

**ILPA BRIEFING**  
**House of Commons - Committee****September 2011****LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –**  
**Bill 205****Exceptional Cases Funding**  
**Amendment Nos. 226 & 227**

Kate Green

**226**

Clause 9, page 6, line 12, at end add –

'(c) that the individual is a child, or is without mental capacity.'

**Presumed Purpose**

The Amendment would preserve legal aid for children and those lacking mental capacity by including these as "exceptional cases" within the scope of clause 9. The Amendment provides an opportunity to probe the Government as to the effect of the Bill on these two groups.

Kate Green

**227**

Clause 9, page 6, line 34, at end add –

'(7) Civil legal services are to be available to an individual on a means tested basis for advice and assistance to prepare an application for funding under subsection (2)(a)'

**Presumed Purpose**

The Amendment would preserve legal aid for applications to the Director of Legal Aid Cases for "exceptional cases" funding under clause 9. It provides an opportunity to probe the Government as the arrangements that are intended for the making of applications for "exceptional cases" funding.

**Briefing Note**

In his Ministerial Foreword to the Government's response to the Legal Aid consultation, the Secretary of State for Justice said<sup>1</sup>:

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<sup>1</sup> Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government's response*, Cm 8072, page 4

*“Many respondents raised concerns about access to justice – especially for vulnerable groups. I believe that the plans I am bringing forward protect fundamental rights to access to justice, whilst at the same time achieving a more affordable system. This is reflected in the retention of certain areas of law within scope, but also in the new exceptional funding scheme for excluded cases. Under its terms, funding will be made available, where the observance of core protections, such as those guaranteed by the Human Rights Act, require it.”*

The Secretary of State’s statement appears to suggest that “vulnerable groups” will receive particular protection by way of access to legal aid via the “exceptional cases” funding arrangements under clause 9. However, it is not clear on the face of the Bill how this is necessarily achieved. The Government’s response to the Legal Aid consultation says relatively little about the proposed exceptional cases scheme. It does say<sup>2</sup>:

*“129. The Government recognises the concerns about the restrictions on scope and the implications for exceptional funding. We believe that cases we intend to retain within the scope of legal aid are those which are more likely routinely to require funding in order to meet our legal obligations. This is reflected by our focusing on factors such as the ability of the individual to present their own case, the complexity of the case, and importance of the issue at stake.”*

This general approach is inadequate. Leaving aside that the decisions the Government has made as to the areas more likely to include “vulnerable groups”, it is clear that children and those lacking mental capacity (and indeed many others especially vulnerable to disenfranchisement if left without access to legal representation) do not only have need of legal advice and assistance in the categories for which civil legal aid is to be retained.

### **Children**

As regards children, the Government revised its original proposals concerning family legal aid to take into account *“that children are not able to represent themselves”*.<sup>3</sup> However, children are no better placed to represent themselves in proceedings other than family proceedings, yet the Bill makes no distinction for children in relation to these. Dr Maggie Atkinson, the Children’s Commissioner for England and Wales, stated in oral evidence to the Public Bill Committee:

*“It is important that we understand that litigation in person by a child is completely inappropriate in a court system that, even in family law, remains adversarial rather than inquisitorial.”*<sup>4</sup>

Article 12 of the 1989 UN Convention on the Rights of the Child provides that, for the purpose of ensuring that the views of children in all matters affecting them are heard and given due weight:

*“...the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or*

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<sup>2</sup> *Ibid*, page 38

<sup>3</sup> *Consultation Response, op.cit.*, paragraph 50, page 21; Bill Schedule 1, Part 1, paragraph 13.

<sup>4</sup> Public Bill Committee, 14 July 2011, afternoon session, Q306.

*through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”*

Ensuring that a child’s views are heard and given due weight, which entails having regard generally to children’s best interests (Article 3 of the Convention), must mean more than allowing children a voice, it must mean giving them an effective voice having regard to the proceedings in which they are involved. As the Children’s Commissioner makes clear, and as the Government accept in relation to family proceedings, this requires that legal representation is available. As regards immigration proceedings, ILPA has provided a separate Briefing in relation to the following amendment to Schedule 1, Part 1, Paragraph 13 (*Children who are parties to family proceedings*):

**Mr Elfyn Llwyd**

**242**

Schedule 1, Page 102, line 44, leave out ‘family’

### ***Mental Incapacity***

As regards those who lack mental capacity (adults and children), they are by definition not able to represent themselves. Nonetheless, the position adopted by the Government in this Bill would exclude such people from legal aid in the same way as those of capacity – save in relation to specific proceedings, e.g. cases relating to the “*abuse of a child or vulnerable adult*”<sup>5</sup> or matters arising under the Mental Health Act 1983, paragraph 5(2) of the Schedule to the Repatriation of Prisoners Act 1984 and the Mental Capacity Act 2005<sup>6</sup>.

In immigration cases, those without mental capacity would be excluded from legal aid for dealing with cases where they faced removal from the UK (and any family, community, care or treatment they may have here) to countries where they may have no family, community or home or none that can support them, and in some cases to countries of which they have little or no knowledge. Such removal may be via detention. Legal aid would be closed off for all avenues to challenge the removal – application to the UK Border Agency, any appeal against a UK Border Agency decision and any judicial review<sup>7</sup>.

The senior judiciary in responding to the Government’s consultation were particularly concerned about the cases of those with mental illnesses or disabilities. They said (in relation to general claims)<sup>8</sup>:

*“54. ...an exception is called for in the case of those who suffer from mental illness or incapacity that makes it difficult or impossible for them to decide on or undertake litigation without legal advice or representation: the general approach taken in relation to cases concerning mental health [that legal aid be retained<sup>9</sup>] should be applied to these cases too. One approach would be*

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<sup>5</sup> Paragraph 3 of Part 1, Schedule 1 to the Bill

<sup>6</sup> Paragraph 5 of Part 1, Schedule 1 to the Bill

<sup>7</sup> Paragraphs 25 and 17 of Part 1, Schedule 1 to the Bill (save for asylum cases)

<sup>8</sup> Response of a Sub-Committee to the Judges’ Council to the Government’s Consultation Paper CP12/10

<sup>9</sup> The Judges’ Council’s response (*op cit*) here refers to paragraphs 4.92-4.94 of the Consultation Paper CP12/10, where the Government had emphasised the importance of legal aid in relation for those with mental illness or disability – e.g. “4.93. ...Although advice is available from other sources, including through voluntary sector organisations such as Mind, which provides a legal advice service, we do not consider that these are sufficient, or that

*to enlarge the criteria for exceptional funding under the scheme for excluded cases so as to ensure that it would apply to such persons.”*

The Amendment seeks to do that, but is strictly limited to cases of mental incapacity whereas the senior judiciary considered a broader approach to be necessary, no doubt since someone who is of mental capacity but with any significant mental illness or disability is intrinsically likely to struggle with administrative and legal procedures or self-representation. As regards those with mental illness or disability in immigration proceedings, ILPA has provided a separate briefing on a wider class of ‘vulnerable adults’ in relation to the following amendments to Schedule 1, Part 1, Paragraph 25 (*Immigration: rights to enter and remain*):

**Mr Elfyn Llwyd**

**240**

Schedule 1, Page 109, line 11, at end insert –

*(ca) Civil legal services provided in relation to rights to enter and to remain in the United Kingdom to a specified person*

**Mr Elfyn Llwyd**

**241**

Schedule 1, Page 109, line 33, at end insert –

*“specified person” means a person –*  
*(i) under the age of 18; or*  
*(ii) who claims an entitlement to enter or remain arising from his having been subjected to domestic violence or human trafficking; or*  
*(iii) whose ability to represent himself or herself is significantly impaired through physical or mental disability or illness, through old age or otherwise; or*  
*(iv) any other class of person as may be specified by the Secretary of State in regulations.*

### ***Funding of applications for exceptional cases funding***

In its response to the Legal Aid consultation, the Government makes clear that<sup>10</sup>:

*“149. In the event that a client visits a face-to-face provider who recognises that the case will not be within scope for legal aid but may be eligible for exceptional funding, the application can be made straightaway without the client first telephoning the helpline.”*

As regards how the scheme will work, the Government’s response says only<sup>11</sup>:

*“131. To ensure the appropriate degree of independence and transparency, the Government has decided that funding decisions for individuals’ cases, including exceptional funding, will be made by the Director of the new legal*

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*there are alternative sources of funding which would enable individuals to resolve these issues without publicly funded legal assistance. Nor do we consider that these cases are ones where the individual could be expected to resolve the issue themselves given the involvement of the state and the nature of the illness.”*

<sup>10</sup> Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government’s Response*, Cm 8072, page 43

<sup>11</sup> *Ibid*, page 38

*aid agency, subject to general criteria and guidance issued by Ministers. Ministers will be prevented by statute from giving the Director directions about funding in an individual case. We will publish details on the operation of the exceptional funding scheme, including the application process, in due course.”*

Nonetheless, it may be assumed that making an application requires some presentation of how the individual meets any criteria or guidance that may be provided, and may require the presentation of evidence to establish entitlement. The Bill sets out as the primary test that legal aid<sup>12</sup>:

- “...because failure [to provide it] would be a breach of –
- (i) *the individual’s Convention rights (within the meaning of the Human Rights Act 1998), or*
  - (ii) *the individual’s rights to the provision of legal services under European Union law...”*

Legal assistance will be required in many cases to ensure that the application to the Director of Legal Aid Casework clearly identifies how such a legal test is met. Indeed, it is likely that the test(s) will generate its own litigation<sup>13</sup>, meaning that an understanding of the application of the test and the information and evidence that needs to be presented will depend on a familiarity with UK and European law and caselaw, including specific judicial rulings on the test.

Accordingly, if exceptional cases funding is to be available to those who most need it, legal aid will be needed for an application to be made. This will be all the more so having regard to, as the Government acknowledge, the reasons why some will be require this funding will relate to “*the client’s capacity to represent himself or herself*”<sup>14</sup> – some of whom will be among those to whom Amendment 226 applies.

**For further information please get in touch with:**

Steve Symonds, Legal Officer, [steve.symonds@ilpa.org.uk](mailto:steve.symonds@ilpa.org.uk), 020-7490 1553  
Alison Harvey, General Secretary, [alison.harvey@ilpa.org.uk](mailto:alison.harvey@ilpa.org.uk), 020-7251 8383

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<sup>12</sup> Clause 9(3)(a)

<sup>13</sup> The Government expressly acknowledges this – see Cm 8072 *op cit*, page 154, paragraph

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<sup>14</sup> Cm 8072 *op cit*, page 38, paragraph 130