

Response to Access to Justice Review (2)

The Agenda

1. Introduction

Housing Rights Service was established in 1964 and is the leading provider of independent specialist housing advice services in Northern Ireland. We work to improve lives by tackling homelessness and housing problems in Northern Ireland. Our policy work is based on the experience of our clients. Our services are delivered throughout Northern Ireland and focus on the key areas of preventing homelessness; accessing accommodation; and tackling affordability and poor housing conditions.

2. Summary

Access to justice is widely accepted as a cornerstone of democracy and a vital ingredient in protecting weak and vulnerable citizens. Housing Rights Service (HRS) therefore welcomes the opportunity of responding to this consultation paper. As a voluntary sector organisation which provides legal aid services and contributed to the consultation on the Access to Justice Review (1), we have a number of particular concerns which are detailed in this response. Given the nature of our work, our comments are largely confined to the area of civil legal services.

In general, we welcome adopting a more strategic approach to ensuring access to justice that continues to be based on publicly funded legal representation but which could also involve a greater emphasis on self-help and the use of alternative dispute resolution (ADR) and 'unbundling' techniques. However we have concerns about the apparent de-prioritisation of housing matters within the proposed scope of legal aid as we believe all housing issues should be covered subject to the usual tests. In addition, we believe homeless people and others threatened with homelessness should be regarded as a client category with legal needs due to the particular problems they face in accessing legal information and advice. The particular needs of these client groups should be considered by the review team together with the needs of children and young people; people with disabilities; and older people.

HRS believes judicial review should remain within the scope of legal aid as it is a vital mechanism that allows citizens to challenge the lawfulness of a decision or action made by a public body. We would also wish to see consideration given to extending tribunals into the area of housing law. In addition, we believe legal aid should be available on merit for pre-hearings and for help at certain tribunal hearings (including representation at hearings provided by advisers with expert knowledge). Generally, Housing Rights Service argues there is scope for better partnership working between voluntary, statutory and private sector advice providers and would support a mixed model of delivery for publicly funded legal services in Northern Ireland.

3. Context and Strategic Approach

This second review is intended to deliver against a vision for public legal services which is about helping people to solve their legal problems, often outside the formal Court process, and providing a wider choice in the sourcing of publicly funded legal help available to those in need. The economic crisis has created many difficulties for people in Northern Ireland including our clients, particularly in regard to growing levels of homelessness and debt. This has resulted in more people relying on legal aid and advice services, often in regard to complex issues such as negative equity and repossessions. In this age of austerity, any moves to reduce access to justice and legal assistance will have pervasive consequences for our society as a whole and for our client base in particular.

Housing Rights Service supports the case, presented in the foreword to the consultation document that access to justice should be “as part of a commitment to human rights, to protecting the vulnerable and to upholding the rule of law.”¹ This is equally applicable to both criminal and civil law. People living in poverty and housing stress are less able to access justice than others. Access to justice is therefore needed for people in order to protect and defend their human rights.

We therefore welcome the reference to a number of human rights instruments in para 3.8, such as Articles 6 and 8 of the European Convention of Human Rights (ECHR), and the commitment to identify in the final report relevant human rights norms and associated case law. Article 6 has been incorporated into UK law by virtue of the Human Rights Act 1998 and, although the right to a fair trial is most often referred to with respect to persons charged with criminal offences, the right equally applies to citizens seeking to assert their civil rights. The commitment to adhering to the requirements of section 75 and 76 of the Northern Ireland Act 1998 is also noteworthy alongside the inclusion of the UN Convention on the Rights of People with Disabilities (UNCPRD) which was omitted in the first review consultation document.

In regard to the highlighting of those priority areas of law and legal process that could attract public funding (para 3.10), we are pleased to see the references to homelessness as an immediate risk; vulnerability and where the interests of children are particularly affected. We also welcome the strategic approach adopted in this review to start from a ‘zero base’ and the emphasis placed on considering whether different and innovative ways can be employed to deliver legal services and advice in partnership with public, private and voluntary sectors. The examination of approaches such as the use of mediation and ADR is noteworthy in this respect and was highlighted in our response to Access to Justice (1).

Sustaining the quality of provision is of paramount importance to Housing Rights Service. In our opinion, rigorous quality assurance should apply to all providers (i.e. voluntary, statutory and private). The effectiveness of this can be dependent on the particular quality standard. For example, Investors in People (IIP) is a useful quality indicator but is not directly linked to advice outcomes. LEXCEL, however, is much more comprehensive and incorporates elements of IIP and Customer Service Excellence (CSE) while also covering organisational structures and policies.

In regard to the section dealing with Family and Children, we would emphasise the importance of private family law in maintaining the family home and preventing homelessness. We note that family ADR and mediation is funded out of legal aid in England and Wales with a mandatory requirement for Mediation Information and assessment Meetings (MIAMS). We believe, given the importance to society of cohesive family relationships, private family law court proceedings should remain in scope (Q13). We would contend that if a fundamental review of family justice is to take place in Northern Ireland, including the consideration of establishing a unified family court, then it should also consider the synergy between housing and family law.

4. Administrative Law

In regard to the three elements of administrative law – tribunals, ombudsmen and judicial reviews, we argued in Access to Justice (1) that legal aid should be available on merit for pre-hearing and for

¹ Access to Justice Review (2) – The Agenda. P1

help at certain tribunal hearings (including representation at hearings provided by advisers with expert knowledge). Apart from the Appeals Service for Housing Benefit cases, there is no tribunal for housing cases. We would wish to see consideration given to extending tribunals into the area of housing law.

In Scotland, a tribunal for the Private Rented Sector has been agreed and the Scottish Tribunals Service (STS) administers the Private Rented Housing Panel (PRHP), first established in 2007. If a tenant's home fails a certain standard of repair and the landlord refuses to carry out the necessary work, the tenant can apply to the PRHP. If the panel thinks there is a case, they will pass the application to the Private Rented Housing Committee (PRHC). The Committee will look into the issue and, if necessary, order the landlord to carry out the repairs. Once a repairs application has been made, parties can opt to choose mediation to resolve the dispute instead of the Committee. This particular model was considered at a recent conference organised by HRS on 6 November 2014 when a presentation from the current President of the PRHP, Aileen Devanny, attracted much interest. We believe that our clients could benefit by being able to access this system of administrative law. Legal representation could also be supported at other complex proceedings such as social security appeals; and immigration, mental health review and SENDIST tribunals (Q23).²

With regard to the role of the Northern Ireland Ombudsman (and Commissioner for Complaints), Housing Rights Service has significant experience of using this form of redress to help resolve clients' cases. In the main, the service is effective although we have experienced some serious delays before matters have been resolved. Whilst we support the work of this office it is important, as with any redress body, that it is adequately resourced to deal with the level of complaints received (Q24).

HRS believes judicial review should remain within the scope of legal aid and would not propose any changes to the current system (Q25). As noted by Lord Neuberger, president of the Supreme Court, "Any attack on judicial review, or any attempt to limit it, has to be looked at very critically. Judicial review is increasingly essential if we have an increasingly powerful executive. It is an irritant to the executive but it is a very important, fundamental control on the executive. And the fact that members of the executive know they are subject to judicial review helps ensure that they carry out their job properly."³

It is difficult to disentangle public and personal benefit considerations in determining whether a case qualifies for legal aid. However we would welcome the commissioning of research into the grounds and outcomes of judicial review cases in Northern Ireland and how they can be used by public authorities to secure improvements and improved decision-making processes (Q26).

In regard to injunctions, HRS is unable to comment due to the lack of detail provided in the consultation document on the types of cases involved. We would welcome further information from the Department before any major changes are introduced for injunctive relief (Q27).

We note the list of matters as set out in para 6.19 that have been retained in scope for full legal aid in England and Wales although we would highlight that all aspects of landlord and tenant law are in scope in Scotland. Be that as it may, we would like to see claims and appeals relating to

² England & Wales has retained SENDIST cases within the scope of legal aid

³ Judicial review is increasingly essential, judges warn government. Guardian 13 February 2013.

<http://www.theguardian.com/law/2013/feb/13/judicial-review-judges-supreme-court> accessed 02/12/14

homelessness included as a priority category (Q28) and fewer matters removed from scope, particularly social security appeals, debt and welfare benefits.

In comparison, the only proceedings for which legal aid is not available in Scotland include:

- defamation proceedings
- election petitions
- simplified divorce applications
- small claim processes at first instance
- petitions by a debtor for his own sequestration.⁴

In general, we believe all housing matters should be covered by legal aid, subject to the usual tests. We note that under the proposed scheme the ruling by Judge Horner in August 2013 which found the allocation of a number of properties by St Matthew's Housing Association in Belfast to be unlawful and "not fair or equitable" would have been considered out of scope.⁵ As a consequence of Justice Horner's decision the Northern Ireland Housing Executive (NIHE) has introduced additional Selection Scheme Rules for the allocation of social housing. We also believe legal aid should continue to be available for advice and representation on mortgage debt on a case by case basis.

In addition, we believe homeless people and those at risk of homelessness should also be prioritised as a client category with legal needs (Q32) due to the particular problems they face in accessing legal information and advice. The legal needs of this client group should be considered by the review team together with the needs of children and young people; people with disabilities; and older people.

5. Advice and Assistance

Housing Rights Service would like to emphasise the importance of early intervention and casework funded by legal aid. We note the reference to our work and advisers in paras 7.5 and 8.10, in particular:

"The (HRS) advisers, employed because of their expertise rather than because they are lawyers, appeared regularly before the Chancery Judge and Master and were well received and respected, securing positive outcomes and avoiding repossession in a number of cases, often through negotiation."⁶

This service now covers all county court division through funding provided by the Department. Housing Rights Service has developed considerable expertise in Northern Ireland housing law, policy and practice since its establishment in 1964. We deliver specialist advice to the public and other advice agencies in a range of ways. We constantly review and develop our methods of delivery to ensure services are developed in effective, value for money, sustainable ways and that our services impact across all of Northern Ireland. We employ in house solicitors, as well as specialist advisers, who provide advice on a range of matters relating to social housing, privately rented accommodation, housing conditions, housing benefit, homelessness and housing debt. We also

⁴ Civil Legal Assistance Handbook, January 2011. SLAB. Part II of Schedule 2 to the Scottish Legal Aid Act (1986) and associated legislation

⁵ Application by JT for judicial review. [2013] NIQB 89 NIQB 2. Ref HOR8876. 15 August 2013

⁶ Op cit 1, P43

provide advice, advocacy and representation on complex matters such as homelessness review and appeal procedures, defending possession actions at court and taking forward judicial review proceedings. We believe we are better placed than many private law firms to offer advice on housing and housing debt.

HRS also works closely with other frontline agencies to assist in the delivery of comprehensive housing advice. To achieve this, a number of our services are delivered using a triage system. The Community Housing Advice Partnership (CHAP) is a particularly good example. Established in 2003, the CHAP model has formal partnerships and referral arrangements between Housing Rights Service and 24 advice agencies (through the AdviceNI and Citizens Advice networks) as well as NIHE (in relation to private rented sector enquiries). This delivery model has a coverage of two thirds of all housing enquires received by the voluntary and community sector in Northern Ireland.

Additionally, HRS has other referral links to private practice, statutory sector and to non- advice agencies (e.g. counselling, drugs / alcohol support services, relationship mediation services etc). This helps us to respond to the holistic nature of clients' problems. By having such arrangements in place, we are well placed to accept and make appropriate referrals for support and assistance while not diluting our housing law specialism.

Housing Rights Service believes that voluntary advice providers are well placed to offer advice on social welfare law at both a generalist and specialist level and we agree the provision of advice and assistance should be integrated as part of the emerging Advice Services Strategy in Northern Ireland (Q33).

Although we believe the 'Green Form Scheme' needs to be reviewed as part of the overall advice services strategy, we would nevertheless highlight its effectiveness in addressing client issues particularly in the voluntary sector and believe it should be retained (Q34). We believe great care needs to be taken on remodelling this scheme and we would be concerned if direct access to a solicitor for advice and assistance under legal aid would be removed for many of the matters listed in Table 5. Generally we would argue it is a relatively cost effective scheme with 10,000-15,000 instances of advice provided at a cost to the legal aid fund of only £1-2m in 2013/14. We note that in this period 417 housing-related matters were dealt with at a cost of £28,234 – an average of only £68 per case.

6. Delivery Models

Housing Rights Service agrees there is scope for better partnership working between voluntary, statutory and private sector advice providers and would support a mixed model for service delivery (Q35). Housing Rights Service is supportive of the procurement strategy approach and the funding model for civil legal services of grants as opposed to contracts. This, we believe, will enable more effective targeting of publically funded legal services to people most in need.

We believe our model of providing expert advice on housing law could be adapted for use in other contexts where court representation is required. When considering how best to deliver advice services in the future, we feel it is important to build upon the structures and referral mechanisms that exist currently, such as the Law Society's waiver system, to complement and not duplicate service provision. We are nevertheless impressed by the approach taken by the Scottish Legal Aid

Board to supporting advice initiatives during the recession and believe that services such as ADR could be best suited to this type of grant provision (Q35, 36, 37 & 38).

The document also refers to the role of telephone advice, operating within the same type of funding model as that in England and Wales. In principle we have no objection to the concept of single gateway to access welfare advice, although such a system should not simply add an additional layer to the current structure. This could be the case, for example, if the service simply offered signposting to other sources of advice. In general, we are in favour of providing clients with a menu of different options in regard to how they access advice. If a single gateway was however to be the preferred approach to advice delivery, a number of issues would need to be addressed including ensuring the quality of advice. We are sceptical about the effectiveness of pro-bono and self-help online tools to significantly improve the delivery of advice outside the legal aid system however we would be interested in receiving further information on such delivery models (Q40 & 41).

Generally Housing Rights Service supports client choice. We believe that when deciding on the most effective models for delivery, the primary consideration must be what system would help to achieve the best outcomes for clients. It will therefore be vital to involve key stakeholders in deliberations to help formulate any new service delivery models and to agree timing and transition requirements.

7. Future Strategic Approaches

In general, we welcome adopting a more strategic approach to access to justice that continues to be based on publicly funded legal representation but which could also involve a greater emphasis on self-help and the use of 'unbundling' techniques. The elements of such a strategy, as detailed in para 8.20, are all worthy of further consideration (Q43).

Throughout the consultation document many references are made to the greater adoption of ADR techniques such as mediation. Although ADR is relatively under developed in Northern Ireland compared to many other jurisdictions, Housing Rights Service believes it could be the preferred approach in a number of cases. We are however of the opinion that ADR is not always appropriate, particularly in cases involving disputes regarding clear entitlements to social security benefits and homelessness support. Nevertheless we believe ADR could be particularly beneficial in helping to resolve landlord/tenant disputes, both in the private rented and social housing sectors, as well as in mortgage/secured loan lender and borrower cases. It should be noted that the Tenancy Deposit Schemes Regulations (Northern Ireland) 2012⁷ created a statutory dispute resolution scheme for the protection of tenancy deposits and resolving any disputes regarding their return to private tenants.

In the future delivery of legally aided services, HRS is of the opinion that advice should be free at the initial point of delivery and means tested thereafter (if follow up work is required). We also believe that it is not practical to apply means testing in an emergency situation. This viewpoint comes from our experience of providing an 'in situ' court representation service for debt related possession proceedings.

Housing Rights Service believes that further information is required on the successor body (Legal Aid Agency) to the Legal Services Commission and how this reorganisation can be achieved within any

⁷ The Tenancy Deposit Schemes Regulations (Northern Ireland) 2012. Part 6
<http://www.legislation.gov.uk/nisr/2012/373/contents/made> accessed 18/11/14

new strategic approach to service provision. Equal priority should be given to civil and criminal justice by this new body and responsibility for developing policy must be clear and transparent. We believe that, through the experience of its front line services, the advice sector has a role to play in the evolution of this new body and it is important that the new agency establishes a conduit to facilitate the input to policy development by voluntary advice providers.

Housing Rights Service supports the proposal for a Civil Justice Council (or a similar body to achieve the same objectives in Northern Ireland) and we believe its membership should go beyond the legal profession and judiciary and include representation from key stakeholders including consumers, voluntary organisations and legal aid providers. It should have responsibility for overseeing and co-ordinating the modernisation of the civil justice system in Northern Ireland.

8. Further information

Housing Rights Service will be pleased to provide additional information in support of this response and would welcome opportunities to further engage in future working groups and/or piloting initiatives.

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