

Residence test – Equalities analysis

Introduction

1. The Government is mindful of the importance of considering the impact of the civil legal aid residence test on different groups, with particular reference to users and providers of legally aided services.
2. In accordance with our duties under the Equality Act 2010 we have considered the impact of the proposals on individuals sharing protected characteristics in order to give due regard to the need to eliminate unlawful conduct, advance equality of opportunity and foster good relations.
3. Our analysis of the original proposal was included in the April 2013 consultation *Transforming Legal Aid: delivering a more credible and efficient system*.¹ We summarised the key issues that were raised in relation to equalities in our September 2013 response, *Transforming Legal Aid: Next Steps (Next Steps)* and set out our equalities analysis of the revised proposal.²
4. This equalities analysis considers the proposal against our responsibilities under the Equality Act 2010, and builds on our previous equalities analysis on the residence test. Since the publication of *Next Steps*, we have set out a number of further exceptions and modifications to the residence test, and have published our intended approach in relation to the evidence requirements which an individual will need to meet to demonstrate that they are lawfully resident or do not need to satisfy the test. This analysis particularly focuses on the impact of the evidential requirements.

Legal Duties

5. Under section 149 of the Equality Act 2010, when exercising its functions the Ministry of Justice is under a legal duty to have due regard to the need to:
 - Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Act;
 - Advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and
 - Foster good relations between different groups.
6. The relevant protected characteristics for those purposes are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
7. Consistent with that duty, and with the statutory objectives of section 149 of the Act in mind, we have considered whether and how the policies in question are likely to impact on people sharing protected characteristics.
8. In relation to the second and third statutory objectives - advancement of equality of opportunity and fostering good relations - to which, under section 149, the

¹ <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>, page 147.

² <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps>, pages 199 to 202.

Ministry is obliged to have due regard, guidance is provided in section 149(3) and (5):

‘(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; take steps to meet the needs of persons who share a relevant protected characteristic that are connected to that characteristic; encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.’

‘(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to - tackle prejudice and promote understanding.’

9. Those provisions indicate that the matters to which the Ministry must have due regard include the need for steps to be taken - although the duty remains one of due regard. We have considered the relevance and implications of the policies in question for the advancement of equality of opportunity and the need to foster good relations with the guidance in section 149(3) and (5) in mind. Where relevant, we address the second and third limbs of the duty in more detail in the analysis that follows.

Update since *Next Steps*

10. In line with our duty to keep the equalities impacts of the proposal under review, we have considered the impact of the changes made to the residence test proposal since *Next Steps* as well as any new information which has come to light and might be relevant to that equalities analysis.
11. Firstly, since the publication of our consultation response document, *Transforming Legal Aid: Next Steps (Next Steps)*, the Joint Committee on Human Rights (JCHR) published its report *The implications for access to justice of the Government’s proposals to reform legal aid*.³
12. We carefully considered this report and in our response, we agreed that some further modifications to the proposed residence test were justified in order to achieve the essential policy aim of targeting legal aid at those with a strong connection to the UK, whilst providing protection for those who are particularly vulnerable. We therefore made the following changes to the residence test.⁴
 - An asylum seeker who is successful in their asylum claim will not need to satisfy the residence test until 12 months after the asylum claim was made or determined (whichever is later).

³ <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/100.pdf>

⁴ <https://www.gov.uk/government/publications/the-implications-for-access-to-justice-of-the-governments-proposals-to-reform-legal-aid>

- Other categories of refugees who do not make a claim for asylum in the UK would not need to satisfy the test until 12 months after they arrive in the country.
 - We also intend to make a similar exception for persons relocated under the proposed Syrian Vulnerable Person Relocation scheme
 - Alongside other exceptions for protection of children cases previously set out in *Next Steps* there will be a further exception for sections 17 and 20 of the Children Act 1989 cases falling within paragraph 6 of Part 1 of Schedule 1 to LASPO. In addition, we will make exceptions for sections 22A, 22B, 22C, 23, 23B, 23C, 24, 24A and 24B of that Act cases falling within paragraph 6 of Part 1 of Schedule 1 to LASPO.
13. We also propose to introduce flexibility in the requirements to provide evidence of residence for individuals whose personal circumstances, for example age, mental disability, and homelessness, may make it impracticable for evidence to be supplied. The impact of this flexibility is considered further below, in the analysis of the equalities impacts of the evidence requirements.
14. These modifications, and in particular the flexibility in providing evidential requirements (which is considered further below), go some way to mitigate the impact of the residence test on certain vulnerable groups. For example, in *Next Steps* respondents raised concerns that the residence test would impact on groups with or likely to have protected characteristics, including refugees and asylum seekers.⁵ The proposed modifications we have made since *Next Steps* for asylum seekers and refugees will further mitigate the impact of the test on these vulnerable groups.
15. Secondly, since *Next Steps*, in October 2013 the Office for National Statistics (ONS) published, census data on the characteristics of non-UK born short-term migrants, those residing in the UK intending to stay between 3 and 12 months. While we do not know how many of these individuals apply for legal aid, and therefore how many would be affected by the residence test, the characteristics of this group can be used to provide an approximate indication of the protected characteristics of those most likely to be affected by the residence test since non-UK born residents intending to reside in the UK for between 3 and 12 months would no longer be eligible for legal aid. The census data shows that non-UK born short-term migrants residing in England and Wales are disproportionately young and of black and minority ethnic (BAME) ethnicity compared with the general population. The census data shows that 54% of short-term migrants residing in England and Wales are of BAME ethnicity compared with just 14% of the general population, and that 55% of short-term migrants are under the age of 25 compared with 31% of the general population. Although, of course, we anticipate there will be persons among the general population also affected by the residence test, this data suggests that the residence test is likely to disproportionately impact young people and those of BAME ethnicity compared with the general population. Whilst this information provides an indication of the characteristics of the types of groups that may be affected by this proposal, caution should be observed before drawing strong conclusions from this data as it is not known how many of these individuals would apply for legal aid and on

⁵ <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps> p. 200

what matters (and therefore whether an exception may apply) and who would therefore be affected by the residence test.

16. In light of the above, particularly the mitigating effect of the further modifications set out in the response to the JCHR, we continue to believe that the residence test is a proportionate means of ensuring that limited public resources are spent appropriately and on those with a strong connection to the UK.
17. Thirdly, the government has now laid in draft a Statutory Instrument which would introduce the residence test. We have published a Policy Statement alongside the Explanatory Memorandum to this Instrument. The Policy Statement sets out our intended approach in relation to the evidence requirements which an individual will need to meet to demonstrate that they are lawfully resident or do not need to satisfy the test.

Analysis

Impact of the evidential requirements

Impact on clients

18. As we set out in *Next Steps* in general, we anticipate that the residence test proposal would have an adverse impact on those who cannot satisfy the test (assuming for this purpose the proposal amounted to a provision, criterion or practice) as, subject to the exceptions, those affected would no longer receive civil legal aid. We recognised that this proposal may therefore have the potential to put non-British nationals at a particular disadvantage compared with British nationals.
19. A further potential source of impact comes from the evidence requirements. Once the residence test is implemented, all applicants for civil legal aid on matters which are subject to the test will need to demonstrate either that they meet the residence test or that they fall within one of the exceptions for certain groups of people (asylum seekers, refugees and members of the Armed Forces and their immediate families).
20. We intend to keep under the review the impact of the evidential requirements on individuals.
21. Legal Aid statistics for 2012/13 show that a higher proportion of civil legal aid clients are from a BAME origin compared with the general population, and that a higher proportion of civil legal aid clients are disabled compared with the general population. However, in both cases these may be affected by the high numbers of cases where ethnic origin and disability is unknown⁶.
22. We have therefore considered whether the proposed evidential requirements for the residence test have the potential to put any groups at a particular disadvantage to others. For example, if they are in fact lawfully resident (or exempt from the test) but are less able, compared to others, to provide the necessary documentation to prove it. This includes the potential impact on

⁶ <http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf>

children, older people, people with mental health disabilities, those that lack capacity due to learning disabilities, homeless people, those who lead chaotic lifestyles and prisoners.

23. In undertaking this assessment, we have also taken account of equivalent evidence requirements for residence obligations in other contexts and their impacts on those with protected characteristics. The Home Office consultation document *Tackling illegal immigration in privately rented accommodation*⁷ outlined a new requirement for landlords to ask prospective tenants to produce evidence from a checklist of specified documents of their lawful entitlement to be in the UK. Whilst we have not drawn direct comparisons of our residence test proposals, we have taken into account the impacts of acquiring evidential requirements for the proposed landlord test, on the basis that it is similar to the requirement under the legal aid residence test that an individual must demonstrate they are lawfully resident at the time of applying for civil legal aid.
24. The Home Office then considered what impact these proposals could have on tenants with protected characteristics. Whilst there are differences between the Home Office test and the legal aid residence test, we have taken into account of the impacts of acquiring evidential requirements for the Home Office test, on the basis that it is similar to the requirement under the legal aid residence test that an individual must demonstrate they are lawfully resident at the time of applying for civil legal aid. We believe that the impact the Home Office evidence requirements will have on tenants with the protected characteristics may be similar to the impact of the evidence requirements for the civil legal aid residence test on those with protected characteristics, in relation to establishing that they are lawfully resident at the time of applying for civil legal aid.
25. In their consultation response document, particular regard was given to elderly people who were deemed less likely to have original or current documentation. The Home Office acknowledged that there was a small risk that some older people may have greater difficulty in providing appropriate documentation. The Home Office decided to mitigate this risk by allowing the production of expired passports that still allow a person to be identified by their photograph and the production of other documents in combination, such as birth certificates and letters attesting to the person's identity and nationality. For the purposes of the residence test we believe that an expired passport can be used to prove 12 months previous lawful residence. However, an individual would generally need to produce a valid passport to establish that they remain lawfully resident at the time of applying for civil legal aid, subject to the flexibility in evidential requirements. Taken together, we believe that expired passports and the flexibility in evidential requirements mitigate any impact on elderly people.
26. Transgendered people were specifically identified as being particularly impacted by the evidential requirements of the Home Office policy. The government acknowledged that there was a risk that transgendered people may need to produce documentation to a third party that might mean they reveal an earlier identity. However, in response, the Home Office felt that many people in these circumstances will already receive support in obtaining official documentation that does not reflect upon the gender change or is gender neutral. In some cases,

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226713/consultation.pdf

gender change may be accompanied by a change in name. The Home Office felt that many people in these circumstances will be able to provide documentation that does not reveal birth gender. However, we acknowledge that the residence test will differ in that it will require individuals to provide evidence of lawful residence covering a 12 month period. We note that civil legal aid providers are under a duty of confidentiality to their clients as well as being required to adhere to equality and diversity standards throughout the life of a contact. These requirements are accompanied by an equality and diversity guidance document that expressly requires providers to act lawfully under the Equality Act 2010, including taking account of the needs of clients which would include meeting the needs of transgender clients. Therefore civil legal aid providers would have a different relationship with a prospective client than that which exists between a landlord and prospective tenant. In addition providers will be subject to the Gender Recognition Act 2004 (GRA) which makes it an offence for a person who has acquired protected information in an official capacity to disclose the information inappropriately to any other person. "Protected information" includes information about an earlier gender identity of a transgendered person. We consider that providers, who will be acting in the course of providing professional services, will be acting in an "official capacity" within the meaning of section 22 of the GRA. The Director of Legal Aid Casework (DLAC), (who may also come into possession of "protected information") is also subject to the requirements as set out in the GRA. Unlawful disclosure applies not only to direct word of mouth communication but also to uncontrolled access to paper or computer files. A transgendered person may consent to disclosing the information if they decide that it is in their interests to do so, however, such consent must be explicit and it may not be assumed. We believe these factors mitigate the impact of the evidential requirements on transgendered individuals.

27. In addition to these impacts, we have considered further specific impacts that might arise in relation to the evidence requirements for the residence test.

Case-specific exceptions

Children

28. We have considered the impact of the evidence requirements on children. The case-specific exceptions for protection of children cases will reduce the number of children who will be required to satisfy the residence test when claiming civil legal aid, thereby reducing the potential for adverse impacts on this group of any evidence requirements. However, those children who are required to satisfy the residence test will still need to show that they are lawfully resident at the time they apply for civil legal aid, and, in the case of children over 12 months, have 12 months of previous lawful residence. They will be required to provide documentation in the same way as adults, and may face a delay or be required to pay a fee to obtain the necessary documents, such as a passport. However, we note that in most cases, it will be likely that a parent or guardian will be providing evidence on behalf of the child.
29. To mitigate the potential for an adverse impact on children of the evidence requirements we have specifically included forms of evidence that children or their parent/guardian are more likely to possess or be able to access easily in respect of the requirement for 12 months of previous residence i.e. a letter/record confirming attendance at a school or other educational institution over a 12 month period. Moreover, the introduction of flexibility in evidential requirements for individuals whose personal circumstances may make it impracticable for

evidence to be supplied will help to mitigate the adverse impact on children who are unable to produce evidence because of their personal circumstances.

Homeless people, victims of domestic violence and forced marriage and individuals suffering from mental health and learning disabilities

30. Homeless people, victims of domestic violence and force marriage who have had to flee their homes, people with mental health and learning disabilities and others who lead chaotic lives may face particular difficulty in accessing the required documentation to evidence they meet the residence test. Prior to the publication of the *Next Steps*, we considered whether or not to allow for signed declarations in limited circumstances where documentary evidence cannot be obtained. On balance, we concluded that signed statements should not be allowed given the risks that this could dilute the effectiveness of the test as a genuine means of preventing non-residents from claiming civil legal.
31. However, the introduction of the flexibility in evidential requirements will mitigate the impact on homeless people, victims of domestic violence who have had to flee their homes, people with mental health problems and others who lead chaotic lives, where their personal circumstances make it impracticable for evidence to be supplied.

Prisoners

32. Finally, we have considered the potential impact on prisoners and mental health detainees. It should be noted that as set out in *Next Steps* the Government made exceptions for categories of case which broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children. This includes exceptions for certain detention cases where an individual's liberty is at stake; in particular under paragraphs 5, 9,⁸ 20, 25, 26 and 27 (and challenges to the lawfulness of detention by way of judicial review under paragraph 19) of Part 1 of Schedule 1 to LAPSO. Prisoners and mental health detainees can apply for civil legal aid on the same basis as other individuals and therefore may claim civil legal aid (subject to means and merits). Prisoners and mental health detainees may face particular difficulties in obtaining the required documentation to establish lawful residence by virtue of their situation and may therefore be adversely impact by the proposed approach to evidential requirements.
33. Prisoners serving a custodial sentence are eligible to apply for and be issued with a UK passport and prisoners who are released on bail, remand or conditions are entitled to apply for a passport. The proposed list of evidence requirements specifically contemplates that a letter from a prison or other detention facility confirming the individual's full name and that they are currently detained will constitute acceptable evidence of current actual lawful residence. A letter from a prison or other detention facility confirming that the individual was lawfully detained for at least 12 months will also constitute acceptable evidence of 12 months actual continuous residence. However, there are two types of prisoner who might be particularly impacted:

- (i) Those released on bail, remand or conditions where it is a condition of their terms that they do not apply for a passport;

⁸ In line with the exception for detention cases in Schedule 1, the Government has also made an exception for deprivation of liberty cases falling under paragraph 9 of Part 1 of Schedule 1.

- (ii) British nationals serving sentences in a foreign jurisdiction who have been repatriated to the UK. Such prisoners will not be entitled to their passport until they have repaid expenses to the Secretary of State incurred by him/her in connection with the prisoner's conveyance to the United Kingdom.

34. Generally, prisoners may find it more difficult than others to provide evidence of 12 months of previous residence such as utility bills etc. and may be more reliant on friends and family to assist. However, in introducing a degree of flexibility in the requirements to provide evidence of residence for individuals whose personal circumstances may make it impracticable for evidence to be supplied, we believe will mitigate the impact of the residence test.

Conclusion

35. Our final equality analysis published in *Next Steps* considered the implications of the reforms for the advancement of equality of opportunity and the need to foster good relations. In light of the additional exceptions to the residence test, and the modified evidential requirements set out at paragraphs 12 and 13, we have reconsidered the extent to which the proposed changes are compatible with these limbs of the duty. We consider that where relevant, neither the additional exceptions to the residence test, nor the proposed evidential requirements undermine attainment of those objectives.

36. The primary responsibility of the Ministry of Justice in administering the legal aid system must be to provide fair and effective legal aid to those clients most in need. Although we are mindful of the need to encourage those with a protected characteristic to participate in public life and the need to advance equality of opportunity generally, we have considered how potential adverse impacts could be mitigated.

37. We consider that the intention to introduce a degree of flexibility in the evidential requirements for individuals whose personal circumstances may make it impracticable for evidence to be supplied, mitigates the potential for adverse impact on the groups identified. Additionally, the additional exceptions to the residence test outlined at paragraph 12 also mitigates the potential for adverse impacts on the groups identified.

Impact on providers

38. As we set out in our initial analysis in *Next Steps* we have no data upon which to base an assessment of likely impact on providers although we believe the proposals are unlikely to result in negative equality impacts on this group (assuming for this purpose the proposal amounts to a provision, criterion or practice). However, we acknowledge that the extent of impact on a given provider firm may be dependent upon the extent to which they rely on income from impacted civil legal aid work. Were any disadvantage to materialise, given that analysis carried out at the time of the *Next Steps* consultation showed that those managing firms engaged in civil legal aid work are more likely to be male and non-disabled when compared to the population as a whole, they may be disproportionately affected.

39. The evidence required for the purposes of the test will be described in secondary legislation and guidance as appropriate. Since the publication of *Next Steps* we

have set out intention to introduce a greater degree of flexibility over the evidential requirements. This principle is not new, in so far as providers may assess the prospective client's means without the accompanying evidence where, for example exceptionally, the personal circumstances of the client (such as the client's age, mental disability or homelessness) make it impracticable for the evidence to be supplied at any point in the case.

Conclusion

40. We therefore continue to believe it is reasonable to expect providers to carry out the test. As set out in the policy statement, we believe that the test will be objective and not overly onerous to administer.
41. Having considered that the mitigating effect of the further modifications to the residence test outlined above we continue to believe that the residence test is a proportionate means of ensuring that limited public resources are spent appropriately and on those with a strong connection to the UK.