

Executive Summary: Shadow Impact Assessments Transforming Legal Aid – Proposed Residence Test

1. The Ministry of Justice (MoJ) has now considered the responses to its Transforming Legal Aid consultation, which proposed, among other things, imposing a residence test on all civil legal aid.¹ The MoJ has announced its response and a second ‘Next Steps’ consultation.²
2. The Transforming Legal Aid consultation included an Equality Impact Assessment (at Annex K)³ and a financial ‘Civil Credibility Impact Assessment’.⁴ The recently published Transforming Legal Aid: Next Steps consultation includes a supplementary ‘Equality Statement’ (at Annex F)⁵ and a ‘Cumulative Legal Aid Reforms Impact Assessment’.⁶ In our view these assessments do not adequately address the reality or seriousness of the likely impact of the proposed residence test.
3. We believe that the proposed residence test would fundamentally undermine the operation of the rule of law in the UK. It would significantly impact on access to justice in that it would prevent many people from pursuing vital equality/discrimination claims, cases that protect fundamental human rights. The residence test would deny legal aid to people who have received (or are receiving) unlawful treatment at the hands of public bodies; they will have no right to seek judicial review and in certain circumstances the stake will be as high as life or death.
4. This test will apply to all who are considered to fail to meet this flawed test regardless of whether they are children or are extremely vulnerable adults, who are in the UK perfectly lawfully. In addition many British nationals will be unable to demonstrate that they meet the test, because the evidential threshold will be so high.
5. The MoJ has relied heavily on an ‘Exceptional Funding Scheme’ as the mechanism to provide a safeguard to protect the rule of law and fundamental rights, but this scheme has been running since April and has so far manifestly failed to do this (only granting legal aid in six cases up to July 2013, despite receiving hundreds of applications from desperate people). The scheme is clearly not fit for purpose.
6. Drawing together some of the key evidence available from leading organisations in this area, we have produced a Shadow Equality Impact Assessment (EIA) and Financial Impact Assessment in

¹ C.f. Section 3: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>.

² Available online at: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view

³ Available online at: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/user_uploads/annex-k-transforming-legal-aid.pdf.

⁴ Available online at: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/civilcredibilityia.pdf.

⁵ Available online at: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/annexequalitystatement.pdf.

⁶ Available online at: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/latimpactassessment.pdf.

light of the government's wholesale failure to carry out an adequate Equality Impact Assessment itself. We hope to encourage the British government to take full account of the harm the proposed test would cause to equality in the UK and the strong likelihood that the proposal would cost, rather than save, public money.

7. We have not been able to speak with all the expert groups the MoJ would have access to, so we would encourage readers to treat our analysis as non-exhaustive. We would like to recognise the hard work and commitment that has been shown in the expert work that is taking place to challenge the proposed residence test, links to many of these invaluable submissions are set out in our footnotes.

Summary of Conclusions

Shadow Equality Impact Assessment

8. The MoJ's EIAs are manifestly inadequate, for example the first EIA dedicated less than a page to the proposed residence test and the second EIA dedicated little more to the section on the MoJ's response to the consultation.
9. The proposed residence test cannot be justified because it is not sufficiently connected to any legitimate aim or lawful objective. Even if it were, as it stands at present, it would be disproportionate and unreasonable.
10. The proposed residence test would hit all groups sharing protected characteristics hard because it would prevent those who failed the test from accessing legal aid to pursue discrimination claims and challenge victimisation and harassment. If the residence test came into force, employers and service providers could discriminate against, harass and victimise many migrants on the basis of a protected characteristic with impunity. Therefore rather than eliminating this unlawful behaviour it seems likely that the proposed residence test would encourage it.
11. The proposed residence would damage the equality of opportunity between groups who share a protected characteristic and those who do not, especially members of certain groups who share characteristics of age (particularly children), gender (particularly woman), disability, faith and race. Many members of these groups would face desperate, and potentially life-threatening, destitution compared with the majority of the population in the UK.
12. By completely barring access to justice for a category of people the proposed residence test is likely to damage community cohesion and fragment communities, quite the opposite of fostering good relations between those who share a protected characteristic and those that do not.
13. The proposed residence test is at odds with the UK's obligations under international human rights law and appears to be irreconcilable with requirements of the European Convention of Human Rights and international treaties, in particular the UN Convention on the Rights of the Child and race/gender equality treaties.

14. The proposed residence test is also highly likely to discriminate unlawfully against EEA nationals, who may be unable to demonstrate when they arrived in the UK and how long they have resided here lawfully for. This is likely to be found unlawful.
15. As stated, the Exceptional Funding Scheme is not working and it is failing in its stated intention to ensure the UK is able to meet its legal and international obligations. Even if those excluded under the proposed residence test could access the Exceptional Funding Scheme, it would not be an adequate mechanism for effectively safeguarding the rule of law and fundamental rights.
16. The case study at Appendix 2 sets out the genuine life or death importance of people accessing their legal entitlements. Without a legal mechanism to enforce these entitlements the result will cause severe, irreparable harm to vulnerable children, other individuals and communities.
17. It is disappointing that a proposal for a residence test is still being pursued despite huge opposition from local communities, charities, the judiciary and the legal professions. In a joint statement the government's own lawyers fiercely objected:

"...we have particular concerns about the proposals to introduce a residence test for civil legal aid. This risks creating an underclass of persons within the UK for whom access to the courts is impossible. Persons in the UK who cannot meet a residence test are subjected to government action which cannot, by definition, be imposed on British citizens. For example, such persons are liable to indefinite administrative immigration detention, are prohibited from working, and have, at best, entitlement to subsistence levels of maintenance well below mainstream benefits. Judicial review is important, not because such individuals have more rights, but because they have fewer. To deny legal aid altogether to such persons, so that even the minimal rights provided to them by the law cannot be enforced, is in our view unconscionable. By the same token, to prevent people bringing legal proceedings who are subject to the actions of the UK acting abroad, often in ways which are alleged to be contrary to the most fundamental human rights, is in our view impossible to reconcile with the rule of law".⁷

Shadow Financial Impact Assessment

18. There is no evidence at all to show that the residence test would save public money. Instead (particularly due to the new administrative infrastructure it would require and the cost shift to other statutory services) it is likely to be extremely expensive.
19. On a cost/benefit analysis a residence test simply cannot be justified.
20. The residence test may cost just under £1m to the Legal Aid Agency per year, but there is also likely to be a cost shift to the Home Office, who will be the final port of call for checking immigration status.

⁷ To see the full letter from Treasury Counsel to the Attorney General in July 2013 visit:
<http://legalaidchanges.wordpress.com/2013/06/>.

21. In addition to this there is likely to be an expense of around £26m a year to local authorities if the residence test comes into force due to increases in homelessness among people with no recourse to public funds and barriers to legal aid for migrant children supported by the local authority who need to pursue a legal issue.
22. On the other hand the MoJ has not been able to quantify any annual or estimate for a financial saving from the residence test, which is quite astonishing given that the justification for all the legal aid cuts is based on the necessity of financial savings.

Next Steps

23. We believe that there is no evidence to suggest that a residence test on civil legal aid is needed or that it would be justified or legal. On this basis we believe the proposal should be dropped.
24. If the government intends to pursue this proposal despite the risks to equality and protection of human rights and the increase in public spending that we highlight here then we would strongly recommend that at the very least the MoJ:
 - a. Undertakes proper research with the LAA to obtain some proper disaggregated data on legal aid applicants, including information on protected characteristics, nationality, length of time spent in the UK, country of residence and apparent immigration status linked to what type of case the person seeks legal aid for.
 - b. Seeks comment on the additional exceptions to the residence test that the MoJ has announced, but is not currently consulting on
 - c. Includes additional exceptions for judicial review, habeas corpus, human rights claims, equality/discrimination claims, homelessness cases, children supported by local authority social services department and separated children.
 - d. Urgently creates a strategy with the LAA for improving the Exceptional Funding Scheme so that it is fit for purpose and in particular setting out how the scheme will be adequate for:
 - i. Urgent cases
 - ii. Cases involving mental disability, diminished/no legal capacity or unaccompanied children
 - iii. Providing applicants with suitable information on how to challenge or appeal a decision from the LAA on an application for Exceptional Funding
 - iv. Ensuring effective and practical protection for Convention and EEA rights, including where a person needs to clarify/resolve their immigration status in order to meet the residence test or where a person caught by the residence test wishes to challenge the LAA by way of judicial review.

September 2013