# UNJUST AND UNWORKABLE:
# WHY THE GOVERNMENT'S LEGAL AID REFORM CONSULTATION IS IMPORTANT FOR YOU AND THE PEOPLE YOU REPRESENT

## Introduction

The Ministry of Justice's latest proposals to cut legal aid will seriously undermine access to justice and government accountability. If they are brought in, these proposals will affect the most disadvantaged in society and allow unlawful and unfair public body decision making to go unchallenged.

It is vital that the Ministry of Justice understands the devastating impact that these proposals would have and the threat to the rule of law that they pose. We urge you to respond to the consultation giving examples from your experience (such as anonymised case studies) that demonstrate the extent to which you consider the proposals to be (as we think they are) unjust and unworkable. The points made in this briefing are intended to help with formulating your response.

The consultation paper is available here: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid

**Responses to the consultation must be submitted by midnight on 4 June 2013.**

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## PROPOSED RESIDENCE TEST

### *What is being proposed?*

The MoJ is proposing to introduce a residence test for civil legal aid, which will apply across the board to all areas where civil legal aid is still available.

There are two limbs to the residence test, and both will need to be satisfied:

**(a)** A person must be "lawfully resident" in the UK (or Crown Dependencies or British Overseas Territories) at the time the application for legal aid is made; **and**

**(b)** Must have been "lawfully resident" in the UK (or Crown Dependencies or British Overseas Territories) for a continuous period of at least 12 months at some point.

The legal aid provider would be required to retain evidence on their file that their clients satisfy both limbs of this test.

See paragraphs 3.42-3.54 of the consultation paper.

***Are there any exceptions?***

There will be an exception for UK armed forces personnel.

There will also be an exception for asylum seekers **only** whilst their asylum claim is pending. If asylum is granted, at this point legal aid funding will continue for an on-going legal aid matter, but for any new matter, the person will need to satisfy the second limb of the test and wait until they can demonstrate 12 months lawful residence. If the asylum application is refused, at this stage the exception will no longer apply.

The MoJ has stated that legal aid will continue to be available where necessary to ensure compliance with obligations under EU and international law. But the precise details of how this would work in practice are not set out in the proposal.

See paragraphs 3.55-3.59 of the consultation paper

***Who will be excluded from accessing legal aid by this proposal?***

This proposal will impact on those who live outside the UK, those who are living in the UK unlawfully or those who have difficulties in evidencing 12 months continuous lawful residence in the UK. Below is a list of illustrative examples of the different people who will be excluded by the residence test. **This is not an exhaustive list and it is really important that you add your own examples from your casework or client group.**

- Anyone unlawfully in the UK.

- Any person who is unable to evidence that they have in the past lived in the UK (lawfully) for a period of at least 12 months, including people of British nationality.
- All children under 12 months of age.
- Migrant children who are here unlawfully or who have not been here for 12 months.
- Unaccompanied children arriving in the UK (unless they can claim asylum).
- Trafficking survivors (either those who have not regularised their status yet or who have not been here for 12 months).
- Survivors of domestic violence who have not been lawfully in the UK for 12 months yet or who stop being lawfully resident in the UK upon leaving their violent partner.
- Immigration detainees, including those with serious mental health problems such as post-traumatic stress disorder.
- Destitute families with outstanding immigration applications.
- EU nationals who are working here lawfully and exercising their lawful treaty rights but who have not been here for a 12 month period.
- Zambrano carers of British national children who have not yet reached the age of 12 months.
- Foreign nationals who have been subjected to abuse abroad by British army personnel.

***What kinds of cases will be excluded?***

We include some examples of the types of cases that would be excluded by the residence test. **These are just some illustrations – you need to add your own examples from your casework or client group.** The following cases would not be eligible for legal aid:

- Parents and migrant children who have not been lawfully in the UK for at least 12 months will no longer be able to get legal aid for family court proceedings, even in circumstances where proceedings are necessary to protect a child who is at risk of abuse.
- Where a member of a protected group for the purposes of equality law (such as a disabled person) is discriminated against by a public authority, such as the police, or a school, that person will be unable to vindicate their right to equal treatment under the Equality Act 2010 if they have not been in the UK lawfully for 12 months, even though the Equality Act 2010 is there to prevent discrimination.
- A survivor of domestic violence who is not lawfully in the UK or who has not lawfully been in the UK for at least 12 months could not obtain legal aid for advice on family

matters such as divorce, financial disputes or disputes about the children in the relationship.

- Where a person suffers mistreatment at the hands of the police, such as false imprisonment, assault or malicious prosecution, they will be unable to get public funding to bring a claim if they have not been in the UK lawfully for 12 months and the police will therefore face no sanction for their unlawful behaviour.
- Where local authorities unlawfully refuse to provide support under s17 of the Children Act 1989 to a child who is need by virtue of his or her family's destitution, he or she will be unable to challenge that decision unless he or she has been lawfully in the UK for 12 months. This proposal will frustrate the statutory purpose of the Children Act 1989 to safeguard and promote the welfare of the children and could leave children street homeless and starving.
- In the last two years there have been four cases against the UK Border Agency finding that mentally ill detainees had been subject to inhuman treatment in immigration detention, in breach of Article 3 ECHR. None of these cases would have been funded under this proposal, leaving the most serious human rights abuses unchallenged.
- A person with priority need for housing assistance would not be able to challenge an unlawful refusal to provide housing if they had not been in the UK for 12 months, even though they may be qualified persons under the housing legislation.
- A person leaving a violent partner who has not been in the UK for 12 months or who becomes unlawfully present in the UK by virtue of leaving the violent partner could not receive legal aid to obtain a non-molestation order to protect themselves from further violence.
- The survivors of torture, or the family members of those unlawfully killed by UK forces in their home country, could not obtain legal aid to challenge breaches of their human rights.

***Why is this being proposed?***

The MoJ has stated that they think that introducing this test will limit legal aid to those who can show a strong connection with the UK. The government consider that limiting access to legal aid in this way will increase public confidence in the legal aid scheme.

***What are you being asked to respond to?***

You are being asked to respond to the following question:

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

***Points to consider in your response***

PLP strongly disagrees with this proposal for the reasons outlined below. In summary, are our objections are:

a) Limiting legal aid in this way undermines the rule of law and is unjust;
b) The proposal would be administratively unworkable and expensive;

Unjust and contrary to the rule of law

PLP is concerned that this proposal:

- undermines the rule of law, a fundamental feature of which is that everyone is equal before the law;
- leaves people open to abuses of power and arbitrary decision making because they are excluded from the protection of the law;
- means that individuals, groups and public bodies can act with impunity as there will be little risk of legal sanction for unlawful action;
- will impact on the most vulnerable members of our society, such as mentally ill immigration detainees, survivors of human trafficking and destitute families;
- is likely to have an adverse impact on protected equality groups, which does not appear to have been adequately considered by the MoJ.

**It is important that you add examples from your own casework, client group and experience to support these points and any others that you would like to make.**

Unworkable and expensive

PLP is concerned that this proposal will be administratively unworkable because:

- it will result in significant satellite litigation about whether or not a person is or has been lawfully resident in the UK.
- it could lead in an increase in litigants in person who without legal aid will have no option but to bring the case themselves without legal assistance, clogging up the courts with cases that are poorly prepared and poorly argued.
- will result in insurmountable evidential hurdles. It will require solicitors in all areas to act as immigration officers. This will cause chaos. The question of lawful residence is a complex legal one which practitioners will be unable to resolve in many cases. For example:
    - How will historic questions of lawful residence be determined by non-immigration practitioners, for example, where someone claims that they were lawfully present here in the 1960s?
    - How will practitioners determine whether lawful residence has been granted by operation of law, for example, under section 3© of the Immigration Act 1971 or as a result of the *Zambrano* litigation? These residence rights vest automatically and are not based on documentary evidence.

In addition, PLP is concerned that:

- The evidential difficulties are liable to impose a significant administrative burden on the Legal Aid Agency (LAA), who will be responsible for assessing whether lawful residence has been sufficiently evidenced. This in turn is liable to lead to increased litigation against the LAA, with costs implications for the UK tax payer.
- In many cases legal aid will be required to litigate whether a person is lawfully resident in the UK. Where there is a risk that the UK Border Agency and/or another public body (for example a local authority or an NHS Trust) has wrongly determined that someone is not lawfully resident, and the individual's claim against them is meritorious as a result, preventing that person from accessing public funds to challenge the determination is unjust and may have the effect of incentivising unlawful decision making around issues of residence.

**It is important that you add examples from your own casework, client group and experience to support these points and any others that you would like to make.**

*For a more detailed briefing on the problems with the proposed residence test, see the Immigration Law Practitioners' Association website (ILPA): http://www.ilpa.org.uk/*

## PROPOSED CHANGES TO FEES

### *What is being proposed?*

The consultation proposes to cut junior counsels' fees and experts' fees. Junior counsels' fees will be cut to bring them into line with other advocates' fees in the High Court and the County court, although with the possibility of an uplift in complex cases. Expert fees will be cut by 20% across the board. This is in addition to the 17.5% cut across the board in prison law and the cut of 10% for public family law solicitors.

See paragraphs 4.31, 6.21 and 7.10 of the consultation paper

### *What are you being asked to respond to?*

You are being asked to respond to the following questions:

> *Q30. Do you agree with the proposal that the public family law representation fee should be reduced by 10%? Please give reasons.*
>
> *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.*
>
> *Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.*

### *Points to consider in your response*

Points about fees need to be handled sensitively because they can come across as self-interested. However, PLP is of the view that there are two principled objections to the proposed fee cuts for junior counsel and experts:

- Cuts in the rates of remuneration for claimant counsel and experts employed by claimants offends the principle of equality of arms. If the government can pay its lawyers and its experts more then it will have access to advocates and experts who are more senior, more expert and more capable.

- Cutting junior counsels' fees may signal the end of the specialist junior Bar. This in turn will mean that JRs will be more poorly argued and poorly prepared, taking up more judicial and court time and not saving the public purse anything in the long run.

**PROPOSED CHANGE TO PRISON LAW**

The Public Law Project does not have expertise in prison law, but it is deeply concerned by the proposed changes in this area. For a detailed briefing on the prison law proposals and how to resist them, see the Howard League for Penal Reform's website: http://www.howardleague.org/.