

*Ensuring access to a lawyer  
and access to legal aid:  
Issues of concern in England and Wales*

John Wadham  
General Counsel  
Equality and Human Rights Commission

# Structure of presentation

- The Equality and Human Rights Commission
- How human rights and EU law are relevant to civil justice rights
- The legal aid system in England and Wales
- Changes to civil and family legal aid
- Threats to ECHR rights
- Alternatives to legal aid?

# Equality and Human Rights Commission

- Category 'A' National Human Rights Institution
- Equality Act 2006 sets out domestic remit, which includes:
  - S8(1) - promote equality/tackle discrimination
  - S9(1) - duty to promote human rights (*ECHR and other human rights instruments*)
  - S16 - power to conduct formal inquiries
  - S30 - power to bring own-name cases
- Remit: England & Wales; Scotland (partly)

# How human rights instruments support access to civil law justice

- Article 6(1)/Art 13, European Convention on Human Rights
- Article 8, Universal Declaration of Human Rights
- Article 2(3) International Covenant on Civil and Political Rights
- Article 13 UN Convention on the Rights of Persons with Disabilities
- Article 6 International Convention on the Elimination of all forms of Racial Discrimination
- Article 2(c) Convention on the Elimination of all forms of Discrimination against Women

# Access to civil law justice: EU law

- European Union Directives - many require Member States to provide effective remedies
- Charter of Fundamental Rights of the EU:
  - Article 47 requires legal aid to be made available to those without sufficient resources (for matters within the EU's competence)
- The Aarhus Convention: under third pillar, Article 9 requires states to provide access to court which is 'not prohibitively expensive'

# Legal aid in England and Wales

- Total expenditure 2011-2012 was nearly £2.1 billion, of which.....
- ...over half (£1.1 billion) was spent on criminal legal aid and .....
- ...remainder (£977 million) on legal aid for civil and family cases
- Legal aid is administered by Legal Services Commission, an arms-length statutory body
- Most legal aid services delivered through contracts with private law firms

## 'Why is so much spent on legal aid?'

- Difficulties of international comparison because of structural differences in justice systems (eg inquisitorial vs adversarial)
- A recent international study suggests higher cost per capita in England/Wales because:
  - high volume of crime in England and Wales
  - high proportion of criminal cases brought to court (cf other European jurisdictions)
  - higher proportion of defendants getting legal aid.
- In England and Wales, spending on the courts is less than in comparable jurisdictions

# Criminal legal aid

- Criminal legal aid budget is largely demanded (to comply with Article 6(3)(c) ECHR)
- Defendants who qualify (NB means test and 'interests of justice' test) are entitled to legal advice and representation in court
- Free advice (no means test!) for suspects held at police stations - usually by telephone
- Proposals for competitive tendering of criminal legal aid contracts raise concerns about future impact on quality and supply

## Civil and family legal aid

- Delivered through contracts with private law firms, law centres and advice centres; also first stage advice from central helpline
- Providers contracted to give initial advice have a fixed allocation of new cases, with fixed fees payable for their work
- For representation in court, providers have to apply for legal aid on case-by-case basis
- Dramatic cuts in scope from April 2013 - Legal Aid, Sentencing and Punishment of Offenders Act 2012.

# Changes to civil and family legal aid

- Areas of law raising fundamental human rights issues will remain in scope:
  - Eg, asylum cases; cases involving detention (mental health and immigration); domestic violence; discrimination; housing or debt cases where someone's home is at risk.
- But legal aid no longer available for (eg):
  - Other housing or debt cases, non-detention immigration cases, family cases not involving domestic violence, welfare benefits (apart from tribunal appeals), employment disputes
- Also - tougher rules for means-testing

# Exceptional funding scheme

- Cases in 'out of scope' categories may still raise fundamental human rights issues
- The new legislation allows exceptional funding for certain cases normally out of scope
- Criteria for exception funding will be published as Government guidance
- Still unclear how the exceptional funding scheme will operate
- Lawyers will take financial risk if they help clients prepare applications for exceptional funding

# Mandatory telephone gateway

- Face-to-face advice will be difficult/ impossible to access without using phone gateway first
- Unqualified first tier advisers will rely on scripts
- Initially (from April 2013) for three areas of law: special educational needs, debt where home is at risk, discrimination
- Government plans to extend gateway to most areas of civil law in future
- Potential barriers for clients with poor mental health, learning or cognitive impairments

# Closer government control?

- Legal Services Commission will be replaced by an Executive Agency (linked to Ministry of Justice)
- The new Agency will be led by a Director of Legal Aid - a senior civil servant
- Questions have been raised about the Agency's operational independence
- Particular concerns about funding for cases that challenge the government

# Threats to ECHR rights?

- The legal aid reforms could adversely affect:
  - People seeking to pursue or defend 'civil rights and obligations' (Article 6(1))
  - People whose cases engage other fundamental rights under ECHR
- Exceptional funding scheme: can people find a lawyer/adviser willing to prepare an application, without guarantee of payment?
- Excluded areas of law won't have legal aid contracts: how can clients overcome this barrier to get first-stage advice?

# Alternatives to legal aid funding?

- Pro bono advice and representation
- Sources of charitable funding for advice
- Funding from EHRC (s28 Equality Act 2006)
- Introducing a Contingency Legal Aid Fund (CLAF) supported by a percentage of damages from successful cases?
- Introducing a scheme for funding from interest on lawyers' trust accounts (IOLTA)?
- Voluntary surcharge on clients' bills?