

HOUSE OF LORDS COMMITTEE
Legal Aid, Sentencing and Punishment of Offenders Bill (HL Bill 109)
22 December 2011

ILPA is a professional association the majority of whose members are immigration, asylum and nationality law practitioners. Academics and charities are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law. ILPA is represented on numerous Government, including UK Border Agency and Legal Services Commission, consultative and advisory groups.

This Briefing sets out in short those matters and amendments currently tabled, with which ILPA is particularly concerned and/or supportive. Issues are raised in the order in which they appear likely to arise having regard to the anticipated order in which clauses and amendments are to be considered.

General concerns

The accumulation of ten Acts of Parliament since 1993, on top of the Immigration Act 1971, coupled with frequent and substantial changes still made to the immigration rules, policy and practice have produced often bewildering complexities in the area of immigration. This is compounded by complex interrelation between immigration and other areas such as social welfare, and the distinct provisions of EU law relating to European citizenship and free movement. The Government's suggestion that general advice rather than legal advice and representation is needed for those too poor to pay privately is unrealistic in the face of that complexity. Moreover, it is impossible given that immigration is uniquely regulated such that immigration advice cannot lawfully be given by those who are not solicitors, barristers, legal executives or within the scheme governed by the Office of the Immigration Services Commissioner. To give general advice outside this regulation in the course of a business, including a not for profit, is a criminal offence.

Regulation was introduced into this area by the Immigration and Asylum Act 1999 in recognition of the particular vulnerability of those in need of immigration advice and representation to exploitation and incompetence. By generally excluding immigration matters (other than asylum) from legal aid, the risk that those in need of such advice fall victim to the incompetence of poor advisers and/or other exploitation by their seeking to secure funds to pay for advice will be seriously exacerbated.

Clause 8(2): Lord Chancellor's power to modify

Clause 8(2) empowers the Lord Chancellor to remove more from the scope of civil legal aid by order. There is no commensurate power to add to the scope of legal aid. This is despite the several and serious risks of perverse outcomes, including by the removal of legal aid generally for immigration matters such as the exploitation of those in need of immigration advice and representation. ***ILPA supports the joint briefing at <http://tinyurl.com/6nuf4py>***

Schedule 1, Part 1: legal aid provision for children and other vulnerable persons

See also "Clause 9: exceptional cases funding" below. Currently victims of trafficking and separated children are among those excluded from legal aid for immigration matters. Some are able to resolve their immigration situation through the asylum system, but many cannot even though there may be other good reasons for their claim to remain in the UK. ***ILPA supports amendments to provide legal aid for children and other vulnerable persons. The JustRights briefing provides more information, see <http://tinyurl.com/6qf7pk5>***

Schedule 1, Part 1: legal aid provision for onward appeals

Currently, where the Bill generally excludes legal aid, such as for immigration, it excludes legal aid for appeals both at first-instance and onward against the decision of the first-instance judge. Onward appeals (i.e. beyond first-instance) can only be brought on points of law and with a judge's permission. They are brought by appellants whose appeals are dismissed, and by the State where appellants'

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appeals succeed. The Bill would allow for an immigration appeal to go all the way to the Supreme Court with the UK Border Agency represented by teams of lawyers and a poor appellant left without any legal advice or representation at any stage of the way. ***ILPA supports the amendment on 'immigration appeals' to Schedule 1 (page 133) in the name of Lord Thomas of Gresford. ILPA also supports the briefing at <http://tinyurl.com/88ydlh4>***

Schedule 1, Part 1, paragraph 17: judicial review

The Bill includes exclusions from legal aid for certain immigration judicial review applications. These exclusions operate regardless of an application's underlying merit, and regardless of the fact that the applicant may have been excluded from legal aid, and therefore (because of the effect of regulation in this area) effectively excluded from any or any legitimate source of immigration advice or representation at any and every stage of previous immigration proceedings. These exclusions were not included in the original proposals and have not been the subject of consultation. ***ILPA opposes the inclusion of these exclusions (paragraph 17(5), (6) and (7)).***

Schedule 1, Part 1, paragraph 25: immigration and victims of domestic violence

The Government has acknowledged that victims of domestic violence are at serious risk of being trapped in an abusive relationship where their immigration status is dependent on their abusive partner. However, the Bill only provides the protection of legal aid for those whose partner is a British citizen or has indefinite leave to remain. Others whose partner is a European citizen or has limited leave to remain can be no less at risk. ***ILPA supports the amendments to paragraph 25 (page 129) in the name of Baroness Gould of Potternewton. Please see ILPA's briefing at <http://tinyurl.com/7j74cl2>***

Schedule 1, Part 1, paragraph 26: refugee family reunion

The Government has protected asylum because of the importance of this issue, yet key to the integration of refugees and the rehabilitation of torture survivors is reunion with family. Refugee family reunion cases are made especially complex by the often desperate and unsafe situation of the family overseas (e.g. in hiding or in a refugee camp) and the distress and ongoing trauma of the refugee in the UK, coupled with the frequent refusal by the UK Border Agency to accept family relationship. ***ILPA would support bringing back into scope the provision of legal aid for refugee family reunion.***

Schedule 1, Part 1, paragraph 26: persons liable to detention

The Government has stated that that the protection of liberty should rank among the primary factors in the allocation of legal aid. The Bill does not fulfil this, since migrants who are liable to detention will be excluded from legal aid for immigration matters where such matters are the cause or may lead to the individual's detention. ***ILPA would support bringing back into scope the provision of legal aid for those persons who are liable to immigration detention.***

Clause 9: exceptional cases funding

The Government has suggested that "where people genuinely could not represent themselves" (Jonathan Djanogly MP, Legal Aid Minister, *Hansard* HC, Report, 31 Oct 2011 : Column 648), exceptional funding may be available. If that is intended, it is bureaucratic and wasteful to require persons such as children and those without mental capacity to seek legal aid through any scheme established under clause 9 rather than specify such persons' entitlement. However, clause 9 does not on its face provide for exceptional funding in such cases. ***ILPA supports the Law Centre's Federation briefing at <http://tinyurl.com/79ds3ok>***

Clause 26(2): the telephone gateway and provision of legal aid services by telephone

The Government proposes that legal aid services shall generally be accessed only by a telephone gateway, and that in many cases telephone may also be the means by which legal aid services are delivered. Those with language difficulties, mental health difficulties, unwilling or embarrassed to make disclosure of sensitive information, whose body language would reveal a lack of understanding or a need to add information or ask a question and others will be seriously disadvantaged by the requirement to use the telephone. Among these groups are likely to be a disproportionate number of refugees and other migrants. ***ILPA supports the joint briefing at <http://tinyurl.com/8yfbdz6>***

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