



Justice Select Committee

**Inquiry into the impact of changes to civil legal aid under the Legal Aid,
Sentencing and Punishment of Offenders Act 2012**

**Submission of further written evidence by
Coram Children's Legal Centre**

November 2014

Coram Children's Legal Centre (CCLC), part of the Coram group of charities, is an independent charity working in the United Kingdom and around the world to protect and promote the rights of children, through the provision of direct legal services; the publication of free legal information online and in guides; research and policy work; law reform; training; and international consultancy on child rights. Founded in 1981, CCLC has over 30 years' experience in providing legal advice and representation to children, their parents and carers and professionals throughout the UK. CCLC's Legal Practice Unit specialises in child and family law, education law, community care law and immigration and asylum law. CCLC operates the Child Law Advice Line (CLAL), providing free advice on family and education law, and the Migrant Children's Project (MCP) advice line. The Migrant Children's Project at CCLC is a centre of specialist expertise on the rights of children subject to immigration control. As part of CCLC's work to promote the implementation of children's rights, CCLC has undertaken amicus curiae interventions in a number of significant cases, including in the European Court of Human Rights, the Supreme Court and the Court of Appeal, providing assistance to the court on matters of children's rights and best interests.

1. Coram Children's Legal Centre (CCLC) welcomed the opportunity to submit written evidence in April 2014 to the Justice Select Committee on the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA) and to give oral evidence to the Committee on 21 October 2014. This submission provides further detail to the answers given during oral evidence.

Short of going back to pre-LASPO levels of legal aid funding, what would be your highest priority for something that would improve the situation?

2. Our highest priority is for measures to be put in place to protect children and young people's rights. We detail below how this could be done. There are two parts to this. First, something needs to be done to protect child and young person applicants for civil legal aid in their own right. Second, steps need to be taken to improve the situation in cases where a child is not themselves the applicant for civil legal aid but that child's welfare is directly affected by the legal case in question, notably in cases about a child's education (where it is generally their parent or carer who brings the case), private family law cases about arrangements for a child, and immigration law cases revolving around a child's best interests.

Does the issue of legal aid funding for children need to be addressed separately from the main scheme?

3. Yes. The issue of legal aid funding for cases where a child or young person is the applicant for civil legal aid needs to be addressed separately from the main scheme. There are four main ways that this could be done, outlined below.
4. Reinstate civil legal aid for children and vulnerable young adults. Children and young people's cases could be brought back into scope under section 9(2) of LASPO. During the passage of LASPO, Parliament considered an amendment that would have protected legal aid for any child who is the applicant or respondent in proceedings and another that would have preserved legal aid for vulnerable young people aged 24 and under (defined as those

who are care leavers, have a disability or are otherwise vulnerable).¹ Both had significant cross-party support. Such protections should be reassessed in light of the evidence on the impact of the legal aid cuts on children's rights,² as was mentioned by Julie Bishop of the Law Centres Network at the Committee's oral evidence session on 8 July 2014. Such a reconsideration would be in line with the Low Commission's call for a 'sense check' review of the matters excluded from legal aid.³

5. The costs of bringing cases back into scope have been estimated as follows:
 - Where the recipient of civil legal aid is a child under 18: c. £7m per annum.
 - Where the recipient of civil legal aid is a young adult aged 18 to 24 who is a care leaver, has a disability or is 'otherwise vulnerable': c. £4m per annum.⁴
6. The advantages of this option include existing cross-party support and a relatively low administrative burden for the Legal Aid Agency (LAA). Existing legal aid contract-holders (providers) in the relevant areas of law could provide otherwise out-of-scope services to children and young people.
7. Restore civil legal aid for children in specific categories of law. This option would involve undertaking an urgent review of priority areas in which children most require legal support. Our highest priority area is separated children's immigration cases (approximately 2490 children's cases per annum costing £1.1m). Other important areas include debt (approximately 280 cases per annum costing £100,000), housing (approximately 430 cases per annum costing £100,000), and welfare benefits (approximately 1330 cases per annum costing £300,000). The advantage of this option is that specific priority areas can be targeted at low cost.
8. Improve the exceptional case funding (ECF) scheme for children and young people. While cautioning that it may not be enough to solve the problems she identified in her child rights impact assessment, the Children's Commissioner has put forward reforming the ECF scheme as a potential solution. She said:

¹ Hansard, 27 March 2012, Column 1256, available at

<http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120327-0001.htm#12032757001721>

² Office of the Children's Commissioner, *Legal aid changes since April 2013: Child rights impact assessment* (September 2014), available at http://www.childrenscommissioner.gov.uk/content/publications/content_871.

Joel Carter, *The impact of legal aid changes on children since April 2013: Participation work with children and young people* (September 2014), available at

http://www.childrenscommissioner.gov.uk/content/publications/content_873. See also written evidence to the Justice Select Committee inquiry, *Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, from the Association of Lawyers for Children, the British Red Cross, Citizens Advice, Coram Children's Legal Centre, the Family Justice Council, the Family Law Bar Association, Gingerbread, the Immigration Law Practitioners' Association, the Judicial Executive Board, the Legal Aid Practitioners Group, Mary Ward Legal Centre, Refuge, Resolution, Rights of Women, Southwark Law Centre, Women's Aid and Young Legal Aid Lawyers.

³ The Low Commission, *Tackling the advice deficit: A strategy for access to advice and legal support on social welfare law in England and Wales*, January 2014, available at

<http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>.

⁴ Based on data provided by the Ministry of Justice on 10 October 2011 in response to a Freedom of Information Act request made jointly by JustRights and the Children's Society.

There are various options for the Government to consider: one is to urgently review and reform the working of Section 10 of LASPO in order to ensure that cases – in particular those involving or affecting children or vulnerable young adults – in which there is a risk of violation of rights under the Human Rights Act 1998 or under EU law if Legal Aid is not granted, are properly funded and parties represented where appropriate.⁵

9. At the very least, we would suggest that action must be taken so that children and young people can access this purported safety net. We do not think that the ECF scheme should be designed to be directly accessible to children and young people themselves because they should not have to apply to the scheme unassisted. Instead, we believe that the LAA should pay providers for all applications made for exceptional case funding, and at least for those made on behalf of a child (and preferably a vulnerable young adult too) irrespective of the outcome of the application. There may still be challenges for a child or young person to access a lawyer willing to make the application, but this would at least remove the prevailing financial disincentive on providers and ensure that children and young people could put forward their applications for civil legal aid funding, especially following the decision in *Gudanaviciene and Ors v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin).
10. Beyond this minimal improvement, we believe that the ECF scheme could be revised more fundamentally to include an in-built presumption for child and young person applicants for civil legal aid. This presumption would operate so that a child or young person could expect to have their case for civil legal aid funding considered in line with children's rights standards.
11. The advantage of this option is that it utilises the existing LAA structures. We know that the Government predicted higher numbers of ECF applications, and therefore presumably already budgeted for greater spending on the ECF scheme than has transpired. The disadvantage to this option would be that it would be more bureaucratic than simply bringing children's cases back into scope.
12. Create a new scheme specifically for children and young people. Alternatively and more ambitiously, a new scheme could be created that would be dedicated to providing accessible, quality, child-focused legal information, advice and representation. The advantages of such a scheme include the ability to look afresh at the legal needs of children and young people from a cross-departmental perspective and make best use of the remaining civil legal aid spend on children. When assessing the financial feasibility of such a recommendation, it should also be noted that the LAA had an underspend of nearly £120m last year.
13. The changes detailed above would protect children and young people who need civil legal aid for cases in their own right and who apply independently for funding. Changes also need to be made within the main scheme, however, to protect children whose welfare is affected

⁵ Office of the Children's Commissioner, *Legal aid changes since April 2013: Child rights impact assessment* (September 2014), available at http://www.childrenscommissioner.gov.uk/content/publications/content_871.

by legal cases brought by others, most commonly a parent or carer. This is obviously necessary in education law and private family law cases about arrangements for children, but is also relevant in other civil cases such as immigration, housing, welfare benefits or employment cases. For example, the case of *Gudanaviciene v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin) was brought by a victim of domestic violence in respect of legal aid funding for legal representation in her appeal against deportation, but a significant part of the case centres around her two-year-old daughter's best interests and future care.

14. One simple and cost-free change that we believe should be implemented immediately is for the LAA to amend the CIV ECF1 form for ECF to include a question about the rights and interests of any child affected by the case. The LAA should accordingly publish guidance for its casework staff deciding ECF applications on how to handle applications affecting children. Changing the form and producing guidance would be one practical first step that could lead to the ECF scheme taking account of children's rights.
15. Beyond this, we support the proposal put forward at the oral evidence session on 2 September 2014 by the Association of Lawyers for Children and others to provide at least preliminary legal advice in private family law cases. This would essentially entail bringing legal aid back at the advice and assistance stage. The form of service is called Legal Help. The fixed fee of £86 is very low cost. An initial consultation with a lawyer would equip the parent with a greater understanding of the law, the process and the legal issues at stake in their case from the start. It could encourage more to opt for mediation. It would lead to cost savings for the courts as litigants would be better prepared and better informed. Most importantly, it would lead to better outcomes for children.

Why do you think so few exceptional funding applications are granted?

16. The first reason is that so few applications have been being made by providers or direct applicants in the first place, far fewer than the LAA anticipated. This was because the threshold was commonly perceived to be impossible to get over. With grant rates so incredibly low, it was not worth providers taking on the financial risk of spending hours on an application, to be paid only in the highly unlikely event of a grant. Many providers were not even trying to get ECF because the process is so cumbersome and the chances of success were so low. A provider may have been able to make one or two applications but cannot keep doing this as it is not financially viable. In addition, it is very difficult to explain the process to a child client and it may be in their interests to pursue funding via any other available avenues, such as the local authority if they are looked after.
17. The second reason why so few applications have been granted is due to the policy position of the Ministry of Justice and the approach adopted by the LAA. In the case of *Gudanaviciene and Ors v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin) the guidance on exceptional case funding has been held to be defective and the test to have been set too high. Following this case, it is likely that more applications will be made to the LAA for ECF. It remains to be seen whether more will be granted in line with the High Court's judgment, which the Government has appealed.

18. In terms of improving the ECF scheme, we would wish to see the following:

- Providers paid for all ECF applications made and at least all those made on behalf of a child (and preferably a vulnerable young adult too) irrespective of the outcome of the application.
- The LAA treating the best interests of a child as a primary consideration in its ECF decision-making. As explained above, we wish to see a new section on the CIV ECF1 form asking specifically about the rights and interests of any child affected by the case, as well as the introduction of new guidance for ECF decision-makers on assessing ECF applications involving a child.
- The detailed means assessment and obtaining of evidence of means pushed back to later in the process, as called for by Sarah Campbell of Bail for Immigration Detainees in oral evidence on 21 October 2014.
- Applications to be handled by specialised teams to improve the quality of decision-making by the LAA, as suggested by Sarah Campbell of Bail for Immigration Detainees and Carita Thomas of the Immigration Law Practitioners' Association in oral evidence on 21 October 2014.

Should the taxpayer pay for legal representation in children and young people's Article 8 cases?

19. This question arose during the oral evidence session on 21 October 2014. Legal representation should be provided in cases involving Article 8 of the European Convention on Human Rights, and in particular in children and young people's Article 8 cases. As explained by Denise McDowell of Greater Manchester Immigration Aid Unit, children are rights-bearers in their own right, whose rights and best interests must be considered in and of themselves, irrespective of what their parent or parents may or may not have done. For example, a child's parents may have overstayed a visa. If that child grows up in the UK and is educated in the UK and is a long-term resident of their community, they deserve to have their rights and best interests properly considered by the Home Office and by the courts in line with existing legal standards⁶ if the Government of the country to which they feel they belong (the UK) wishes to expel them. Article 8 ECHR in the context of immigration law is an incredibly complex area, with constantly evolving jurisprudence, and legal representation is essential if a child's voice is to be heard in such proceedings. Whether or not to provide legal representation to a child is a question of whether or not the UK is committed to children's rights and compliance with the European Convention on Human Rights and the UN Convention on the Rights of the Child.

20. An example of a deportation case may illustrate the severity of the issues at stake for children and young people in their legal cases. We have been contacted about cases of children in the youth justice system who had indefinite leave to remain but who, as they approach the age of 18, face deportation to countries they have not been to since they were infants. These are young people who often could have been British citizens, if only the right application had been made and if only they or their family could afford the application fee. These young people feel that they are from here; this is their home. Indeed, they may have assumed they were British. But then when they are serving a criminal sentence in a YOI they

⁶ See especially *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

get a letter from someone in the Home Office saying that the Government is considering deporting them. Some of these young people grew up in the care system. The state is their parent and the same state wants to deport them to a country they cannot even remember. And the state will not even provide them with a lawyer and a chance to argue their case.

21. The obligation to ensure access to justice in cases like this cannot be deflected by pointing to alternative sources of advice or legal representation. Our experience in the period since 1 April 2013 indicates very clearly that such alternatives do not exist. We ourselves provide an advice line providing free, initial, on-off advice but this is very limited and in no way resembles the legal representation that these complex cases require. We know of hardly any services providing not just initial advice but full legal representation in out-of-scope immigration cases. Any that do exist have extremely limited capacity. Citizens Advice Bureaux are, in our experience, unable to assist. Law centres have, in our experience, no or only very limited resources to allocate to this type of work. Pro bono provision in out-of-scope immigration cases is limited where it exists at all, and is certainly not on the scale to meet the level of need. Moreover, pro bono provision is not cost free.

How can cost shifts be tackled?

22. Evidence of cost shifts onto the courts and tribunals, in particular in the area of private family law, has been provided to the Committee by others and we do not intend to repeat those points here. Suffice to say we believe that costs on the courts would be reduced if parties to proceedings were provided with at least an initial legal consultation, at a fixed fee, so that they are better able to understand the process and the relevant legal issues in their case, and so take up less court time.
23. We also wish to highlight another cost shift that we have seen, namely local authorities having to pay for application fees and legal services in out-of-scope immigration cases for children and young people in their care. As explained by Carita Thomas of the Immigration Law Practitioners' Association in oral evidence on 21 October 2014, the picture is very variable. By no means should this be seen as completely filling the gap because practice is highly inconsistent and the situation does not add up to reliable access to justice for children and young people in the care system. It is completely unfunded reliance on the last remaining safety net rather than any kind of proper solution to the complex legal needs of children and young people.
24. This cost shift can be tackled by bringing separated children's immigration cases back into scope under section 9(2) of LASPOA. There was much debate around this issue during the passage of LASPOA and we believe that the case in favour of this course of action is strong. The cost would be approximately £1.1m per annum.

Would making limited funding available for expert reports at the beginning of a case, without access to funding for legal advice, improve access to justice?

25. This could be helpful in certain types of case. For example, Paula Twigg of the Mary Ward Legal Centre, set out during oral evidence on 21 October 2014 how such funding for reports

would assist in welfare benefits cases and housing cases. Catherine Evans of Southwark Law Centre explained the necessity for expert reports in immigration cases. We concur with these views. As a legal aid provider beginning to work with pro bono partners, we also strongly support the view expressed by Ruth Hayes of Islington Law Centre that pro bono provision can be undermined if there is no source of funding for disbursements, including expert reports, as there are few, if any, sources of funding for this.

26. However, in the areas of law in which we have experience – family law and immigration law – we would suggest that this would not be at the top of the shopping list for changes to the current legal aid landscape. This is because it could be difficult for litigants in person with out-of-scope cases to instruct experts on their own behalf, or to know whom to instruct. It could work well in cases where there is a factual issue at stake, such as a medical issue, but may not be appropriate in all cases. Overall, we would put greater emphasis on the need for spending on legal advice and representation than on the need for spending on expert reports. Arguably, in many private family law cases a one-off spend could be equally well utilised on an initial consultation with a lawyer to help equip the person with a greater understanding of the law and the process.
27. In relation to private family law cases, we would also highlight that directions giving permission for expert witnesses to be instructed are subject to a ‘necessary and just’ test under the Children and Families Act 2014. This is a higher test than was previously in operation. The Family Justice Review’s recommendation which found favour with the Government was to reduce the number of expert witnesses in family cases. The movement is towards agreeing the identity of and questions to ask a single joint expert. We would suggest that it is far easier to achieve this where parties are legally advised and represented.

How can the telephone gateway be improved to fulfil the role for which it was developed?

28. We are a legal aid provider in education law through the telephone gateway (CLA). As we expressed in our oral evidence, we are concerned that not all legally aidable education law cases are getting through to us or another of the providers. We worry that many people do not know about Civil Legal Advice (CLA) and so do not call the operator service. There is not enough information about CLA out there and more needs to be done so that the public is aware of it. We also worry that those whose first language is not English may be put off and that generally people find it a complex system and difficult to grasp exactly what is in and out of scope.
29. It is important not only that people are aware of the availability of legal aid through CLA, but also that they are made aware of it at the right time, early on in their case. We have worked on cases that were prejudiced because the family has not sought our assistance soon enough, having previously been unaware of CLA and having only found out later on in their case either through our Child Law Advice Line or another charity.
30. We would like to see the CLA telephone number included in SEN appeal guidance and in local authority decision letters, so that people know that civil legal aid may be available if they meet the eligibility requirements. In guidance on school exclusions, the number of our

Child Law Advice Line is included so that parents know where to go for advice; similarly, families with SEN cases should be made aware of CLA.

31. Improvements also need to be made to the service people receive when they get through to CLA. We have recently seen some improvement, but we still have concerns that CLA operators are wrongly telling people that their cases are out of scope. For example, the CLA operator may not recognise a matter as a judicial review case following an admission appeal, an exclusion appeal, or a transport appeal. CLA operators therefore need better training on eligibility.

How could the Legal Aid Agency be reformed to reduce bureaucracy while ensuring legal aid applications are properly determined?

32. Both in the areas of law that remain in scope and in the operation of the ECF scheme, bureaucracy could be reduced.
33. The financial means test has become incredibly bureaucratic. The LAA should review its approach to evidence of financial means. We support Legal Action Group's recommendation that entitlement to means-tested benefits should completely passport clients to legal aid eligibility.
34. Bureaucracy could also be reduced by getting rid of funding caps, so that less provider and LAA time is wasted on applying for the caps to be extended and processing those applications. For example, on certificated cases, we spend at least 18 minutes drafting an application to extend a costs limitation and the LAA has to employ staff to then probably spend around 18 minutes considering it. There is a huge amount of paperwork involved and transporting of paper. In even an average case, we have to repeat this exercise three to seven times as you can only increase the cost limitation a little at a time. The bureaucracy is increased if the LAA reject the request and we need to appeal. All this is wasteful because at the end of the case, the LAA or the court has to assess the claim for costs (the bill) anyway, with each item (each six-minute unit of work) scrutinised. If too much time is claimed for a particular task, the bill assessor will not allow it or will reduce the bill accordingly. Cost limitations therefore only serve to allow the LAA to project – in the broadest, most unscientific way – global costs to the LAA fund but the administrative burden is disproportionate to that end.

Please direct inquiries to:

Anita Hurrell

Legal and Policy Officer

Email: anita.hurrell@coramclc.org.uk

Telephone: 020 7713 2022

Coram Children's Legal Centre
48 Mecklenburgh Square
London WC1N 2QA