

Transforming legal aid: delivering a more credible and efficient system

Response to the Ministry of Justice consultation
by

JustRights, the campaign for fair access to advice and legal support for children and young people

May 2013

1. Introduction

1.1 **JustRights** is a coalition of organisations who believe that:

- Children and young people are a uniquely vulnerable client group with advice needs and advice-seeking behaviour that are distinct from those of all other client groups.
- Only carefully tailored – and properly resourced – service delivery approaches will be successful in meeting the specific advice and legal support needs of children and young people.
- Current arrangements do not provide the advice and legal support needed by children and young people if they are to enjoy the rights and protections the law affords them.
- The benefits to society of investment in accessible advice and legal support for young people far outweigh the costs.

1.2 JustRights is working to achieve a society in which :

- All children and young people enjoy ready access to high quality, independent advice and legal support whenever they need it.
- Children and young people's distinct needs for advice and legal support are widely recognised

- 1.3 JustRights was founded by Children’s Rights Alliance for England, The Howard League for Penal Reform, The Law Centres Network and Youth Access.
- 1.4 We welcome the opportunity to share our experience in response to the Ministry of Justice consultation.
- 1.5 **Our response focuses on the impact of the proposals on young people themselves**, rather than on providers.
- 1.6 For more information on any aspect of this response, please contact:

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2. General comments

- 2.1 Below we set out our response to each of the questions asked in the consultation. However, before doing this, we wish to emphasise our position that the proposed changes are unjust and an affront to the rule of law, a fundamental feature of which is that everyone is equal before the law.
- 2.2 The proposals leave people open to abuses of power and arbitrary decisions because they are excluded from the protection of the law. This means that individuals, groups and public bodies can act with impunity as there will be little risk of legal sanction for unlawful action.
- 2.3 Children face complex administrative and legal proceedings requiring legal support. These proposed changes will impact on the most vulnerable members of our society and will destroy access to justice for many children and young people.
- 2.4 **Parliament expressed its concerns about children and young people’s access to justice during the passage of the LASPO Bill/Act.**
- 2.5 A cross-party amendment to LASPO that would have retained legal aid in all civil cases where a child under the age of 18 needed legal aid in their own right was passed in the House of Lords, although it was eventually overturned by MPs. There was also widespread support in both Houses for protecting ‘vulnerable’ young people up to the age of 25, including care leavers, disabled young people and young victims of trafficking.
- 2.6 The Government would be well-advised to heed the warning from Baroness Walmsley, a Liberal Democrat peer, that if children’s access to legal aid is not protected, the Government *“will be taken to the international court. It is as simple as that.”*¹

¹ *Hansard: Monday 16 Jan 2012: Column 443. House of Lords: Legal Aid, Sentencing and Punishment of Offenders Bill - Committee (3rd Day).*

- 2.7 **The Government also has clear international commitments and duties to protect children’s access to legal aid.**
- 2.8 The Council of Europe guidelines on child-friendly justice² state: *“Children should have access to free legal aid, under the same or more lenient conditions as adults.”*
- 2.9 Article 3 of the United Nations Convention on the Rights of the Child states: *“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*
- 2.10 Article 12 of the UN Convention on the Rights of the Child provides that states ‘shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child’.
- 2.11 Legal aid is a vital tool for young people to access justice at a crucial stage in their lives. It is often a life saving tool that enables young people to secure housing, an education that meets their special needs, support during care proceedings and when leaving care.
- 2.12 Being able to access legal aid, and a specialist lawyer, is essential for young people in order to resolve their legal issues. Indeed, research has proved that unresolved legal problems have a greater negative impact on young people than on any other age group, neglecting the fact that young people are inherently more vulnerable than adults and have lower legal capability.
- 2.13 Unresolved legal issues have a significant impact on young people as well as putting extra pressure on public services, including the NHS, prison services and mental health services, and consequently the public purse.
- 2.14 Research for Youth Access has shown that, typically, a young person’s unresolved legal problem costs local health services, housing services and social services around £13,000.³
- 2.15 Research for JustRights has revealed clear links between young people’s civil justice problems and crime. As many as 55% of young people who had recently been arrested and 63% of young victims of crime had also experienced a civil justice problem.⁴ Given the evidence that cuts to civil legal aid can lead to increased social unrest and crime, we are concerned that the Government has failed to fully analyse the knock-on costs for the criminal justice system resulting from the proposed changes to civil legal aid.

² *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*, adopted by the Committee of Ministers on 17 November 2010, at the 1098th meeting of the Ministers’ Deputies.

³ *The Legal Problems and Mental Health Needs of Youth Advice Service Users: The Case for Advice*, Balmer, N.J., and Pleasence, P., Youth Access, 2012.

⁴ *Civil Legal Problems: Young People, Social Exclusion and Crime*, Pleasence, P., Law Centres Federation and Youth Access, 2011; *Heading For Trouble?*, JustRights, 2011.

3. Restricting the scope of legal aid for prison law

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

- 3.1 JustRights agrees with the matters remaining in scope, we do not agree with the proposal to remove further areas of law from the scope of legal aid.
- 3.2 Ensuring the rights of young people in prison is vital. Young people in prison need access to legal services. They are amongst the most vulnerable within the prison system.
- 3.3 Prison law represents just over 1% of the legal aid budget. If the UK complied with international and national obligations, then it would see the resultant legal challenges and associated costs drop.
- 3.4 The requirement of providers to hold a criminal law contract will result in a loss of specialist providers. Ensuring continued access to specialist providers who are able to effectively advocate on behalf of young people is essential if young people in prison and leaving prison are to be protected from abuse and exploitation and secure sustainable accommodation on their release.

4. Imposing a financial eligibility threshold in the Crown Court

Q2. Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court? Please give reasons.

- 4.1 No.
- 4.2 We fundamentally disagree with proposals which will result in innocent people being financially disadvantaged by being compelled to defend themselves from a criminal charge. The state brings a criminal case and there is no mechanism for negotiation, mediation or opportunity to avoid the court process. If the state has brought a case that cannot be proved to the criminal standard, or which is dismissed, the state should bear the full costs rather than expecting the innocent party to do so. This proposal will mean that many young people will be severely disadvantaged at the beginning of their life.
- 4.3 The proposal does not provide any details as to how the threshold would operate in cases where the victim and defendant are financially linked, such as those which involve domestic and sexual violence where the victim of the offence might have had, or might have, a relationship with the defendant. This could mean that a child is fearful of reporting abuse because of the financial impact on his or her family. Victims of abuse within in a family will have no access to justice if this measure goes through.
- 4.4 The proposal would result in an increase in the numbers of litigants in person. Child witnesses will face being cross-examined in court by a non expert, the perpetrator of the crime themselves. Many young people will simply be denied access as they will not be able to face that experience.

Q3. *Do you agree that the proposed threshold is set an appropriate level? Please give reasons.*

4.4 No. See above.

5. Introducing a residence test

Q4. *Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.*

5.1 No

5.2 The introduction of any residence test is a threat to the rule of law and the principle of equality before the law. It is unacceptable to deny any group of people access to the courts and therefore to justice.

5.3 Young people who are in care proceedings will be severely affected. Family courts will have to make decisions about whether a child should stay with his/her mother, and that may deny him or her lifelong relationships with a sibling, without the parties being represented if they can not satisfy this test.

5.4 New migrants to the country will have no access to civil legal aid at a time when they might most need it, whether it is to seek protection from domestic violence or to challenge housing decisions and access to vital services.

5.5 Young people who are victims of trafficking will have no access to legal aid and no access to justice.

5.6 The test is unworkable. It can take a specialist Judge days to determine questions on lawful residency. A lawyer committed to protecting the rights of children and young people will simply not have the resources to determine this. The test will lead to unlawful discrimination.

6. Paying for permission work in judicial review cases

Q5. *Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.*

6.1 No.

6.2 The importance of judicial review proceedings as a check to the unlawful exercise of power cannot be overstated. Judicial review proceedings can enable young people to ensure that local authorities meet their legal obligations to provide them with housing and homelessness assistance; meet their community care needs; compel the UK Border Agency to accept a fresh claim for asylum; prevent an unlawful removal from the UK; and ensure that victims of trafficking are correctly recognised as such.

- 6.3 Many public law issues can be resolved without judicial review proceedings being issued, for the benefit of the client. This includes situations where the decision is so clearly unlawful that the decision-maker withdraws or changes it as soon as the decision and possibility of legal action being taken is drawn to their attention. It also includes cases where successful applications for interim relief effectively end the need for bringing substantive proceedings. If judicial review cases are only funded in cases where permission is granted, then the majority of work undertaken by public lawyers will be unfunded. This will have a catastrophic impact on the provision of advice and representation to children and young people in public law proceedings.
- 6.4 The loss of provision of public law advice and representation will have considerable implications for some of the most vulnerable groups in society, including those who are unintentionally homeless and who have community care needs. This will have an impact on other public authorities including the police and NHS as well as the voluntary sector.

7. Civil merits test – removing legal aid for borderline cases

Q6. *Do you agree with the proposal that legal aid should be removed for all cases assessed as having “borderline” prospects of success? Please give reasons.*

- 7.1 No.
- 7.2 Cases that involve children and young people are often factually and legally complex in comparison with other areas of law. Such cases are therefore more likely to be considered ‘borderline’ and to be of significant importance to the individual concerned.
- 7.3 Currently the test for the receipt of legal aid in borderline cases is that they must be of wider public importance or of overwhelming importance to the individual. The current test has not been set out in paragraphs 3.81-3.83 of the consultation, which gives the impression that all cases that are ‘borderline’ are granted legal aid. In fact, it is relatively few under the current system; the consultation does not state how many or provide any supporting evidence to support this proposed change. It is therefore submitted that the current merits test is appropriate and should remain unchanged.

8. Introducing Competition in the Criminal Legal Aid Market

- 8.1 JustRights believes that the proposals made in relation to criminal legal aid are unworkable and have particularly serious implications for children and young people. JustRights endorses the response of the Law Society (www.lawsociety.org.uk) on these proposals.
- 8.2 We are very concerned that a child or young person will not be able to choose their own lawyer. A child or young person must be able to choose a lawyer that is specialised in representing children and has the confidence of that child or young person. Without that, the child or young person faces the prospect of real injustice within criminal proceedings.

i) Scope of the new contract

Q7. Do you agree with the proposed scope of criminal legal aid services to be competed? Please give reasons.

8.3 No.

Q8. Do you agree that, given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable? Please give reasons.

8.3 No.

8.4 Any reduction of this kind would render the provision of quality advice and representation impossible.

8.5 The credibility of legal aid is determined as much by the quality of the service delivered as its cost to the taxpayer. The government are not reducing prosecutors fees and resources. There is an overwhelming inequality of arms.

Many children and young people are at risk of being convicted of crimes they did not commit under these proposals.

ii) Contract length

Q9. Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract term by up to two further years and a provision for compensation in certain circumstances for early termination, is an appropriate length of contract? Please give reasons.

8.7 No.

iii) Geographical areas for the procurement and delivery of services

Q10. Do you agree with the proposal under the competition model that with the exception of London, Warwickshire/West Mercia and Avon and Somerset /Gloucestershire, procurement areas should be set by the current criminal justice system areas? Please give reasons.

8.8 No.

Q11. Do you agree with the proposal under the competition model to join the following criminal justice system areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas? Please give reasons.

8.9 No.

Q12. Do you agree with the proposal under the competition model that London should be divided into three procurement areas, aligned with the area boundaries used by the Crown Prosecution Service? Please give reasons.

8.10 No.

Q13. *Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas? Please give reasons.*

8.11 No.

iv) Number of contracts

Q14. *Do you agree with the proposal under the competition model to vary the number of contracts in each procurement area? Please give reasons.*

8.12 No.

Q15. *Do you agree with the factors that we propose to take into consideration and are there any other factors that should to be taken into consideration in determining the appropriate number of contracts in each procurement area under the competition model? Please give reasons.*

N/A.

vi) Contract value

Q16. *Do you agree with the proposal under the competition model that work would be shared equally between providers in each procurement area? Please give reasons.*

8.13 No

vii) Client choice

Q17. *Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.*

8.6 No

8.7 Children and young people must be able to have access to a lawyer of their choice. They must be able to choose a lawyer who is specialist in dealing with children and young people. They must be able to choose a lawyer who they have confidence in. Many children and young people are at risk of wrongful conviction if these changes go ahead. Innocent children and innocent young people will be wrongly convicted.

viii) Case allocation

Q18. *Which of the following police station case allocation methods should feature in the competition model? Please give reasons.*

8.16 Other: client choice, see above.

Q19. *Do you agree with the proposal under the competition model that for clients who cannot be represented by one of the contracted providers in the*

procurement area (for a reason agreed by the Legal Aid Agency or the Court), the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.

8.17 No, see our answer to question 17 above.

Q20. Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

8.18 No, see our answer to question 17 above.

ix) Remuneration

Q21. Do you agree with the following proposed remuneration mechanism under the competition model? Please give reasons.

8.19 No.

Q22. Do you agree with the proposal under the competition model that applicants be required to include the cost of any travel and subsistence disbursements under each fixed fee and the graduated fee when submitting their bids? Please give reasons.

8.20 No.

x) Procurement process

Q23. Are there any other factors to be taken into consideration in designing the technical criteria for the Pre Qualification Questionnaire stage of the tendering process under the competition model? Please give reasons.

Q24. Are there any other factors to be taken into consideration in designing the criteria against which to test the Delivery Plan submitted by applicants in response to the Invitation to Tender under the competition model? Please give reasons.

8.8 An understanding and experience of working with children and young people local to their area.

8.9 An understanding of the trafficking indicators.

Q25. Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons.

8.22 No.

9. Reforming Fees in Criminal Legal Aid

i) Restructuring the Advocates' Graduated Fee Scheme

Q26. Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme to:

- introduce a single harmonised basic fee, payable in all cases (other than those that attract a fixed fee), based on the current basic fee for a cracked trial;
- reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and
- taper rates so that a decreased fee would be payable for every additional day of trial?

9.1 No.

ii) Reducing litigator and advocate fees in Very High Cost Cases (Crime)

Q27. Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%? Please give reasons.

9.2 No.

Q28. Do you agree that the reduction should be applied to future work under current contracts as well as future contracts? Please give reasons.

9.3 No.

iii) Reducing the use of multiple advocates

Q29. Do you agree with the proposals:

- to tighten the current criteria which inform the decision on allowing the use of multiple advocates;
- to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court; and
- to take steps to ensure that they are applied more consistently and robustly in all cases by the Presiding Judges?

9.4 No.

10. Reforming Fees in Civil Legal Aid

i) Reducing the fixed representation fees paid to solicitors in family cases covered by the Care Proceedings Graduated Fee Scheme.

Q30. Do you agree with the proposal that the public family law representation fee should be reduced by 10%? Please give reasons.

9.5 No.

9.6 There is a correlation between domestic violence and abuse and being involved in public law children proceedings. Children who are subject to public law proceedings are vulnerable and in need of special protection. The family courts are already under pressure to resolve public law cases expeditiously.

- 9.7 Any further reduction in fees in public law cases (which, by definition, are complex cases that require considerable care and attention) risks reducing the number of specialist providers who undertake this work and, thus, access to legal advice and representation for children and young people.

ii) Harmonising fees paid to self-employed barristers with those paid to other advocates appearing in civil (non-family) proceedings

Q31. Do you agree with the proposal that fees for self-employed barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts. Please give reasons.

- 9.8 No.

iii) Removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases

Q32. Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

- 9.8 No.

- 9.9 The proposed changes to contracts may decrease the number of providers willing to do 'at risk' work or immigration and asylum work at all. The way that immigration and asylum law is regulated means that alternative sources of advice and representation are limited. Children and young people's access to legal advice and representation will, thus, be reduced.

11. Expert Fees in Civil, Family, and Criminal Proceedings

Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

- 11.1 No.

12. Equalities Impact

Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

- 12.1 No.

- 12.2 The proposals will discriminate against children and young people.

- 12.3 The proposals will discriminate against children and young people on the grounds of nationality and probably indirectly race too.

Q35. *Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.*

12.4 No.

12.5 The EIA fails to examine the impact of these proposals on individuals with one or more protected characteristics (race, age, disability, religion or belief, sexual orientation, sex, marriage and civil partnership, pregnancy and maternity and gender reassignment). The Legal Aid Agency collects information about the gender, race and disability status of legal aid applicants; this is not drawn upon to reach any conclusions about the potential impact of these proposals on the vulnerable groups who would be adversely affected by them.

12.6 These proposals do not, therefore, comply with section 149 of the Equality Act 2010 which places positive duties on public bodies to have due regard to specific equality aims, including alleviating discrimination against women. Indeed, public authorities are required to have due regard to the need to advance equality of opportunity, not merely to promote it or prevent disadvantage. The EIA does not attempt to explain how the proposals advance equality.

12.7 The EIA also completely fails to explain or justify how any savings made (which are disputed) can be assessed against costs which would be incurred by other public bodies such as the courts, local authorities, the police or NHS or legal aid providers.

12.8 Finally, given the evidence that cuts to civil legal aid can lead to increased social unrest and crime, we are concerned that the Government has failed to fully analyse the knock-on costs for the criminal justice system resulting from the proposed changes to civil legal aid.