Ministry
of Justice

Government response to the Joint Committee on Human Rights tenth report of session 2017–19: Enforcing Human Rights

September 2018

Cm 9703

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Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

September 2018

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Contents

Government response to the Joint Committee on Human Rights tenth report of session 2017–19: Enforcing Human Rights

Introduction

The Joint Committee on Human Rights announced an inquiry on enforcing human rights on 8 December 2017, and published their findings on 19 July 2018 in their tenth report of session 2017–19. This Command Paper presents the Government's response to the Committee's conclusions and recommendations.

Access to justice and the rule of law

1. ***The ability to know about and enforce human rights is vital for the rule of law to be a reality. As well as the current review of the impact of legal aid reform in England and Wales, there is a pressing need for a much wider evaluation of the broader landscape of advice, support and means of resolution for legal problems to assess how they can collectively better serve individuals faced with a breach of their human rights. Such a process must also consider the economic viability of the whole system.***

The UK has a long tradition of protecting rights and liberties domestically and of meeting our international human rights obligations. The protections contained in our domestic legal framework mean that individuals can uphold their rights in a UK court.

Alongside the post-implementation review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), the Government is looking to the future to establish how best we can empower people to resolve their problems in a modern justice system. This will include consideration of the broader landscape and how people are supported to use both the courts, and alternative means of problem resolution.

Legal aid reforms

2. ***The ongoing Government review of the legal aid reforms must look again at the financial eligibility criteria with a view to widening access to a larger proportion of the population. At the least, it should consider extending the passporting of those on welfare benefits so that the part of the means test focussing on capital is aligned with welfare benefits criteria, thus making it fairer and more administratively expedient.***

Means testing is a vital mechanism by which the Government protects legal aid for those who need it most, while ensuring that all those who are able to contribute do so. We are listening to stakeholder concerns about legal aid eligibility, both as part of the post-implementation review and more widely.

The post-implementation review will be making an assessment of the impact of applying the capital eligibility test to all legal aid applicants. It is important that we do not prejudice the outcome by speculating on possible changes at this point.

3. ***The Exceptional Case Funding scheme was expected to support up to 7,000 cases per year, whereas in reality it only funds hundreds of cases. Urgent reform is needed to ensure that human rights cases are properly supported and therefore to ensure meaningful and effective access to justice. The LASPO review should consider how to remove barriers to accessing Exceptional Case Funding where this is needed to secure effective enforcement of human rights. This should include ensuring simplification of the application process, and access to legal advice and assistance (legally aid funded where necessary) to navigate complex legal process forms.***

The Government recognised in making the reforms to legal aid that there might be unusual cases where, on the facts of the case, legal aid may be required to ensure the effective right of access to justice. As a result, the Exceptional Case Funding (ECF) scheme was introduced. The scheme makes sure that funding will continue to be provided (subject to means and merits testing) where:

- failure to provide legal aid would breach the applicant's rights under the ECHR or EU law; or
- in the light of the risk of a breach, it is appropriate to provide legal aid.

The scheme also provides for funding for representation at inquests for family members of the deceased in some cases.

Exceptional funding is a demand-led scheme that does not provide a general power to fund cases that fall outside the scope of legal aid. As Parliament intended, it is designed to provide funding only to the extent it is legally required.

Applications for ECF are dealt with by the Director of Legal Aid Casework at the Legal Aid Agency (LAA) and Ministers are unable to intervene. The process for applying, including the form, are set out by the Lord Chancellor in regulations.

There have previously been concerns about the low number of applications granted under the ECF scheme. Since the implementation of LASPO, the number of individuals granted funding under the scheme has risen. 745 applications for ECF were received in the first quarter of 2018. This represents the highest number of applications received in one quarter since the scheme began in April 2013 and a 40% increase from the same quarter last year. 657 (88%) of these were new applications. Of the 746 ECF applications received between January and March 2018, 88% (658) had been determined by the LAA as of 20 May 2018. 59% (390) of these were granted, which is the highest proportion and number of grants since the scheme began. Data on the operation of the ECF scheme is available as part of the quarterly legal aid statistics.[1] We are constantly improving our training and guidance to ensure that people are able to effectively access legal aid via the ECF Scheme. Alongside this work to support applicants, the post-implementation review will be assessing the extent to which the introduction of the ECF system has achieved its implementation objectives.

4. ***We welcome the fact that the Government is considering the impact of the increased number of Litigants in Person in the LASPO review and the impact that this is having on access to justice in those individual cases, but also the***

[1] Available here: https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018

burdens on the justice system more generally. We recommend that the review looks specifically at what options might exist to ensure that the Courts are properly supported so that justice may be served in such cases, including whether better use could be made of an amicus curiae system to assist the court or tribunal and unrepresented individuals.

Where individuals are representing themselves in court, we have introduced a range of measures to provide additional information, support and guidance. Since 2015, we have invested almost £6.5 million in a support strategy for unrepresented parties. This provides practical support and information as well as routes to free or more affordable legal advice. We have also delivered training to better equip the judiciary to support litigants in person through the court process. We have also ensured that legal aid remains available to those who need it, in the most important cases. Ensuring everyone can resolve their legal issues is vital to a just society. Last year we spent £1.6bn on legal aid.

5. ***The Government must urgently resolve the question of how legal aid for discrimination and education matters will be made available from September 2018. We are concerned by the fall in numbers of those using the Mandatory Telephone Gateway, and those who are referred for face-to-face advice. The LASPO review must consider whether the Gateway is effective, and whether it is sufficiently accessible and readily navigable by all.***

The LASPO reforms were founded on the principle of ensuring that legal aid continues to be available for the highest priority cases. The post-implementation review will assess the extent to which LASPO targeted legal aid to those who need it most, one of the core objectives set out at the time of the reforms.

The policies under assessment as part of the review include the introduction of the mandatory telephone gateway for education, discrimination and debt issues, and the introduction of a domestic violence evidence gateway for accessing legal aid for private family law matters. We shall be making an assessment of the extent to which the gateway fulfils its implementation objectives to provide accessible and cost-effective legal advice.

In regards to the on-going provision of advice in the categories of Special Educational Needs (SEN) and Discrimination, when the LAA initially tendered for providers to deliver gateway telephone services from 1 September 2018 we did not receive sufficient compliant tenders to award contracts. However, as a result, we have since extended the two existing SEN contracts and one existing Discrimination contract by up to two years and procured two further Discrimination providers. Therefore we now have three Discrimination providers and two SEN providers able to provide advice to clients as of 1 September 2018.

6. ***We recommend that the Government consider whether immigration cases engaging the Article 8 right to private and family life be brought within the scope of civil legal aid, where they would be available on the means and merits test basis.***

On 12 July, Lucy Frazer, the Minister with responsibility for legal aid, announced her intention to lay an amendment to LASPO to bring immigration matters for unaccompanied and separated children into scope of legal aid.

Under current legislation, legal aid is available in all asylum cases – for all age groups – and immigration cases where someone is challenging a detention decision. Legal aid for

other immigration matters is available via the ECF scheme, which is intended to ensure legal aid is accessible in all cases where there is a risk of breach of human rights.

The amendment to LASPO follows a judicial review brought by the Children's Society. Both the evidence presented as part of the case and legal aid data on applications for funding were examined. The decision was based on the distinct nature of the cohort in question, and of our data regarding them.

The amendment will be laid in due course following discussion across Government and with external stakeholders.

The post-implementation review will consider the major changes introduced by and under Part 1 of LASPO. This includes the reduction of scope of legal aid for non-asylum immigration matters.

7. ***The LASPO review must consider whether further amendments are necessary to evidential requirements for access to legal aid funding to ensure that women who have experienced domestic violence are able to access legal aid.***

On 8 January 2018, the Ministry of Justice made changes to legislation to introduce new forms of evidence, expand the scope of existing evidence and remove the time limit of five years from all forms of evidence for domestic violence and child abuse.

The post-implementation review will be making an evidence-based assessment of the removal of private family law proceedings from the scope of legal aid and the introduction of the domestic violence evidence gateway. The impact of subsequent changes to the legislation will also be assessed.

We are committed to giving family courts the power to stop unrepresented perpetrators of abuse cross-examining their victims in family proceedings. We are currently considering the appropriate way to take this forward.

8. ***The Ministry of Justice's review of LASPO must examine the reasons for the low uptake of ECF in private family law cases, the impact of this on families' abilities to secure effective access to justice, and whether the Courts are able to act consistently in the best interest of children, when individuals are not represented.***

We want to make sure the family justice system puts the interests of children first and minimises the distress that separation causes for families. The review will assess the impact of the ECF scheme against its objectives and estimates outlined prior to its introduction in the contemporary impact assessment. During the evidence gathering phase of the review we have listened to views about the ECF scheme from a wide variety of interested parties.

9. **While inquests are theoretically inquisitorial, in practice they often have a more adversarial nature. It is extremely difficult for families of the deceased to participate effectively without legal representation, leading to inequality of arms and consequent concerns about fairness, access to justice and compliance with the procedural requirements of Article 2 ECHR. *If inquests are to remain inquisitorial, families must be given non-means tested funding for legal representation at inquests where the state has separate representation for one or more interested persons. Consideration should be given as to funding***

models that might be employed, such as whether there should be a requirement on public bodies to pay a proportion of their own legal costs to fund families' representation.

The Government is also currently reviewing the provision of legal aid for inquests. The review will look at the existing scope and eligibility criteria for inquests. As part of the evidence gathering process, the Ministry of Justice has been working in collaboration with senior coroners, representatives from the legal profession and other key stakeholders. The Department has also held a call for evidence to which members of the public were invited to respond. The Department will consider the responses, and any prospective changes to policy will be presented subsequently in a public consultation. The review will be published later this year, alongside the post-implementation review of LASPO.

As well as the work on legal aid, we are progressing other work to help ensure that inquests are always inquisitorial, as they should be, and more sensitive to the needs of bereaved families. There are several work strands which include:

- Engaging with the Bar Standards Board and the Solicitors Regulation Authority to consider what they might do to ensure that lawyers conduct their advocacy in inquests appropriately;
- Engaging with the Chief Coroner (who is responsible for coroner and coroner's officer training) to develop training to ensure that coroners conduct their inquests in a way that is sensitive to the needs of bereaved people and that they are better equipped to control proceedings and to make sure that coroner's officers engage sensitively with bereaved families;
- Engaging with officials across Whitehall and external stakeholders to consider what more could be done to help make the inquest process inquisitorial rather than adversarial;
- Refreshing the MoJ Guide to Coroner Services to focus it on the needs of bereaved families;
- Preparing to tender to extend support services to every coroner's court in England and Wales.

10. We share the concerns of many of our witnesses that the pressures caused by the reforms to legal aid are having a severe impact on legal aid professionals, damaging morale and undermining the legal profession's ability to undertake legal aid work, leading to consequent grave concerns for access to justice, the rule of law and enforcement of human rights in the UK.

The primary aim of legal aid is to ensure adequate provision is in place across the country to assist the most vulnerable. We are committed to ensuring that is the case in a way that is accessible to a variety of people – be it face to face, on the telephone or online. In the recent re-tender of the face-to-face contracts, the LAA received tenders from more than 1,700 organisations wishing to deliver face-to-face civil legal aid work. These organisations submitted over 4,300 individual bids. The LAA frequently reviews market capacity to make sure there is adequate provision around the country, and moves quickly to ensure provision where gaps may appear.

Independence of the judiciary

11. In our view, Government Ministers should be restrained in their reaction to court judgments, bearing in mind that in cases where they are a party, they can exercise appeal rights and that they can seek to change the law.

We support the Committee's conclusion which, as it acknowledged in the body of the report, is consistent with the Government's position. We would like to emphasise that restraint in making comment is not limited to cases where the Government is a party, but should be exercised in respect of any judicial decision.

12. We are sympathetic to the argument that extending the duties within the Constitutional Reform Act 2005 to cover all Ministers may have the effect of diluting those duties. Nonetheless, we consider that the Government as whole needs to be more proactive in its defence of the independence of the judiciary. The Lord Chancellor has a duty to have regard to the need to defend the independence of the judiciary. *We recommend that the Government consider amending the Ministerial Code to reinforce the duties on Ministers to uphold the independence of the judiciary, whilst retaining the specific role for the Lord Chancellor in defending the judiciary.*

We will take this under consideration, however, as the Committee recognised, section 3(1) of the Constitutional Reform Act 2005 already places a duty on all Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice, to uphold the continued independence of the judiciary. The Ministerial Code which is to be read against the background of the overarching duty on Ministers to comply with the law (1.3 Ministerial Code), alongside the statutory provisions and the Cabinet Manual, all require Ministers to comply with their statutory duty to uphold judicial independence.

Independence of the legal profession

13. The Government must create a positive environment in which lawyers are not impeded from bringing human rights cases against the Government. Lawyers should not be criticised because they represent 'unpopular' clients in human rights claims. Where there are concerns about lawyers' conduct, the proper disciplinary channels should be used, and the Government should not seek to abuse their position to influence, intimidate or interfere in that process.

The Government fully respects the constitutional principle of the rule of law and the independence of the legal profession, as well as the independence of our judiciary, courts and tribunals. We acknowledge the important and independent role that the legal services regulators play in upholding standards in the profession, and we would not seek to influence, intimidate or interfere in disciplinary proceedings.

The Equality and Human Rights Commission and other UK National Human Rights Institutions

14. It is difficult to understand why the EHRC should have weaker enforcement powers as concerns human rights violations than equality matters. The EHRC's inability to bring cases on purely human rights grounds severely restricts its effectiveness. *We therefore recommend that the Government harmonise the Commission's enforcement powers in line with its powers in relation to equality,*

so that it can undertake investigations into named bodies for possible breaches of the Human Rights Act and provide legal assistance to individuals in Human Rights Act cases.

15. ***The Commissions have the potential to play a more significant role in the enforcement of human rights. If they are given the necessary powers and use them assertively, then there is a case for their budgets to be increased to at least partially reverse the impact of the funding reductions they have experienced. This additional cost would be offset to some extent by a reduction in legal costs as fewer individual cases would reach the Courts. At the same time, if they are to play a more significant role then greater scrutiny of their work by their respective Parliament or Administrations would be appropriate.***

As part of the Cabinet Office's review of all arms-length bodies, the EHRC has recently been subject to a Tailored Review, which will be published shortly. The Review considered how best the Commission can deliver its statutory obligations, the broader issue of independence, as well as reviewing the powers available to the Commission more widely, and whether they remain appropriate. The Women and Equalities Select Committee has also launched an inquiry into Enforcing the Equality Act: the law and the role of the EHRC. The Government will consider the evidence and recommendations in both reports once they are published to inform whether changes need to be made to EHRC enforcement powers.

The UK Government is fully committed to facilitating the ongoing work of the Northern Ireland Human Rights Commission (NIHRC), which is sponsored by the Northern Ireland Office, and ensuring that it is appropriately funded so that they can perform their statutory functions.

This strong commitment to the work of the NIHRC has been reconfirmed in the context of the UK exiting the European Union (EU), with the Government specifically committing to facilitating the ongoing work of the Northern Ireland Human Rights Commission, as an institution established under the Belfast Agreement, consistent with the obligation to ensure no diminution of rights in Northern Ireland resulting from exiting the EU. Questions on the NIHRC's future resource requirements in light of additional work emerging from exiting the EU will be considered as part of the normal Spending Review process.

The Scottish Human Rights Commission was established under the Scottish Commission for Human Rights Act 2006 and is the responsibility of the Scottish Government.

The need for a culture of human rights

16. ***Media organisations and commentators should be accurate in their reporting of human rights cases. Where reporting is inaccurate, corrections should be published with the same due prominence as the original article.***

The media plays an important role in our cultural and democratic life; scrutinising public institutions, including the justice system, and in defending human rights by holding the Government to account where rights are abused or curtailed. The media facilitates an understanding of the importance of human rights among the general public through its reporting of human rights cases and government activities. It is crucial that justice is not only done, but seen to be done.

The Government is committed to a free and independent press, and does not interfere in editorial decisions, including the prominence of corrections. Independent media regulators such as Ofcom and the press self-regulator the Independent Press Standards Organisation (IPSO), provide rules for editors to follow, on many topics, including accuracy. Section 5 of the Ofcom Broadcasting Code, for example, sets out rules on due impartiality, due accuracy, and undue prominence of views and opinions, and sets out guidelines on the prominence of corrections where broadcasters have breached these rules. IPSO's Editors' Code of Practice also provides guidelines on accuracy and due prominence and editors are encouraged to correct inaccuracies promptly and with sufficient prominence in order to comply with the requirements of the code. The public can complain to the appropriate regulator if they believe a media outlet has broken with the relevant code.

Whilst the Government recognises that the current system is not perfect, we believe it is vital to the protection of freedom of speech that the Government does not interfere with regulation of the media.

17. **Government, NHRIs and human rights advocates should seek ways of engaging more effectively with the public about how different human rights are balanced, in order to address the perspectives that human rights are "for others and not for us" and that "political correctness" stifles debate. The Government should consider the introduction of a legal test to ensure that claims of conscience and faith are reasonably accommodated within the human rights framework. The rights of minority groups will always be vulnerable, and the acid test of an effective human rights system is that it must protect these groups, while ensuring the rights of the majority are also respected**.

The Government considers that the UK human rights framework ensures that the rights, including the right to freedom of belief, of different groups in society, including minority groups, are upheld. The following rights are particularly relevant:

Article 9 ECHR as set out in the Human Rights Act 1998 (HRA) protects the right to freedom of thought, conscience and religion. The right to hold a belief and to change one's religion or belief is absolute, and cannot be interfered with. Article 9 also provides that the freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The freedom to manifest one's religion or belief is therefore a 'qualified' right, recognising explicitly the need to respect the rights of others and the broader needs of society. The domestic and international human rights framework recognises that not all rights are absolute and that an individual's rights may need to be balanced, either against the rights of others or against the wider public interest. Many of the Convention rights given further effect by the HRA are such rights.

In addition, Article 14 ECHR as set out in the HRA provides that the enjoyment of the Convention rights shall be secured without discrimination on grounds which include race, colour, language, religion, political and other opinion, national or social origin or association with a national minority.

In light of this we do not consider that a new test of reasonable accommodation is necessary, and indeed it could lead to unintended consequences. We note that this was

also the conclusion reached by the EHRC in their 2016 report 'Religion or Belief: is the law working?' which looked at whether Great Britain's equality and human rights legal framework sufficiently protects individuals with a religion or belief.

18. Public authorities are under a duty to act compatibly with the Human Rights Act (s.6), including in administrative decision making. However, as the case of the Windrush generation detainees demonstrates, this is does not always happen. Public authorities must comply with their duty under s.6 of the Human Rights Act in order to prevent breaches of individuals' human rights.

Section 6 of the HRA makes it unlawful for a public authority to act in a way that is incompatible with a Convention right (unless they are required to do so by primary legislation). An 'act' for the purposes of section 6 includes a failure to act. The Government takes its duties under section 6 seriously.

Section 7 of the HRA provides that a person who claims that a public authority has acted (or proposes to act) in a way that is made unlawful by section 6 may bring proceedings against a public authority under the HRA, or rely on the Convention rights in any legal proceedings, if they are (or would be) a victim of an act that is incompatible with a Convention right. Under section 8 of the HRA, if a court finds that a public authority has acted in a way that is incompatible with a Convention right, it can award any remedy within its power that it considers to be just and appropriate.

We note the Committee's report on Windrush detention and the Government will respond on this in due course.

19. *We recommend that the Government should include comprehensive coverage of human rights across the curriculum at all key stages.*

Citizenship is a compulsory subject in maintained secondary schools (key stages 3 and 4). The new programme of study ensures that teaching is directed towards the core knowledge of citizenship, helping to prepare pupils to play a full and active part in society. The revised programmes of study, which have been taught from September 2014 ensure that teaching is directed towards the core knowledge of citizenship: how our society is governed, rather than the more issues-based content, which dominated the previous programmes of study. At key stage 3 pupils are taught about the nature of rules and laws and the justice system, including the role of the police and the operation of courts and tribunals and at key stage 4 pupils are taught about human rights and international law and the legal system in the UK, different sources of law and how the law helps society deal with complex problems.

The national curriculum was comprehensively reformed and published in final form in 2013. In April 2018, the Secretary of State for Education committed to making no further reforms to the national curriculum in this parliament. The national curriculum outlines the body of essential knowledge that must be taught in maintained schools; this essential knowledge should not change significantly over time. However, schools are free to build on the content set out in the national curriculum and can include additional teaching on human rights should they wish to.

20. *In July 2017, the Solicitor General launched a Public Legal Education panel to support and drive forward legal education initiatives. We welcome this development and urge the Government to prioritise this work.*

Driving forward Public Legal Education is a priority for the Law Officers, and provides people with vital awareness, knowledge and understanding of their rights and the rights of other citizens. Public Legal Education needs coordination, engagement and support. This is why the Solicitor General set up the Public Legal Education panel, formed of leading organisations who promote the importance of teaching people about the law and their basic civil and criminal rights. Bringing together key organisations will mean a more joined up approach to Public Legal Education, ensure that more people can reap the benefits of the good work being done and aid the public understanding of the rule of law. It features members from across the legal community, for example Law for Life, Citizens Advice and the Bar Council. The panel have set up two subgroups, which will meet frequently to drive the work on public legal education forward. The subgroups focus on two aspects of public legal education – engaging and informing people about their rights – which we call Just in Case – and ensuring that people have the skills, knowledge and support at the time of a legal issue – which we call Just in Time. The work of the panel will support the strategic development of Public Legal Education and work to promote best practice in the field, enabling the sector to work together to achieve more than ever before.

The Law Officers are the Government's Pro Bono Champions and they promote Public Legal Education and pro bono work across Government and beyond. In addition to launching the Public Legal Education panel, the Law Officers participate in various events to encourage and support the excellent work being done in this space. The Solicitor has been involved with 'Lawyers in School's' events and multiple 'Streetlaw' sessions. 'Lawyers in Schools' is a fantastic initiative run by the Citizenship Foundation, which places practising and trainee lawyers into the classroom to work with young people to develop their awareness and understanding of the law. The Solicitor General delivered a 'Lawyers in Schools session' to 45 students at Pimlico Academy in December 2017, and lawyers from the Government Legal Department will continue to work with the 13–14 year olds about issues such as consumer law, human rights, police powers and discrimination over the course of the year. The Attorney presents the LawWorks and Attorney General's Student Awards, for pro bono students, annually at an event in Parliament.

21. No one would argue that individuals should not be protected from abuse by the State, that public bodies should be able to act without lawful authority or that torture, slavery and arbitrary detention are defensible. The UK's legal framework allows individuals to protect their rights and gives the courts the task of deciding that balance in individual cases, within the parameters set by Parliament, which include the Human Rights Act. There is legitimate debate over how best to protect rights and where the balance should be struck if rights compete. But no-one should lose sight of the fact that enforceable rights, and the ability to enforce them, are the hallmarks of a civilised country. Government, Parliament, the media and the legal profession all have a responsibility to consider the importance of the rule of law, and the role that rights which can be enforced through an independent court system plays in that.

As stated above, the UK has a long tradition of protecting rights and liberties domestically and of meeting our international human rights obligations. The Government continues fully to abide by the principle of the rule of law as one of the pillars of the UK constitution. The freedoms and protections that we all enjoy are built on the principle of the rule of law, which, together with the independence of the judiciary, forms the bedrock of a free and democratic society.

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