

From the President



The Law Society

Dr Hywel Francis MP
Chairman of the Joint Committee on Human Rights
House of Lords
London
SW1A 0PW

10 November 2011

Dear Dr Francis

Inquiry into the human rights implications of the Legal Aid, Sentencing and Punishment of Offenders Bill by the Joint Committee on Human Rights

I am writing with regards to the potential human rights implications of Parts 1 and 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill currently before Parliament. It is the view of the Law Society that, as I set out in summary below, a number of provisions contained within this Bill in its present form may be in serious breach of both the European Convention on Human Rights ('ECHR') and the European Convention on Fundamental Rights ('the Charter').

I therefore strongly urge the Committee to consider undertaking a full and comprehensive inquiry when the Bill comes before the committee for legislative scrutiny.

The Society has obtained independent legal advice which suggests that the Bill may prove incompatible with the United Kingdom's human rights obligations for the following reasons:

- 1. The scope cuts to civil legal aid are in violation of the European Convention on Human Rights ('ECHR') and the European Union Convention on Fundamental Rights ('the Charter')** - The Bill takes outside the prima facie scope of civil legal aid disputes in a number of circumstances where the result, in practical terms, is likely to deprive people of a realistic right of access to the court. Many of these areas are 'civil rights' within the meaning of Article 6 of the ECHR or are 'rights and freedoms guaranteed by the law of [European Union]'. The removal of these rights from scope therefore engages the rights to a fair hearing under Article 6 of the ECHR or Article 47 of the Charter respectively.
- 2. The Bill's proposed exceptional funding model is likely to prove ineffective** - The Bill contains provision for 'exceptional cases' determinations, so that the Director of Civil Legal Aid may decide that services which are outside of scope are nonetheless to be provided. The Society's legal advice is that this exceptional funding model is unlikely to ensure practical and effective protection of the right in question. That is particularly so in circumstances where individuals are not entitled to any free advice or assistance in applying exceptional funding.
- 3. The limitations on scope impose unrealistic costs, risks and burdens** - The removal of eligibility for legal aid will also (in many cases) remove court fee waivers and protection from the risks of adverse costs orders from those who would otherwise be eligible for them in terms of means. Thus, the practical effect of the removal of legal aid from those who would (but for the restriction on scope) be financially eligible for it may be effectively to preclude them from bringing or defending a claim at all. In any event, the imposition of such

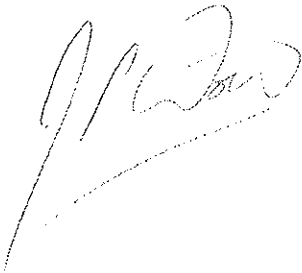
fees and risks is likely to be a major, and disproportionate restriction on the right of access to a court.

4. **The proposals introduce a lack of institutional independence and impartiality** - The Bill's provision for a Director of Civil Legal Aid, answerable to the Lord Chancellor, to rule whether a person qualified for publicly funded civil legal aid raises serious concerns. A gatekeeper who is answerable to the Secretary of State does not have sufficient impartiality to enable their decisions as to the grant of legal aid to comply with Article 6 of the ECHR.
5. **There is a possibility of a declaration of incompatibility by the courts** - Where provisions in primary legislation appear, on a neutral reading, to be incompatible with the Human Rights Act 1998, courts may make a declaration of incompatibility under section 4 of that Act. However, a provision of national law which cannot be read compatibly with general principles of EU law must be disapplied by national courts (*Kukudevici v Swedex GmHB* C555/07, 19 January 2010 (European Court of Justice, Grand Chamber, 50-53)). The right to a fair hearing has long been recognised as one of the general constitutional principles of EU law (see *Kadi v European Council* C-402/05P (ECJ) [2009] 1 AC 1225).

These are, I hope you will agree, serious and well considered concerns regarding the Bill as presently drafted. I therefore believe it appropriate that your Committee undertake an in-depth inquiry to ensure that the Government does not breach its human rights obligations.

I, and my colleagues at the Law Society, would be happy to discuss our concerns with you in more detail. If you think this would be helpful please get in touch with the Society's public affairs adviser, Richard Messingham, on 020 7316 5527 or Richard.Messingham@lawsociety.org.uk.

Yours sincerely,



John Wotton
President

Direct Line: 020 7320 5602
Direct Fax: 020 7320 5759
john.wotton@lawsociety.org.uk

cc:

Mike Hennessy
Commons Clerk, Joint Committee on Human Rights
7 Millbank
London
SW1P 3JA

Ms Chloe Mawson
Lords Clerk, Joint Committee on Human Rights
7 Millbank
London
SW1P 3JA