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Lord Carlile
House of Lords
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Committee - Day 2

Our ref: 319114

16 January 2012

Dear Alex,

CONSULTATION WITH REPRESENTATIVE BODIES / CLAUSE 11

I thought it may be beneficial to write to you on some points made during the debate on the second day of Committee on the Legal Aid, Sentencing and Punishment of Offenders Bill.

The first point I wished to address concerns the group beginning with amendment 8, and specifically the question of consultation with representative bodies in relation to rates of remuneration set by the Lord Chancellor. You spoke forcibly on this particular aspect and as such I wished to further our engagement on this issue.

You suggested during debate that a failure to consult would automatically result in a Judicial Review on process grounds. This is by no means certain and will depend on the particular circumstances. There is no general duty to consult on government policy decisions, but the courts will enforce such a duty where it is in statute, or where a legitimate expectation has arisen that a consultation will take place. I accept that lack of consultation may also be a factor in some cases which goes to the lawfulness of a decision. For example, depending on the precise circumstances of a particular case, it may be that failure to consult may form part of the evidence of failure to have due regard to the equality duties. But a decision not to consult is not, of itself, something which can automatically form the basis of a judicial review application.

In respect of the amendment itself and the debate that followed, I wish to emphasise that there is no untoward intention where these provisions are concerned, and equally no untoward intention in resisting the amendment. In practice it is the Government's intention to engage (though not necessarily by way of formal consultation) representative bodies wherever it is appropriate and constructive to do so, and I readily acknowledge that for the vast majority of changes to remuneration it is likely that we would do so. It is of course feasible that a measure might be required, for example to provide funding for representation in a new type of hearing not currently within the scope of the replacement for the Funding Orders that govern civil and criminal legal aid

remuneration, where a statutory duty to consult could act against the best interests of practitioners and clients alike in terms of an inertial effect in making provision that meets a given need.

You also asked me to explain the difference between clause 11(5), which *requires* the regulations to be made under clause 11(2) to include provision establishing procedures for the review of determinations, and clause 11(6), which provides that those regulations *may* make provisions for appeals against determinations to a court, tribunal or other person. You asked why "must" was used in the former and "may" was used in the latter. I am happy to confirm that the distinction is not merely a result of boredom or whimsy on Parliamentary Counsel's behalf. The important distinction is that which exists between the two mechanisms we are referring to, i.e. *review* and *appeal*.

A *review* in this context means an internal review by the Director; and regulations *must* provide for reviews pursuant to clause 11(5). For example, in a case concerning civil or family representation, a client will be able to ask the Director for an internal review in the event that funding is refused on merits grounds.

An *appeal* in this context means an external and independent appeal, which, as was discussed during debate, we intend to be an appeal to an Independent Funding Adjudicator; and regulations *may* provide for appeals pursuant to clause 11(6). To extend the example above, if an internal review, concerning a refusal to provide civil and family representation on merits grounds, was not successful, the applicant would be able to request an appeal by an independent funding adjudicator, under regulations made pursuant to sub-clause 11(6).

The reason that provision for appeals does not have to be made in every case is that an appeal is not appropriate in every type of case. Decisions on Legal Help (the advice and assistance level of legal aid), for example, will not be subject to an external, independent appeal process. The merits test for receiving Legal Help is likely to be straightforward, and will be made directly by providers in most cases. There is no right of independent appeal at the moment in these cases, and to require one under the Bill would be costly, bureaucratic and un-necessary. To take another example, there will be no right of independent appeal in relation to exceptional funding determinations. As I said in the House, our view is that these cases are unsuited for an independent appeal given the particular nature of the assessment at their heart, which will focus on an interpretation of the Government's obligations under the European Convention on Human Rights to provide legal aid.

We are basing the review and appeal system under the Bill firmly on the existing model which has operated successfully, under the Access to Justice Act 1999, for several years. It is worth reiterating that where an internal review and - where relevant - an independent appeal, is unsuccessful, legal aid will of course remain available for judicial review of the Director's decision.

I am placing a copy of this letter in the House Library.

Your Sincerely
Tom McNally

TOM MCNALLY