likely to be disproportionately affected by the proposals".² This briefing provides an overview of the key changes alongside concerns about their impact on children and young people.

2. Summary of proposals and concerns for children and young people

Changes to criminal legal aid:

- **Criminal work (police stations and courts) are to be delivered through competitive contracts dealt to the cheapest bidder with clients having no**

¹ Transforming Legal Aid: Delivering a more credible and efficient system, Ministry of Justice, available at <https://www.gov.uk/government/consultations/transforming-legal-aid-delivering-a-more-credible-and-efficient-system>

² Response of the Children's Commissioner to Transforming Legal Aid, page 5, available at http://www.childrenscommissioner.gov.uk/content/publications/content_669

choice of solicitor: young people need specialist help from people they trust to achieve justice.

- **Specialist criminal appeals (miscarriage of justice cases) and prison law to be bolted on to the competitive contracts, excluding those who only specialise in these areas:** young people need expert help in these complex cases.
- **Cutting treatment and sentence cases from prison law:** young people will no longer be able to get help to obtain a resettlement package on release or get on the right course to progress through their sentence.

Changes to civil legal aid:

- **No legal aid for anyone ‘not lawfully resident’ in the UK for 12 months:** this excludes many vulnerable young people from legal aid, including British babies under 12 months and trafficked children who have not claimed asylum.
- **No pay for lawyers in judicial review work unless a court grants ‘permission’ (usually well into the case) and including cases which settle before the permission stage:** this will restrict the availability of legal aid for young people who are often the victims of unlawful state decisions such as refusing to provide care or accommodation.
- **Test cases where the prospects of success are unclear will no longer be funded:** children are likely to benefit from these test cases as they are often not sufficiently aware of their rights to bring cases on their own.

Changes affecting all types of legal aid:

- **All expert fees will be reduced by 20 per cent:** courts often require expert evidence to make important decisions about whether or not children are fit to stand for trial or whether they should be taken into care;
- **Cuts to fees:** fee cuts across the board may mean that good quality, child-centred providers cannot continue to practice.

The need for choice of solicitor and specialist services for young people

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.

The special needs of young people in the legal system is recognised by the UN Committee on the Rights of the Child which has recommended training for all those providing legal assistance to children noting that such persons:

*“must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law.”*³

The Guidelines of the Committee of Ministers of Council of Europe on child-friendly justice states that a ‘lawyer representing children should be trained in and knowledgeable on children’s rights and related issues, receiving on-going and in-depth training and of communicating with children at their level of understanding.’⁴

Our own courts have endorsed the importance of proactive steps to ensure children achieve access to justice. In *R (HC) v Secretary of State for the Home Department*⁵ it was held that “there is a constitutional duty owed by the state not to place obstacles in the way of access to justice is now well settled. It is inherent in the rule of law (see Laws LJ’s analysis between paragraphs 34-38 in *R (on the Application of) The Children’s Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34).” The practical impact of a restriction on choice would be to impede access to justice for children.

As the Children’s Commissioner states, “without robust, high quality specialist solicitors there is a risk that children and young people will not be represented by specialists in youth justice. The seemingly random resulting allocation of cases would mean a lottery in terms of who would represent the young person.”⁶ Just for Kids Law, who provide criminal and civil representation to young people note “this process of competitive tendering could leave vulnerable children in the care of individuals who may not only have any specialist knowledge of working with children but may not even be CRB checked.”⁷ The Howard League for Penal Reform, which runs a dedicated legal service for children in prison, has stated that “young and vulnerable clients need to have developed a trusting relationship with their lawyer before effective representation is possible. It is well recognised that detained young people are at an immediate disadvantage due to the inherent power imbalance in the system and require legal the support of a person they trust to compensate for this.”⁸

³ General comment 10 (2007) Children in juvenile justice, available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm> and cited in the response of the Children’s Commissioner

⁴ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, page 9, available at: http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf

⁵ [2013] WLR(D) 157

⁶ Response of the Children’s Commissioner to Transforming Legal Aid, page 20, available at: http://www.childrenscommissioner.gov.uk/content/publications/content_669

⁷ Response of Just for Kids (JFK) to Transforming Legal Aid, page 6, available at: <http://www.justforkidslaw.org/docs/Transforming-legal-aid-response-JfKLaw.pdf>

⁸ Response of the Howard League for Penal Reform to Transforming Legal Aid, page 5, available at http://d19y|po4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Consultations/Consultation_response_on_legal_aid_June_2013.pdf

3. Why young people in prison need legal aid

The Children’s Commissioner, citing its own research, states that young people in prison “are known to be the most troubled and disaffected in our society. The majority of children who commit offences have proven histories of abuse, abandonment and bereavement, often compounded by learning difficulties and disabilities which have too often been inadequately addressed.”⁹ We believe that advice and assistance is fundamental in determining cases in an appropriate and “just” way. It has been accepted by the State, with approval of the High Court and the Court of Appeal that “children in custody are amongst some of the most vulnerable and socially disadvantaged and that they have specific needs which may not be common to the wider population of young people.”¹⁰

The proposals will end legal aid for all prison law except parole reviews and prison disciplinary hearings by an external judge or that meet the Tarrant criteria. This will disproportionately affect children and young people who will find that they rarely qualify for any prison law legal aid as parole hearings are few and far between for young people and most will only have disciplinary hearings that will not qualify for representation. Even where they qualify for legal aid before the parole board, experienced practitioners such as the Howard League for Penal Reform have found that the real success of the case is in making sure that the young person has done the right courses and got a suitable package of support to be released to: these cases are to be axed from scope. The Parole Board agrees¹¹, noting that “the change in scope will increase the cost of conducting parole reviews and will increase the number of offenders who remain in prisons” and that significant contributory factors to the large number of deferrals included the late or non-completion of relevant offending behaviour work and the lack of adequate accommodation and support in the community – issues which “disproportionately” affect “young people” and “care leavers”.

Further, the rationale that most prison law matters should be dealt with through the complaints system is flawed. Citing research from its own surveys in its response to the consultation, HM Inspectorate of Prisons highlights the challenges that prisoners face in making complaints and having those complaints handled satisfactorily.¹² It concludes that in respect of matters that materially and adversely affect prisoners, “the vast majority of these matters can be sorted out simply and quickly without

⁹ “I think I must have been born bad”: emotional wellbeing and mental health of children and young people in the youth justice system, Office of the Children’s Commissioner, page 5, available at http://www.childrenscommissioner.gov.uk/content/publications/content_503

¹⁰ See *R (on the Application of) The Children’s Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34 at para 9

¹¹ Response of the Parole Board to Transforming Legal Aid, page 3, available at: <https://www.justice.gov.uk/downloads/offenders/parole-board/pb-response-transforming-legal-aid-consultation-june-2013.pdf>

¹² Response of HM Inspectorate of Prisons (HMIP) to Transforming Legal Aid, para 12, available at: <http://www.justice.gov.uk/downloads/about/hmipris/transforming-legal-aid-response-hmip.pdf>

resource to formal procedures let alone the law. Nevertheless, our inspection evidence is that the prison complaints system cannot be completely relied on to resolve all such matters and this is a particular concern for prisoners who lack the competence to advocate on their own behalf or for where the treatment of excluded sentencing matter is particularly serious.” Also citing its own research, the Children’s Commissioner has stated that “children and young people face serious barriers in obtaining redress through this mechanism and that these barriers are particular to their age and stage of development.”¹³

The Howard League for Penal Reform draws a similar conclusion asserting that “the complaints system is inadequate as a substitute for legal advice and representation in relation to serious issues such as violence or humiliation and legal issues such as appeals against decisions concerning release on temporary licence or suitability for a parole review. This is especially the case where a child or young person is concerned.”¹⁴

4. Why the residence test is unfair on young people

The proposed residence test excluding anyone not ‘lawfully resident’ for more than 12 months from legal aid is discriminatory and will result in some people being completely prohibited from challenging unlawful action by the state¹⁵, including children and young people, who are not exempt from satisfying the test. The Children’s Commissioner has stated that the proposal “will have serious consequences for thousands of children in those areas of civil law where legal aid still exists such as community care, special educational needs, some housing cases, clinical negligence, Judicial Review and private law family cases involving domestic violence and child abduction.”¹⁶ Crucially, the proposal is contrary to the rule of law¹⁷ and, as observed by the Children’s Commissioner, contravenes a number of

¹³ Response of the Children’s Commissioner to Transforming Legal Aid, page 6, available at: http://www.childrenscommissioner.gov.uk/content/publications/content_669

¹⁴ Response of the Howard League for Penal Reform to Transforming Legal Aid, page 7, available at: http://d19y|po4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Consultations/Consultation_response_on_legal_aid_June_2013.pdf

¹⁵ Response of the Howard League for Penal Reform to Transforming Legal Aid, page 8, available at: http://d19y|po4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Consultations/Consultation_response_on_legal_aid_June_2013.pdf

¹⁶ Response of the Children’s Commissioner to Transforming Legal Aid, page 7, available at http://www.childrenscommissioner.gov.uk/content/publications/content_669

¹⁷ See *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198 per Lord Steyn and Lord Bingham’s *The Rule of Law* (Allen Lane 2010) p.85 ‘means must be provided for resolving without prohibitive cost or inordinate delay, bona fide disputes which the parties are unable themselves to resolve’ and p 88 ‘denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law’.

important rights protected by the United Nations Convention of the Rights of the Child.¹⁸

The following categories of children and young people have been identified as groups whose access to legal aid will be restricted as a result of the proposal:

- All children under the age of 1, who at times will require their own legal representation will be unable to meet the 12 month minimum lawful residence criteria;
- Children and young people who have been trafficked but who have never been able to claim asylum; in the recent case of *R v L, and others*¹⁹ the Court of Appeal recognised the importance of treating victims of trafficking as victims rather than criminals. Under the new proposals, where the system does not work as it should, these young people would be unable to prevent criminalisation by bringing a judicial review.
- Children who are not lawfully resident but are subject to an unlawful decision by the parole board who would be unable to appeal this as the only avenue of appeal is by way of judicial review;
- Children leaving custody who are not lawfully resident and to whom a duty is owed under the Children Act 1989 would not be able to enforce that duty in the courts;
- Children and young people who are “over stayers” in the UK, even those who were brought to the UK by their legal guardians and subsequently abandoned or estranged;
- An age-disputed child who does not fall within the asylum-seeker exception will not get legal aid to challenge an unlawful age assessment;
- ‘Appeal rights exhausted’ young people who came to the UK as an unaccompanied child, who claimed asylum but were refused and became ‘appeal rights exhausted’.

5. Why changes to payment for judicial review are unfair on young people

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 devastating impact on young people, with consequences that can impact well into their adult lives.

¹⁸ Response of the Children’s Commissioner to Transforming Legal Aid, page 8, available at: http://www.childrenscommissioner.gov.uk/content/publications/content_669

¹⁹ [2013] EWCA Crim 991

Judicial review is an important mechanism by which the rule of law is upheld and public decision-makers are held accountable. Someone who has suffered an unlawful act or omission by a public authority can bring a challenge by judicial review where there is no other remedy.

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.

Very few 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.

Limiting access to judicial review means that homeless young people and care leavers will find it harder to challenge the decisions of the local authority²⁰. 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.

The landmark case of *R (G) v London Borough of Southwark*²¹ had a significant impact on the way local authorities are expected to operate in relation to homeless 16 & 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.

6. Why borderline and test cases are important for young people

At present there are a small group of cases where legal aid is granted even though prospects of success are not clear. These must not be confused with cases where the prospects of success are poor. Cases commonly known as “borderline” cases are generally cases where the prospects of success depends on the answer to an unknown question, for example, the court must interpret the law or decide on the disputed facts or expert evidence. At present, these cases are only funded where it is agreed by the Legal Aid Agency that there is a wider public interest in the unknown questions to be decided by the court. In ordinary language, these are often known as “test cases”.

²⁰ The Howard League for Penal Reform has been involved in many of these kinds of cases. A list of judgments is available at: <http://www.howardleague.org/judgments/>

²¹ [2009] UKHL 26

Borderline and test cases are particularly important for children and young people, as they will often involve significant wider public interest or may be of overwhelming importance. It is essential that these cases are heard by the courts as they are capable of bringing about effective and positive change in the law for children and young people. However, under the government's proposals, such important cases will be treated in the same way as those assessed as having 'poor' prospects of success and so legal aid will not be available for them.

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In addition JustRights has produced a briefing 'The effect of LASPO Act 2012 on children and young people'. Please contact us if you would like a copy of this.

