



**Draft Legal Aid, Sentencing and Punishment of Offenders
Act 2012 (Amendment of Schedule 1) Order 2014**

Briefing for MPs and Peers

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Introduction

1. The Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 (“the Order”) will give effect to the Government’s decision to restrict access to legal aid for persons with less than 12 months lawful residence. We understand that the Fifth Delegated Legislation Committee will consider the Order on 1 July 2014, with consideration in the House of Lords expected shortly thereafter. We outline our concerns below.
2. By way of summary, JUSTICE is concerned that these changes are unnecessary and ill-considered. The changes, in our view, are incompatible with the right to the equal protection of the law and the right to equal treatment protected by Article 14 ECHR and the HRA 1998. We consider that there are significant questions to be raised about their legal basis.
3. The Government’s consultation on these proposals and the proposals themselves are currently subject to litigation, awaiting imminent judgment.¹ Parliamentarians may wish to question whether they might be better placed to take a decision on the propriety and scope of the Regulations and their basis, after the High Court has expressed a view.

The Order

4. The Order is made pursuant to sections 9(2)(b) and 41(1)(a) and (b), (2)(a) and (b) and (3)(b) and (c) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”). The Order is scheduled to come into force on 4th August 2014.

Parliamentary scrutiny and the legal basis for change

5. Section 1 LASPO places a duty on the Secretary of State to ensure that legal aid is made available consistent with the provisions of the Act. Section 9, by extension, provides that such services as are specified in Schedule 1 are to be made available provided the individual concerned qualifies for legal aid. Section 9(2) of LASPO makes provision for adding to, varying or omitting services in Part 1 of Schedule 1.

¹ *R (PLP) v Lord Chancellor* (CO/17247/2013) (Judgment is expected to be handed down imminently).

6. Section 41(1)(a) and (b) of LASPO empower the Minister to “*make different provision for different cases, circumstances or areas*” and to “*make provision generally or only for specified cases, circumstances or areas*”. Section 41(2)(a) of LASPO provides that such provision may be by reference to “*services provided for the purposes of proceedings before a particular court, tribunal or other person*”.
7. JUSTICE is concerned that – particularly in light of the controversial debate over the scope of the scope of legal aid during debates on LASPO – it is far from clear that these measures are designed to permit the Minister to remove an entire category of persons from eligibility entirely based on their status, without further primary legislation. JUSTICE considers that the insertion of a *de facto* bar on non-residents from eligibility is a measure which should more properly have been considered during the passage of LASPO.
8. In May, the House of Lord Secondary Legislation Committee produced a detailed and critical report on these measures. It concluded:

This Order is laid by the Ministry of Justice (MOJ) under powers in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) to amend Schedule 1 to that Act to introduce a residence test which individuals will need to satisfy in order to access civil legal aid, subject to certain exceptions. The Committee notes that this exclusion is being pursued primarily as a matter of principle since the savings to be made cannot be quantified. It is a very sensitive matter and the House will wish to be absolutely clear on how the residence test will operate in practice. **There are a number of operational aspects that are still being worked out, in particular the emergency provisions and the appeals mechanism, about which the Committee considers the MOJ should make a clearer statement before asking the House to approve the main Order. There are also a number of key pieces of information still in the pipeline such as the outcome of judicial review proceedings and reports from the Joint Committee on Statutory Instruments and Joint Committee on Human Rights on the Order as laid before the House. We therefore recommend that the Order should not be debated until all the these items have been published.**²

² Fortieth Report of 2013-14, HL 176, (Summary).

<http://www.publications.parliament.uk/pa/ld201314/ldselect/ldsecleg/176/17603.htm>

9. The Secondary Legislation Committee noted, that the Joint Committee on Statutory Instruments had not yet reported. It was important that the Government consider its views. The JCSI reported on 18 June 2014. Critically, that Committee expresses direct concern about the legal basis for these Regulations:

The Committee draws the special attention of both Houses to this draft Order on the grounds that, if it is approved and made, there will be a doubt whether it is *intra vires*, and that it would in any event make an unexpected use of the power conferred by the enabling Act.³

10. This issue is currently subject to litigation. Both cross-party Parliamentary Committees tasked with reporting on secondary legislation have expressed unusually strong concerns. Parliamentarians may wish to ask the Minister to explain why the Government considers that the legislative basis for these measures is sound. They may also wish to ask why these measures are being brought forward while their legal basis is awaiting determination by the High Court. **JUSTICE considers that it will be difficult for Parliamentarians to support any affirmative resolution measure to approve these Regulations in their current form, without acknowledging that they may yet be deemed unlawful and *ultra vires*.**

The effect of the proposed changes

11. JUSTICE strongly opposes the proposal to introduce a blanket ban on eligibility for legal aid based on residence. The Government proposes to exclude from civil legal aid anyone who cannot demonstrate that they are lawfully resident within the UK for a period of 12 consecutive months, with some limited exceptions. This discriminatory bar stops one small step short of an arbitrary exclusion from justice of non-nationals within the jurisdiction. The proposal is novel in rendering a whole class of individuals ineligible regardless of the seriousness of their claim.
12. The government has set out only a limited number of exceptions in the Order, the effect of which will be to exclude the following types of issues and individuals from assistance in practice:

³ First Report of 2014-15, HC 332/HL 4, para 4.1. <http://www.publications.parliament.uk/pa/it201415/jtselect/jtstatin/4/4.pdf>

- a. *Homelessness*: homeless people and people facing homelessness, including families with children, may find it difficult to prove eligibility in order to challenge local authority decisions to refuse support.
- b. *Human trafficking victims*: Despite lengthy discussion about the need to secure access to legal advice and assistance for human trafficking victims in LASPO, victims of the slave trade brought to the UK against their wishes will now be eligible but only in connection with some immigration and employment claims and claims against an alleged trafficker. No provision is made for claims about eligibility for support, including healthcare.⁴
- c. Similarly, *victims of domestic violence* will now be eligible, but only in relation to a very limited number of cases.
- d. *Asylum*: those whose asylum claims have failed but who cannot be removed.
- e. *Immigration detainees*: Immigration detainees will be eligible for legal aid, but only for claims in relation to the fact of their detention. It appears that any and all challenges relating to mistreatment during detention will be ineligible for support. This would mean that recent reported sexual abuse claims at Yarl's Wood would not attract funding for legal aid.⁵
- f. *Families of victims of crime within the UK, who are resident overseas*: Where the UK is involved in the death of an individual, whether through direct State action or negligence, it bears the responsibility to provide an investigation in which the family may participate effectively (for example, the family of Jean Charles de Menezes).

13. Other high-profile claims which would be barred include those brought by Guantanamo detainees alleging UK complicity in torture;⁶ claims for *habeas corpus* by individuals illustrating UK control over their detention abroad;⁷ and claims against UK armed forces for violations of international human rights standards overseas.⁸ The scrutiny of the

⁴ The Catholic Church has, for example, written to Ministers to raise particular concerns about trafficking victims: <http://www.guardian.co.uk/law/2013/may/22/catholic-church-legal-aid-trafficking>

⁵ <http://www.theguardian.com/uk-news/2013/sep/14/yarls-wood-immigrant-sex-abuse-tanja>. The JCHR conducted a lengthy inquiry on the treatment of asylum seekers and made a number of recommendations connected with treatment in detention. These recommendations were based on a series of visits to places of detention, including at Yarl's Wood. Tenth Report of Session 2006-07, *Treatment of Asylum Seekers*, HLPaper 80, HC60.

⁶ *Al Rawi and others v The Security Service and others* [2011] UKSC 34

⁷ *Secretary of State for Foreign and Commonwealth Affairs and another v Yunus Rahmutullah* [2012] UKSC 48

⁸ *R (on the application of Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58; *Al-Jedda v The United Kingdom* (27021/08) [2011] ECHR 1092; *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26; *Al-Skeini and Others v the United Kingdom* (55721/07) (2011) 53 E.H.R.R.18.

domestic courts in these cases has contributed to redress for serious violations of human rights standards and promoted the rule of law in international relations.

14. The Government has failed to grapple seriously with the practical implications of this test. All applicants for legal aid or assistance will need to be subject to verification of residence. There is no proposed provision for emergency assistance, subject to subsequent verification. The costs and potential delay have not been realistically costed, nor does it appear that any significant consideration has been given to the sufficiency of evidence capable of providing verification. The documents which many may consider necessary to illustrate residence rights and duration – passports, visas, bank and employment records – are not necessarily readily available to many vulnerable people or those from low income households (those most likely to be in need of legal assistance). Importantly, the exceptions do not provide for a general exception for ‘vulnerable persons’. Individual solicitors will bear the responsibility of checking the residence of each and every would-be client. Thus, the likelihood is that these measures will, in practice, further add to the number of litigants in person appearing in our courts, with associated costs and delays which may adversely impact on the efficiency and reputation of our justice system.⁹

15. JUSTICE considers that the residence test will violate the common law guarantee of equality before the law and the UK’s international human rights obligations. For example, EU nationals who exercise rights of free movement are entitled to equal treatment, yet there is no specific exemption to ensure the residence test does not operate as a barrier to EU nationals.¹⁰ Specific articles of the Refugee Convention, the UN Convention on the Rights of the Child, the Convention on the Elimination of Discrimination against Women, the UN Convention on the Rights of Persons with Disabilities and the Trafficking Convention will be engaged.¹¹ There is a strong argument that the residence test could operate to violate the principle of non-discrimination in Article 14 ECHR and the positive procedural obligations on the State to investigate and prevent violations of the Convention.¹² Residence – and nationality – is

⁹ On the impact of litigants in person on the effectiveness of hearings, see *Wright v MWS Ltd* [2013] EWCA Civ 234 at 2.

¹⁰ Article 24(1) Treaty on the European Union

¹¹ The Refugee Convention, article 16; Council of Europe Convention on Action Against Trafficking in Human Beings articles 10, 12 and 15. See also UNCRPD, Articles 12 and 13, CEDAW, Article 15.

¹² Articles 2, 3, 4 and 8 ECHR – and possibly 5 and 6 ECHR which ensure access to an independent and impartial tribunal - will be engaged by the examples set out in this section. See also legal advice prepared for the Public Law Project and others by Michael Fordham QC, published as part of the PLP response to the First Consultation Paper.

clearly a relevant status for the purposes of Article 14 ECHR. Yet none of these concerns have been addressed by the Government.

16. The Joint Committee on Human Rights (JCHR) has reported on the implications for access to justice of the Government's proposed residency test both generally¹³ and specifically in relation to children.¹⁴
17. The Committee has expressed concern that exemptions have not been granted to groups who need legal aid in order to access justice and to protect their needs, specifically, children¹⁵ and those lacking capacity.¹⁶ Where exemptions had been granted – domestic violence¹⁷ and trafficking cases¹⁸ – the Committee considers that the exemptions are too narrow to meet the UK's human rights and international obligations.
18. Focusing on the impact on children, in their Second Report, published on 30 June 2014, the JCHR emphasises that they “cannot see any way in which this proposal can be compatible with the UK's obligations”¹⁹ under the UNCRC. They counsel that “the residence test will inevitably lead to breaches”²⁰ of the UNCRC, in practice.
19. The Committee particularly regretted that there was a lack of a robust costs justification in relation to children and were concerned that any savings would be set off by increased costs in the Courts and Tribunal Service of having to deal with unrepresented children.²¹ Importantly, in both reports the JCHR found that the exceptional funding regime under s.10 LASPO was insufficient to make the residence test compliant with human rights standards.²²

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¹³ Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform Legal Aid* (2013-14, HL 100, HC 766). Herein “*The First JCHR Report*”.

¹⁴ Joint Committee on Human Rights, *Legal aid: children and the residence test* (2014-15, HL 14, HC 234). Herein “*The Second JCHR Report*”.

¹⁵ *The First JCHR Report*, [93] and [131]

¹⁶ *Ibid.*, [122] – [124]

¹⁷ *Ibid.*, [112]

¹⁸ *Ibid.*, [129] – [130]

¹⁹ *The Second JCHR Report*, [22]

²⁰ *Ibid.*, [23]

²¹ *Ibid.*, [32]

²² *The First JCHR Report*, [144]; *The Second JCHR Report*, [39]