



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**Submission of the Northern Ireland Human Rights Commission to the DoJ Consultation on the Scope of Civil Legal Aid.**

**Summary**

**The Commission recommends that the Department ensure that individuals seeking to enforce their rights under the ECHR are able to do so by virtue of the mainstream legal aid system without routine recourse to exceptionality mechanism. (para 3.2)**

**The Commission recommends that the Department give specific consideration to support for vulnerable individuals who may be acting as litigants in person. (para 5.9)**

**The Commission advises that the Department should consider the impact in the number of litigants in person on witnesses, particularly in cases where physical or sexual abuse has been raised. (para 5.11)**

**The Commission recommends that the Department consider the sustainability of the identified advice providers to continue to operate on a long term basis and their ability to accommodate an increase in demand, following a reduction in the scope of legal aid. (para 6.4)**

**The Commission recommends the Department, in conjunction with other relevant Government Departments, mitigate against the threat of referral fatigue through streamlining of existing advice provision to ensure individuals, including those with vulnerabilities, are able to access required services without repeat referrals. (para 6.6)**

**The Commission recommends that the Department review and applies where possible the conclusions and recommendations to the recent research into litigants in person in private family law cases from England and Wales when implementing changes to access to representation. Any changes should be effectively monitored and evaluated from commencement. (para 7.8)**



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## 1. Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC) pursuant to Section 69 (1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights.<sup>1</sup> In accordance with this function the following statutory advice is submitted to the Department of Justice in response to the consultation on the scope of civil legal aid.
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant international treaties in this context include:
- the CoE European Convention on Human Rights, 1950 (ECHR)<sup>2</sup>;
  - the International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup>;
  - the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>4</sup>;
  - the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)<sup>5</sup>;
  - the UN Convention on the Rights of the Child (CRC)<sup>6</sup>;
  - the UN Convention on the Rights of Persons with Disabilities (CRPD)<sup>7</sup>;

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<sup>1</sup> Northern Ireland Act 1998, Section 69(1).

<sup>2</sup> Ratified by the UK in 1951.

<sup>3</sup> Ratified by the UK in 1976.

<sup>4</sup> Ratified by the UK in 1969.

<sup>5</sup> Ratified by the UK in 1986.

<sup>6</sup> Ratified by the UK in 1991

<sup>7</sup> Ratified by the UK in 2009

- 1.3 The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom (UK) Government's ratification. In addition, the Northern Ireland Act 1998, section 26 (1) provides that 'if the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... he may by order direct that the proposed action shall not be taken.'
- 1.4 Moreover the Northern Ireland Act 1998, section 24(1) states that 'a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention rights'.

## **2. General Observations**

- 2.1 Access to justice is a fundamental human right, forming an essential element of the right to a fair hearing and the right to an effective remedy. As such, it is enshrined in ECHR Articles 6 and 13, and Articles 2(3) and 14 of the International Covenant on Civil and Political Rights. Legal aid and access to justice are matters also dealt with in Principles 1 and 3 of the United Nations Basic Principles on the Role of Lawyers.<sup>8</sup> The right to both a fair hearing and an effective remedy require practical arrangements to be put in place to provide legal advice and, where appropriate, representation to those of limited means to ensure that access to justice is secured in a manner that is effective in practice, not just in theory.<sup>9</sup>
- 2.2 Where an individual's human rights are at stake, the right to an effective remedy may require the provision of legal advice and assistance free of charge to enable an individual of limited means to protect his or her human rights, outside the context of judicial proceedings. In addition, the right to a fair hearing requires equality of arms for all parties to proceedings in the preparation and presentation of their case and effective access to the courts.<sup>10</sup>
- 2.3 The ICCPR Article 14 states:
- "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of*

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<sup>8</sup> ibid

<sup>9</sup> Airey v Ireland, European Court of Human Rights, Application No 6289/73 (9 October 1979).

<sup>10</sup> Case of Golder v UK, European Court of Human Rights, Application No 4451/70 (21 February 1975).

*his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."*

2.4 With respect to Article 14 the UN Human Rights Committee has highlighted to State Parties that this relates to civil and criminal proceedings. In General Comment No. 13 the Committee stated:

*"In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law."*<sup>11</sup>

2.5 The ECHR Article 6(3)(c) provides that in criminal proceedings a person with insufficient means is to be given free legal assistance when the interests of justice so require, there is no express provision for legal aid in civil proceedings. However the European Court of Human Rights (ECtHR) has recognised that the rights protected by the ECHR must be practical and effective and that in disputes relating to a "civil right" the provision of legal assistance will be required, when it:

*"... proves indispensable for an effective access to a court either because legal representation is rendered compulsory..., or by reason of the complexity of the procedure or of the case".*<sup>12</sup>

2.6 The ECtHR has further held that:

*"It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side."*<sup>13</sup>

2.7 The ECtHR has acknowledged that the provision of legal aid is one of the methods of guaranteeing the right to equality of arms.<sup>14</sup> Whether the provision of legal aid is necessary is

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<sup>11</sup> Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994).

<sup>12</sup> Airey v UK (Application no. 6289/73) 9 October 1979 para 26

<sup>13</sup> Steel and Morris v UK (Application no. [68416/01](#)) para 59

<sup>14</sup> *ibid* para 60

determined on the basis of the particular facts and circumstances of each case.<sup>15</sup>

- 2.8 The Commission acknowledges that State resources are not infinite. The Commission is aware that the Office of the High Commissioner for Human Rights has outlined that States should not allow existing protection of socio-economic rights to deteriorate without strong justification.<sup>16</sup>

### **3. Exceptionality Provisions**

- 3.1 The Commission notes that the mechanism for the granting of exceptional legal aid is not the subject of the current consultation. However, noting the experience in England & Wales, the Commission cautions against over reliance upon the exceptionality mechanism. Section 110 of the Legal Aid Sentencing and Punishment of Offenders Act 2013 (LASPO) provides the Director of the Legal Aid Agency with discretion to make legally aided services available to an individual because failure to do so would be a breach of the individual's Convention rights (within the meaning of the Human Rights Act 1998), or any rights of the individual to the provision of legal services that are enforceable EU rights.

As the Department will be aware it was anticipated that between 5,000 and 7,000 applications for exceptional funding would be received in the first year post implementation of the LASPO, in fact only 1,520 applications were received and only 5% of these were granted.<sup>17</sup> In December 2014 the Court of Appeal ruled that guidance relating to the exceptional funding of immigration cases was incompatible with the ECHR, Article 6.<sup>18</sup> The figures for family law in particular are equally stark. There were 821 applications made in 2013/14, of which only nine were granted.<sup>19</sup> The Joint Committee on Human Rights also considered the scheme was not working as anticipated.

- 3.2 The Commission recommends that the Department ensure that individuals seeking to enforce their rights under the ECHR are able to do so by virtue of the**

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<sup>15</sup> *ibid* para 61

<sup>16</sup> Office of the High Commissioner for Human Rights, 'Factsheet No 33: Frequently Asked Questions on Economic, Social and Cultural Rights', December 2008, at 16.

<sup>17</sup> Legal Aid Agency 2013-2014 Ministry of Justice 'Legal Aid Statistics in England and Wales 2013-2014' Ministry of Justice, Statistics bulletin, Published 24 June 2014

<sup>18</sup> *The Queen oao Gudaviciene and Others -v- The Director of Legal Aid Casework and Others* [2014] EWCA Civ 1622

<sup>19</sup> Legal Aid Agency 2013-2014 Ministry of Justice 'Legal Aid Statistics in England and Wales 2013-2014' Ministry of Justice, Statistics bulletin, Published 24 June 2014

**mainstream legal aid system without routine recourse to exceptionality mechanism.**

**4. Green Form Advice**

- 4.1 The Commission notes the proposal that immigration be removed entirely from the scope of Green Form. The Commission presumes that this exclusion would not extend to asylum, in line with the recommendation from the access to justice review. Moreover this is an example where we would seek reassurance that the Department will ensure alternative sources of advice are available as The Legal Services Commission currently funds provision through the Law Centre. Advice on issues such as family reunion frequently raise human rights issues under the Convention.

**5. Litigants in Person**

- 5.1 The Commission notes that a 'Litigants ability to present own case' is identified as a strategic consideration within the consultation document. The Department identifies a number of characteristics which may make an individual vulnerable. International human rights law has recognised a number of specific duties with respect to access to justice for vulnerable groups.
- 5.2 The UNCRPD, Article 13 requires States Parties to:
- "ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.*
- 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."*
- 5.3 In addition under CEDAW, Article 2 the State must ensure the availability of remedies for women subject to discrimination. Article 2 (c) recognises the entitlement of women to enjoy rights on an equal basis to men. The CEDAW Committee is currently giving consideration to the development of a general recommendation on access to justice.

- 5.4 A central article of the UN CRC is Article 12, paragraph 2 of which states:

*'...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'.*

- 5.5 The UN Committee on the Rights of the Child (CRC) emphasised in its General Comment no 5 *General measures of implementation for the Convention on the Rights of the Child*:

*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.<sup>20</sup>*

- 5.6 In recommendations following its Day of General Discussion on 'The right of the child to be heard' the CRC reminded States Parties that *'the right of the child to be heard in judicial and administrative proceedings applies to all relevant settings without limitation, including children separated from their parents, custody and adoption cases, children in conflict with the law, children victims of physical violence, sexual abuse and other crimes, asylum-seeking and refugee children and children who have been the victims of armed conflict and in emergencies.'* It requested that: *'States Parties establish specialised legal aid support systems in order to provide children involved in administrative and judicial proceedings with qualified support and assistance.'*<sup>21</sup>

- 5.7 The CERD, Article 5 requires that States Parties undertake "to guarantee . . . the right to equal treatment before the tribunals and all other organs administering justice". Furthermore Article 6 provides that States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the

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<sup>20</sup> General Comment no 5 General measures of implementation for the Convention on the Rights of the Child para 24

<sup>21</sup> CRC, Report on the forty-third session, September 2006, Day of General Discussion, Recommendations, paras. 34 to 36 and 38.

right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

5.8 The Department will be aware of the operational difficulties which the increase in the number of litigants in person has had upon the court system in England & Wales. The Judicial Executive Board and Family Justice Council both noted in evidence to the Westminster Justice Committee an unprecedented increase in the prevalence of litigants in person.<sup>22</sup> The judicial concerns of this development include; cases taking longer; less likelihood out of court or early settlement; and difficulties in managing proceedings where the litigant in person has mental health issues or dysfunctional difficulties. The Commission's principal concern is to ensure rights holders continue to have effective access to a court when their human rights are at stake. International human rights law has recognised a general duty on the state, and a specific duty with regard to a number of groups of people, to ensure individuals are able to access justice.

**5.9 The Commission recommends that the Department give specific consideration to support for vulnerable individuals who may be acting as litigants in person.**

5.10 In addition the Commission notes the concern that the increase of litigants in person may result in a witness who has been subjected to abuse being cross examined by his or her abuser. In this regard the Commission notes the recent decision of His Honour Judge Clifford Bellamy, sitting in the Family Court who ordered the HM Courts & Tribunals Service bears the cost of a representative rather than allow a litigant to cross-examine a child in court.<sup>23</sup>

**5.11 The Commission advises that the Department should consider the impact in the number of litigants in person on witnesses, particularly in cases where physical or sexual abuse has been raised.**

**6. Alternative Providers of Advice Services relating to matters to be taken out of scope**

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<sup>22</sup> Written evidence of the Judicial Executive Board to the Justice Committee inquiry into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

<sup>23</sup> Re K and H (Children: unrepresented father: cross-examination of child) [2015] EWFC 1



- 6.1 The ECHR and other international human rights instruments are designed to guarantee not rights that are theoretical or illusory but rights which are practical and effective.<sup>24</sup> The State has an obligation to ensure that the domestic protections it has put in place to ensure compliance with the ECHR and other international human rights instruments are accessible.
- 6.2 The consultation paper suggests that if matters are taken out of scope of civil legal aid, alternative pre-existing advice schemes will be able to meet the legal needs of persons currently relying on civil legal aid. This suggestion is premised on the understanding that there is duplication in existing service providers. The consultation paper refers to a number of service providers from the Northern Ireland voluntary and community sector.
- 6.3 The consultation document does not acknowledge that the voluntary and community sector service providers are operating in the same context of strained finances as the Department. Therefore the ability of existing advice providers to sustain their current level of service may be uncertain. In real terms for example, funding to independent voluntary sector advice providers locally and regionally from the Department for Social Development through the rate support grant has reduced under the past three years.
- 6.4 The Commission recommends that the Department consider the sustainability of the identified advice providers to continue to operate on a long term basis and their ability to accommodate an increase in demand, following a reduction in the scope of legal aid.**
- 6.5 The Commission notes that following reductions in the scope of civil legal aid in England & Wales there was a significant reduction in the number of civil legal aid applications for matters remaining in scope.<sup>25</sup> It has been suggested that this reduction may be attributed to a mistaken public perception that legal aid is no longer available and to 'referral fatigue' with those in legal need being incorrectly referred to providers who have no capacity to take up their case.<sup>26</sup>
- 6.6 The Commission recommends the Department, in conjunction with other relevant Government Departments, mitigate against the threat of referral fatigue through streamlining of existing advice provision to ensure**

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<sup>24</sup> Airey v Ireland, European Court of Human Rights, Application No 6289/73 (9 October 1979).

<sup>25</sup> EHRC 'Response of the Equality and Human Rights Commission to the Consultation: Changes to civil legal aid National Audit Office 21st July 2014 para 18

<sup>26</sup> Ibid para19

**individuals, including those with vulnerabilities, are able to access required services without repeat referrals.**

## **7.0 Private Law Children Order Cases**

7.1 The Commission notes the stated need to re-structure legal aid provision in private law children order cases to facilitate resolution, minimise conflict and produce sustainable solutions for all parties. In discussions regarding children order cases it is important to recall the State's obligations under the UNCRC, in particular Article 3 (1) which states:

*"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".*

7.2 The Commission notes that the UNCRC Committee has stated that:

*"all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes"<sup>27</sup>*

7.3 As discussed the removal of legal aid from private family law proceedings, save for domestic violence and child abuse cases in England & Wales has led to an increase in the number of litigants in person.<sup>28</sup> Moreover, the proposal to utilise family mediation more readily to deal with matters has not worked effectively in practice. The reforms in England & Wales have paradoxically led to a significant decrease in the use of mediation from 3,282 occasions in the last quarter of 2012/13 to 1,739 in the equivalent quarter in 2013/14.<sup>29</sup> Furthermore, the evidence to the Justice Select Committee's enquiry into the impact of the LASPO Act in England & Wales is that victims of domestic violence have found it particularly difficult to access services due to the procedures and definitions put in place to determine access.<sup>30</sup>

7.4 The Commission notes the two options set out in the consultation document. In respect of the option to remove private law children

<sup>27</sup> CRC/C/GC/12 1 July 2009 para 51 – 52

<sup>28</sup> *ibid* and see further Response of the Equality and Human Rights Commission to the Consultation: Changes to civil legal aid National Audit Office 21st July 2014 para 10 anon

<sup>29</sup> Ministry of Justice, June 2014. *Legal aid statistics in England and Wales; Legal Aid Agency, 2013-2014.*

<sup>30</sup> Written evidence of the Judicial Executive Board to the Justice Committee inquiry into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

order proceedings entirely out of scope the Commission notes that the access to justice review 2011 identified concerns regarding supply and demand issues in relation to mediators in Northern Ireland.<sup>31</sup> The Department will wish to consider the sustainability of the mediation sector in Northern Ireland.

- 7.5 The Commission also notes the alternative option to limit multiple private family law applications, the consultation paper does not contain information on the number of cases in which there are multiple family law applications or details as to their frequency. If this information were available it would assist a more informed discussion on the likely impact.
- 7.6 The Commission is also aware of the recently published research commissioned by the Ministry of Justice examining litigants in person in private family law cases. The research noted that family law courts in England and Wales still operated and managed on a basis that assumes both parties would be represented. It also noted approaches where one or both parties were underrepresented was ad-hoc and inconsistent. A number of valuable recommendations were made covering information needs, provision of emotional support and legal knowledge. Many of the recommendations are pertinent to Northern Ireland and should be considered when bringing forward proposals to amend access to representation in private family law issues.
- 7.7 In reaching any conclusions the Commission suggests that the new arrangements are properly monitored and evaluated and the impact in practice is measured. In addition reforms to children order family law cases should continue to ensure that the best interests of the child remain paramount.
- 7.8 The Commission recommends that the Department review and applies where possible the conclusions and recommendations to the recent research into litigants in person in private family law cases from England and Wales when implementing changes to access to representation. Any changes should be effectively monitored and evaluated from commencement.**<sup>32</sup>

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<sup>31</sup> Access to Justice Review Northern Ireland The Report August 2011

<sup>32</sup> [Trinder, Liz et al \( November 2014\) 'Litigants in person in private family law cases', Ministry of Justice Analytical Series.](#)