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Access to Justice: Scope of Civil Legal Aid

1 Introduction

This paper examines developments relating to reform of the scope of civil legal aid in Northern Ireland. This only discusses scope in the context of civil legal aid, as the Access to Justice Review Team has indicated that, from a human rights perspective, it would be difficult to limit the scope of criminal legal aid beyond some of the recent developments that have taken place, such as means, reforming representation provided by legal aid at the Crown Court and changes to fee structures.¹

This is the third paper in a series of papers on developments in access to justice in Northern Ireland. The first and second papers dealt with the developments in eligibility in criminal legal aid and civil legal aid respectively. This paper considers recent policy developments including issues arising from the Access to Justice Review in Northern Ireland, the Ministry of Justice Green paper on Proposals for the Reform of Legal Aid in England and Wales, and the House of Commons Justice Select Committee report on the government's proposed reforms.

¹ Access to Justice Review Northern Ireland Discussion Paper,

2 Scope of Civil Legal Aid in Northern Ireland

In Northern Ireland, nearly every type of hearing falls under the coverage of civil legal aid. Also included are care proceedings involving children, applications for bail in criminal matters, costs relating to Enforcements of Judgments and referring an issue to the European Court of Justice.² However there are exceptions including tribunals, arbitrations and Coroner's Courts.³ Certain types of cases are excluded from the scope of civil legal aid such as defamation cases, hearings relating to elections and recovery of debt.⁴ There are other sources of funding for people who wish to take cases to the European Court of Human Rights as there is a legal aid scheme available in Strasbourg for these cases.⁵

2.1 The Funding Code

Section 15 of the Access to Justice (NI) Order 2003 makes provision for the Legal Services Commission (NILSC) to prepare a Funding Code setting out criteria for deciding whether to fund civil legal services and what services are to be funded. The NILSC issued a consultation on the Funding Code criteria and procedures in 2009, however this has not been implemented yet.⁶ The Funding Code would enable the Minister to set priority cases which should be funded. According to the NILSC, the Lord Chancellor's priorities for funding legally aided services in England and Wales was equally applicable to Northern Ireland. It was therefore proposed that special Children's Order proceedings and civil proceedings where the client is at real and immediate risk of loss of life and liberty should be adopted as priorities. It is also proposed that other categories of cases would be accorded higher priority than others. These categories include:⁷

- Help with social welfare issues that would help people climb out of social exclusion, and advice relating to debt, employment rights and social security;
- Domestic violence proceedings;
- Proceedings concerning the welfare of children;
- Proceedings against public authorities alleging serious wrong doing, abuse of position or power or significant breach of human rights.

Other areas such as money damages are not priority areas under the Code, however it was proposed they would still be catered for providing criteria are met.⁸

² B Dickson (2005) "The Legal System of Northern Ireland", 5th Edition, SLS Legal Publications, 153.

³ B Dickson (2005) "The Legal System of Northern Ireland", 5th Edition, SLS Legal Publications, 153.

⁴ Schedule 1, part II of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981

⁵ B Dickson (2005) "The Legal System of Northern Ireland", 5th Edition, SLS Legal Publications, 153.

⁶ The Northern Ireland Funding Code-The Criteria, 29 June 2009 and The Northern Ireland Funding Code-The Procedures, 29 June 2009.

⁷ The Northern Ireland Funding Code-The Criteria, 29 June 2009, 3.

⁸ The Northern Ireland Funding Code-The Criteria, 29 June 2009, 23

2.2 Access to Justice Review Recommendations

In its final report, the Access to Justice Review Team stated they are working on the basis that criminal legal aid will remain in scope in line with the United Kingdom's human rights commitments. However the Review proposed changes to the scope of civil legal aid in the following ways:⁹

- Changes to legal advice and assistance that will shift some welfare and education matters onto a contractual or grant arrangement, remove a number of money damages categories from the scope of advice and subsume legal help on family matters into family help;
- Remove most money damages except for high level clinical negligence from the scope of civil legal aid, while securing and enhancing access to justice in these cases by other means;
- Limiting the ability to secure legal aid to re-open private family law issues.

The Review Team noted that it gave serious thought as to whether to follow the proposals in England and Wales to remove private family law cases from the scope of legal aid except in cases involving domestic violence or child abuse. The Review Team concluded that private family law cases should remain in scope however there should be procedures put in place to discourage the use of the courts to prolong disputes or re-open cases; incentivise mediation, collaborative interventions or other pre-court solution; and secure economic and proportionate use of resources.¹⁰ The Review Team confirm that public law children cases involving local authority intervention and the ability to challenge public authorities on serious wrongdoing or human rights abuses will remain in scope.¹¹ The Review Team also concludes that Exceptional legal aid funding should remain as part of the legal aid architecture, for excluded cases where in the particular circumstance of the case, failure to provide funding would result in a breach of the individual's right to legal aid under the Human Rights Act 1998 or European Union law. However it is recommended that DoJ should consult authorities in England and Wales to consider how the provision for funding might be framed in such a way as to retain criteria that are tight whilst protecting the individual who is subject to proceedings initiated by an economically more powerful plaintiff.¹²

The Review Team has identified other 'candidates' if budgetary pressures mean other types of cases have to be taken out of scope. They include:

- Consumer issues and general contract;
- Criminal injuries compensation;
- Debt (unless the home is at risk);

⁹ Access to Justice Review Northern Ireland "The Report" August 2011, 105.

¹⁰ Access to Justice Review Northern Ireland "The Report", August 2011, 8.

¹¹ Access to Justice Review Northern Ireland "The Report", August 2011, 8.

¹² Access to Justice Review Northern Ireland "The Report" August 2011,95-96

- Immigration;
- Tort, including nuisance and injunctive relief (except in protection from harassment cases where mediation has failed)
- Other miscellaneous matters such as probate.

3 Proposals relating to scope in England and Wales

The Ministry of Justice's Green Paper on Proposals for Reform of Legal Aid set out ways in which it will limit the scope of legally aided cases. These are more extensive than those areas outlined in the Access to Justice Review and Law Centre NI has raised concerns about Northern Ireland following the approach adopted in England and Wales and its potential impact on Access to Justice.¹³ The Green Paper highlights a number of issues "which fall on a spectrum of objective importance."¹⁴ At the highest end of this spectrum are cases where an individual's life or liberty are at stake, where a person faces intervention from the state in family affairs, for example in care proceedings or where a person faces homelessness.¹⁵ The proposals include:

- Legal aid will continue to be available for the following:¹⁶ asylum cases; in cases against public authorities involving abuse of position or power; significant breaches of human rights or negligence by acts or omissions falling far below required standard of care; claims against individuals or public authorities in relations to claims of abuse or sexual assault; debt matters where a person's home is at immediate risk of repossession; community care; domestic violence and forced marriage; damages for housing disrepair where persons at risk of homelessness; cases involving challenge to detention under immigration powers; international child abduction; mental health and capacity detention cases; judicial review (Public Law) and care proceedings, registration and enforcement of judgments under the European Union; legal help at inquests;
- Legal aid will no longer be routinely available in the following: private law family cases not involving domestic violence such as divorce or child contact. Funding will be provided for family mediation in private law family cases. Matters such as the division of assets following divorce will fall outside the scope of legal aid.
- Other areas will continue to remain outside the scope of civil legal aid including personal injury, property; conveyancing, boundary disputes, defamation, wills and trusts, clinical negligence, consumer contract, debt matters where the home is not at risk, education and employment; tort including damages claims, assault, and nuisance, malicious prosecution and false imprisonment; representation in relation

¹³ Law Centre NI "Fundamental Legal Aid Review: Access to Justice NI" <http://www.lawcentreni.org/policy/consultation-responses/770.htm>

¹⁴ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 33

¹⁵ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 33

¹⁶ Note this is not an exhaustive list. See Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, chapter 4 for full details.

to welfare benefits; advice and representation for applications for asylum support. Persuaded by responses to the consultation, the Government has decided to retain Special Education Needs cases (SEN) within the scope of legal aid.¹⁷

The Government has also signalled its intention to change the current arrangements for the grant of exceptional funding of legal aid. The new scheme will provide funding for excluded cases where the government is satisfied that some level of legal aid funding is required to comply with its obligations under international human rights law, in particular article 2 (right to life) and article 6 (right to a fair trial) of the European Convention of Human Rights (ECHR). Exceptional funding will be made available where there is significant public interest in funding legal representation in inquest cases.¹⁸

The House of Commons Justice Select Committee has raised specific concerns about removing family law from the scope of legal aid, particularly in using domestic violence as the criterion for the most serious cases. The Committee notes that there is no definition of domestic violence in the green paper and it has been highlighted by witnesses that the scope of domestic violence is very narrowly drawn.¹⁹ One witness highlighted to the Committee that violence can often be emotional, financial and psychological.²⁰ The Committee recommended the government consider other ways that legal aid could be focused on more serious cases and that if domestic violence to be used in order to determine eligibility, that the definition is extended to cover non-physical violence.²¹ It has been suggested that allowing funding in family cases under the limited scope of presence of domestic violence 'will act as a perverse incentive for false claims and prevent women who are victims but who do not wish to pursue complaints in court from receiving legal aid for assistance with legal issues surrounding a relationship breakdown.'²² In response to the Committee's report, the Government stated that it was right that legal aid is available for victims of domestic violence in private family law cases. The Government has set out the circumstances which will be accepted as evidence of domestic violence to include:²³

- A non-molestation order, occupation order, forced marriage protection order or other protective injunction made in the last 12 months. To prevent false

¹⁷ Government Response to the Justice Select Committee's Third Report of Session 2010/11 on Government's Proposed Reforms of Legal Aid, June 2011, 30. <http://www.justice.gov.uk/downloads/consultations/response-to-justice-select-comm-report-legal-aid.pdf>

¹⁸ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 170

¹⁹ House of Commons Justice Select Committee "Government's Proposed Reform of Legal Aid" Third Report of Session 2010-2011, 37

²⁰ House of Commons Justice Select Committee "Government's Proposed Reform of Legal Aid" Third Report of Session 2010-2011, 37

²¹ House of Commons Justice Select Committee "Government's Proposed Reform of Legal Aid" Third Report of Session 2010-2011, 3

²² The Guardian "Lawyers demand pause for legal aid reforms", 18 May 2010,

<http://www.guardian.co.uk/law/2011/may/18/lawyers-demand-pause-legal-aid-reforms?intcmp=239>

²³ Government Response to the Justice Select Committee's Third Report of Session 2010/11 on Government's Proposed Reforms of Legal Aid, June 2011, 19-20. <http://www.justice.gov.uk/downloads/consultations/response-to-justice-select-comm-report-legal-aid.pdf>

allegations of domestic violence, where there are ongoing proceedings and such orders have not yet been made, then these would not provide sufficient evidence; however legal aid would be available where there is an emergency domestic violence order and emergency application in respect of a child would be made at the same time;

- There is a criminal conviction or criminal proceedings for domestic violence offence by the other party towards the applicant;
- The victim has been referred to a Multi -Agency Risk Assessment Conference and a plan has been put in place to protect them against violence by the other party;
- There has been a finding of fact in the family courts of domestic violence by the other party giving rise to the risk of harm to the victim.

Concerns were raised during the Committee Stage of the Legal Aid, Sentencing and Punishment of Offenders Bill 2011 as to whether there would be a problem with people who suffer domestic violence who bring cases under the immigration domestic violence rule if immigration cases are taken out of scope of legal aid.²⁴ This was accepted by Government; the Justice Minister Jonathan Djanogly agreed that there was a “real risk, without legal aid, people would be trapped into staying in abusive relationships out of fear of jeopardizing their immigration status.”²⁵ It appears that the Government has changed its mind with regards to these types of cases as the Justice Minister stated during the evidence session that it is intended that an amendment to the Bill will be to bring these cases back under the scope of legal aid.²⁶

The Committee expressed concern that the changes could impact on vulnerable groups as the government conceded it was not certain of the impact on groups from black and ethnic minority backgrounds and people with disabilities due to information gaps. The Committee stated that from evidence heard, these groups rely more on legal aid than less vulnerable groups and there is potential for them to be disproportionately impacted by the reforms. The Committee stated that, if this was to happen, “this would sit uneasily with the Government’s commitment to protect the most vulnerable in society.”²⁷ It has been reported that many areas of law where services are provided to the most vulnerable are being removed from scope. It has been calculated that the £49m in legal aid cuts to social welfare will cost the government £286.2m in expense on other services and that the proposed £7m in cuts to housing advice will cost the state £16m in other services such as benefit

²⁴ Rt Hon Ben Gummer MP Committee Stage of the Legal Aid, Sentencing and Punishment of Offenders Bill 2011 19 July, 6th sitting, col 245, <http://www.publications.parliament.uk/pa/cm201011/cmpublic/legalaid/110719/pm/110719s01.htm>

²⁵ Rt Hon Jonathan Djanogly MP, Committee Stage of the Legal Aid, Sentencing and Punishment of Offenders Bill 2011, 19 July 2011, 6th Sitting . col 245,

²⁶ Rt Hon Jonathan Djanogly MP, Committee Stage of the Legal Aid, Sentencing and Punishment of Offenders Bill 2011, 19 July 2011, 2nd Sitting . col 245, <http://www.publications.parliament.uk/pa/cm201011/cmpublic/legalaid/110719/pm/110719s01.htm>

²⁷ House of Commons Justice Select Committee “Government’s Proposed Reform of Legal Aid” Third Report of Session 2010-2011, 70

payments.²⁸ The Law Society has called on the government to publish its proposals to reform legal aid as a draft Bill to be scrutinized by a Joint Committee of the House of Commons and House of Lords.²⁹

4 Conclusion

The Access to Justice Review Team has suggested in its final report that there are some areas that could be taken out of the scope of legal aid, if this approach were to be taken to reduce spend. These include money damages and limiting the ability to reopen private family law disputes. A number of candidates have been identified if budgetary pressures mean that some types of cases are taken out of scope. These include:

- Consumer issues and general contract;
- Criminal injuries compensation;
- Debt (unless the home is at risk);
- Immigration;
- Tort, including nuisance and injunctive relief (except in protection from harassment cases where mediation has failed)
- Other miscellaneous matters such as probate.

These are similar to some of the areas identified in England and Wales that could be taken out of scope; however the Ministry of Justice proposals go much further than the areas identified by the Access to Justice Review Team. Other areas in England and Wales include removing from scope- private law family cases (except in cases where domestic violence and child abuse is involved, employment, education and welfare benefits). Some concerns have been raised regarding the proposals in England and Wales in particular the issue of domestic violence as a criterion for eligibility. It has been suggested this could give rise to false claims and prevent women who do suffer domestic violence but do not wish to pursue complaints in court from receiving assistance in relation to breakdown of a relationship. The Justice Select Committee recommend that if domestic violence is used as a criteria for legal aid in family law cases that consideration should be given to widening the definition to extend to non - physical violence. The Government has set out a number of instances which demonstrates evidence of domestic violence in which legal aid would be available.

²⁸ This is according to a letter from the Law Society to the Justice Secretary. The Guardian "Legal Aid: a letter to Ken Clarke" 18 May 2010

²⁹ The Guardian "Legal Aid: a letter to Ken Clarke" 18 May 2010 <http://www.guardian.co.uk/law/2011/may/18/legal-aid-letter-ken-clarke?intcmp=239>

Concerns have also been raised in relation to the Ministry of Justice's proposals that the removal of some areas from legal aid could disproportionately impact on vulnerable groups in England and Wales including black and ethnic minority groups and people with disabilities who often rely more on legal aid.

One of these candidates identified by the Access to Justice Review that could be taken out of scope if there are budgetary pressures is immigration. This may need further consideration particularly immigration cases particularly those involving persons who suffer domestic violence. Amendments have been made to the Legal Aid, Sentencing and Punishment of Offenders Bill 2011 in England and Wales to ensure domestic violence cases involving immigration remain within the scope of legal aid in response to concerns that affected people would remain in abusive relationships out of fear of risking their immigration status.