

Public Law Project response to the Ministry of Justice consultation on Legal Aid Financial Eligibility and Universal Credit

The Public Law Project (PLP) is a national legal charity founded in 1990 which aims to improve access to public law remedies for those whose access to justice is restricted by poverty or some other form of disadvantage. Within this broad remit PLP has adopted three main objectives:

- increasing the accountability of public decision-makers
- enhancing the quality of public decision-making
- improving access to justice

Uniquely for an organisation of its kind, PLP undertakes research, policy initiatives, casework and training across the range of public law remedies.

The issues raised in this consultation fall squarely within PLP's specific areas of interest and expertise, in particular access to justice and legal aid. We summarise some of our relevant expertise below:

- PLP was the claimant in the challenge to the legal aid 'residence test'.¹
- PLP acted for the Official Solicitor in individual² and systemic³ challenges to the exceptional case funding scheme.
- PLP acted for a number of solicitors firms and charities in a challenge to the civil legal aid regulations that put payment for work done at the pre-permission stage in judicial review 'at risk'.⁴
- To investigate and counter the impact of the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO") on vulnerable and disadvantaged groups PLP established our Legal Aid Support Project. Part of that wider project was our Exceptional Case Funding Project, set up to assist lawyers, NGOs and individuals making applications for exceptional case funding ("ECF") in areas that were no longer within the scope of legal aid following the LASPO. PLP has engaged in outreach and training to lawyers and NGOs in making ECF applications.

This is PLP's response to the Ministry of Justice's consultation on proposed changes to financial eligibility for legal aid for Universal Credit claimants.

Question One

Is limiting passporting through the legal aid means tests to Universal Credit recipients with zero income from employment (while continuing to passport recipients of legacy benefits) a reasonable measure to accommodate the expansion of Universal Credit?

¹ R(Public Law Project) v Lord Chancellor [2016] UKSC 39

² R(Gudanaviciene & ors.) v Director of Legal Aid Casework & or. [2014] EWCA Civ 1622

³ Director of Legal Aid Casework & Anor v IS [2016] EWCA Civ 46

⁴ R(Ben Hoare Bell Solicitors & Ors) v The Lord Chancellor [2015] EWHC 523 (Admin)

No. PLP believes that the any measure to accommodate the expansion of Universal Credit should create parity between Universal Credit claimants and claimants of legacy benefits.

The purpose of the proposed measure is to bring the application of Universal Credit as a passporting benefit for applications for legal aid in line with passporting for applicants in receipt of legacy passporting benefits. The legacy passporting benefits which will eventually be incorporated into Universal Credit are: income related Jobseeker's Allowance ("JSA"), income related Employment and Support Allowance ("ESA") and Income Support.

The proposed measure fails to take into account that under the current system, applicants in receipt of ESA, JSA and Income Support who have income from employment are passported through the means assessment of their income.

JSA and Income Support claimants are entitled to carry out paid work for up to 16 hours per week.⁵ ESA claimants are entitled to carry out paid work while claiming ESA, providing that they are doing certain permitted work, which includes working as a local councillor and working as a member of the First Tier Tribunal.⁶ ESA claimants can carry out permitted work provided that they work, on average, for less than 16 hours per week and do not earn more than £520 per week.⁷ A claimant carrying out 16 hours of paid work per week at the national minimum wage would be earning £120 per week, or £520 per month.

Income from paid work is taken into account by the Department for Work and Pensions when conducting a means assessment for a claimant's eligibility for all three benefits. Any income from paid work leads to a corresponding reduction in the claimant's benefit payment.

Under the current system, an applicant for legal aid who is in receipt of means-tested ESA, JSA or Income Support and carrying out 16 hours per week paid work or less, will be passported through the means assessment of their income. Under the proposed measure, a claimant in an equivalent situation, but who has been moved onto Universal Credit, will not be passported, and will be subject to a means assessment of their income, at greater administrative cost to providers and to the Legal Aid Agency.

We note that the Ministry of Justice considered and chose not to pursue an alternative option, which was to limit passporting to applicants in receipt of Universal Credit with earnings of up to £500 per month. This option is much more closely aligned with the current system, and would maintain passporting for applicants who are in receipt of means tested benefits and also have income from earnings. On that basis we consider that this is the most appropriate option to adopt in order to accommodate the expansion of Universal Credit.

Legal aid is only available to individuals on very low incomes. The passporting system reflects the fact that in order to meet the eligibility criteria for means tested benefits the DWP will already have conducted a full means assessment, and the applicant been recognised as requiring financial support from the state. The proposal to passport Universal Credit claimants with up to £500 per month income from work maintains the recognition that claimants in receipt of means tested benefits are highly likely to be eligible for legal aid,

⁵ Regulation 5, Income Support Regulations 1987; Regulation 51, Jobseekers Allowance Regulations 1996

⁶ Regulations 40 and 45, Employment and Support Allowance Regulations 2008; Regulations 37 and 39, Employment and Support Allowance Regulations 2013

⁷ Regulation 45, Employment and Support Allowance Regulations 2008; Regulation 39, Employment and Support Allowance Regulations 2013

whether they are carrying out some paid work or not. The number of applicants earning up to £500 per month who would be passported if this measure is adopted, but who are ineligible for legal aid or who would be required to pay a contribution if a means assessment were conducted is likely to be extremely small.

This measure reduces the administrative burden on legal aid providers and the LAA, and ensures that the best use is made of information obtained by government departments. We note that the Impact Assessment dated 17 March 2017 states that in relation to its proposal to limit passporting to Universal Credit claimants with no income from employment, “*this option...would ensure that the LAA continue to make the best use of information on an individual’s financial circumstances that has already been collected by the government as applicants would not be required to provide the same information again*”. We consider that assessing the income of applicants with an income of up to £500 per month who have been means assessed as eligible for Universal Credit by the Department for Work and Pensions is unnecessary duplication, and the cost of requiring a full means assessment is not justified.

The legal aid system is designed to assist those who have the most need, and passporting applicants who have been assessed as eligible to claim means tested state benefits on the basis of their income reflects that intention. Earnings of £500 per month is a reasonable threshold to capture applicants with the most need. Below that threshold almost all applicants will be eligible for non-contributory legal aid.⁸ Passporting applicants in receipt of Universal Credit with earnings of up to £500 per month is therefore the appropriate measure to adopt.

The impact assessment also considered but chose not to pursue whether it would be appropriate to means test the income of all applicants for legal aid. We agree that this option is not the right measure. For the reasons set out above it is unnecessary to conduct an income assessment of applicants who are in receipt of means tested benefits.

Question Two: Should the total amount for housing in the Universal Credit award be disregarded when assessing a claim for legal aid?

Yes. In order to maintain parity between recipients of legacy benefits and Universal Credit, the housing element of a Universal Credit award should be disregarded from an applicant’s gross income.

We would like to take this opportunity to note that for the purposes of the income assessment, the £545 cap on deductible housing costs for single applicants with no dependents is unrealistic. The average rent in the UK is £904 per month.⁹ It is likely that there will be very many applicants for legal aid with housing costs in excess of the cap. The net disposable income figure for these applicants will not reflect their true disposable income and will either exclude them from legal aid altogether or require them to pay an unaffordable contribution. We urge the MOJ to consider removing, or increasing, the cap on deductible housing costs for single applicants with no dependents to more closely reflect the actual cost of housing.

⁸ The only exception would be those with no dependents, housing costs of less than £190 per calendar month, and no other allowable deductions such as tax, national insurance, or employment expenses.

⁹ <https://homelet.co.uk/homelet-rental-index>

Question Three: Do you agree with the proposal that where there are contrary interests both parties should be assessed using the Universal Credit award amount for their household circumstances but any earnings would be taken account of separately?

Yes.

Question Four: Have we correctly identified the range of impacts of the proposals as currently drafted in this consultation paper?

The impact assessment is inadequate. It is not possible to comment on the range of impacts identified without further information.

The impact assessment sets out two options: Option 0 and Option 1. Option 0 is to continue to passport all Universal Credit Claimants. Option 1 is to limit passporting to the Universal Credit claimants who have zero income from employment.

The impact assessment is inadequate for the following reasons:

1. There is no assessment of the economic impact of Option 0. The summary contained within the impact assessment document states that Option 0 *“is likely to generate additional costs burdens for the legal aid budget of up to £14m per annum in steady state”*. There is no costing or explanation for the figure of £14 million. It is not possible to comment on the impact assessment without realistic information about the cost of Option 0. We request that the Ministry of Justice provides a full economic assessment of the impact of Option 0 before proceeding to implement any change.
2. The full economic assessment of Option 1 fails to assess the option against the correct measure. The cost to the legal aid fund of Option 1 has been assessed against the position before the introduction of Universal Credit. The correct measure to assess Option 1 against is Option 0. The assessment estimates the net additional cost of Option 1 is £400,000. This cost is additional to the position if Universal Credit had not been introduced. However, given that Universal Credit has been introduced, it is not a useful or accurate exercise to compare the cost of Option 1 against an historic scenario. The correct measure to compare Option 1 against is Option 0, which would be the position if no changes are made.
3. There is no assessment of the impact of the other options which the consultation paper states have been considered but rejected, such as the option of passporting those in receipt of Universal Credit with earnings of less than £500 per month. As set out above PLP considers on the basis of available information that this is the appropriate measure to adopt. The absence of any economic assessment of the impact of this measure however means that the impact assessment is inadequate.

Question Five: Have we correctly identified the extent of the impacts of the proposals as currently drafted?

See above. It is not possible to comment on the extent of the impact of the proposals without knowing the proper basis for the assessment and in the absence of any impact assessment of the alternatives apparently considered and rejected by the LAA.

Question Six: Are there any forms of mitigation in relation to the impacts that we have not considered?

See above. It is not possible to comment on whether there are any forms of mitigation in relation to Option 0 without knowing the basis for the assessment of the costs of that option and similarly there is no consideration of the impacts of adopting the alternative options which the consultation paper states were considered and rejected.

Question Seven: Do you have any other evidence or information concerning impacts or equalities that we should consider when formulating the more detailed policy proposals?

No.