

## **Implications of cuts to legal aid for children and young people in light of the Legal Aid, Sentencing and Punishment of Offenders Act 2012:**

1. This note accompanies a discussion with members of The Children's Society practitioners' legal subgroup on 17<sup>th</sup> May.
2. A key purpose of the discussion is to assist practitioners to consider how they may now prepare for supporting children and young people, and families, who will be affected by the changes to be made to legal aid provision by the Legal Aid, Sentencing and Punishment of Offenders Act 2012; and how they may collect evidence to support ongoing advocacy and influencing work in this area.
3. To meet either of these aims, it is necessary to first understand what is changing and when.

### **What will be different for children and young people as a result of the Legal Aid, Sentencing and Punishment of Offenders Act 2012?**

4. The Act was passed on 1<sup>st</sup> May. However, it is not intended to bring its legal aid provisions into force until April 2013.

#### ***Before April 2013***

5. Nonetheless, the impact of the changes are likely to be felt before the provisions are brought into force. Legal advisers, who wish to do legal aid work in immigration and asylum after April 2013, are now engaged in a process to decide who will be offered legal aid contracts at that time. Immediate questions for those who currently do legal aid work in this area include – do I want to continue to do this work, will the new legal aid regime be sustainable for me, and if I do want to do this work what size of legal aid contract do I need? For those who want to continue to do legal aid work, it may be necessary that they are asking themselves now (and possibly exploring with others) what options there may be – in terms of ways of working, or ways of funding work – that can make good quality (or competent) legal work under a legal aid contract sustainable?

6. While legal advisers are considering their futures, it is as well for others working in this area to be reflecting on the developing situation. In particular, if you have established working relationships with particular legal aid advisers, in whom you have confidence, or are aware of particular legal advisers doing good quality work on whom those you work with rely, it may be useful for you to know what are those legal advisers' plans.
7. The Legal Services Commission has announced its intention to start the tendering process for April 2013 legal aid contracts (including in immigration and asylum) on 21<sup>st</sup> May, with a pre-qualification procedure to which those who wish to bid for a contract must respond by 12 noon on 18<sup>th</sup> June:  
[http://www.legalservices.gov.uk/civil/cls\\_news\\_13727.asp](http://www.legalservices.gov.uk/civil/cls_news_13727.asp)
8. Those who choose not to bid for a contract (or later are unsuccessful, including those who may be offered contracts they consider to be too small to be sustainable) may be looking to wind-up their legal aid work; and may be unwilling to take on new cases.

***From April 2013***

9. The Act will remove most non-asylum immigration cases from legal aid scope (i.e. legal will no longer be available for these non-asylum immigration cases). While this will be a critical development, it is unlikely to be the only development at this time which will have a dramatic impact on the availability of legal advice and representation in immigration and asylum cases. There is going to be less legal aid work in the immigration and asylum area. As indicated above, some legal advisers may simply cease to do this work; or cease to do legal aid work in this area. Those that continue may find profit or budget margins even more constrained. The availability of legal advice or representation, including in asylum cases where legal aid will still be available, is likely to be reduced; and it can be expected that current concerns as to the

quality of some of that provision will not be alleviated and may well be exacerbated from April 2013.

10. The key changes to legal aid scope likely to affect children and young people are:

- a. Asylum (refugee and Article 3) claims are to remain in legal aid scope. However, it is uncertain who will be doing this work. Refugee family reunion applications, however, will be out of legal aid scope.
- b. Extensions of discretionary leave, on non-asylum grounds (and perhaps onward appeals on non-asylum grounds) – e.g. claims and appeals brought on Article 8 grounds – will be out of scope. Separated children, most of whom will bring an asylum claim, may nonetheless find themselves ineligible for legal aid if and when that claim falls away. Being an asylum-seeker will not be a gateway to legal aid for all immigration problems. (While an asylum claim is being pursued, legal aid may also be available for an Article 8 claim under the provisions for ‘mixed cases’.) If there is no longer an asylum claim being pursued, it can be expected that legal aid will not be available. It remains to be seen whether local authorities accept their duties towards these children (and young care leavers) to extend to obtaining and paying for legal advice and representation. It may be expected that, if local authorities do not accept this to be included in their duties, legal advisers may be willing to bring judicial review claims demanding that local authorities accept such duties to ensure advice and representation is available for these children and young people. Judicial review cases will (generally) remain in scope for legal aid.
- c. Children who have been abandoned in the UK (e.g. having come as a dependant of an adult who has long since left) and who need to regularise their stay, will – unless making an asylum claim – be

ineligible for legal aid. These too may turn to a local authority, who is responsible for them as a child in need.

- d. Although legal aid is generally to be retained for judicial review cases (including claims against local authorities, and claims against the UK Border Agency), there are to be some restrictions on legal aid in immigration judicial review cases. This will most likely affect young people and families facing removal, in that legal aid will not be available for a judicial review claim challenging removal directions (if made within 12 months of a decision to remove or any appeal against such a decision) – unless this relates to a fresh asylum claim.
- e. Although legal aid is generally to be retained for challenging immigration detention, it is not to be available for any underlying immigration case. This is most likely to affect families, or former separated children. Thus, a family (or parent) detained and facing removal may be eligible for legal aid for a bail application, but not to pursue the Article 8 case which may establish an entitlement to remain in the UK. In such circumstances, it may be that the challenge to detention is rendered toothless. Note that families or family members who have never made an asylum claim may be subjected to detention, having never had any legal aid (or any legal advice). Those families liable to be detained at Pease Pottage (the so-called 'pre-departure accommodation') include families who have not passed through the asylum system. Those facing deportation, including those in prisons or youth offender institutions (whether serving a sentence or detained under immigration powers post-sentence), may have no legal aid advice or representation – unless making an asylum claim.
- f. Victims of trafficking, including children and young people, will be eligible for legal aid in relation to immigration claims and appeals; but only if recognised as victims or potential victims via the National Referral Mechanism. For some (perhaps many), an alternative

route to legal aid may be the making of an asylum claim (see above). (Note there is particular provision for legal aid for victims of trafficking to bring certain compensation or damages claims against traffickers.)

- g. There are concerns that legal aid provision for claims for damages against the UK Border Agency (e.g. for unlawful detention) or other public authorities is also to be curtailed by the Act.
  - h. Those whose immigration status is relevant to entitlements and proceedings in other areas (e.g. welfare benefits, housing, education and employment) may be especially disadvantaged in seeking to access services which may generally be available to support individuals and families with issues in these areas. This is likely to arise because service-providers may not have the expertise to understand or be regulated to assist with the immigration matter, and without resolving this the non-immigration entitlement may remain inaccessible.
11. The Government has made clear its intention that a person's age, mental or physical health or disability, language or learning difficulties, detention or imprisonment or other disadvantage shall not be relevant to whether legal aid is to be available for an otherwise ineligible immigration case. The Act contains provision for funding in certain exceptional cases (section 10), where the case is generally out of legal aid scope. However, immigration cases are to be excluded from this funding.
12. As regards immigration cases, the Government has said that these cases are not complex and that legal advice is not needed. Children, as in other areas, are to be expected to rely upon their parents to protect their legal interests. As regards separated children, the Government has said it will discuss with the Immigration Services Commissioner providing an exemption to social workers so that they can lawfully provide basic immigration assistance (such as form-filling) to these children.

## **What support can be offered to children, young people and families in the face of these changes?**

13. It is vital to remember that the provision of immigration advice and services, unlike that in others areas, is regulated. Providing immigration advice or services in the course of a business (whether or not for profit) is a criminal offence unless the provider is regulated (whether as a member of a designated professional body, e.g. a solicitor; or within the scheme of the Office of the Immigration Services Commissioner (OISC)). The OISC scheme consists of distinct levels – level 1 (basic), level 2 (casework) and level 3 (advocacy) – and is also divided between asylum and immigration. It is necessary to be registered at the correct level (and in the correct division) appropriate to the advice or services you are providing.
  
14. As now, many children, young people and families will need assistance in finding a legal adviser. However, in view of the anticipated changes, it is likely that from April 2013 (or even before) this will be much harder. Distinct concerns as to availability and quality are likely to be exacerbated rather than lessened. The vulnerability of individuals to exploitation – whether in seeking to raise funds to pay for a legal adviser or by incompetents or charlatans holding themselves out to provide such advice – is also likely to increase. Current issues concerning when and how to complain will remain critical ones for those working with children, young people and families; as will recording of good and bad practice (see below). Much of the generalist advice sector, which Government has suggested can pick up where legal aid is to be excluded, is not regulated so as to be permitted to undertake legal aid work. If those not-for-profits regulated by the OISC, many have a particular asylum focus and relatively few are registered beyond level 1.
  
15. It can be expected that there will be an increase in young people and families passing through immigration procedures without any legal advice or representation. These may need help in understanding the procedures to which they are subject; and assistance in identifying, obtaining and presenting evidence relevant to those procedures.

However, this is less than straightforward. Advising about procedures and what evidence to collect and present is likely to constitute regulated work. In any event, immigration procedures can be complex; and misunderstandings can have disastrous consequences. Obtaining and presenting evidence is often critical, but failing to spot or understand flaws in evidence (e.g. inconsistencies between pieces of evidence) can be fatal to an individual's claim.

16. Any increased difficulties faced by children, young people and families as regards securing good legal advice may be expected to exacerbate pressures on others working with these individuals and families – particularly if the incidence of need which cannot be met is to increase.
17. If there are ways of working with good legal advisers, with whom a relationship now exists or can be developed, now is the time to be exploring these.

**What work can be done to support advocacy and influencing work to address the expected impact of the legal aid changes?**

18. The Act contains power to bring areas, which it takes out of legal aid scope, back into scope (section 8(2)). Thus, there exists the means for Government to reverse or mitigate the changes if sufficient pressure is brought to bear, without the need for a new Act of Parliament. However, it must be expected that the Government will be very resistant to any change that would increase cost to the legal aid budget, and that there will be many eyeing this particular power in the Act with a view to bringing pressure to bear in other areas affected by the legal aid changes. The importance of good quality evidence of the impact of changes being recorded, collated and presented as part of strategic, co-ordinated and effective advocacy and influencing work cannot be underestimated.
19. What is of interest? As wide a range of evidence and experience of the impact of changes as possible, including that which may be anticipatory – i.e. experiences now, which may inform an understanding of what is to

be lost or of the inadequacy of what will be left (such as experiences demonstrating the risk to which a individual or family has been exposed by reason of inadequate legal aid provision, or the inadequacy of social workers to substitute for lawyers in non-asylum immigration cases). It will be relevant to consider both the direct impact of loss of legal aid provision in immigration cases and the indirect impact – e.g. situations where inability to establish immigration status has knock-on effects such as exclusion from entitlements relating to education or housing.

20. The future is looking bleak. However, while mitigating the full extent of the Government's disastrous legal aid policy may be beyond us, there are opportunities ahead and specific issues or areas in respect of which the Government and its policy appears to be particularly vulnerable.
21. The intention to keep immigration cases out of the exceptional cases fund may be subject to legal challenge. Legal advisers may need to think more imaginatively as to when judicial review is appropriate, in view of the absence of legal aid in non-asylum immigration cases (including at appeal); and also to explore the extent of the UK Border Agency's and perhaps the tribunals' duties towards children or other unrepresented litigants in ensuring that their circumstances and properly and fully explored. Evidence and experiences that are recorded and collated may be equally useful to traditional lobbying and campaigning work as to litigation that may prove critical in mitigating or reversing some of the worst aspects of the Act and the Government's intentions.
22. The obligations of local authorities towards children in need and care leavers is likely to lead to pressure on the Ministry of Justice and Home Office, especially if it is seen that the withdrawal of legal aid has simply shifted the cost-burden from central to local Government. The Government's suggestion of exempting social workers from regulation to enable them to substitute for legal advisers has been questioned and criticised.
23. In relation to welfare benefits, the Government has conceded that legal aid should be available for higher appeals on points of law; and there is



no greater need for legal advice and representation in welfare benefits than immigration higher appeals. Indeed, the Government has acknowledged the need to look at immigration appeals, albeit suggesting that this can await 12 months after implementation (i.e. from April 2014).

24. Of course, pressure may also be brought to bear via individual MPs. Particularly in view of regulation, the constituency MP may become for many the sole legitimate source of immigration advice and representation. Some MPs already have high immigration caseloads, but it can be expected that such caseloads will increase.

**Conclusion:**

25. ILPA – as The Children’s Society, Refugee Children’s Consortium and many others – will continue to battle against the withdrawal of legal aid for immigration cases. The issue for us now, is less to define our goals but more to identify, explore and implement ways of working that seek to protect the needs of individuals in the immediate term, and the provision of quality legal advice wherever it may be found, while recording, collating and making best use of the impact of the withdrawal of legal aid with a view to restoring its provision. A difficulty we face is getting the balance right. Simply throwing all our efforts into doing the best we can to mitigate the immediate loss of legal aid may appear to be of overwhelming importance. However, doing this and this alone, will only serve to mask the impact of what is done by this Act, and ease any pressure on the Government to take steps to mitigate or reverse that impact.

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