

Children's Rights Alliance for England

Transforming Legal Aid Consultation Paper Response from the Children's Rights Alliance for England¹

1. About CRAE

The Children's Rights Alliance for England (CRAE) seeks the full implementation of the UN Convention on the Rights of the Child (UNCRC) in England. Our vision is of a society where the human rights of all children are recognised and realised. CRAE protects the human rights of children by lobbying government and others who hold power, by bringing or supporting test cases and by using national, regional and international human rights mechanisms. We provide legal information, raise awareness of children's human rights, and undertake research about children's access to their rights. We mobilise others, including children and young people, to take action to promote and protect children's human rights. Each year we publish a review of the state of children's rights in England.

2. Overview

CRAE welcomes the opportunity to comment on the proposed changes to legal aid. However, we are concerned that the proposals show a serious disregard for children's rights.

Whilst many of the proposals relate on the surface to lawyers, the consultation is not about lawyers but about the children those lawyers represent. These proposals will seriously compromise access to justice for children whose rights are breached. They will deny children legal aid in relation to important areas of law designed to protect children in situations in which they are vulnerable to human rights abuses. In other areas, they will undermine the legal advice to be provided, by denying children a choice of representative. Children will also suffer the knock on effect of limited access to justice for their parents or carers, whose ability to access justice will impact upon them in areas such as housing, welfare, immigration and education. In some respects the proposals themselves violate children's rights by discriminating against particular groups of children.

In 2010 the Government made a commitment to give due consideration to the United Convention on the Rights of the Child (UNCRC) when making new law and policy. The Government must comply with this commitment when shaping its policy in respect of legal aid. Any reform to legal aid must ensure that it respects, protects and fulfils children's rights.

¹ The contents of this response do not necessarily reflect the view of all CRAE's members.

3. Introduction

Legal aid is central to the rule of law – it ensures accountability in the event that public bodies breach the law, including those laws which breach children's rights, by allowing people complain to the courts. Legal aid also makes the law effective outside of the court room. It makes it a realistic possibility that people can bring a case when their rights are breached – this possibility encourages public bodies to comply with the law. It is also an essential element of a fair justice system, ensuring that it is not only the rich and powerful who can access the courts by providing a vital safety net for those who cannot afford to pay for legal assistance.

Children's rights, as enshrined in the law, are meaningless unless children can take action when their rights are violated. An effective system of legal aid is crucial to ensuring that children are able to access the court to challenge breaches of their rights. This is recognised by the international human rights bodies. The UN Committee on the Rights of the Child has said:

For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include ... access to independent complaints procedures and to the courts with necessary legal and other assistance.²

The guidelines adopted by the Committee of Ministers of the Council of Europe relating to child-friendly justice³ are intended to allow children to effectively exercise their rights or act upon breach of their rights. They provide:

- Any obstacles to access to court, such as the cost of the proceedings or the lack of legal counsel, should be removed (para 35);
- 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 (para 37);
- Children should have access to free legal aid, under the same or more lenient conditions as adults (para 38).

Without appropriate legal aid, children will be left without a remedy when decisions are made which breach their rights and they do not have the independent means to fund a legal challenge. Even those children with strong cases will be unable to pursue them, placing justice beyond the reach of many children, with alarming gaps in protection.

² Committee on the Rights of the Child (2003) *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*

³ *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

4. Responses to Consultation Questions

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

CRAE does not agree with the proposal to cut legal aid for treatment cases. All aspects of prison law should remain within the scope of legal aid for children.

The UNCRC is clear that those children who are placed in custody do not lose their fundamental rights, and must continue to enjoy these to the full extent compatible with their deprivation of liberty. This means that children in custody should enjoy all of their rights, including adequate food, clothes, health care, education, family contact, religion and belief, play, privacy and protection from violence and abuse. Yet CRAE's work has shown that children in custody are highly vulnerable to treatment which breaches their rights whilst in prison. It is vital that children should have access to legal representation to challenge any such abuses.

The Government's proposals are based on notion that internal complaints procedures provide an adequate means of redress in respect of treatment issues. However, such procedures have been shown to be inadequate to address children's rights abuses in the past. In a judicial review brought by CRAE the court found that if a child had complained in relation to unlawful restraint '*he would have been met with the riposte that it was perfectly permissible*'.⁴ Without recourse to a court, internal complaints mechanisms do not secure access to justice for children. The proposed changes to the scope of legal aid in relation to prison matters will substantially reduce the prospect of external legal scrutiny and accordingly the authorities' accountability for abuses of children's rights whilst in prison.

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

CRAE does not agree with this proposal.

Children may have strong cases in relation to crucial aspects of their human rights, such as community care, housing and private family law cases, but be unable to meet the residency test. For example, trafficked children who do not claim asylum, the children of undocumented migrants, babies under the age of one, and British children born abroad may all be unable to bring proceedings when their rights are breached if this proposal is implemented. Furthermore, the test is likely to have a discriminatory impact on certain groups of children, in breach of children's right to access justice without discrimination. There must be access to justice and equality before the law for all. The residence test clearly undermines both these principles.

⁴ *The Queen (on the application of) The Children's Rights Alliance for England v The Secretary of State for Justice and G4S Care and Justice Services (UK) Limited and Serco Plc (Interested Parties) and Equality and Human Rights Commission (Intervener)* [2013] EWCA Civ 34

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)? Please give reasons.

CRAE does not agree with this proposal.

As the Ministry of Justice itself recognised in its earlier consultation on legal aid⁵:

In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means to which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.

Judicial review is a vital legal safeguard against an unlawful or unreasonable decision, act or omission by a public body. Not only is it central to promoting good decision-making by public bodies by making them accountable to the public but it also provides an important means by which individuals can hold the state to account and seek redress in the event that a public body does act unlawfully or in breach of a child's fundamental rights. As previously highlighted by the Children's Commissioner,⁶ judicial review proceedings have been widely used to uphold children's rights in nearly every area covered by the UNCRC.

The proposals will undermine the ability of legal representatives to offer legal advice in respect of judicial review, by requiring them to bear the risk that the case may be unsuccessful. This will undermine access to justice for children where their rights have been breached.

Question 6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

CRAE does not agree with this proposal. The proposals could encourage a risk adverse approach by legal providers that would undermine access to justice for children where their rights have been breached.

It is often difficult to establish at the outset whether a case is weak or strong. An assessment of a child's case as borderline means that there remains a significant chance that there will be a successful outcome. It does not mean that the case is without merit. It simply may not be possible to assess the merits of the case accurately because, for example, of disputed law or facts. Children in such cases should not be denied access to justice.

Appropriate legal representation will be particularly important in securing access to justice for children in such borderline cases which, by definition, are not clear cut. Without representation, there is a serious risk that borderline cases will fail at first instance.

Borderline cases are often those which allow the law to develop, and as such are of importance to individual child concerned and to the wider public interest. It is crucial that such cases receive the necessary funding to allow important points of law to be tested.

⁵ . Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales Consultation Paper*. Cm7967

⁶ OCC, *Judicial review: Proposals for Reform: A response from the Children's Commissioner for England to consultation paper CP25/2012*

Question 17. Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.

CRAE does not agree with this proposal.

Children require specialist lawyers, with particular knowledge and the ability to communicate effectively with and work for children. Children must also be able to trust their lawyer. When they choose a relationship with a particular solicitor, it is much more likely that children will disclose information about their background and circumstances that a solicitor can use to the child's benefit. It is also much more likely that the child will trust their solicitor's advice. The apparently random allocation of cases would deny a child the right to select a lawyer based on specialism or particular experience or understanding of their particular needs.

Question 20. Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

CRAE does not agree with this proposal.

Children who are dissatisfied with their legal representative should have the ability to instruct an alternative solicitor, without restriction. We reiterate both the particular importance of the lawyer-client relationship for children and that client choice remains the best form of quality control.