

Clause 9 - Exceptional Funding Scheme

Legal Aid, Sentencing and Punishment of Offenders Bill Joint Briefing

House of Lords, Report Stage

Clause 9 provides for legal aid to be made available to a client whose case is not eligible for funding, but in relation to whom the Director of Legal Aid Casework has made an 'exceptional case determination'.

The Government proposes that these determinations should be based solely on whether a failure to provide funding would be a breach of the individual's right to a fair trial under Article 6 of the European Convention on Human Rights ('ECHR') or associated EU laws.

As it stands, the criteria referred to in the Clause are excessively narrow. A reliance on Article 6 of the ECHR – which relates to the general right 'to a fair... hearing' will not cover many cases in which failure to provide legal assistance would be contrary to the interests of justice.

We therefore urge Peers to adjust the wording of Clause 9 in order to provide the Director with sufficient flexibility to award funding where a failure to provide legal aid would lead to an obvious unfairness in the proceedings, even if it may not invoke Article 6. The Clause requires amendment for the following reasons:

- **The wording of Clause 9(3) will result in people facing patently unfair arrangements being refused legal aid.** The extent of the obligation to provide funding under Article 6 is limited to 'criminal charges' and 'civil rights and obligations'. The Article does not apply to cases relating to deportation, asylum and nationality; nor does it apply to cases of an administrative character. Many of the latter, reaching the courts from tribunals or decision-making officials, involve important issues – about education, privacy or social care, for example – where unfairness can have devastating consequences for individuals.
- **Reliance on the ECHR is out of kilter with the common law of England and Wales.** The courts of England and Wales have adopted a broader interpretation of the right of access to justice than the ECHR. Most starkly, the common law dictates that the same standards of fairness as called for in Article 6 apply across the court system, including in those areas of law not covered by the ECHR.
- **The current wording is inefficient and raises the risk of further consequential litigation as to whether ECHR rights have been breached.** ECHR case law is complex and its procedures are often difficult to interpret and apply. If, as the Clause presently insists, the Director's decisions must be based solely on an interpretation of the scope and application of Convention rights, rather than on evidence that an injustice may occur, there is potential for numerous consequential cases challenging the Director's interpretation, which will have to be defended at substantial public expense.

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