



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Submission to the Access to Justice Review

Summary

In this submission, the Human Rights Commission responds to a consultation on reforming the legal aid system. We stress the need to ensure that legal aid is available for anyone who would otherwise be denied access to justice, particularly in relation to legal proceedings that concern the right to life. In relation to civil cases such as claims for personal injury, we point out that “no win, no fee” arrangements do not always provide access to justice for the people with the lowest incomes.

1. The Northern Ireland Human Rights Commission (“the Commission”) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights.¹ In conducting this work, the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding ‘soft law’ standards developed by international human rights bodies.
2. The Commission welcomes the opportunity afforded by the Access to Justice Review Northern Ireland (“the Review”) to consider whether the current arrangements for ensuring

¹ Northern Ireland Act 1998, s.69(1).

access to justice could be developed or improved in the years ahead, notwithstanding budgetary constraints. In particular, the Commission welcomes the decision to “take account of human rights imperatives” as a guiding principle of the Review.

Access to justice and human rights

3. 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.² 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.³
4. 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 case⁴ and effective access to the courts.⁵
5. Principle 3 of the UN Basic Principles recommends that “governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources”.⁶

² Adopted at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 28 August 1990 to 7 September 1990. Available: <http://www2.ohchr.org/english/law/lawyers.htm>.

³ *Airey v Ireland* (1979) 2 EHRR 305.

⁴ See *Kamasinski v Austria* (1991) 13 EHRR 36.

⁵ See *Golder v UK* (1979-80) 1 EHRR 35.

⁶ See note 2 above.

The exceptional grant of legal aid in civil cases, inquests and public inquiries

6. The Discussion Paper prepared by the Review team raises the question of whether the exceptional power to grant legal aid in civil cases, inquests and public inquiries should be reformed. In particular, the Review team indicates that it will consider:
 - a. The continuing applicability of the “exceptionality” provisions;
 - b. Whether they should be applicable only in cases that fall outside the scope of legal aid, or also to those situations where legal aid may, in the normal course, be refused on other grounds; and
 - c. The treatment of inquests where ECHR Article 2 issues are at stake, including whether representation of relatives in these circumstances should be brought within the scope of mainstream legal aid.⁷
7. The exceptional power to provide legal aid where not otherwise available under the legal aid system in Northern Ireland is set out in Article 12(8) of the Access to Justice (NI) Order 2003.⁸ Guidance as to the application of this power is found, *inter alia*, in the guidance of the Legal Services Commission on Exceptional Legal Aid, 23 October 2008,⁹ the Lord Chancellor’s Guidance, 15 December 2005¹⁰ and the Lord Chancellor’s Direction 1 on Representation at Inquests.¹¹
8. With regard to the issues raised by the Discussion Paper, the Commission notes that although the provision of free legal advice or representation may be particularly important in the context of criminal prosecutions, there are also situations, albeit less numerous, where the rights to a fair trial and to an effective remedy necessitate the provision of free legal advice and representation in civil proceedings.

⁷ Discussion Paper, Access to Justice Review NI, November 2010, p26.

⁸ The principal scheme is set out in the Legal Aid, Advice and Assistance (NI) Order 1981.

⁹ Available: www.nilsc.org.uk/uploads/publications/documents/SEGP%2022%20SEPT08final%20signed.pdf.

¹⁰ Available: www.nilsc.org.uk/uploads/publications/documents/lc%20guidance%20a10a%20of%20lao%20order%201981.pdf.

¹¹ *Ibid.*

9. This principle was established in *Airey v Ireland* where the European Court of Human Rights (ECtHR) held that the failure to provide legal aid to an indigent woman seeking judicial separation amounted to a denial of her right of access to justice.¹² More recently, in *Steel and Morris v United Kingdom*, a case concerning the refusal to provide legal aid to two defendants in defamation proceedings, the ECtHR found that the failure to provide legal aid to the applicants had violated their right to a fair hearing, noting in particular (a) the importance of what was at stake for the applicants in the proceedings, (b) the complexity of the legal issues raised in the litigation, (c) the volume of material forming part of the proceedings and (d) the capacity of the individuals to represent themselves in the proceedings, bearing in mind the nature of the proceedings and their educational and professional background.
10. These issues were also explored by the Court of Appeal of England and Wales in *R (Khan) v Secretary of State for Health*,¹³ where the court held that in light of the complexity of the issues at stake in an inquest and the issues raised in connection with Article 2 ECHR concerning the treatment of the deceased by the local health trust, the provision of legal aid would be essential to ensure respect for Convention obligations.
11. With this in mind, there is a continuing need for capacity within the legal aid system in Northern Ireland to grant legal aid, in certain circumstances, to individuals who may not qualify under ordinary legal aid provisions. The need for such powers is particularly acute in the context of the significant number of complex legacy issues which continue to come before the courts, in particular those cases which raise issues under Article 2 ECHR.
12. More generally, the Commission sees merit, in principle, in bringing inquests raising issues with regard to fundamental human rights, including the right to life, within the scope of the mainstream legal aid system. It should not be necessary for families unable to afford advice and representation in proceedings as complex and important as these to have recourse to an exceptional, discretionary power. Often the families who participate in such proceedings have already experienced significant delay and it is important that further delays be avoided where possible. The discretionary scheme

¹² *Airey v Ireland* (1979) 2 EHRR 305.

¹³ [2003] EWCA Civ 1129.

has not always avoided, and indeed may have given rise to, further delays. Moreover, it is questionable whether a scheme designed to grant legal aid in *exceptional* circumstances provides the best mechanism of dealing with what is a significant number of inquests relating to historic events which raise Article 2 issues.

13. In addition to legacy cases, there are many other situations where legal aid may be necessary to ensure respect for Convention obligations, such as proceedings arising from a death in hospital, prison or police detention. Where inquests raise issues of fundamental human rights, in particular, Article 2 ECHR, legal aid should be provided as a matter of course to participants who could not otherwise afford representation.
14. There will, however, be a continuing need for a discretionary power to provide legal aid outside the mainstream system even if certain inquests (or other forms of proceedings) are brought within the scope of that system. Any such power should have sufficient flexibility to deal with other exceptional cases where the provision of legal aid is essential to ensure the fairness of proceedings and to ensure respect for fundamental human rights guarantees. As illustrated by *Steel & Morris*, which concerned defamation proceedings, it is not feasible to foresee every circumstance in which indigent individuals may need legal advice and representation to ensure that fundamental human rights are protected, since much will depend on the precise facts of individual cases. A flexible, discretionary power to provide legal aid should be available, both in cases that fall outside the scope of ordinary legal aid provisions and in cases which fall within such provisions but where legal aid is refused on other grounds.

Reform of the funding of monetary damages and personal injury litigation

15. The Discussion Paper raises the question of whether the present arrangements for the public funding of civil litigation, in particular actions for monetary damages, personal injury and other negligence cases should continue to be funded in qualifying cases through the legal aid system or whether Northern Ireland should follow the approach adopted in England and Wales, where such actions are no longer funded through legal aid but are instead usually funded through conditional fee arrangements (with the introduction of contingency fee arrangements planned in the near future).¹⁴

¹⁴ For example: where a lawyer's fee is calculated as a percentage of damages,

16. Any changes in this area have significant potential to impact upon the ability of the poorest in society to gain meaningful access to justice. Arrangements other than legal aid could have a role to play in enhancing access to justice. Indeed, for many individuals who are, at present, financially ineligible for legal aid, but who cannot afford the costs of litigation, permitting other arrangements may play a valuable role in enhancing access to justice. However, the experience of England and Wales suggests that the introduction of conditional fee arrangements for funding civil litigation has tended to increase its overall cost, substantially increasing the financial risks associated with it for many individuals,¹⁵ which has the potential to impede access to justice. Moreover, as noted in the report on civil litigation in England and Wales prepared by Lord Justice Jackson, the introduction of conditional or contingency fee arrangements also brings with it the risk of the strongest cases being “cherry picked” at the expense of those individuals who have cases which are of low value or those which are meritorious but less than certain of success.¹⁶ Evidently, factors such as these may significantly impede the prospect of many individuals gaining meaningful access to justice.
17. Although the Commission expresses no view as to the precise form of funding arrangement best suited to fund civil actions for monetary damages, negligence and personal injury, as a matter of principle any proposals brought forward should ensure that the ability of indigent litigants to gain access to justice to protect their legal interests is guaranteed at least as effectively as at present, bearing in mind difficulties associated with other arrangements.
18. As the work of the Access to Justice Review develops, the Commission looks forward to the opportunity to engage further with Review team.

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with no fee payable in the event that the client loses.

¹⁵ Jackson LJ (2010) *Review of Civil Litigation Costs* (London: HMSO), p96.

¹⁶ *Ibid.* p111.

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