



## **YOUNG LEGAL AID LAWYERS**

### **Response to the Ministry of Justice Consultation on Legal Aid Financial Eligibility and Universal Credit**

**11 May 2017**

#### **About Young Legal Aid Lawyers**

1. Young Legal Aid Lawyers (YLAL) was formed in 2005 and has over 2,800 members. We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded. YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.
2. YLAL's objectives are:
  - a. To campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it.
  - b. To increase social mobility and diversity within the legal aid sector.
  - c. To promote the interests of new entrants and junior lawyers and provide a network for likeminded people beginning their careers in the legal aid sector.
3. This is YLAL's response to the Ministry of Justice (MoJ) Consultation on Legal Aid Financial Eligibility and Universal Credit. The consultation has come about as a means of considering the impact on legal aid financial eligibility of the changes to the benefits system currently being implemented under the Welfare Reform Act 2012, which will result in a number of benefits that have historically been used as an administrative marker to 'passport' applicants through parts of the criminal and civil legal aid means tests being replaced by Universal Credit.

#### **Introduction**

4. A comprehensive knowledge of Universal Credit is required to fully answer the technical questions posed in this consultation. YLAL therefore defers to the specialist knowledge of those at the Public Law Project (PLP). In addition to the answers set out below through which we provide a response on behalf of our members, YLAL endorses the response of PLP.
5. In summary, YLAL considers that there are a number of fundamental flaws and inadequacies in the impact assessment undertaken and that the alternative options for amending the legal aid financial eligibility criteria to accommodate the changes to the benefit system need to be considered and a detailed impact assessment provided before implementing any changes.

6. YLAL also considers that the government should conduct a comprehensive and objective review of the financial means tests for legal aid in order to ensure that legal aid is not reserved only for the very poorest and most vulnerable in society, but rather is available to anyone who is unable to pay for legal advice and representation.
7. The report of the Rushcliffe Committee in May 1945, which led to the creation of the modern legal aid scheme, recommended that the provision of legal aid should not be limited to those who are normally classed as poor but should include a wider income group. Following the introduction of the Legal Aid and Advice Act 1949, it was estimated that 80 per cent of the population was financially eligible for civil legal aid. However, by 2008 this figure had fallen to 29 per cent<sup>1</sup>, and it is likely to have fallen further since then as a result of the overly stringent financial means tests for legal aid.
8. The Prime Minister has spoken of wanting to make Britain “*a country that works for everyone*”. We consider that a country in which the vast majority of people are financially ineligible for legal aid is not a country which works for everyone. We therefore urge the government to conduct a comprehensive and objective review of the financial means tests for legal aid.

**Q1: Is limiting passporting through the legal aid means tests to Universal Credit recipients with zero income from employment (while continuing to passport recipients of legacy benefits) a reasonable measure to accommodate the expansion of Universal Credit?**

9. No. Limiting passporting to Universal Credit recipients with zero income from employment is not a reasonable measure to accommodate the expansion of Universal Credit. It will result in a lack of parity between claimants of Universal Credit and those still in receipt of legacy benefits (Income Support, income related Jobseekers Allowance, income related Employment and Support Allowance).
10. Under the current system, those in receipt of Income Support and Jobseekers Allowance are allowed to undertake paid work for up to 16 hours per week and those in receipt of Employment and Support Allowance are entitled to undertake up to 16 hours of certain permitted work. YLAL understands that the Department for Work and Pensions takes into account a claimant’s income from paid work when conducting a means assessment for a claimant’s eligibility for all three benefits and that any income from paid employment leads to a corresponding reduction in the respective benefit payment.
11. The proposed measure to limit passporting for Universal Credit recipients with zero income does not take into account that currently, applicants in receipt of Income Support, Jobseekers Allowance and Employment and Support Allowance who also work and have income from employment continue to be passported through the means assessment.
12. Furthermore, the legal aid passporting system reflects the fact that in order to meet the eligibility criteria for these means tested benefits, the Department for Work and Pensions will already have conducted a full means assessment, which recognises the applicant as requiring financial support from the state.
13. We note that the MoJ considered but chose not to pursue an alternative option of limiting passporting to applicants in receipt of Universal Credit with earnings of up to £500 per month. The consultation paper notes that this figure “roughly equates with the potential earnings currently allowed to people in receipt of income support or income-related Employment and Support Allowance”, and is therefore much more closely aligned with the current system. It would

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<sup>1</sup> *The Justice Gap*, Steve Hynes and Jon Robins, p21

maintain passporting for applicants who are in receipt of means tested benefits and also have income from earnings. On that basis, we consider that this is the most appropriate option to adopt in order to accommodate the expansion of Universal Credit.

**Q2: Should the total amount for housing in the Universal Credit award be disregarded when assessing a claim for legal aid?**

14. Yes. The total amount for the housing element of a Universal Credit award should be disregarded from an applicant's gross income. This will ensure parity with those in receipt of legacy benefits.

**Q3: Do you agree with the proposal that where there are contrary interests both parties should be assessed using the Universal Credit award amount for their household circumstances but any earnings would be taken account of separately?**

15. Yes. We agree that the position on contrary interest should remain unchanged from that which it is now.

**Q4: Have we correctly identified the range of impacts of the proposals as currently drafted in this consultation paper?**

16. The consultation paper provides an impact assessment, which includes only two options: Option 0 and Option 1. Option 0 is to continue to passport all Universal Credit claimants. Option 1 is to limit passporting to the Universal Credit claimants who have no income from employment.

17. This impact assessment is fundamentally flawed for the following reasons:

- (a) The impact assessment does not provide an assessment of the other options which have been considered, including limiting passporting through legal aid means assessment to Universal Credit recipients with earnings less than £500 per month. This option should be fully costed and consulted upon before the MoJ proceeds to implement any changes.
- (b) The impact assessment also does not provide the costs of Option 0 to allow a comparison of the associated costs. No description is given as to how the figure of £14million per annum has been reached. Again, this option needs to be fully costed and consulted upon before the MoJ proceeds to implement any changes.
- (c) Some of the costs provided may have to be incurred regardless of the option which is taken, and the figures are potentially misleading. For example, the £300,000 cost of updating the LAA computer systems: this appears to refer to the cost of changing the IT system used for assessing applications for legal aid. If this is the case then this cost will be incurred for any option, apart from doing nothing.
- (d) The data used to assess the impact on individuals with protected characteristics is inaccurate and should not be used to assess the impact of the proposal. It is recognised that the data is provided optionally so cannot be considered to accurately reflect claimants, and it does not include data for five characteristics.

18. Further, the potential discrimination due to the gradual roll out Universal Credit has not been considered. Currently Universal Credit is only available in certain areas and for certain groups. It is accepted that if Option 1 is implemented, people who were previously eligible for legal aid will become ineligible or have to pay a contribution. This means that your eligibility for legal aid will

be dependent on the area you live or the type of claimant you are. This has a potential for indirect discrimination which has not been considered by the MoJ.

**Q5: Have we correctly identified the extent of the impacts of the proposals as currently drafted?**

19. We repeat that the impact assessment is fundamentally flawed so should not be used to justify a decision on the proposal contained within the consultation paper. We also agree with PLP that it is not possible to comment on the extent of the impact of the proposals in the absence of any impact assessments on the alternative options rejected by the LAA.
20. We believe it important to mention the points below, which indicate that the extent of the impact of this consultation has not been fully addressed:

- *Impact on LAA administrative costs.*

The impact assessment states that the impact on the LAA's administration costs cannot accurately be assessed. The LAA has a designated team responsible for conducting means assessments and data could be collected as to the average time it takes to consider one application. Using an average figure it should be possible to cost the means assessments required under each option.

No assessment has been provided as to the additional administrative costs associated with managing contribution payments. The LAA is required to accept and track payments monthly and administer notices to show cause when payments are in arrears. A number of additional claimants paying contributions will increase this administrative cost and should be considered.

Further, if the aim of Universal Credit (getting people into work) is successful then the administrative impact of reassessing claimants when they find work must be considered. One of the aims of passporting benefits is to prevent double administrative burdens. Universal Credit claimants will be assessed by the Department for Work and Pensions when they find work and have their benefit adjusted accordingly. The Legal Aid Agency will also have to undertake a further means assessment to ensure continuing eligibility for legal aid, resulting in two government departments repeating the work of the other.

- *Impact on service providers*

The administrative burden on providers of publicly-funded legal advice and representation – which are already significant – will increase substantially for both controlled work and publicly funded applications.

- *Potential discrimination*

The consultation paper states that the decision may affect groups with a high percentage of a protected characteristic: (1) recipients of Income Support; (2) recipients of Employment and Support Allowance in civil cases; and (3) those on Job Seekers Allowance for criminal cases. However, there is a failure to assess the impact of this.

One example is of a potential impact on claimants of Employment and Support Allowance: currently, claimants can work as long as they are doing permitted work and do not earn more than £520 per month. Therefore those currently receiving Employment and Support Allowance and receiving income from employment are going to be worse off under the

proposed regime then under the legacy benefit rules. This has the potential to result in indirect discrimination.

Another example is sole parents who make up 61% of Income Support claimants. Removing the automatic passporting in these cases will mean more sole parents being required to pay contributions from their already stretched finances, which again creates the potential for indirect discrimination.

**Q6: Are there any forms of mitigation in relation to the impacts that we have not considered?**

21. Without knowing the basis for the costs for Option 0 and as there is no consideration of the impact of the alternative options, it is not possible to comment further as to whether there are any forms of mitigation.

**Q7: Do you have any other evidence or information concerning impacts or equalities that we should consider when formulating the more detailed policy proposals?**

22. No.

**Conclusion**

23. We urge the MoJ to conduct (or, if already undertaken, provide to consultees) an impact assessment of the other options which the consultation paper states have been considered but rejected, and to provide further information on the economic impact of Option 0, before proceeding to implement any change.
24. We also urge the government to take this opportunity to conduct a comprehensive and objective review of the financial means tests for legal aid in order to ensure that legal aid is not reserved only for the very poorest and most vulnerable in society, but rather is available to anyone who is unable to pay for legal advice and representation, as envisaged when the modern legal aid scheme was created.

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