

The Children's Society submission to the 'Transforming Legal Aid' consultation June 2013

Introduction

1. The Children's Society is a leading national charity, driven by the belief that every child deserves a good childhood. We provide vital help to the most vulnerable children, young people and families in our society through a range of services. We work with around 48,000 children each year, supporting them and advocating on their behalf to tackle discrimination and disadvantage in their daily lives. Our services include helping young people to access legal services as well as supporting them through the legal process when no-one else will. For further details, please contact Ilona Pinter, Policy Adviser, at ilona.pinter@childrenssociety.org.uk or on 020 7841 4400.

2. We welcome the opportunity to comment on these proposals. Our response is based on our experience of working directly with vulnerable children, young people and families across the country. It focuses on the impact on children, young people and families, including unaccompanied children, with a focus on the questions pertaining to the residence test, judicial review, prison law and the impact assessments.

3. We also support the submissions made by the Refugee Children's Consortium, the Immigration Law Practitioners' Association and the Standing Committee for Youth Justice of which we are members.

Key messages

4. Legal aid is already only available to those who cannot afford to pay for legal advice and representation. It provides vital help to some of the most vulnerable children and young people to navigate our complex legal system when they need it most and where other methods of resolution have not worked. It ensures that the poorest and most marginalised in our society are able to challenge decisions which affect their lives made by those with power and resources such as landlords, local authorities or government departments.

5. If implemented these changes will prevent some of the most vulnerable children, young people and families from seeking and obtaining justice. We believe these proposals are inconsistent with the governments' commitments to protecting all children's welfare, best interests and rights as set out under domestic and international legislation – regardless of their or their parents' status or nationality.

6. We welcome this government's continued commitment to ensuring that new policy and legislation takes into account children's rights. However, the impact assessments accompanying this consultation are wholly inadequate and show no evidence of any consideration given to the impact on children and young people or their rights.

7. We do not believe that these proposals will achieve the intended outcomes of saving money and securing credibility in the system. Indeed, any 'savings' are likely to result in costs elsewhere to other government departments and public services such as the police, health and social services and will also have a significant impact on the voluntary sector.

8. The government has already made devastating cuts to civil legal aid through the Legal Aid Sentencing and Punishment of Offenders Act 2012 by removing entire areas of legal matter from scope, including in important areas such as housing, employment, welfare, immigration and education. These additional cuts – if implemented – would have drastic consequences for many thousands of children and young people.

Prison Law

Question 1: Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria?

9. We oppose these restrictions. The life-line provided by good quality specialists to challenge the maltreatment, failures or actions of prisons and other statutory agencies in supporting and rehabilitating young people, is vital in securing children's well-being. We believe these proposals would have detrimental consequences for children and young people in the secure estate.

10. Many children and young people in custody are incredibly vulnerable yet there are no proposed exemptions for them. They are often children who have been excluded from school, suffer mental health difficulties or have special educational needs. Many children in custody have been abused, exploited or neglected, have been victims of crime themselves and have been in the care system. It also includes child victims of trafficking who have been wrongly convicted of offences committed under coercion from their traffickers.

Residence Test

Question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?

11. We oppose the introduction of the residence test entirely. We believe this proposal to be unworkable, ineffective and discriminatory,¹ and likely to put very vulnerable children, young people and families at risk of exploitation, abuse and homelessness. We have noted below the kinds of cases that are likely to be affected and some examples of children and young people we have worked with or are still supporting who would be affected.

12. The residence test will prevent the following groups of children from accessing legal aid:

- Children and young people abandoned here by their parents without lawful residence in the UK or the ability to prove lawful residence for 12 months (from EU and non-EU countries).
- Children and young people trafficked into the country for abuse and exploitation on false documents, i.e. who have no lawful residence or proof of lawful residence.

¹ The government makes clear in its impact assessment that there is likely to be a disproportionate impact on non-British nationals. See statement by the No Recourse to Public Funds Network:
<http://www.nrpfnetwork.org.uk/SiteCollectionDocuments/Transforming%20Legal%20Aid%20Consultation%20local%20authority%20statement.pdf>

- Children and young people who have been refused asylum and have exhausted their appeal rights but are too afraid to return and have ongoing protection needs² or unable to get documentation³
- Stateless children – they cannot be removed but will not have documentation or be able to prove lawful residence⁴.
- All children under 12 months old (including those in clinical negligence or child protection/public family law proceedings).
- Children and young people sent here to live in private fostering arrangements on a visa or false document who do not know there is an immigration issue and who might be at risk of violence and abuse (e.g. Victoria Climbié⁵ came in on a false document).
- Children, young people and families who have been accepted as refugees but will need to wait an additional year before they qualify for legal aid.

Unworkable

13. For many children we work with, including British citizens, it will be extremely difficult to prove that they are lawfully resident in the UK and that they have been for the last 12 months. British/EU passports or identity cards are not stamped on entry or exit so it would be impossible to prove that you had been resident in the UK for 12 months. Also some very vulnerable children and young people, such as those who have been abandoned by their families, trafficked children or those fleeing domestic violence, are unlikely to have documentation but will be homeless and in desperate need of support.

Likely to put children and young people at risk

14. Through our direct practice we know that young people, particularly teenagers, require legal support in order to get the services they are both entitled to and in desperate need of. A recent Serious Case Review from Manchester illustrates the disastrous consequences where children do not have documentation, have not been in the UK for 12 months and are not properly supported.

Serious case review involving a young person who was denied support⁶

Manchester City Council undertook a serious case review following the death of 'Child S', who came to England at the age of 16. Within months of arriving in the UK, a country that was totally unfamiliar to him, Child S was effectively abandoned by his father without any means of support. He did not have documentation to prove his identity or age and was not provided with adequate support from the council. He was street homeless for periods of time and supported in bed and breakfast accommodation. Child S had lived in Manchester for ten months when he was found hanged in local authority bed and breakfast accommodation. It is believed that Child S took his own life.

² The UN Committee Against Torture recently criticised the UK for not amending its asylum policy on Sri Lanka despite the High Court ruling earlier this year suspending removals of Tamil refused asylum seekers to Sri Lanka. 5th periodic report – May 2013: <http://www2.ohchr.org/english/bodies/cat/cats50.htm>. Reports by organisations such as Amnesty International and Refugee Council illustrate other examples of the protection gap for nationals from the Democratic Republic of Congo, Eritrea, Somalia, Sudan, and Zimbabwe who have been refused asylum but may still have a well-founded fear of return: Refugee Council (2012) 'Between a Rock and a Hard Place' and Amnesty International (2013) 'A question of credibility: Why so many initial asylum decisions are overturned on appeal in the UK'.

³ Iranian nationals are readily refused asylum but cannot be redocumented as there is currently no embassy in the UK

⁴ See Asylum Aid and UNHCR report on Mapping Statelessness in the UK:

http://www.unhcr.org.uk/fileadmin/user_upload/images/Updates/November_2011/UNHCR-Statelessness_in_UK-ENG-screen.pdf

⁵ House of Commons Health Committee report on Victoria Climbié:

<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhealth/570/570.pdf>

⁶ Serious Case Review of Child S in Manchester:

<http://resources.leavingcare.org/uploads/60fec78b9daa74ee5c0b036e096a8854.pdf>

The review found that children's services did not respond lawfully according to the child's needs – i.e. by providing him with adequate support and accommodation under Section 20 of the Children Act 1989⁷. His age was questioned by children's services despite an age assessment having been done by the same authority recognising that he was a child.

The review also identified an underlying issue across a range of agencies that at aged 17 years Child S was not always perceived to be, and therefore treated as, a child. As Child S was not assessed as a Child in Need, his needs for education, health and beyond were never addressed.

IMPACT: In this case the child did not benefit from legal advice and representation to challenge the local authority's unlawful decisions; if he had, perhaps the outcome may have been different.

15. We are currently supporting a boy who was similarly abandoned by his carer in the West Midlands: the local authority provided him only with bed and breakfast accommodation. We were able to challenge this only with the help of a community care solicitor and now he is properly supported under Section 20. We see many young people in this situation every year through our direct practice as illustrated in our reports – 'I don't feel human'⁸ and 'Hidden Children'⁹. Although we advocate on their behalf and make a 'child in need' referral, unfortunately budgetary pressures and a lack of understanding or clarity about statutory responsibilities, means that we often need to refer children and families to community care solicitors to challenge statutory agencies on their unlawful practice. This requires a fast response which cannot always be done through advocacy or complaints procedures and without a means of challenging authorities, these children and young people risk becoming or remaining street homeless, and continuing to suffer abuse and exploitation. If the residence test is implemented, these young people would no longer be eligible for legal aid to challenge unlawful practice.

CASE STUDY: Destitute young person from Iran who was 'appeal rights exhausted'

Peter is a young Kurd who came to the UK alone from Iran to seek protection. But the Home Office rejected his asylum claim before his 18th birthday and six months later social services stopped his support and told him to go back to his country. They called the police, who went to his house and broke down the door while he was not at home. They called him and told him to come to the police station. He was told that he could not go back to his house. He was made homeless for nine months. During this time he slept on buses, stayed with friends and sometimes in a mosque. He was not able to eat every day. Sometimes he ate only once, sometimes he did not eat at all. He stayed in unsafe places and regularly experienced violence and abuse on the streets from passers-by. When he was homeless he had a headache every day and was coughing a lot. He did not know where else to turn and he tried to commit suicide more than once.

⁷ Department for Education statutory guidance (2010) Provision of accommodation for 16 and 17 year olds who may be homeless and/or require accommodation: <https://www.gov.uk/government/publications/provision-of-accommodation-for-16-and-17-year-olds-who-may-be-homeless-and-or-require-accommodation>

⁸ Pinter, I. (2012) 'I don't feel human: Experiences of destitution among young refugees and migrants': http://www.childrenssociety.org.uk/sites/default/files/tcs/research_docs/thechildrenssociety_idontfeelhuman_final.pdf

⁹ Wirtz, L. (2009) 'Hidden Children: Separated children at risk' http://www.childrenssociety.org.uk/sites/default/files/tcs/research_docs/Hidden_children_full_report.pdf

Despite The Children's Society's advocacy the local authority would not rehouse him so we supported him to get a legal aid lawyer to challenge the local authority . Following this challenge the local authority agreed to rehouse Peter. He has been able to make a fresh claim.

IMPACT: The residence test would mean that, as Peter was 'appeal rights exhausted' when the local authority made him homeless he would not be able to challenge this decision. As an Iranian national there is no lawful way for him to get documentation in the UK, as there is no Iranian embassy in the UK, and Peter is not able to return to Iran. So he would be left homeless and would be at risk of harming himself further.

CASE STUDY: Destitute family – a lone mother from Jamaica with two young children

Claire was referred to The Children's Society because she was homeless, destitute and pregnant. She is a Jamaican national who was sent to the UK as a child when she was 12 years old to stay with her older sister following the death of her father. She came to the UK on a visa. But she was kicked out of home at 14 and began selling sex in order to survive. She was abused by older men but stayed with them because she had no place to go. She then became pregnant. When she came to The Children's Society she did not know her immigration status. She received legal aid to put in a non-asylum immigration claim based on human rights grounds and was able to successfully challenge the unlawful decision by social services to refuse her support. She has since been granted leave to remain.

IMPACT: With the residence test because she would not be considered to be 'lawfully resident' at the time when she was homeless and did not have an asylum claim, she would not be able to challenge the local authority who refused to support her and her children. Yet she has lived here since she was 12, considers this her home and has no strong connections in Jamaica.

Refugee status

16. Applying the residence test a second time to those who have been recognised as refugees would be inconsistent with the Refugee Convention¹⁰. A refugee is not 'created' when they get refugee status; a refugee is recognised by a grant of asylum. Any proposal to take legal aid away from those with a claim, including a fresh claim, for asylum risks taking it away from refugees. Also, it is inaccurate to suggest that these children, young people and families would not have a strong connection to the UK by the time they gain their status when most have spent many years in the UK waiting for their asylum claim to be considered. During this time they are not allowed to work but nevertheless many still contribute to our communities and our society through volunteering. The Children's Society has benefited from this, as have many other voluntary and community organisations.

Ineffective

17. We also believe these proposals are ineffective. No cost savings have been calculated for this proposal as the government does not have figures about how many children, young people and families will be affected by its proposals. While there may be some cost savings to some parts of the Ministry of Justice by eliminating this provision, there will no doubt be a cost-shift to other parts of the department – for example delays in court proceedings if more

¹⁰ The 1951 Refugee Convention states under Article 16 that "A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance"

people are bringing cases as litigants in person – as well as costs elsewhere for other government departments and statutory agencies. For example, if families are forced to stay in domestic violence situation or are made homeless, there will be cost implications for the police, health services, child protection services and local authorities overall as problems escalate.

Uncertainties

18. A number of things remain unclear concerning the consultation proposals:

- Would children who are undocumented but were born in the UK be caught by the residence test? They clearly have a strong connection to the UK and may have British citizenship.
- It is unclear what the term 'lawfully resident' refers to. Would a child or family which has been in the UK for a long time, and has made a human rights application to the Home Office (e.g. on the basis of children's welfare or under Article 8 of the European Convention on Human Rights) be included within this definition?
- It is also unclear from the consultation whether British children and non-EU parents – 'Zambrano' carers – are considered to be within scope or not. Are they considered to be 'lawfully resident' in the UK given that the child is a British citizen but will not be able to prove this. A lawyer with no knowledge of immigration law (or more specifically nationality law) may not be aware of this, if they are dealing with the parent and their status rather than the child.

Judicial Review

Question 5: 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)?

19. We do not agree with this proposal. Judicial review is a vital safeguard against public authorities acting unlawfully or where it is necessary to clarify the law. The tension between certain areas of law – for example welfare and immigration law – and the judicial review process is essential in clarifying this and developing case law. One example of a successful judicial review that The Children's Society intervened in was the R (SO) v Barking & Dagenham judgment in 2010. This held that local authorities have a general duty to provide a former relevant child with accommodation to the extent that his or her welfare requires it, and cannot rely on the provision of accommodation and support from the UK Border Agency. This was an important test case clarifying how care leavers should be treated and that leaving care duties override immigration considerations. The government's impact assessment recognises that 18-24 year olds are overrepresented among those who might be impacted by this proposal in comparison to the population as a whole. This age group includes care leavers who will not have families or other support networks to rely on (Annex K pg 148) and are therefore at particular risk of homelessness and disadvantage.

20. The impact assessment clearly identifies that there is a risk that providers may refuse to take on judicial review cases because the financial risk of the permission application may rest with them. We do not agree that these are cases that would not be considered by the court in any case. In fact we often find that cases settle before the permission stage in the child or family's favour because the threat of legal action is sufficient for the authority or

Home Office to change their unlawful practice. Without this vital safeguard, children and families would be put at risk. Echoing the Public Law Project's position, we do not believe that where cases do not make it to permission stage that they are a waste of public money. In addition, it would add a further burden to voluntary and advocacy organisations who would struggle to support such cases without legal means.

Impact assessments

Question 34: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?

Question 35: Do you agree that we have correctly identified the extent of impacts under these proposals?

21. We believe the impact assessment is wholly inadequate and does not give adequate consideration to the impact on children and young people or their rights under domestic and international legislation. The government has not taken into account the impact on children's rights under the UN Convention on the Rights of the Child (UNCRC), despite repeatedly stating its commitment to giving "*due consideration to the UNCRC Articles when making new policy and legislation*".¹¹ In the recently published general comment¹² on Article 3 the UN Committee states that:

*"Whenever a decision is to be made that will affect a **specific child, an identified group of children or children in general**, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, **be they broad issues of policy or individual cases.**"*

22. We also believe that the changes are in conflict with the government's obligations to children and young people in relation to the child-friendly justice guidelines adopted by the Committee of Ministers of the Council of Europe in 2010¹³. These guidelines apply to all domestic courts and tribunals, and aim to ensure that in legal proceedings, the rights of children, including the rights to information, representation, participation and protection, are fully respected. The following paragraphs of the guidelines are particularly relevant:

"35. Any obstacles to access to court, such as the cost of the proceedings or the lack of legal counsel, should be removed.

¹¹ Written Ministerial Statement from the Department for Education in response to the independent review of the Children's Commissioner:

<http://media.education.gov.uk/assets/files/pdf/w/written%20ministerial%20statement%20%20%20office%20of%20the%20childrens%20commissioner.pdf>

¹² General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*: <http://www2.ohchr.org/english/bodies/crc/docs/GC.14.pdf>

¹³ 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, available at: <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

37. *Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.*

38. *Children should have access to free legal aid, under the same or more lenient conditions as adults."*

23. In relation to the residence test, the impact assessment (Annex K paragraph 5.3.1) states that non-British nationals will be at a particular disadvantaged compared with British nationals. We agree with the No Recourse to Public Funds Network that this is discriminatory under domestic and international human rights legislation. A fundamental part of the UNCRC under Article 2 is that there should be no discrimination between children on the basis of their nationality, ethnicity, social status or other status, or the status of their parents. This is reiterated in government guidance including the Home Office guidance 'Every Child Matters'¹⁴ which states that "*Every child matters even if they are someone subject to immigration control*".

24. Furthermore, the UNCRC states that in all decision concerning a child, their best interests must be a primary consideration. It is difficult to see how the residence test proposal complies with the UNCRC or other human rights and children welfare legislation, and puts children's best interests in a primary position.

Impact on the voluntary sector

25. The impact assessment makes no mention of the impact on the voluntary sector. If implemented, these changes will radically change the landscape of advice provision and access to justice, which will have a direct affect on voluntary and community organisations such as ours who will be left with no way of supporting our vulnerable clients.

Credibility and confidence

26. It is unlikely that there will be a significant difference to public confidence since very few people are aware of these proposals or what these changes will actually mean in practice. There is a great deal of misunderstanding among members of the public about the rights and entitlements of refugee and migrant children in the UK, and the situation of young people caught up in the youth justice system. We believe that the government should aim to correct these misperceptions with better information and public communication.

¹⁴ <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/bci-act1/change-for-children.pdf?view=Binary>