

Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from the Scottish Human Rights Commission

The Scottish Human Rights Commission (Commission) is a statutory body created by the Scottish Commission for Human Rights Act 2006. The Commission is a national human rights institution (NHRI) and is accredited with 'A' status by the International Co-ordinating Committee of NHRIs at the United Nations. The Commission is the Chair of the European Group of NHRIs and it is also a representative of Scotland on the Advisory Panel to the Commission on a Bill of Rights. The Commission has general functions, including promoting human rights in Scotland, in particular to encourage best practice; monitoring of law policies and practices; conducting inquiries into the policies and practices of Scottish public authorities; intervening in civil proceedings and providing guidance, information and education.

PART 2 OF THE BILL: CRIMINAL LEGAL ASSISTANCE

1. Introduction

The Commission welcomes the opportunity to provide written comments on the general principles of the Scottish Justice Council and Criminal Legal Assistance Bill. The Commission would like to highlight the relevant human rights standards in this context and express its views in relation to a number of provisions of the Bill. The Commission will focus on Part 2 of the Bill: Criminal Legal Assistance.¹

2. Relevant human rights standards

Article 6 (3) of the European Convention on Human Rights.

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

Article 6 provides that *"in the determination of ... any criminal charge against him, [sic] everyone is entitled to a fair and public hearing"*. Article 6 incorporates many aspects of the due process of the law, including the right to free legal assistance where needed and the right to access to court.

In *Quaranta v. Switzerland*,² the Court reiterated that:

"while Article 6 § 3 (c) confers on everyone charged with a criminal offence the right to 'defend himself in person or through legal assistance ...', it does

¹ The Commission has highlighted the importance of criminal legal aid in the context of access to justice in number of cases. See for example, Commission's response to Carloway Review and Victims and Witnesses Bill at www.shrc.com

² 24 May 1991, § 30, Series A no. 20

not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial."

However, the Court also pointed out that Convention is intended to:

"guarantee not rights that are theoretical or illusory but rights that are practical and effective".

It is clear that the right to free legal assistance is not an absolute right under the Convention. The right to free legal aid for an accused depends on two circumstances; a) that the accused lacks sufficient means to pay for legal assistance and b) that the provision of legal aid is required by the interests of justice. In relation to the first the level of proof required for an accused that he or she lacks resources should not be set too high. In relation to the second, the Court found that in determining what is required in the interests of justice consideration should be given to a number of factors such as the gravity of the offence, the likely penalty if convicted,³ the complexity of the case, the principle of equal treatment of the parties and the personal situation of the accused (e.g. his or her mental health or the existence of a mental disability, linguistic skills, etc).⁴

Article 47 of the EU Charter of Fundamental Rights.

...Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The guarantee under Article 47 restates the core protection offered by Article 6(1) of the ECHR. The Charter reaffirms the indivisible, universal values of human dignity, freedom, equality and solidarity within Europe and it is based on the principles of democracy and the rule of law.

Article 14. 3 (d) of the International Covenant on Civil and Political Rights⁵.

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:...

(d) ... to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

In this respect the UN Human Rights Committee⁶ has expressed its view that:

³ *Lloyd and others v United Kingdom*, 1 March 2005, para 134, "where deprivation of liberty is at stake, the interests of justice in principle call for legal representation."

⁴ *Benham v United Kingdom*, (19380/92) 23 January 1995

⁵ See also Arts. 10 and 11 of the UDHR

⁶ The UN Human Rights Committee is the body of independent experts charge with monitoring compliance with the International Covenant on Civil and Political Rights.

“The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so...”⁷

While Article 14 is not included in the list of non-derogable rights of Article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.

3. Criminal Legal Assistance

The Commission has significant concerns about this part of the Bill. The Commission notes that in particular sections 17, 19, 20 and 21 would have a considerable impact on access to justice.⁸ The Commission observes that any change to the rules on criminal legal aid need to be objectively and reasonably justified by the Scottish Government.

The right to access to a court is one of the most basic prerequisites of an effective system of justice.⁹ In order for access to be effective it is sometimes required that a person receives legal representation.¹⁰ The Commission would like to emphasise the obligation on States to provide effective legal assistance in terms of Article 6 of the ECHR. Article 6 sets out a number of constituent rights. These are designed to guarantee the fulfilment of the overall right to a fair trial. The issues being considered by Bill principally arise from Article 6(3)(c), the right to legal assistance.

The right to legal assistance fulfils a number of functions. It is designed to ensure adequate representation in the case, to prevent abusive coercion by the authorities,¹¹ to ensure equality of arms to the accused, to provide vigilance by the defence over procedural regularity on behalf of the client and in the interest of justice. It is important to note that the general rules and standards of international human rights law, including the principle of non-discrimination, apply to the provision of legal aid.

The Commission notes that many of those in the criminal justice system are the most marginalised and vulnerable in society in terms of poverty, educational disadvantage, mental health problems, etc. In light of this, the Scottish Government should take steps to ensure that the proposed system of contributions complies with Article 6 of the ECHR/HRA, in terms of affordability and the interest of justice.

⁷ General Comment No. 32, CCPR/C/GC/32, 23 August 2007

⁸ Access to justice is a broad concept which involves substantive and procedural guarantees that ensure effective and fair remedies for people including effective legal assistance, adjudication, enforcement and public accountability.

⁹ *Golder v United Kingdom*, 4451/70) [1975] ECHR 1

¹⁰ *Airey v Ireland*, (6289/73) [1979] ECHR 3

¹¹ *Salduz v Turkey* para 54.

While it is important to maximise the value of legal aid expenditure, in a time of austerity, it is essential to maintain a fair, high quality and equitable system which maintains public confidence and guarantees access to justice. The Commission notes that the overall cost of criminal legal assistance has remained roughly the same over recent years.¹² Furthermore, initial applications for legal assistance have dropped from 234,472 in 2006 to 131,469 in 2011 and the number of cases paid to solicitors has also dropped from 262,983 to 142,690 during the same period.¹³ Given these facts the Commission questions whether the introduction of a wider scheme of contributions can be reasonably and objectively justified as it may impact on the right to a fair trial.

The Commission would welcome clarification of the Governments' intention in section 17 of the Bill. The Commission is concerned that the effect of section 17, which allows for the introduction of contributions in circumstances where advice and assistance is automatically available, may limit the individual rights of people in legal proceedings. For example, should individuals be expected to pay contributions when they ask for legal assistance in police stations this may increase the likelihood that they would waive their right for purely economic reasons. This may not be a valid waiver in terms of ECHR given the recognised vulnerability of people in detention and the duty of the state to provide effective legal assistance.¹⁴

While sections 19 and 20 seem to ensure that an applicant in receipt of 'passported' benefits will be eligible for criminal ABWOR or criminal legal aid with no contribution from income, they might still be required to contribute from any disposable capital. The Commission is concerned that marginalised people could become excluded from the legal aid system or find themselves having to pay an unaffordable contribution towards the cost of their defence out of their benefit payments (such as disability living allowance and personal independence payments).

The term "disposable income"¹⁵ in this section presents definitional challenges. People living in poverty are more likely to have a variable rate of outlays, depending on levels of income week by week and are less likely to have to bank accounts with regular direct debits.¹⁶ There is of course a difference between the impact of a contribution on a single man with a disposable income of £68 and a family of seven with the same disposable income. The Commission believes that the threshold for disposable income at or above which a contribution is payable of £68 per week is relatively low. Unavoidable expenses, which will be subtracted from eligible income, should also include household repairs, transport costs and clothing. In order to

¹² Scottish Legal Aid Board. (2010) *Criminal legal assistance update*. Edinburgh: Scottish Legal Aid Board in Legal Aid Spice Briefing, 24 August 2011.

¹³ See Key statistics 2006 – 2011 SLAB available at http://www.slab.org.uk/common/documents/about_us/whatwedo/Appdx1-Keystatistics.pdf

¹⁴ *Keenan v The UK* (27229/95)

¹⁵ The term "disposable income" is defined in Section 42(1) of the Legal Aid (Scotland) Act 1986 as a person's income after making such deductions and allowances as regulations may prescribe.

¹⁶ EHRC (2010) *How Fair is Britain*, Chapter 12; Standard of living. Available at <http://www.equalityhumanrights.com>. Disabled people in all age categories are more likely than non-disabled people to have no bank account. Some ethnic minorities are particularly likely to lack access to standard financial products, especially Pakistani and Bangladeshi women who are three times as likely as White men and women not to have a bank account.

preserve access to justice adequately, the figure selected should be justifiable in terms of what is considered a necessary disposable income for an decent standard of living in Scotland.

There are significant differences between the civil and criminal systems in Scotland which render them incomparable. For example, in criminal cases the accused does not have control over the case as the Procurator Fiscal decides what action is appropriate (including whether to prosecute, offer a direct measure or to take no action in the case). In addition, there is no provision for an acquitted person to seek recovery of the cost of their contribution. These factors alongside with the obligation to provide legal assistance in criminal proceedings should be taken in consideration by the Committee in view of the Bill.

Section 21 provides for contributions for appeals where the appellant is deceased. This provision would allow the board to determine that the full cost of such an appeal be paid by the estate or relatives. The Commission is concerned that this may have the potential to discourage the family of a deceased appellant continuing to attempt to clear his name. This provision also seems to suggest the authorised person may also have to take on a contribution that may not have been payable by the deceased if he survived (and was eligible for criminal ABWOR or criminal legal aid). This is unclear in the absence of regulations.

The Commission would like to draw the Committee's attention to the difficulty of assessing the full human rights implications and impact of the changes, until regulations are made setting out the scale of contributions. In this respect, the Commission suggests that a sunset provision be incorporated into the Bill in order to review the impact of any contributions system on access to justice.

4. Conclusion

The Commission considers that assessing financial eligibility for criminal legal assistance and the level of any contribution requires further analysis and clarity. It is imperative that any changes to the rules on criminal legal aid do not create the risk that access to justice will be impaired, particularly for people on low incomes and other marginalised groups. The Scottish Government should take steps to ensure that the proposed system of contributions complies with Article 6 of the ECHR/HRA, in terms particularly of affordability and the interests of justice.

The Commission would be pleased to answer any queries that the Justice Committee may have in relation to this submission.

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