



Office of the Children's Commissioner

Legal Aid changes since April 2013

Child Rights Impact Assessment

September 2014

Contents

About the Office of the Children’s Commissioner.....	3
Foreword by the Children’s Commissioner.....	5
Executive summary.....	6
Introduction.....	11
1. Changes to Legal Aid since April 2013.....	14
2. Children’s rights to Legal Aid.....	16
3. Impact of changes to Legal Aid: Behavioural responses.....	21
4. Impacts on children and young people.....	29
Conclusion.....	32
References.....	34

About the Office of the Children's Commissioner

The Office of the Children's Commissioner (OCC) is a national public sector organisation led by the Children's Commissioner for England, Dr Maggie Atkinson. We promote and protect children's rights in accordance with the United Nations Convention on the Rights of the Child and, as appropriate, other human rights legislation and conventions.

We do this by listening to what children and young people say about things that affect them and encouraging adults making decisions to take their views and interests into account.

We publish evidence, including that which we collect directly from children and young people, bringing matters that affect their rights to the attention of Parliament, the media, children and young people themselves, and society at large. We also provide advice on children's rights to policy-makers, practitioners and others.

The post of Children's Commissioner for England was established by the Children Act 2004. The Act makes us responsible for working on behalf of all children in England and in particular, those whose voices are least likely to be heard. It says we must speak for wider groups of children on the issues that are not-devolved to regional Governments. These include immigration, for the whole of the UK, and youth justice, for England and Wales.

The Children and Families Act 2014 changed the Children's Commissioner's remit and role. It provided the legal mandate for the Commissioner and those who work in support of her remit at the Office of the Children's Commissioner to promote and protect children's rights. In particular, we are expected to focus on the rights of children within the new section 8A of the Children Act 2004, or other groups of children whom we consider are at particular risk of having their rights infringed. This includes those who are in or leaving care or living away from home, and those receiving social care services. The Bill also allows us to provide advice and assistance to and to represent these children.

Our vision

A society where children and young people's rights are realised, where their views shape decisions made about their lives and they respect the rights of others.

Our mission

We will promote and protect the rights of children in England. We will do this by involving children and young people in our work and ensuring their voices

are heard. We will use our statutory powers to undertake inquiries, and our position to engage, advise and influence those making decisions that affect children and young people.

This report is © The Office of the Children's Commissioner 2014

Please reference this report as follows: Office of the Children's Commissioner (2014). *Legal aid changes since April 2013: Child Rights Impact Assessment*. London: Office of the Children's Commissioner

Foreword by the Children's Commissioner

This Child Rights Impact Assessment (CRIA) concerns the changes to civil and prison law Legal Aid since April 2013. This topic was chosen because of our concern at the potential to seriously and systemically affect the rights of children and young people within my remit. Access to legal advice, assistance and representation affects both the ability of children and their parents/carers to enforce their rights, or obtain a remedy if those rights are violated; and the ability of decision-makers, administrative and judicial, to make decisions properly, in possession of all relevant evidence and information. Children, and many of the vulnerable young adults whose rights my Office is charged with protecting and promoting, require special attention in this context because they cannot be expected to act alone to deal with a legal problem – and because their best interests must be a primary consideration in all decisions affecting their lives.

As the Joint Committee on Human Rights said in 2013, '*the right of access to legal advice has also long been recognised as a distinct common law right enjoying a fundamental status: "one of the fundamental rights enjoyed by every citizen under the common law" and as "inherent and fundamental to democratic civilised society."*' Any changes to the availability of legal advice – especially when they are as far reaching as those in England and Wales since 2013 – should be carefully scrutinised for their potential impact on rights. We hope that in relation to children and young people this CRIA will form an important part of this scrutiny.

Like all of OCC's work, this CRIA has an evidence base. In this case our own body of knowledge was supplemented by the excellent reports of Perpetuity Research and Consultancy International (PRCI) and by Just for Kids Law (JfKL). We are very grateful to them for their contribution and to the children and young people who participated in JfKL's focus group and interviews and told their stories. Their evidence is a powerful reminder of both the severe legal problems that children and young people face daily and the importance of legal assistance in resolving them. As one girl who had faced permanent exclusion from school said, '*When the lawyer came it was okay, at least there's an exit. Before it felt like a labyrinth. But after, it felt like someone was helping you. They gave you a map and there is a way out ...*'

As we move towards the UK's next examination by the UN Committee on the Rights of the Child, we will continue to monitor the impact of these changes and highlight where we consider the rights of children and young people – in prison, in the immigration system, in education, in care and in the family – are being negatively affected.



Dr Maggie Atkinson
Children's Commissioner for England

Executive summary

This Child Rights Impact Assessment examines the impact on the rights of children and young people within the remit of the Children's Commissioner of changes to civil and prison law Legal Aid since April 2013.

Undertaking CRIAs is part of the Children's Commissioner's primary function to promote and protect the rights of children in England according to Section 2 of the Children Act 2004, as amended by the Children and Families Act 2014. The UN Committee on the Rights of the Child (CRC) has also recommended that governments carry out a child rights impact assessment on all policies and proposed legislation that may affect children, as early as possible in the policy making process. We have selected these changes for child rights impact assessment due to the considerable concerns regarding the ability of children and young people to secure their rights following the restrictions to Legal Aid provision.

Two further reports commissioned by Office of the Children's Commissioner (OCC) are published alongside this CRIA. Their findings form the basis of its evidence on impact, supplemented by the now considerable body of evidence in the public domain on the Government's Legal Aid reforms since 2013 (Powell et al, 2014; Carter, 2014). Read together, they present clear evidence of the ways in which restrictions on Legal Aid are impacting on children and young people.

Children and young people's rights

Children under 18, and young adults whose capacity is restricted because of learning disability or mental ill health, cannot be expected to navigate complex legal processes. In many cases they will require the assistance of a lawyer (rather than a parent, litigation friend or non-legal advocate) to effectively participate in proceedings which affect them. In those circumstances, legal advice, assistance and representation are necessary in order for them to exercise their rights effectively in a wide range of circumstances.

- Article 3 (1) of the United Nations Convention on the Rights of the Child (UNCRC) states the best interests of children should be the primary consideration in all decisions affecting children. This includes 'courts of law' and 'administrative bodies'.
- Article 12 of the UNCRC guarantees the right of the child to be heard and for his or her views to be taken seriously in all judicial and administrative proceedings affecting them.
- Article 4 states that governments must do all they can to fulfil the rights of every child. The right to effective access to justice is a general underpinning for all the rights in the Convention, since without the ability effectively to request, inform or challenge decisions, rights cannot be secured.

Other important rights are also likely to be negatively impacted due to lack of legal representation as legal problems are not correctly resolved. These rights are diverse, including, for example, the right to freedom from cruel, inhuman or degrading treatment or punishment (Article 37 of the UNCRC); to an adequate standard of living (Article 27 of the UNCRC); to education (Article 28 of the UNCRC); or not to be separated from a parent except in the child's best interests and with due process (Article 9 of the UNCRC).

What changes are being made to Legal Aid?

Detailed changes to civil and prison law Legal Aid for cases involving or affecting children and young people have been set out in the research report prepared for this CRIA (Powell et al, 2014). Broadly, the changes include:

- Legal Aid provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which for the first time provided an exclusive list of what matters would be in scope for legal aid in non-criminal cases
- financial eligibility changes, also in LASPO
- changes to scope, eligibility and merits proposed in *Transforming Legal Aid: Delivering a more credible and efficient system* (TLA) (MoJ, 2013a) and *Transforming Legal Aid: Next Steps* (TLANS) (MoJ, 2013b).

This means the following can no longer be funded through civil Legal Aid:

- asylum support (except where accommodation is claimed)
- consumer
- debt (except where there is an immediate risk to the home)
- employment (except for discrimination)
- education (except for cases of Special Educational Needs)
- housing matters (except those where the home is at immediate risk, homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the County Court)
- immigration (except asylum and detention)
- private family law (other than cases where criteria are met regarding domestic violence or child abuse, or for child parties)
- welfare benefits (except for appeals on a point of law in the Upper Tribunal and onward appeals to the Court of Appeal and Supreme Court).

In addition, a number of miscellaneous cases were also removed from scope including Criminal Injuries Compensation Authority cases, cash forfeiture actions under the Proceeds of Crime Act 2002, legal advice in relation to a change of name, actions relating to probate or land law, actions concerning personal data, tort and other general claims and legal advice on will making. Further, TLA has removed criminal Legal Aid for most prison law cases. It also proposed a Legal Aid 'residence test' (this is currently subject to judicial consideration and its impact will not be assessed in this CRIA).

How the changes affect children and young people

The changes are complex and their impact is only recent or not yet being felt. There will also be indirect impacts, for example on the availability of lawyers and charitable services outside the scope of the changes; and the effects of behavioural changes by individuals as a result of the loss of Legal Aid. Potential impacts on children and young people (and adults acting on their behalf) identified include:

- **Children and young people changing behaviour to avoid the legal problem arising** – children will frequently be unable to avoid legal problems even where an adult might be able to do so because the relevant decision rests with their parent or carer. Interviewees in the participation work carried out by Just for Kids Law (Carter, 2014) would not have changed their behaviour to avoid the need for legal support. For example, the four young people interviewed who had non-asylum immigration cases came to the UK without understanding of their legal status. The six young people interviewed who faced homelessness did not feel that they had made a choice to leave home (over half had fled domestic violence or abuse) and, perhaps unsurprisingly, would not have chosen otherwise on account of the availability of Legal Aid.
- **Children and young people attempting to deal with decision-makers directly without support, including pursuing formal proceedings as a litigant in person (or through an adult litigation friend)** – In the family courts, statistics suggest that there has been a rise in litigants in person in private family law proceedings: if figures for October–December 2012 (the period starting six months prior to LASPO) are compared with October–December 2013 (the period starting six months after LASPO), they indicate that in private family law cases, the proportion of cases in which both parties were represented fell from 46% to 30%; neither party was represented rose from 12% to 22%; one party was unrepresented rose from 42% to 48%. Children and young people reported the negative impact of being a litigant in person. One girl interviewed by Just for Kids Law reported feelings of intimidation from appearing in person at an education hearing, saying, '*...it felt really intimidating coz you know they are all sitting there facing me and I didn't really say much and I cried*' (Carter,2014).
- **Children and young people seeking alternative dispute resolution (including complaints, advocacy and representation)** Without Legal Aid, children and young people in custody will be expected to resolve problems through the use of advocates and the complaints system, meaning that complaints may not potentially be resolved. Powell et al (2014) suggest a limited level of confidence in the complaints system among children and young people in custody, for example: a recent survey, by HMIP (2013) of boys aged 15–18 in Young Offenders Institutions, found that only 55% said it was easy to make a complaint and of those who had made a complaint, 39% felt it was dealt with fairly and 41% felt that their issues were resolved quickly. Powell et al also report feedback from Barnardo's, who run the advocacy services in Young Offenders Institutions and Secure Training Centres, that children and

young people in custody are less likely to pursue a complaint when they realise the process and the time involved to obtain a result.

- **Children and young people attempting to obtain legal assistance pro bono/from the voluntary sector** – There has been a large increase in demand on voluntary sector and pro bono providers of legal advice, assistance and representation, particularly amongst asylum and immigration cases. Much of this demand was likely to be unmet. In addition, the Family Law Bar Association, in its evidence to the House of Commons Justice Committee’s inquiry into the impact of LASPO changes to civil Legal Aid, cited a number of impacts on the court system and the legal sector. These include ‘*advice deserts*’ which they state are ‘*growing in number and size across the country*’ due to the closure of firms reliant upon Legal Aid, and the loss of experienced staff by others (FLBA, 2014).
- **Children and young people paying privately for legal advice/assistance/representation** – This option is only available to those who can afford it. Children acting without adult support are unlikely to be able to locate, instruct and pay a solicitor privately, and therefore may not have access to appropriate legal representation.
- **Children and young people ceasing to attempt to resolve the legal problem (discontinuance)** – Young people interviewed by Just for Kids Law (Carter, 2014) predicted feelings of desperation if they had been unable to obtain help. One young man said that he would have ceased to fight for contact with his daughter. Another interviewee, who had been trafficked to the UK and subsequently made homeless, when asked to imagine what would have happened if she had been unable to obtain legal support, referred to her previous suicidal feelings and predicted that she ‘*would have been dead a long time ago*’ as she ‘*would have given up, it wasn’t worth it*’.

Conclusion

Based on evidence from our reports, we have concluded that a wide range of rights under the UN Convention on the Rights of the Child are likely to be negatively impacted by the civil and prison law Legal Aid changes since April 2013. These include both the rights enjoyed during proceedings – those under Articles 2 (non-discrimination), 3(1) (best interests to be a primary consideration), 12 (right to be heard) and the specific guarantees attached to specific proceedings (e.g. in Article 9 re separation from parents) – and substantive rights which are being infringed because of the legal problem that the child or their parent/carer is encountering.

Therefore, we consider that urgent review and reform is needed in order to ensure that the Legal Aid system can adequately protect the rights of children and young people and that the Government’s obligations under the UNCRC are met. One option for reform is to ensure that the exceptional funding procedure under Section 10 of LASPO is funding cases where children and young people’s rights may otherwise be infringed and is accessible to children

and young people acting without assistance. However, based on the evidence reviewed for this report, this alone will not be sufficient to prevent negative impacts on children's rights: broader changes to the new system of civil and prison law Legal Aid are needed.

Introduction

The preparation of Child Rights Impact Assessments (CRIAs) is now an express part of the Children's Commissioner's primary function – to promote and protect the rights of children in England. Section 2 of the Children Act 2004, as amended by the Children and Families Act 2014, now provides that the Commissioner may:

Consider the potential effect on the rights of children of government policy proposals and government proposals for legislation.

While the Office of the Children's Commissioner (OCC) has carried out a number of Child Rights Impact Assessments in recent years, the primary obligation to do these has been placed upon governments. The UN Committee on the Rights of the Child (CRC) has stated that CRIAs are required in order that a state's obligations under the UN Convention on the Rights of the Child (UNCRC) are fulfilled (UNCRC, 2003, para 45):

Ensuring that the best interests of the child are a primary consideration in all actions concerning children (art. 3 (1)), and that all the provisions of the Convention are respected in legislation and policy development and delivery at all levels of government demands a continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation). This process needs to be built into government at all levels and as early as possible in the development of policy.

The Committee has also highlighted the usefulness of impact assessment and evaluation by statutory and voluntary sector bodies (UNCRC, 2003, para 46):

Self-monitoring and evaluation is an obligation for Governments. But the Committee also regards as essential the independent monitoring of progress towards implementation by, for example, parliamentary committees, NGOs, academic institutions, professional associations, youth groups and independent human rights institutions...

The impact of changes to civil and prison law legal aid since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) has caused concern among many of the monitoring organisations mentioned by the Committee. No child rights impact assessment was published by the Government in relation to either LASPO or the proposals that followed it in *Transforming Legal Aid: Delivering a more credible and efficient system* (TLA) (MoJ, 2013a) and *Transforming Legal Aid: Next Steps* (TLANS) (MoJ, 2013b). Children, by virtue of their age and capacity and their lack of autonomy and agency in many decisions affecting their lives – legal, personal and administrative – require special consideration in relation to Legal Aid.

Many cases for which Legal Aid has been restricted or withdrawn – such as education matters and private family law cases concerning arrangements for children – centre upon the rights and interests of children. In others, such as immigration, housing and welfare, children are an important group affected by proceedings and their best interests must be properly considered by decision-makers. In many cases, the child may not be the active party dealing with an administrative body, or a party to legal action, but his or her rights may be strongly impacted by the decision reached. The loss of legal advice, assistance and representation can result in a decision not being taken, not being challenged or affect the quality of the decision made or re-made. In particular, it can mean that the best interests of the child are not a primary consideration in decisions affecting children’s lives (including where those best interests cannot properly be assessed by the decision-maker), as required by Article 3(1) of the UNCRC; and that the child’s views are not heard and given due weight in the decision-making process (as required by Article 12 of the UNCRC). Many other important children’s rights are severely impacted by ongoing legal problems and/or the failure to take decisions in a manner compliant with the UNCRC. It is therefore crucial that the particular impacts on the rights of children and young people are assessed and taken into account in future policy decisions regarding Legal Aid.

In 2012, OCC published a proposed model for Child Rights Impact Assessment for consultation, incorporating both quantitative and qualitative evidence of impact and legal analysis (OCC, 2012). This CRIA follows that model, and in its preparation we commissioned Perpetuity Research and Consulting International (PRCI) – an independent research consultancy – to carry out desk-based research on quantifiable impacts, and Just for Kids Law (JfKL) – a London-based charity providing community-based legal representation, advocacy and opportunities for children and young people – to obtain qualitative evidence through participation work with children and young people. Their reports: *The impact on children of Legal Aid changes since April 2013: Desk-based research* (Powell et al, 2014) and *The impact on children of Legal Aid changes since April 2013: Participation work with children and young people* (Carter, 2014) are published alongside this CRIA, and their research forms the basis of its findings on impact, supplemented by the now considerable body of evidence in the public domain on the Government’s Legal Aid reforms since 2013. The structure of this assessment follows the research questions which we put to PRCI and JfKL and draws together their findings with our own children’s rights analysis.

This CRIA is unusual in that it considers changes which have already come into effect as well as those which remain proposals. Implementation of the LASPO changes, however, is recent – and therefore a full ex post evaluation of their impacts on children and young people is not yet possible (Powell et al, 2014). In addition, it is important in our view to assess the likely cumulative effect of LASPO and subsequent changes on children and young people.

The changes to civil and prison law Legal Aid since April 2013 were one of only two topics chosen by OCC for extensive analysis of impact in 2013-14,

along with the 2013 Autumn Statement and 2014 Budget (on which we will publish our CRIA later in the autumn). This marks the importance with which we regard these changes: like fiscal and spending changes impacting upon children's standard of living, the inability to access legal advice, assistance and representation as a result of legal aid changes has the potential to impact systemically upon a wide range of children's rights under the UNCRC and other instruments.

1. Changes to Legal Aid since April 2013

The changes to civil and prison law Legal Aid for cases involving or affecting children and young people within the remit of OCC implemented or proposed by the Government since April 2013 have been set out in the research report prepared for this Child Rights Impact Assessment (CRIA) by Perpetuity Research and Consultancy International Ltd (Powell et al, 2014), which should be read alongside this CRIA, and will only be summarised here. They include:

- the coming into force on 1 April 2013 of the Legal Aid provisions of LASPO, which for the first time provided an exclusive list of what matters would be in scope for legal aid in non-criminal cases
- financial eligibility changes, also in LASPO
- changes to scope, eligibility and merits proposed in TLA and TLANS.

The changes to scope in LASPO are well-known and are set out in the Appendix to the PRCI report (Powell et al, 2014):

In brief, the matters which can no longer be funded through civil Legal Aid include: asylum support (except where accommodation is claimed); consumer; debt (except where there is an immediate risk to the home); employment; discrimination; education (except for cases of Special Educational Needs); housing matters (except those where the home is at immediate risk, homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the County Court); immigration (except asylum and detention); private family law (other than cases where criteria are met regarding domestic violence or child abuse, or for child parties); and welfare benefits (except for appeals on a point of law in the Upper Tribunal and onward appeals to the Court of Appeal and Supreme Court). In addition, a number of miscellaneous cases were also removed from scope including Criminal Injuries Compensation Authority cases, cash forfeiture actions under the Proceeds of Crime Act 2002, legal advice in relation to a change of name, actions relating to probate or land law, actions concerning personal data, tort and other general claims and legal advice on will-making.

Section 10 of LASPO provides for exceptional funding where a matter is otherwise out of scope but where failure to provide funding would breach the individual's rights under the Human Rights Act 1998 or enforceable EU rights, or where the Director of Legal Aid Casework determines that it is appropriate to do so because of a risk of such a breach. Exceptional funding for inquests is also provided for by the section where there is significant wider public interest in the case. However, rates of both applications for, and grants of, exceptional funding have been much lower than was predicted. The Ministry of Justice (MoJ) anticipated that there would be between 5,000 and 7,000 applications in 2013–14 and that about 3,700 would be granted. In fact only

1,519 applications were made in that period and of the 1,468 which were determined only 48 were granted (Powell et al, 2014).

Further restrictions on eligibility have resulted, and may result, from TLA and TLANS. In particular, TLA has restricted criminal Legal Aid in prison law cases, so that it is only available for proceedings before the Parole Board where the Board is considering whether to direct release; sentence calculation where there is a dispute over the date of release; minimum term reviews; and disciplinary matters where additional days may be imposed or where the 'Tarrant Criteria'¹ apply. There are no specific exemptions to the prison law changes for children in custody or for vulnerable adults.

TLA and TLANS also proposed the Legal Aid 'residence test' in civil cases, with certain exceptions. The test restricts civil Legal Aid to people who are lawfully present in the UK at the time of their application and have at any time been lawfully resident for 12 continuous months (with no longer than 30 days' total absence during that period). Babies under 12 months old are exempt from the second part of the test. The residence test has a number of exceptions, including for asylum seekers and resettled refugees, members of UK armed forces and their immediate families, and certain cases relating to detention, abuse and protection of children, asylum and community care cases under the Children Act 1989.

Draft regulations introducing the residence test were placed before Parliament in 2014 (the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014); however, the test was judicially challenged by the Public Law Project in a case in which OCC intervened. In *R (Public Law Project) v Secretary of State for Justice* [2014] EWHC 2365 the Divisional Court found that the test was unlawful because it was outside the powers conferred on the Secretary of State by LASPO (*ultra vires*) and because it was unjustifiably discriminatory. This case is subject to appeal and pending this appeal the draft Regulations have been withdrawn from Parliamentary consideration. In these circumstances this CRIA will not consider the Legal Aid residence test. OCC's submissions and the Children's Commissioner's witness statement in the Divisional Court case are available on our website (OCC, 2014a and OCC, 2014b).

2. Children's rights to Legal Aid

¹ These are criteria that the prison governor must consider when considering whether to grant a request for legal assistance at a prison adjudication and include, amongst other matters, the 'capacity of the prisoner to present his or her own case': see www.prisonersadvice.org.uk/DOCS/INFORMATION/ADJUDICATIONS.pdf [accessed September 2014].

The UNCRC differs from many other treaties that guarantee civil and political rights in that it does not include a general express right to a fair trial in civil proceedings. However, the Convention includes a number of strong procedural guarantees for all proceedings – including, importantly, both judicial and administrative decision-making – affecting children. Primary among these are Article 3(1) of the Convention, which expressly includes ‘courts of law’ and ‘administrative bodies’ amongst those organisations making decisions affecting children that must make the best interests of children a primary consideration, and Article 12 of the Convention, which guarantees the right of the child to be heard and for his or her views to be given due weight in all judicial and administrative proceedings affecting the child.

Article 3(1) UNCRC requires that in all actions concerning children – including those by ‘social welfare institutions, courts of law, administrative bodies or legislative authorities’ – the best interests of the child shall be a primary consideration. The CRC has said that this right is a ‘threefold concept’ (UNCRC, 013, para 6):

The Committee underlines that the child's best interests is a threefold concept:

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

(b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall

explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

One of the implementation measures that the Committee says that States should take in order to ensure that the right under Article 3(1) of the Convention is realised is '*creating the necessary conditions for children to express their point of view and ensuring that their opinions are given due weight*' (UNCRC, 2013, para 15).

The right to be heard under Article 12 of the UNCRC is, like the best interests principle in Article 3(1), a general principle of the UNCRC underlying all of the Convention rights. Article 12 provides that:

- (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
- (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

The CRC, in its General Comment, *The Right of the Child to be Heard* (UNCRC, 2009, para 32), emphasises that Article 12(2) applies to:

All relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies. Typical administrative proceedings include, for example, decisions about children's education, health, environment, living conditions, or protection. Both kinds of proceedings may involve alternative dispute mechanisms such as mediation and arbitration.

This list clearly includes a number of the areas of decision-making where Legal Aid has been restricted since April 2013. The Committee specifies that both proceedings 'initiated by the child' and those 'initiated by others which affect the child' are subject to Article 12(2) (para 33). In order to be effective, the Committee notes the child's need for advice and information (para 25):

The realisation of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child's parents or

guardian. The child must also be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the precondition of the child's clarified decisions.

The Committee also pays attention to the circumstances of the proceedings and the need to avoid intimidation and an age-inappropriate environment (para 34):

A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.

The Committee regards it as a decision of the child 'to decide how to be heard: "either directly, or through a representative or appropriate body" (at para 36). A 'representative' can be a parent, lawyer or another person (such as a social worker). However, the Committee stresses that in many cases there may be a risk of conflict of interest with parents. The Committee states that (para 36, emphasis added):

*...the method chosen should be determined **by the child** (or by the appropriate authority as necessary) according to her or his particular situation. Representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.*

The representative must be aware that she or he represents exclusively the interests of the child...

The Committee does not address the question of Legal Aid specifically. However, it clearly regards the question of representation as a matter primarily for the child's decision. Further, the Convention rights must be effective and not illusory – and must be implemented to the maximum extent and in a non-discriminatory fashion (Articles 4 and 2 of the UNCRC). Legal advice, assistance and representation will be necessary in order for these rights to be effective in a wide range of circumstances.

In addition, there are specific procedural guarantees in other Articles of the UNCRC. Article 9, regarding separation from parents (and therefore particularly relevant to public and private family law cases and immigration, removal and deportation), says:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities

subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

There are other specific procedural guarantees in Article 21 (adoption) and Article 37 (prohibition of torture and cruel, inhuman and degrading treatment or punishment) and a list of requirements for criminal proceedings in Article 40 (children in the criminal justice system). The right to effective access to justice is also a general underpinning for all the rights in the Convention, since without the ability effectively to request, inform or challenge decisions, rights cannot be secured and the general obligation to implement the Convention to the maximum extent possible (Article 4 UNCRC) cannot be fulfilled. Unlike most conventions guaranteeing civil and political rights, the UNCRC contains no general 'fair trial' right equivalent to Article 6 of the European Convention on Human Rights (ECHR), other than for criminal proceedings. However, children and young people, like adults, are guaranteed the right to a fair hearing in civil proceedings both by Article 6 ECHR as incorporated in the Human Rights Act 1998 and by other international instruments.

The right to access to justice does not, of course, directly equate to the right to legal assistance. However, children under 18, and young adults within the remit of OCC because they have a learning disability, cannot be expected to navigate administrative, judicial or quasi-judicial processes without assistance because of their lack of capacity. In many cases, the matters will be so inherently complex that the assistance of a lawyer, rather than a parent, litigation friend or non-legal advocate, will be necessary in order that the child can effectively participate in the proceedings. This is the test under the ECHR, as set out in the case of *Airey v Ireland* (1981) 3 EHRR 592:

It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily. ... Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, [...] or by reason of the complexity of the procedure or of the case.

This test may of course be satisfied in case of a non-disabled adult in proceedings where it would not be satisfied in the case of a child or disabled young person. In other proceedings, a child should not be dependent upon having an adult litigation friend whose interests align with their own and who is both willing to act for them and capable of doing so. Many children – for

example those who are looked after by a local authority, or unaccompanied asylum seeking children – are likely to have no such person. Even parents or carers for children living at home may be unwilling or unable to act, and their interests may not align with those of the child.

The CRC emphasised in its General Comment no 5 *General measures of implementation for the Convention on the Rights of the Child* (UNCRC, 2003, emphasis added):

*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 the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures **and to the courts with necessary legal and other assistance.***

In recommendations following its Day of General Discussion on ‘The right of the child to be heard’ the CRC requested that (UNCRC, 2006, para 39):

‘States Parties establish specialised Legal Aid support systems in order to provide children involved in administrative and judicial proceedings with qualified support and assistance.’

The Committee has also emphasised that the obligation to implement Article 12 UNCRC is not dependent on resources.

3. Impact of changes to Legal Aid: Behavioural responses

In order to assess the impact of the civil and prison law Legal Aid changes since April 2013, we asked both PRCI in their desk-based research and JfKL in carrying out interviews with children and young people, to find out what the effect had been of the changes on the behaviour of a) children and young people facing legal problems b) other relevant adults, e.g. parents/carers and c) relevant organisations (for example, administrative and judicial decision-makers, the legal sector and voluntary advice providers).

Children and young people and adults whose problems affect children and young people experiencing legal problems

In relation to those experiencing legal problems (including both children and young people, and adults whose problems affect children and young people e.g. parents/carers), there are various responses that might be seen from those who are no longer able to obtain legal advice, assistance or representation (depending on the area of law in question and their own circumstances, some or all of these may be open to them):

- changing behaviour to avoid the legal problem arising
- attempting to deal with decision-makers directly without support, including pursuing formal proceedings as a litigant in person (or through an adult litigation friend)
- alternative dispute resolution (including complaints, advocacy and representation)
- obtaining legal assistance pro bono/from the voluntary sector
- paying privately for legal advice/assistance/representation
- discontinuance (ceasing to attempt to resolve the legal problem).

Avoiding legal problems

The ability to change behaviour to avoid the legal problem arising is, of course, dependent upon the nature of the problem and the behavioural choices of others: children, in particular, have less agency in relation to decision-making about their lives and therefore will frequently be unable to avoid legal problems even where an adult might be able to do so because the relevant decision rests with their parent or carer.

Interviewees in the participation work carried out by JfKL would not have changed their behaviour so as to avoid the need for legal support: for example, the four young people interviewed who had non-asylum immigration cases came to the UK without understanding of their legal status. The six young people interviewed who faced homelessness did not feel that they had made a choice to leave home (over half had fled domestic violence or abuse) and, perhaps unsurprisingly, would not have chosen otherwise on account of

the availability of Legal Aid. Notably, interviewees learned that the issue they faced was a legal matter after accessing legal support. This suggests that they would not have changed their behaviour on the basis of their ability or otherwise to access legal support.

Dealing with decision-makers directly/acting as a litigant in person

JfKL's interviews found that at the point where legal support was required, those children and young people who did not know the matter they faced was a legal matter would have continued trying to resolve their cases, unsupported, had Legal Aid no longer been available.

In some areas of law, *'proceedings were initiated without legal support or intervention. For example, quasi-legal governing body meetings were automatically initiated following decisions to permanently exclude interviewees from school'* (Carter, 2014). In education exclusion and family contact cases, therefore, there were interviewees who had appeared as litigants in person.

In other areas of law, including immigration or judicial review, where the initiation of proceedings to resolve a legal problem was dependent upon the child or young person (or an adult litigation friend), it was *'extremely doubtful that the interviewees would have progressed their cases to this stage unsupported. Indeed, interviewees spoke of their confusion when attempting to complete non-legal documents and when trying to research the basic details of their cases'* (Carter, 2014).

Adult parties to private family law cases are increasingly acting as litigants in person in the absence of Legal Aid. Comparing October–December 2012 with October–December 2013 shows that the proportion of cases in which neither party was represented rose from 12% to 22% and the proportion in which one party was unrepresented rose from 42% to 48%. The proportion of cases in which both parties were represented fell from 46% to 30% (Powell et al, 2014).

In relation to the domestic violence gateway, Rights of Women and Women's Aid have reported on a survey indicating that 43% of respondents who had experienced domestic violence did not have the evidence required to obtain Legal Aid. Of those unable to obtain Legal Aid, 25% represented themselves at court (Powell et al, 2014).

Alternative dispute resolution

In relation to the loss of criminal Legal Aid for most prison law matters, since these changes have only been recently implemented it is too early to evidence the behavioural response. However, without Legal Aid, children and young people in custody will be expected to resolve problems through the use of advocates and the complaints system. PRCI's research suggests a limited level of confidence in the complaints system among children and young people in custody, for example:

A recent survey, by HMIP (2013) of boys aged 15–18 in prison, found

that 55% said it was easy to make a complaint and of those who had made a complaint, 39% felt it was dealt with fairly and 41% felt that their issues were resolved quickly (although there is variation across establishments) (Powell et al, 2014).

PRCI also report feedback from Barnardo's, who run the advocacy services in Young Offenders Institutions and Secure Training Centres, that children and young people in custody are less likely to pursue a complaint when they realise the process and the time involved to obtain a result. A similar account was provided by a professional in the focus group run by JfKL:

I have got young people who completely disengage, they've written to us from custody and haven't been able to get help, so they just disengage and it's hard to know how they have dealt with it (Carter, 2014).

The Prisons and Probation Ombudsman's office recorded a 2% increase in complaints and an 8% increase in eligible complaints in 2012–13. However, only 1.8% of cases in 2012–13 were from children or young adults under 21 (Powell et al, 2014, p.50).

In private family law, the Government's intention was that couples should use mediation instead of resorting to court proceedings wherever appropriate. The Children and Families Act 2014 has created a general obligation (with exceptions, mainly relating to domestic violence) now set out in the Family Procedure Rules (see Chapter 3 of Part 3, Family Procedure Rules, and Practice Direction 3A) to attend a 'family mediation information and assessment meeting' before making one of a number of applications in the family court, including applications for child arrangements orders and other orders in respect of a child under section 8 Children Act 1989; orders creating or terminating parental responsibility; appointing or terminating the appointment of a child's guardian; special guardianship orders; and financial orders including an order for financial provision for children under Schedule 1 to the Children Act 1989 etc.

These are fundamental orders affecting children's lives – who they will live with, who will have parental responsibility for them; whether they will have contact with both parents and/or other family members; and affecting their financial support and standard of living – and therefore impacting upon UNCRC rights including Article 9 (separation from parents); Article 16 (privacy and family); and Article 27 (adequate standard of living). The encouragement of mediation was offered as a justification for the removal of Legal Aid in most private family law cases. However, the use of mediation in private family law disputes has decreased since the implementation of LASPO: the number of mediation starts decreased by 38% between 2012–13 and 2013–14; however, of those mediations started the number resulting in full or partial settlement rose from 67% to 79% (Powell et al, 2014).

Paying privately

This option will of course only be open to those of sufficient means. Children

acting without adult support are unlikely to be able to locate, instruct and pay a solicitor privately. Several of the children and young people interviewed by JfKL referred to this (Carter, 2014):

We did know we could get a lawyer but the thing was we didn't have money to help get a lawyer...

Isoke

Normally, if you get a lawyer you have to pay for lawyers and I thought, I don't wanna pay, where am I gonna get the money from? ... What am I gonna do? And then I just thought, you know, life is becoming unbearable now.

Kayefi

I'd just go [back to Egypt] coz obviously I don't have the money to go see a lawyer and I would have just gone and my daughter lost her dad and I lost my daughter and that would absolutely kill me...

Shakir

Of those victims of domestic violence unable to apply for Legal Aid in the Rights of Women and Women's Aid survey, 32% paid a solicitor privately (Powell et al, 2014).

Discontinuance

PRCI and JfKL's reports do not find positive evidence of discontinuance as opposed to the use of one of the other alternatives to Legal Aid. The JfKL interviewees had all found their way to help from JfKL, and therefore had not been forced to discontinue attempts to solve their legal problems. However, the quote from Shakir, above, is one of several examples where interviewees predicted feelings of desperation if they had been unable to obtain help. Shakir predicts that he would have gone back to Egypt and ceased to fight for contact with his daughter. Another interviewee, Kayefi, aged 17, who had been trafficked to the UK and subsequently made homeless, when asked to imagine what would have happened if she had been unable to obtain legal support, referred to her previous suicidal feelings and predicted that she 'would have been dead a long time ago' as she 'would have given up, it wasn't worth it'.

Professionals in the JfKL focus group also referred to young people in custody who 'disengage' after being unable to attend help and to people with immigration law problems who 'stay underground' and 'destitute' whose children will be 'destitute...out of education or in a dire situation' (Carter, 2014).

PRCI also report upon declining case volumes in different types of case. In private family law, for example, new Legal Help matters reduced by 79% between 2012–13 and 2013–14 (Powell et al, 2014, quoting Legal Aid Agency statistics). The number of new certificates for representation in private law children cases has reduced by 66% over the same period. Exceptional funding under Section 10 of LASPO has – unsurprisingly – not filled the gap: it

was only granted in eight family cases in 2013–14. CAFCASS statistics suggest a drop in the number of private law children cases starting in the courts, at least in the short term (Powell et al, 2014). While evidence is still emerging as to the full spectrum of behavioural responses of people with private family law problems who are now unable to obtain Legal Help or representation, it is possible that some will no longer attempt, or will cease to attempt, to solve their problem.

PRCI report on a Rights of Women and Women's Aid survey of victims of domestic violence, in which of those 43% of respondents who did not have the required evidence to obtain legal aid, 47% took no action in relation to their family law problem (Powell et al, 2014).

Organisational responses

Administrative decision-makers

The interviewees spoken to by JfKL revealed that administrative decision-makers exercising public functions often failed to fulfil their duties until the interviewees obtained legal support. For example of the 13 children and young people who had at some point presented to social services as homeless, none were initially offered accommodation and, *'in the vast majority of these cases, legal support was necessary to resolve their cases'*. Notably, all nine interviewees who had obtained non-legal help from an advocate, while finding this helpful, *'did eventually require legal support to progress their case'* (Carter, 2014).

A characteristic feature of the interviewee's accounts was not being listened to by authorities before accessing legal support, or even being accused of lying. This included parents of children facing exclusion from school, and children and young people attempting to obtain services from local authorities (Carter, 2014): *'several, especially those who presented to social services as homeless, felt that they had been badly advised and even misinformed by those exercising public functions'*.

Interviewees depicted an adversarial culture where an unassisted child or young person would not be believed or supported by decision-makers. They depicted the consequences as including homelessness or being expected to return to abusive situations – potentially resulting in breaches of their rights under Articles 6 (right to life and optimal development), 19 (freedom from maltreatment), 24 (health), 27 (adequate standard of living) and 34 (freedom from sexual abuse and exploitation) UNCRC:

I still feel that I've been treated unfairly. What should have happened is they should have helped me straight away but they didn't do that. So, if I didn't have had my advocate, then I was gonna be turned back, sent away which was gonna make stuff worsen coz then if I was to be turned away, I would have been outside on the streets somewhere. I wouldn't have had a place to stay and keep myself safe. It's worsen for a female because once they are out on the street it's not safe for them, anything can happen. Very bad stuff can happen as well. So really, once you

don't have advocates or solicitors you won't be heard from the organisations that you go to. You won't get help.

Amy

Law firms

The PRCI report sets out the decline in the number of contracts available in relevant areas of law. In addition, the Family Law Bar Association, in its evidence to the House of Commons Justice Committee's inquiry into the impact of LASPO changes to civil Legal Aid, cited a number of impacts on the court system and the legal sector. These include 'advice deserts' which they state are '*growing in number and size across the country*' due to the closure of firms reliant upon Legal Aid, and the loss of experienced staff by others. They also refer to delay due to late instruction of counsel by solicitors trying to retain fees (FLBA, 2014):

This tendency is spilling over into public law cases where solicitors are conducting as many hearings as they can, whereby counsel, if instructed at all, often are instructed at a very late stage, when the preparation of the case is not always as focussed as it needs to be, leading to potential delays. This will engender delay and a threat to the 26 week deadline for the conclusion of public law applications, or to injustice to the child and the family by reason of applications for adjournments to get a case in order being refused.

Voluntary sector

In immigration and asylum, PRCI's research has shown that there has been a large increase in demand on voluntary sector and pro bono providers of legal advice, assistance and representation, and that much of this demand was likely to be unmet. For example,

...the Law Centres Network reports that Hackney Law Centre experienced a 200% increase in the number of people looking for immigration law advice over the winter of 2013 and a 500% increase in the number of calls to their telephone helpline (Law Centres Network, 2014).

They note that:

Some not-for-profit providers have established fee charging entities for the first time, particularly in the category of immigration, for example, services are available at Rochdale Law Centre, Islington Law Centre, and Community Advice Law Service in Leicester (Civil Justice Council, 2014).

Islington Law Centre highlighted the lack of funding for interpreters, even where it was possible to get pro bono legal advice. Coram Children's Legal Centre and Southwark Law Centre highlighted the lack of funding for appeals:

Our ability to assist our clients has been severely tested where they evidently need legal representation in their immigration cases but so

few onward referral paths exist for them (Coram Children's Legal Centre, 2014:11).

This highlights the inability of voluntary provision to provide a substitute for Legal Aid. Further, the sector is hampered by the legal requirement to be part of a regulatory scheme under the Immigration and Asylum Act 1999 in order to lawfully provide immigration law advice.

In private family law, the Coram Children's Legal Centre reported a considerable increase in demand for their services since the implementation of LASPO:

...the number of calls to their Child Law Advice Line has increased from approximately 23,000 unique callers in 2012–2013 to approximately 40,200 in 2013–14. A sample of callers in March 2014 indicated that two thirds of calls from people who appeared to be financially eligible for Legal Aid but who were calling in respect of a problem that is no longer in scope, and were calling about private family law matters (Coram, 2014:2–4).

In the linked cases of *Q v Q, Re B, Re C* [2014] EWFC 31 Sir James Munby J referred to the effect of the LASPO changes in private family law upon the Bar Pro Bono Unit:

All this has led to increased calls on the Bar Pro Bono Unit. In 2012 ... it received 171 applications for assistance in family law children cases, in 2013, 291 applications and, in the first five months of 2014, 205 applications. The Unit, I am told, is usually unable to help in cases where the work involved extends beyond three days (including preparation time). It is unable to meet the demand. In the first five months of 2014, it was unable to place 49 family children cases.

Courts system

The Family Law Bar Association, in its evidence to the House of Commons Justice Committee's inquiry into the impact of LASPO changes to civil legal aid, said that delays in private law proceedings have led to delays in the start of public law cases (FLBA, 2014).

The impact on the court system of the rise in litigants in person in private law family cases has been recently demonstrated in the linked cases of *Q v Q, Re B, Re C* [2014] EWFC 31. These were private law children proceedings where in one case, the father was a convicted sex offender and there was expert evidence as to risk, and in the others serious allegations of sexual offences had been made against the fathers. The issues of risk/offending behaviour could not be effectively tested in each case because the father was not legally aided and therefore unrepresented and in one case because Legal Aid was not available to get an expert witness to court. In his judgment, the President of the Family Division, Sir James Munby J, said:

The effects of these changes have been dramatic. There has been a drastic reduction in the number of represented litigants in private law cases. The number of cases where both parties are represented has fallen very significantly, the number of cases where one party is represented has also fallen significantly and, correspondingly, the number of cases where neither party is represented has risen very significantly...

The President indicated that if fairness required a party to be represented in private family law proceedings in circumstances where he or she was unable to obtain Legal Aid, HM Courts and Tribunals Service would if necessary be required to fund representation.

4. Impacts on children and young people

If, as the evidence suggests, the resolution of legal problems is delayed or denied – or proceedings go ahead with a young person or their parent/carer acting in person - because of the lack of available legal advice, assistance and representation through legal aid, the impacts on children and young people are likely to be wide ranging.

They include direct impacts upon the proceedings themselves; direct impacts of the legal problem; and indirect impacts (for example, the effects on mental health and educational attainment of dealing with the legal problem).

JfKL found that:

Interviewees reported negative impacts that were directly associated with the issue for which they required support, as well as secondary impacts that arose as a result of these issues. Impacts included: homelessness and destitution; lack of education; family breakdown; reduced emotional and mental wellbeing; and reduced safety.

A number of interviewees cited an indirect effect upon their education as a result of their continuing legal problem.

Those interviewees who appeared in judicial/quasi-judicial proceedings without legal support cited direct and indirect impacts from having to do so. They had found the experience distressing and bewildering, and had felt unable to effectively make their case before the tribunal. The first, a young woman in a private law children case, *'felt that she could not meaningfully engage with the proceedings at all and questioned whether there was any reason for her to even try'* (Carter, 2014):

The Judge asked me, do I have anything to say? But I'm not a barrister, what am I going to say? Even if I do say anything, you're not gonna listen to me.

Fran

The young woman's partner, a perpetrator of domestic violence, was awarded sole custody of their child. From her description of events, there was a shared feeling that the wrong decision had been reached and that the circumstances of the proceedings had been a key factor in the outcome.

Fran later obtained pro bono support from a barrister who negotiated shared custody of the child. She reported a long-term emotional impact from the experience:

Last year with all the court stuff, I think it's just changed me as a person. I'm not confident outside, it's just mentally drained me. I feel

like an old woman.

The second interviewee was a girl who had been permanently excluded from school. She cited her lack of knowledge of procedural requirements (a factor that has also been reported as a cause of delay in cases featuring litigants in person in the family courts (see FLBA, 2014):

We didn't know that when you go to the meeting you are not actually allowed to bring evidence or papers. You're supposed to submit it three days or so before, so that everyone can have a look at it so that the school can make a rebuttal if they want to. But we didn't know that.

Sara

She also reported feelings of intimidation from appearing in person at the hearing:

It felt like I was a murder case. Apparently I was cold and calculating. I'd never heard someone using [that] unless it was a murder case. So I was sitting there and you had to wait your turn to say anything but it felt really intimidating coz you know they are all sitting there facing me and I didn't really say much and I cried. I just felt defencelessness.

In these circumstances, it is very unlikely that a child or young person can effectively participate in the hearing nor that all relevant information can be put before the tribunal to enable them to make a decision fairly and in the child's best interests.

It is therefore likely that a range of rights will be negatively impacted when children do not receive legal support to resolve an ongoing legal problem, including the 'procedural' guarantees of Articles 3, 12 and other specific procedural elements of the UNCRC depending on the context (eg in Article 9 UNCRC), and the substantive rights that are the subject-matter of the decision (for example, the right to education or to contact with parents).

PCRI's report concludes that:

...[w]hilst it is not possible to provide conclusive evidence on the impact made by the reforms, there is clear evidence prior to April 2013 that indicates that significant numbers of children and young people will still have problems which require resolution and which are no longer in scope for funding, and in respect of which alternative help is limited. Therefore the initial assumption must be that, although unclear as to what degree, there are considerable numbers who are failing to be supported in resolving legal issues and as a result this will have a negative impact on them and their families.

JfKL's report concludes that:

...[i]nterviewees would have faced issues which required legal support to resolve, regardless of the changes to Legal Aid... . Without legal support, "their cases would have been likely to remain unresolved,

impacting their wellbeing and a range of substantive rights.” The use of alternative remedies was “only effective and appropriate in limited circumstances and, if they replaced legal support entirely, would be likely to impact on young people’s wellbeing and safety”. Being a litigant in person “had a negative impact on proceedings as well as a long term impact on wellbeing”. Without legal intervention “those exercising public functions would have been likely to continue to fail to undertake their duties towards young people. This failure would impact wellbeing and a range of substantive rights”.

Conclusion

Based on PRCI and JfKL's reports and other evidence in the public domain, we have concluded that a wide range of rights under the UN Convention on the Rights of the Child are likely to be negatively impacted by the civil and prison law Legal Aid changes since April 2013. These include both the rights enjoyed during proceedings – those under Articles 2 (non-discrimination), 3(1) (best interests to be a primary consideration), 12 (right to be heard) and the specific guarantees attached to specific proceedings (e.g. in Article 9 re separation from parents) – and substantive rights which are being infringed because of the legal problem that the child or their parent/carer is encountering but which cannot be appropriately resolved without legal aid.

The range of substantive legal problems evidenced in PRCI's and JfKL's reports is broad, and impacts include those on the child's right to an adequate standard of living under Article 27 of the UNCRC and to freedom from maltreatment under Article 19 of the UNCRC. Prison law treatment cases will engage rights under Article 37 of the UNCRC (prohibition of torture or cruel, inhuman or degrading treatment) and education cases, the right to education under Article 28 of the UNCRC.

It is likely that in some cases, legal problems will subsist whereas with legal advice, assistance and in some cases representation, they could have been rectified; this will be due in some cases to a child or parent/carer's ignorance of their ability to challenge or solve their legal problem and in others to their inability to do so effectively without legal help. In some cases decision-makers are likely to infringe rights because the information they need to give effect to rights is not before them or they are not effectively persuaded to do so.

The JfKL interviews also suggest indirect impacts of the inability effectively to solve legal problems – in particular on education but also on the psychological health of the interviewees.

Therefore, we believe that urgent review and reform is needed in order to ensure that the Legal Aid system can adequately protect the rights of children and young people and that the Government's obligations under the UNCRC are met.

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. The Administrative Court has recently found in *Gudanaviciene v Director of Legal Aid Casework* [2014] EWHC (Admin) that guidance issued by the Secretary of State for Justice for caseworkers to apply in making Section 10 decisions was too restrictive and that (para 28 of the judgment):

the key considerations are that there must be effective access to a court and that there must be overall fairness in order that the requirements of Article 6 are met. One aspect of effective access must be the ability of a party to present all necessary evidence to make his case and to understand and be able to engage with the process. ... It must be borne in mind that both before a tribunal and a court the process is adversarial. Thus the tribunal cannot obtain evidence where there are gaps in what an applicant has been able to produce. Equally, it may have difficulties if there is defective written material put before it in appreciating whether there is any substance to a claim or even if any particular human rights claim is properly raised.

Any replacement of Section 10 would have to provide for a process which is genuinely accessible to unassisted applicants including children and young people acting alone.

However, reform of Section 10 alone is unlikely to assist all cases where children require legal advice, assistance and representation in order for their rights to be effective, particularly since, as JfKL's interviews revealed, children may be unaware that their problem is a legal one or that they might require or benefit from legal assistance to resolve it. Both provision of information regarding legal rights (as provided for, for example, by Article 42 of the UNCRC – the Government's obligation to make the principles and provisions of the UNCRC widely known to both adults and children), and the maintenance/reinstatement of Legal Aid for advice, assistance and representation in any circumstances where this is required for children's rights to be effective (whether the party assisted is a child or an adult) is required. Urgent consideration should be given as to how this can be provided for.

References

Carter, Joel (2014) *The impact on children of Legal Aid changes since April 2013: Participation work with children and young people*. London: Office of the Children's Commissioner.

Family Law Bar Association (2014) *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*. Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/8973.html> [accessed August 2014].

Law Centres Network (2014) *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*. Available at: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/laspo/?type=Written> [accessed August 2014].

Ministry of Justice (2013a) *Transforming Legal Aid: Delivering a more credible and efficient system*. London: Ministry of Justice.

Ministry of Justice (2013b) *Transforming Legal Aid: Next Steps*. London: Ministry of Justice.

Office of the Children's Commissioner (2014a) *R (Public Law Project) v Lord Chancellor, Claim No CO/17247/2013, Written Submissions of the Intervener*. Available at http://www.childrenscommissioner.gov.uk/content/press_release/content_546 [accessed September 2014].

Office of the Children's Commissioner (2014b), *R (Public Law Project) v Lord Chancellor, Claim No CO/17247/2013, Witness statement of Dr Maggie Atkinson*. Available at http://www.childrenscommissioner.gov.uk/content/press_release/content_546 [accessed September 2014].

Powell, H., Sefton, M., Smith, M., and Randall, A. (2014) *The impact on children of Legal Aid changes since April 2013: Desk-based research*. London: Office of the Children's Commissioner.

UN 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* (arts 4, 42 and 44, para 6), CRC/GC/2003/5.

UN Committee on the Rights of the Child (2006), *Day of General Discussion on the Right of the Child to be Heard*, 29 September 2006.

UN Committee on the Rights of the Child (2009). General Comment No 12, *The right of the child to be heard*, CRC/C/GC/12.

UN Committee on the Rights of the Child (2013). General Comment No 14, *The right of the child to have his or her best interests taken as a primary consideration* (art 3, para 1), CRC/C/GC/14.

Office of the Children's Commissioner
Sanctuary Buildings
20 Great Smith Street
London
SW1P 3BT
E info.request@childrenscommissioner.gsi.gov.uk

