



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **Legal Aid and Coroner's Courts Bill**

### Introduction

1. The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(4) of the Northern Ireland Act 1998, advises the Assembly whether a Bill is compatible with human rights. In accordance with this function the following statutory advice is submitted to the Committee for Justice on the Legal Aid and Coroner's Courts Bill.

2. The Commission 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. In the context of this advice, the Commission relies in particular on:

- The International Covenant on Civil and Political Rights, 1966 (ICCPR);<sup>1</sup> and
- The CoE European Convention on Human Rights, 1950 (ECHR).<sup>2</sup>

3. The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom 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.'*

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<sup>1</sup> Ratified in 1976

<sup>2</sup> Ratified in 1951

## Declaration Compatibility

4. The Commission notes that paragraph 19 of the Explanatory and Financial Memorandum states that "All proposals have been screened and are considered to be Convention compliant". **The Commission advises the Committee to ask the Department to share its legal analysis upon which this statement is based.**

## Part 1 dissolution of Northern Ireland Legal Services Commission

5. The right to a fair trial is protected by the ICCPR, Article 14 and the ECHR, Article 6. Article 6 of the ECHR states:

*"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

*2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

*3. Everyone charged with a criminal offence has the following minimum rights:*

*(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*

*(b) to have adequate time and facilities for the preparation of his defence;*

*(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

*(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

*(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."*

6. While 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>3</sup>*

7. 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>4</sup>*

8. The ECtHR has acknowledged that the provision of legal aid is one of the methods of guaranteeing the right to equality of arms.<sup>5</sup> Whether the provision of legal aid is necessary is determined on the basis of the particular facts and circumstances of each case.<sup>6</sup>

9. The Bill dissolves the Northern Ireland Legal Services Commission and makes provision for a Director of Legal Aid Casework, a civil servant in the Department of Justice, to make decisions on civil legal aid funding.<sup>7</sup> The Commission notes that the Director must comply with directions given by the Department and must have regard to guidance issued by the Department.<sup>8</sup>

10. The Commission notes that on analysing comparative provisions contained within the Legal Aid Sentencing and Punishment of Offenders Bill, as it progressed through Parliament,<sup>9</sup> the Joint Committee on Human Rights (JCHR) were not satisfied that the provisions provided sufficient institutional guarantees of the independence of the Director to prevent any appearance of a conflict of interest arising.<sup>10</sup> The JCHR stated:

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<sup>3</sup> Airey v UK (Application no. 6289/73) 9 October 1979 para 26

<sup>4</sup> Steel and Morris v UK (Application no. [68416/01](#)) para 59

<sup>5</sup> *ibid* para 60

<sup>6</sup> *ibid* para 61

<sup>7</sup> Clause 2

<sup>8</sup> Clause 3

<sup>9</sup> The territorial extent of which covered England & Wales only

<sup>10</sup> JCHR 'Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill' HL Paper 237 HC 1717 19 December 2013

*"Civil servants are bound by the Civil Service Code which sets out the constitutional framework within which they work. Civil servants owe their loyalty to the duly constituted Government and are usually accountable to the Minister responsible for their Department. Even if the Director reports to the Permanent Secretary in the Ministry of Justice (as the Government anticipates), the Permanent Secretary is responsible to the Lord Chancellor and the line of management accountability does not therefore secure institutional independence from the Government. The same consideration applies to the Ministry of Justice civil servants who will be provided to the Director: even if accountable to the Director when exercising functions delegated to them by the Director, they are ultimately accountable to the Lord Chancellor, and moreover remain directly accountable to the Minister in respect of all their other functions as civil servants."*<sup>11</sup>

12. To ensure compatibility with Article 6 of the ECHR a regime governing eligibility for legal aid must contain sufficient guarantees against arbitrariness.<sup>12</sup> In the case of *Del Sol* the ECtHR noted:

*"The scheme set up by the French legislature offers individuals substantial guarantees to protect them from arbitrariness. The Legal Aid Office of the Court of Cassation is presided over by a judge of that court and also includes its senior registrar, two members chosen by the Court of Cassation, two civil servants, two members of the Conseil d'Etat and Court of Cassation Bar and a member appointed by the general public (section 16 of the Law of 10 July 1991 cited above). Moreover, an appeal lies to the President of the Court of Cassation against refusals of legal aid (section 23 of the Law). In addition, the applicant was able to put forward her case both at first instance and on appeal."*<sup>13</sup>

13. The Commission notes that Schedule 2 to the Bill proposes the establishment of an appeals panel to hear appeals against prescribed decisions taken by the Director. The full details of the appeals process are not set out in the Explanatory Memorandum.

**The Commission advises the Committee to request that the Department set out how it will ensure the institutional independence of the Legal Aid Agency and the Director to**

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<sup>11</sup> JCHR 'Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill' HL Paper 237 HC 1717 19 December 2013 para 1.21

<sup>12</sup> *MAK and RK v UK*, App. No. 45901/05 (23 March 2010) para 45

<sup>13</sup> *del sol v. france*, no. 46800/99, echr 2002-iiPara 26

**ensure full compliance with Article 6 of the ECHR. In particular the Committee may wish to consider whether the right of appeal is sufficiently robust.**

#### Schedule 2 Exceptionality provisions

14. The Commission notes the proposal that the Director be empowered to make an exceptional case determination in circumstances in which a failure to do so would result in a breach of an individual's Convention/ECHR rights.<sup>14</sup> The Commission notes that the JCHR raised concerns regarding the comparable provision within the Legal Aid Sentencing and Punishment of Offenders Bill, stating:

*"We are not convinced that the provision in the Bill to fund exceptional cases, including where a failure to make the services available to a person would be a breach of their Convention rights or EU rights, is a sufficient guarantee that the new legal aid regime will not create a serious risk that its operation will lead to breaches of Convention rights."<sup>15</sup>*

15. In England & Wales further concerns have been raised since the Legal Aid Sentencing and Punishment of Offenders Bill came into law with only 35 or 4.2% of applications for exceptional funding being granted in the period April 2013 to December 2013.<sup>16</sup> **The Commission advises the Committee to seek estimates of the number of cases which the Department envisages will be funded by way of the exceptionality provision each year, these should be categorised.**

#### Schedule 2 Exceptional funding inquests

16. The right to life enshrined in Article 2 of the ECHR has been regarded by the ECtHR as one of the most fundamental provisions of the ECHR, so much so that, in addition to the substantive right, there exists a procedural requirement on the part of the state to conduct an effective investigation following an alleged breach of the substantive limb. In *Jordan v the United Kingdom*,<sup>17</sup> the ECt.HR stated:

*Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified,*

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<sup>14</sup> See Schedule 2 pg 14

<sup>15</sup> JCHR 'Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill' HL Paper 237 HC 1717 19 December 2013 para 1.31

<sup>16</sup> Ministry of Justice 'Ad Hoc Statistical Release: Legal Aid Exceptional Case Funding Application and Determination Statistics: 1 April to 31 December 2013' 13 March 2014 , See further "Legal Aid Agency refuses to fund exceptional cases" Legal News | 9 September 2013 Read more: <http://ilegal.org.uk/thread/8106/laspo-exceptional-funding-scheme-working#ixzz2z8ago1Jt>

<sup>17</sup> *Hugh Jordan v the United Kingdom*, European Court of Human Rights, Application No 24746/94 (4 May 2001).

*ranks as one of the most fundamental provisions in the Convention, to which in peacetime no derogation is permitted under Article 15. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe... The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective.*

...  
*The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.<sup>18</sup>*

17. Five essential elements of an effective investigation have been identified by the ECtHR as:

- 1) The persons responsible for carrying out the investigation must be independent from those implicated.
- 2) The investigation must be capable of leading to the identification and punishment of those responsible. The authorities must have taken all reasonable steps available to secure the evidence concerning the incident.
- 3) The investigation must be prompt.
- 4) There must be public scrutiny of the investigation or its results sufficient to secure accountability.
- 5) The next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his/her justifiable interests.<sup>19</sup>

18. The involvement of the next of kin of the victim may in certain circumstances require the provision of legal assistance to ensure their effective participation in the procedures of an inquest.<sup>20</sup>

19. The Bill proposes to introduce a new Article 12A to the Access to Justice (NI) Order 2003 appearing to provide two grounds for a family member seeking legal assistance in inquest proceedings to

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<sup>18</sup> *ibid*, paras 102 and 104.

<sup>19</sup> Jordan principles emerging from <sup>19</sup> *Hugh Jordan v the United Kingdom*, European Court of Human Rights, Application No 24746/94 (4 May 2001).

<sup>20</sup> *McCaughey and Others v UK* (Application no. 43098/09) 16 July 2013 See further *R Humberstone (on the application of) v Legal Services Commission* [2010] EWHC 760 (Admin) (13 April 2010) paras 61 and 62

obtain legal aid.<sup>21</sup> The Commission has previously queried why funding for inquests raising issues with regard to Article 2 of the ECHR are not within the scope of the mainstream legal aid system.<sup>22</sup> **The Commission advises the Committee to seek an assurance from the Department that the requirement on a family member, seeking legal assistance in inquest proceedings, to apply for legal aid by way of the exceptionality provisions will not unnecessarily burden them.**

## Part 2 Coroners' Courts

20. The Commission notes the proposal that the Lord Chief Justice be president of the Coroner's Court and that he be required to appoint a Presiding Coroner with responsibility for the Coroners' Courts. The Committee will be aware of the McKerr group of cases against the UK regarding the investigation of conflict related deaths in NI.<sup>23</sup> A package of measures has been developed to ensure compliance with these judgements, including measures relating to the Coroners Court.<sup>24</sup> At the time of writing the Committee of Ministers of the Council of Europe continue to monitor the implementation of these measures. In the judgement of McCaughey and Other the ECtHR stated:

*"The Court considers that the carrying out of investigations, including holding inquests, into killings by the security forces in Northern Ireland has been marked by major delays. It further considers that such delays remain a serious and extensive problem in Northern Ireland".<sup>25</sup>*

**The Commission advises the Committee to enquire if the new proposed arrangement is likely to have any positive implications for addressing delay in the Coroner's Court.**

## Additional Proposal

21. The Commission notes the proposal that the Attorney General for NI be empowered to obtain papers or information that may be relevant to the exercise of his power to direct an inquest. The power of the Attorney General to order an inquest provides a safeguard to ensuring an effective investigation into the circumstances of a death

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<sup>21</sup> Legal Aid Agency 'Inquests – Exceptional Cases Funding – Provider Pack' 1<sup>st</sup> April 2013 pg 3

<sup>22</sup> NIHRC Submission to the Access to Justice Review January 2012 para 9 – 14

<sup>23</sup> App. No. 28883/95 4 May 2001

<sup>24</sup> CM/Inf/DH(2006)4 revised 2 23 June 20061 - Cases concerning the action of security forces in Northern Ireland – Stocktaking of progress in implementing the Court's judgments - Memorandum prepared by the Secretariat incorporating information received up to 12 June 2006. Paras 85 - 109

See further Communication from the UK concerning the McKerr group of cases against UK (App. No. 28883/95)

<sup>25</sup> McCaughey and Others v UK (Application no. 43098/09) para 144

is carried out. The empowerment of the Attorney General to obtain relevant papers and information to inform the exercise of powers under section 14 (1) of the Coroners Act (NI) 1959 may further strengthen this safeguard. The Commission will provide further advice on publication of the proposed amendment as required.

22. Noting that the Attorney General has raised specific concerns regarding deaths in which there is a suggestion that a medical error has occurred, **the Commission advises that the procedural obligation under Article 2 of the ECHR extends to deaths in a medical context.**<sup>26</sup>

**April 2014**

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<sup>26</sup> *Silih v Slovenia*, ECtHR, App No. 71463/01 (9 April 2009) see para 155