Chapter 1

Access to Justice

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10	Introduction – Laura Hilly
12	New Employment Tribunal Fees and Discrimination: UNISON v Lord Chancellor; Equality and Human Rights Commission
13	The Impact of Fees in the Tribunal
13	A European Right to Legal Aid?
15	The Irrelevance of Residence: The Unlawful 'Residence Test' for Legal Aid
16	Cutting Corners: The Procedural Illegality of Legal Aid Cuts
17	Presumptive Costs Orders: A Threat to Public Interest Interventions
19	Public Interest Lawyering in Times of Austerity
20	Clinical Legal Education as an Access to Justice Innovation
21	Valuing the Work of Community Lawyers' to Resolve Systemic Problems – The Productivity Commission Report on Access to Justice Arrangements in Australia

Access to Justice
Chapter 1

Introduction
By Laura Hilly

Access to justice is the cornerstone of any fair and equitable legal system. As Sir Bob Hepple in his post ‘The Equality Agenda in 2015’ contained in Chapter 11 of this anthology (p 210) emphasises: “This year marks the 800th anniversary of Magna Carta, so it is not inappropriate to recall clause 40 (still on the statute book), which states: “To no one will we sell, to no one will we refuse or delay, right or justice.”” But writing on the second anniversary of the introduction of sweeping cuts to civil legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LAPOS’), in the wake of debilitating fee hikes in UK employment tribunals and an ongoing diminution of criminal legal aid, it is reasonable to ask what price are we all now paying for these ‘reforms’ of access to justice in England and Wales? While some of the proposed reforms highlighted in this chapter ultimately failed to make it onto the statute books (for example, the proposed presumptive cost orders to burden amicus interveners: see Daniel McCredden ‘Presumptive Cost Orders: A Threat to Public Interest Interventions’ p 17) most of them succeeded in being enacted. And with the re-election of the Conservative Party to Government in May 2015, many of these cuts are here to stay.

Michael Ford’s posts (‘New Employment Tribunal Fees and Discrimination: UNISON v Lord Chancellor; Equality and Human Rights Commission’ p 12 and ‘The Impact of Tribunal Fees’ p 13) chart the unsuccessful judicial review applications brought by UNISON in response to the introduction of a new fee regime in the employment tribunal and employment appeals tribunal. Since the introduction of the new fee regime there has been a dramatic drop in employment tribunal filings, particularly in small claims and sex discrimination claims (down a staggering 91%). This is clearly not because equality in the workplace has magically been realised in the 12 month period since the fees began, but rather because the fees pose an unsurmountable hurdle for many would-be claimants that might bring such claims.

There has been some limited success in challenging LAPOS in the courts. In Gudanaviciene & Ors v Director of Legal Aid Casework & Anor [2014] EWHC 1840 (Admin), the applicants sought judicial review of the Lord Chancellor’s guidance issued on how the ‘Exceptional Case Funding’ scheme, established under LAPOS particularly for civil claims, was to be administered. The guidance set an extraordinarily high threshold for eligibility, only for ‘those rare cases where it cannot be said with certainty whether the failure to fund would amount to a breach’ of the rights to legal aid afforded under Art 6 of the ECHR, or for EU Nationals, under Art 47(3) of the EU Charter. As Alexander Thompson describes (‘European Legal Aid in a Domestic Framework’ p 13), the court held that the guidance was ultra vires, and importantly recognised a limited right to legal aid is inherent in Art 8 (Right to Respect for Private and Family Life) in addition to Art 6 and Art 47(3) EU Charter.

Another limb of LAPOS – the introduction of a ‘residence test’ to restrict access to legal aid for persons with less than 12 months’ lawful residence – was also the subject of successful judicial review. Daniel Cashman (‘The Irrelevance of Residence: The Unlawful ‘Residence Test’ for Legal Aid’ p 15) gives an account of a unanimous High Court ruling finding the secondary legislation introducing the restriction to be both ultra vires and discriminatory. In respect to the first, the court rejected the Lord Chancellor’s argument that these provisions were intended to restrict legal aid to those who have the greatest need, powerfully stating that “no one can pretend that removing legal aid from non-residents is a means or targeting legal aid to those most in need”. Moreover, the test was held to unlawfully discriminate in cases of equal need between residence and non-residents.

Changes to criminal legal aid have also been subject to judicial review. Daniel Cashman’s post ‘Cutting Corners: The Procedural Illegality of Legal Aid Cuts’ (p 16) explains the High Court ruling in late 2014 that held that the consultation process adopted by the Government in its decision to reduce the number of criminal legal aid contracts was so unfair that it was unlawful. The Government’s decision saw an immediate reduction of 8.75% in criminal legal aid fees and a reduction of the number of available contracts work in police stations and associated work from 1,600 to just 525. These cuts provoked expressions of outrage by the legal community, leading to unprecedented strikes and protest action within the legal profession in late 2014. While the claimants in this case reiterated their profound disagreement with the Government’s restructuring of criminal legal aid, the actual legal argument was more confined. While the Court held that improper consultation processes were engaged in before enacting the changes, Cashman’s post highlights that the court indicated that even a ‘relatively short re-consultation period would be sufficient’, providing little armoury for would be opponents of the substance of the cuts.

While this litigation has clearly served to highlight some of the flaws in the legal aid cuts package, it has not been enough to stand in the way of a government (now with a fresh five year mandate) determined to dismantle a comprehensive publically funded access to justice framework. Litigation has been useful in generating public awareness of the impact of the cuts, but as Thompson perceptively notes: “it must be asked whether it really is more expensive to conduct this kind of satellite human rights litigation, or just to fund the litigant for the hearing in question.”

As an alternative to direct legal challenge, Natasha Holcroft-Emmes, reflecting upon the Oxford Pro Bono Publico 2014 symposium in ‘Public Interest Lawyering in Times of Austerity’ (p 19) highlights the “importance of members of the legal profession taking ownership of this injustice. It is our social responsibility, as advocates of the values of fairness and equality, to take steps to address this inequity.” Gráinne McKeever’s post ‘Clinical Legal Education as an Access to Justice Innovation’ (p 20) provides an inspiring example of how this social responsibility can be realized through innovative clinical legal projects such as the Ulster University’s

LLM in Clinical Legal Education. Programmes such as this are important not only for the immediate access to justice that they provide for clients of the clinic, but also for the sense of social responsibility that they foster in students, encouraging more people to see “poor people’s law” as a noble and necessary area of specialization that should be valued and encouraged.

While most of the posts in this chapter have focused upon the challenges that currently face England and Wales, Liz Curran’s post ‘Valuing the Work of Community Lawyers’ to Resolve Systematic Problems’ (p 21) reminds us that other jurisdictions are also facing similar “fiscal belt tightening” in the age of austerity. In Australia, this environment threatens to undermine the important work of community legal centres: but at what cost? In this post Curran highlights a recent Australia Productivity Commission Report that underscores the value of community legal services in ensuring that access to justice is not just a lofty aspiration for those who need it most (often the people that can least afford legal assistance), but a reality. The post also points to both the overall economic and social gains achieved through the proper funding of public legal services. This kind of long-term, “big picture” and evidence-based thinking by the Australian Productivity Commission is to be welcomed; it demonstrates that the costs in restricting access to justice by curtailing publically funded legal aid may, in the long run, be too much to bear for all.

As legal challenges to many of these reforms have begun to make their way to the courts in the last year, the posts that describe and explain them in this chapter paint a grim picture. While there have been some small moments of success, litigation has done little to dismantle this new and impoverished ‘access to justice’ framework which, as many highlight, dramatically inhibits access to the courts, and does little to safeguard justice.

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New Employment Tribunal Fees and Discrimination: UNISON v Lord Chancellor; Equality and Human Rights Commission

By Michael Ford | 7th February 2014

In R (Unison) v The Lord Chancellor & Anor [2014] EWHC 218 (Admin), the High Court (Moses LJ, Irwin J) an important judicial review proceeding was brought by UNISON to challenge the fees regime introduced in the employment tribunal and EAT. The Court rejected the application but its judgment is interesting for what it says about the effect of fees and for the possibility of a future challenge.

In summary:

1. The judgment refers to errors in the guidance on the fees and the indication from the Lord Chancellor, given in the course of the hearing, that there will now be a presumption that a successful claimant recovers fees (para 15). The rules may be amended in due course.

2. The Court rejected the claim that the Fees Order breached the EU principle of effectiveness but principally on the basis that there was as yet no sufficient evidence on this. It noted that the dramatic fall in claims "may turn out to be powerful evidence to show that the principle of effectiveness, in the fundamentally important realm of discrimination, is being breached by the present regime" (para. 46). The Court referred to the difficulties of proof in discrimination, now exacerbated by the future abolition of the questionnaire procedure, saying that it would expect tribunals to encourage a full exchange of information before the payment of a hearing fee is due. It also noted the low median awards for discrimination and a recent BIS Study in 2013, which concluded there is an even chance individuals who are successful receive payment of their award. Thus (para 29):

   The evidence amply supports the conclusion that the ability to bring discrimination cases is a vital plank in the means of combating discrimination, but the outcome of bringing claims is difficult to predict and the rewards are small, with an even chance of failing successfully to enforce them.

   Despite that, and evidence of the dramatic fall in tribunal claims (about 80% drop on the latest figures), the Court concluded that the hypothetical examples of claimants proposed by UNISON were not yet sufficient to show the principle had been breached.

3. The Court did not consider there was a breach of the principle of equivalence, in particular, because now that the Lord Chancellor had agreed that a successful claimant should recover his or her fees, it could not be said that the regime was

less favourable than comparable County Court claims. Nor was it persuaded that the evidence showed that the public sector equality duty was breached, though it said there may be substance in the argument that the proposals failed properly to take account of the impact on women of bringing discrimination claims (para. 66).

4. The final ground was whether the regime was indirectly discriminatory. Faced with limited evidence on the effect to date and the dispute about it, the Court ultimately decided it could not determine whether there was disparate impact. But after referring to data showing the relatively low income of women and people from ethnic minorities, it said it had “a strong suspicion that there will be some disparate impact on those who fall within a protected class” (para. 84).

5. On that basis the Court considered objective justification. Both UNISON and the EHRC argued that the imposition of fees on claimants alone could not meet this test, particularly in the context of the low level of awards and the “woefully inadequate enforcement system” (para 87). But in the absence of more compelling evidence as to the disparate impact, the Court considered it could not yet determine whether the regime was discriminatory. It made clear, however, that this matter the Lord Chancellor owed a duty to keep the matter under review and to take remedial measures if it is revealed to have a discriminatory effect (para 89).

Michael Ford QC acted for the Equalities and Human Rights Commission, instructed by Rosemary Lloyd.

The Impact of Fees in the Tribunal

By Michael Ford | 22nd September 2014

Fees for bringing claims in the employment tribunal were introduced in August 2013. Since then, the Ministry of Justice’s statistics have revealed a huge decline in the number of claims. The latest statistics continue the depressing trend of early figures, and undermine any argument that the earlier statistics were unreliable.

A comparison of claims accepted for April-June 2014 with those for the same quarter for 2013, prior to the introduction of fees, shows the following:

- An 81% drop in the total of claims accepted, comprised of a 70% drop in single claims and a 85% drop in multiple claims.
- An alarming 91% drop in claims of sex discrimination, confirming the figures from previous quarters, and 75% fewer equal pay claims.
- An unsurprising huge decline in small claims: for example, claims for deduction from wages are down 74% and working time claims are down 90%.

This decline, if anything, greatly under-estimates the deterrent effect of fees. They only show how they impact on the issue of a claim form. Any worker who wants the privilege of a hearing for a discrimination claim, for example, must pay a further fee of £950. No fees are payable by the employer unless it loses the case, and it is then for the worker to enforce non-payment in the County Court – paying another fee.

Matthew Hancock, Minister of State for Education and Business, celebrated the drop in claims. He asserted that it demonstrated the scale of false allegations that had been made against blameless employers. “Unscrupulous workers caused havoc by inundating companies with unfounded claims of mistreatment, discrimination or worse [*sic*]. Like Japanese knotweed, the soaring number of tribunal cases dragged more and more companies into its grip”, the *Daily Telegraph* reported him as saying.

No-one in government seems to have paid any heed to 2013 research for the Department of Business, Innovation and Skills that, of those claimants who *succeed* in the tribunal, only 49% were ever paid in full. The government responded to similar reliable empirical evidence about this problem in the consultation which preceded the introduction of fees by stating that “we expect all parties to abide by the decisions of the tribunal and pay awards and fees as ordered”. No doubt, too, it “expects” employers not to discriminate against their workers because the current fees system means that the risk of a legal claim is minimal.

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Access to Justice
Chapter 1

A European Right to Legal Aid?
By Alexander Thompson | 25th June 2014

A key aspect of the Government's reform agenda regarding civil legal aid is the restriction, set out in Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), of legal aid to certain categories of claim.

In particular, nearly all areas of immigration law work were removed from the eligibility for legal aid. However, since areas such as deportation and extradition clearly involve the potential application of human rights claims, the Act had to provide some means of catering for the limited right to legal aid itself implicit in the European Convention on Human Rights, which would apply wherever the Convention rights came into play. To take an example, where the Home Office makes a decision to deport a foreign national who has committed an offence within the United Kingdom, there will be a hearing before an immigration judge to determine if that decision can be successfully set aside by the individual concerned.

Three questions arise to that extent. The first is whether there is any right to legal aid in respect of that hearing. This would depend on whether Article 6 of the Convention itself applied. However, Article 6 is qualified by its terms which state it only applies in respect of the "determination of civil rights and obligations" or for criminal proceedings. Awkwardly, many areas of public law fit neither into the private law or criminal law paradigms (although the latter is itself a kind of public law). Whether it can be really said that the framers of the Convention intended whole swathes of domestic law to fall outside the scope of Article 6 is moot, at the very least, but the European Court followed that legalist reasoning to its logical end, and held, in Maaouia v France [2000] ECHR 455, that *inter alia* immigration law did not involve the determination of "civil rights and obligations". Any procedural right to legal aid under Article 6 was therefore itself moot, since the Article could never substantively apply to the hearing at all.

This, it was soon noted, could be conveniently sidestepped by a clever expedient. Provided the claim fell within the bounds of European Union law a more extensive protection might lie. Under the EU Charter of Fundamental Rights a 'legal aid article' exists in the form of Article 47(3). Importantly, that article does not include the restrictive terms that Article 6 does, so that all character of law falls within its protection. Also fundamental is that the European Court of Justice had stated in its decision in *DEB* Case C 279/09 that this would be interpreted in line with Article 6 so that no inconsistency lay between their applications. So, the European citizen awaiting deportation could rely on EU law instead. The American, the Australian, or the Nigerian, could not.

The final question which arose was whether other Articles included a procedural aspect which required legal aid to be granted. Most notably, Article 8 would be engaged substantively to determine in many of these cases whether deportation, extradition or other state decisions were lawful as proportionate interferences with the individual's family and/or private lives. Although Article 8 does not explicitly include a procedural aspect, it had been previously raised in other cases whether a right to legal aid might derive from Article 8. This would, for many cases, render the above discussion rather moot, and would be a boon for the non-EU foreign national.

LASPO is constitutionally a fascinating Act in the history of UK human rights jurisprudence. For the first time, in this author's understanding, it purports to *prospectively cater* for the Court's consideration of the primary legislation's, and the Legal Aid Agency decisions', compatibility with the Convention under sections 3 and 6 of the HRA respectively. For this purpose, it provides a scheme

in section 10 called "Exceptional Case Funding" whereby applicants may apply to be eligible for legal aid where failure to provide it would breach their ECHR or EU law rights, as considered above. That very scheme is now open to challenge under administrative and human rights law angles. In the next post we will see whether the Government policy guidance issued under the Act was held lawful in public law, and whether the recent refusals to provide aid were a breach of the HRA.

Under section 4 of LASPO, the Lord Chancellor provided guidance on how to decide exceptional case funding (ECF) applications made to the Legal Aid Agency.

The lawfulness of that guidance was open to judicial review on the basis that it was ultra vires, having misinterpreted the right answer to the three questions considered above.

In an important decision just handed down earlier this month, Collins J in Gudanaviciene [2014] EWHC 1840 (Admin) held that the Lord Chancellor's guidance was unlawful in the following respects:

1. It set the threshold for determining applications under Article 6 ECHR or Article 47(3) EU Charter, where they applied, too high. The guidance had stated that funding was appropriate in "those rare cases where it cannot be said with certainty whether the failure to fund would amount to a breach". This was perverse, since hardly any applications would ever show with certainty that the Convention required legal aid. This was borne out by the fact that only 1% of ECFs had succeeded since April 2013, when the scheme came into force. By contrast, Collins J preferred the ECtHR's jurisprudence from Steel v UK (2005) 41 EHRR 22, viz. that that there must be effective access to a court, including the consideration of fairness, to be proved on a balance of probabilities.

   The guidance did not consider Article 8 to have any procedural aspect at all, so that the Agency was not to take it into account. Looking at the European jurisprudence, Collins J held that this was wrong in law. In fact, Article 8 did include a procedural aspect, and that did involve a limited right to legal aid where it was engaged: see AK & L v Croatia (Application No: 37965/11). The relevant test was the same as that for Article 6.

2. That concluded the judicial review aspect to the claim. However, Collins J went further and quashed the decisions of the Director refusing aid in respect of all six claimants, on the grounds that they breached their Convention rights. Strictly, this may have been under section 6 of the HRA, or under administrative law on the basis that the decisions were founded on an irrelevant consideration, the unlawful guidance. It is plain from the first claimant, Gudanaviciene, that Collins J considered Article 8 to suffice to depose of the refusal, without any need to rely on administrative law or EU law rights instead.

   There are, therefore, limited rights to legal aid inherent in Article 8 (and some of the other articles: see the discussion of Articles 3 and 5 in the case), so that exceptional case funding should be available for immigration cases notwithstanding the limitations of Article 6 ECHR. Where an individual cannot rely on any of the Articles, but is an EU citizen, Article 47(3) of the EU Charter will provide equivalent protection.

The history of this area is a fascinating insight into the cross-application of administrative and human rights law, since *Page* mandates the High Court to decide in effect every case: wherever the Legal Aid Agency interprets the risk of breach incorrectly, this will result in a misinterpretation of section 10 of the Act, which is a reviewable error of law. It might be queried whether Parliament in fact intended the Lord Chancellor to be able to provide more restrictive protection, even if it breached the UK's international obligations.

Such an interpretation seems to be headed off by section 3 of the HRA, however. In any case, section 6 would always require the Court to assess breach by the Legal Aid Agency. At present, and fascinatingly, if the HRA were ever repealed, *Page* appears to provide an equivalent result, since it mandates a "correct" interpretation of European human rights under the domestic statute. In cost terms, it must be asked whether it really is more expensive to conduct this kind of satellite human rights litigation, or just to fund the litigant for the hearing in question.

Alexander Thompson has a BCL with Distinction from Oxford, where as part of OLA he worked with legal aid firm Turpin & Miller on Gudanviciene.

The Irrelevance of Residence: The Unlawful 'Residence Test' for Legal Aid

By Daniel Cashman | 16th July 2014

In R (Public Law Project) v Secretary of State for Justice [2014] EWHC 2365 (Admin), the Administrative Court held that the Government's proposed residence test for legal aid was ultra vires and discriminatory. The judgment serves as a welcome criticism of the sweeping justifications adopted by the Government in the name of austerity.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') brought swingeing cuts to civil legal aid from April 2013. Soon after it came into force, the Government proposed a raft of further reforms in Transforming Legal Aid. Among the proposals for reform was a residence test, which would restrict access to legal aid for persons with less than 12 months' lawful residence. The Government proposed to implement this test by secondary legislation in the LASPO (Amendment of Schedule 1) Order 2014. The Public Law Project brought judicial review proceedings to challenge the legality of the Government's decision to propose the residence test.

First, it was argued that the proposed legislation was ultra vires. Under LASPO s.9(1)(a), legal aid is to be provided in the cases identified in Part 1 of Schedule 1, which have been identified as the situations in greatest need of public funding. Importantly, they are not cases in respect of which the United Kingdom is obliged to provide legal assistance, either under the Human Rights Act or the common law. Rather, legal aid in such 'exceptional cases' is (supposedly) catered for by s.10.

The Lord Chancellor sought to argue that LASPO conferred power to introduce the residence test in secondary legislation by virtue of ss 9(2) and 41(2)(b) LASPO, as these provisions grant a power to restrict legal aid by reference to a class of individuals identified by residence. However, this argument was given short shrift by Moses LJ, with whom Collins and Jay JJ agreed. Section 9 LASPO serves to identify those individuals who have the greatest need for legal aid (at [37]); so, the powers under ss 9 and 41 must serve and promote that object of the statute. A residence test falls short: in a powerful statement, his Lordship held that 'no one can pretend that removing legal aid from non-residents is a means of targeting legal aid at those most in need' (at [42]). As a result, the Court concluded that the proposed secondary legislation was ultra vires, as it sought to extend the scope and purpose of the statute.

Second, it was argued that the proposed amendment was discriminatory. The Government sought to argue that the discrimination was lawful because legal aid, in those cases where the law does not impose a duty to provide it, is no more than a form of welfare benefit. It is well-established that discriminatory selection in relation to the distribution of benefits is a matter for the judgment of Parliament and the Government. Given that the residence test did not apply to s. 10 LASPO cases, the Government considered that it was permissible to select which individuals could benefit from legal aid.

However, the Court also convincingly rejected this argument. Moses LJ held that legal aid differs from welfare benefits on the facts as 'the Government has already reached the conclusion that certain categories of case demonstrate such a high priority of need as to merit litigation supported by taxpayers' subsidy' (at [71]). The correct question for the court was not about the denial of legal aid, but about discrimination in cases of equal need between those who are eligible and those who are not. As a result, the proposed residence test discriminated unlawfully.

The outcome of this case is no surprise – the residence test had already been widely criticised as unlawful. Nevertheless, the judgment serves as a stark reminder to the Government that its austerity measures must only be adopted within the bounds of the law. Austerity risks becoming a blanket justification for the Government's removal of benefits and legal aid; yet, the High Court has shown that the mere identification of limited public resources cannot legitimate an unlawful discriminatory approach.

However, the residence test may survive. The judicial review was merely of the Government's decision to introduce the proposed secondary legislation, and the Court has not yet decided on the relief to be awarded; the Government has also indicated its intention to appeal. The House of Lords will consider the proposed residence test on 21 July 2014 – it is only to be hoped that the full force of the Administrative Court's reasoning will see the amendment rejected.

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Cutting Corners: The Procedural Illegality of Legal Aid Cuts

By Daniel Cashman |24th September 2014

In R (London Criminal Courts Solicitors Association & another) v Lord Chancellor [2014] EWHC 3020 (Admin), the High Court ruled that the consultation process adopted by the Government in reducing the number of criminal legal aid contracts was so unfair that it was unlawful.

In February 2014, the Lord Chancellor announced that a radical overhaul of legal aid would see an immediate reduction of 8.75 per cent in criminal legal aid fees and a reduction of the number of available contracts for advisory work in police stations and associated work ('Duty Provider Work contracts') from 1600 to 525. The reforms led to protests and strike action within the legal profession, with concerns being expressed about the damage such cuts would cause to the criminal justice system.

While the claimants in the present action reiterated their profound disagreement with the merits of the Government's decision, the judicial review focused on the narrower question of whether the process adopted in reaching the relevant decisions was lawful. The

challenge centred on the fact that the Lord Chancellor should have disclosed, and consulted on, financial reports by Otterburn and KPMG; the latter report was alleged to have been based upon controversial assumptions which had not previously been publicised by the Lord Chancellor.

The Government was under no statutory duty to consult in connection with the legal aid changes; however, there was a long-standing practice of doing so (at [34]). As held by Lord Woolf in Coughlan [2001] QB 213 at [108], 'if [consultation] is embarked upon it must be carried out properly'. And, the impact of a particular decision is relevant in determining what is 'proper' consultation in any context. In the present case, both sides agreed that the 'context of the Lord Chancellor's decisions, namely their potential impact on the livelihoods of solicitors and access to justice, placed this case towards the upper end of the scale so far as the demands of fairness were concerned'. (Interestingly, Burnett J's judgment indicates that his Lordship was particularly influenced by the impact on solicitors' livelihoods, seemingly in preference to arguments focusing on the impact on those accused of crimes, see e.g. [37] and [50].) In the light of this high standard of consultation that was required, the failure to disclose the reports was so unfair as to result in illegality (at [50]).

The implications of the decision may be relatively limited. The decision does not hold the cuts to legal aid themselves as illegal; while the claimants sought to argue that the 8.75 per cent fee cut should also be quashed, Burnett J held that this decision was not sufficiently connected with the flaws identified in the consultation process (at [55]). Further, while the Government is now required to consult on the number of Duty Provider Work contracts to be awarded, it was recognised that a 'relatively short re-consultation period would be sufficient' (at [54]). What is perhaps most significant is the existence of yet another judicial criticism of the Government's desire to rush through cuts to the legal aid system without due concern for the impact that such cuts will have on individuals' lives.

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Presumptive Costs Orders: A Threat to Public Interest Interventions
By Daniel McCredden | 23rd July 2014

The Criminal Justice and Courts Bill received its second reading in the House of Lords on 30 June 2014 and has now been referred to committee stage. Part 4 of the Bill contains a package of reforms to the judicial review process, including a proposed new costs rule for interventions in the High Court and the Court of Appeal. The new rule is a serious concern for human rights litigation in the United Kingdom.

Clause 67 of the Bill will, in two respects, remove the courts' general discretion in relation to costs in a judicial review proceeding. First, the court will not be permitted to order payment of an intervener's costs, unless there are "exceptional circumstances" (cl 67(2) and (3)). Second, the court must, on application by a party to the proceeding, order an intervener to pay that party's costs incurred "as a result of the intervener's involvement in the proceeding" (cl 67(4)). The court may only refrain from making such an order if there are "exceptional circumstances" (cl 67(5)). This is a significant shift from the current position, where in recognition of

the distinct, court-assisting role they play, public interest interveners ordinarily bear their own costs and are not liable to pay other parties' costs, regardless of the outcome. It is also an unusual, restrictive incursion into the courts' general powers to determine costs liability. In that context, one might legitimately expect the Government to provide a strong rationale for change. Worryingly, that has not been the case.

In its consultation material, the Government has described its proposals as being necessary to ensure "that those involved [in judicial review proceedings] have a *proportionate* financial interest in the costs of the case." It has endorsed the "general principle" that "where a party chooses to intervene in judicial review proceedings …, ordinarily that should not result in additional expense for the existing parties to the litigation." It has spoken before the Joint Committee on Human Rights (JCHR) of judicial review being used for "campaigning purposes" and as a "delaying" tactic; and before the Public Bill Committee of interventions becoming "a *risk-free enterprise* for many organisations and for which the taxpayer is shouldering the burden."

The problem is, however, that the proposed rule is itself wholly disproportionate; it misconceives and greatly undervalues the role of interventions in the judicial review process and the courts' responsibility for regulating their scope; and it will in practice shut out public interest interventions in Human Rights Act litigation.

As currently drafted, even where submissions made by an intervener are accepted and endorsed by the court, there is to be a presumption that the intervener will pay the state defendant's costs. As reported by the JCHR, the presumption will also apply in circumstances where the Government unsuccessfully contests an intervener's application for permission. It is difficult to see how an intervener could argue "exceptional circumstances" simply on the basis that the court accepted the arguments it advanced – it is surely not "exceptional" that an intervener might succeed in persuading a court to a view of the law different to that held by a state defendant. So, it is hard to see how this rule results in an intervener having a more "proportionate" financial stake in the outcome of a case.

However, the most troubling aspect of the proposed rule is what it reveals about the Government's view of adjudication in public law litigation. Interventions typically are only sought, and certainly only permitted, where the intervention will assist *the court* in reaching a proper determination. As Arshi and O'Cinneide explain, ('Third-Party Interventions: The Public Interest Re-affirmed' (2004) Public Law 69) the "core rationale for judicial intervention" is "the introduction of relevant perspectives and expertise into the judicial process in order to serve the public interest in good adjudication." In other words, the public interest in the court hearing from those in a position to provide relevant data, experience and legal argument concerning the issues before it. All the more so in human rights cases, where the wider contextual impact of a decision more readily engages the need for third party assistance, especially from organisations representing marginalised voices or that have particular knowledge and experience of human rights discourse at both the domestic and international level.

To encourage better adjudication and judicial decision-making – including through the use of interveners where appropriate – is, of course, simply to recognise the public aspect of the judicial function. The Government frequently refers in its consultation material to the private aspect of judicial review adjudication – resolving one-off disputes between individual and state. There is, however, very little, if any, recognition that adjudication performs a vital public function: it determines, develops and clarifies the law for the benefit of the community as a whole and the maintenance of the rule of law. As the Constitutional Court of South Africa said in Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14 (in relation to costs orders in constitutional litigation) (at [23]):

"[C]onstitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy."

The same considerations apply to human rights judicial review litigation. Yet, the Government's new costs rule has proceeded to date without change through Parliament despite the deep concern expressed by essentially every consultee that the risk of adverse costs orders will almost certainly prevent them from intervening. For example:

- "It will stop organisations such as ours that devote limited resources to [intervening] in cases where the courts might be too narrowly focused on the interests of the parties before them." (JUSTICE)
- "[We] can say with absolute certainty that [our] trustees would not give permission for applications for interventions to be made [with such a costs risk] …" (Public Law Project)
- "[It will]deter third party interventions from organizations that are unable to take any additional costs risks, whereas interventions will continue to be made by those representing well-resourced interests including companies and the government itself." (Amnesty International UK)

Similar representations have been made by Liberty, Reprieve, Shelter, Bail for Immigration Detainees, Rights Watch UK, the Bingham Centre for the Rule of Law, the Law Society and the Bar Council. Their submissions demonstrate that interventions by charities and NGOs are certainly not "risk-free enterprises" – they involve the application of scarce resources, with legal work often performed *pro bono* by necessity, and they demand serious consideration before a decision is taken to seek permission. As the

JCHR has concluded, the proposed cost rule for these reasons poses a “significant deterrent to interventions in judicial review cases”.

The Government’s proposal is also troubling for its apparent lack of respect for the judiciary. The current position is that the courts, in considering permission, have regard to matters such as the additional expense and the effect of the intervention on the parties. Interventions are closely regulated by the courts, in terms of the length, type and focus of submissions permitted. The courts may also order the payment of costs by an intervener if, for example, it has acted unreasonably or has become, in effect, a principal party in the proceeding – this is indeed the current rule in the Supreme Court.

The Government has provided no evidence that the courts are making irresponsible decisions in relation to interventions, and yet the proposed rule will quite conspicuously end the very types of interventions that the courts routinely welcome. Moreover, no reason has been given as to why the same position as exists in the Supreme Court ought not continue to apply in the lower courts. An obvious undesirable consequence of the distinction between courts is that valuable interventions will be prevented from contributing at an earlier stage of litigation, where they might enhance first-instance (or appeal level) decision-making, or help facilitate a settlement (thereby reducing costs).

The upcoming committee debate in the House of Lords offers the opportunity for a rethink on these proposals. It is hoped that the serious concerns expressed by consultees and the JCHR will be given real and genuine consideration.

Daniel McCredden is an Australian barrister. In 2014 he undertook an LLM at University College London.

Public Interest Lawyering in Times of Austerity

By Natasha Holcroft-Emmess | 28th May 2014

On 24 May 2014, to mark its 14th anniversary, Oxford Pro Bono Publico presented a symposium on the importance of, and challenges to, the practice of contemporary public interest litigation. The symposium benefitted from a vibrant dialogue between prominent practitioners and academics. One of the panel discussions centred upon the impact of austerity on public interest lawyering in the UK.

Jo Renshaw, of Turpin & Miller LLP, illustrated the grave effect which austerity measures have had on the day-to-day practice of a public interest law firm. The cuts to civil legal aid brought in under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) affected a substantial proportion of the firm's practice areas.

The pro bono contributions of students are a useful aid for practising solicitors, by providing clerical support in clinics through Oxford Legal Assistance. But the impact of the funding cuts has undoubtedly hit the most vulnerable. Clients from some of the more marginalised groups, such as immigrants and the destitute, have ceased to come for assistance. They know that there are simply no longer funds available to support them. These people have disappeared from the legal landscape.

Helen Mountfield QC, of Matrix Chambers, posited the difficulties of taking a public interest matter through to litigation where the individual(s) whose rights are in jeopardy lack the means necessary to satisfy an adverse costs order, should their claim be unsuccessful.

Although discretionary funding for 'exceptional cases' is in theory available, in practice the provision is nowhere near sufficient, and those who miss out tend to be the ones most in need of additional support.
These practical considerations pose a real barrier to access to justice for those who cannot fund litigation through to completion. The criterion for justice then becomes whether the aggrieved party has sufficient resources, rather than the public interest in resolving cases fairly. This is obviously an unsatisfactory state of affairs. Helen emphasised the importance of members of the legal profession taking ownership of this injustice. It is our social responsibility, as advocates of the values of fairness and equality, to take steps to address this inequity.

Polly Glynn, of Deighton Pierce Glynn Solicitors, explicated her experience with some shocking cases of individuals gravely in need of the assistance of a social fund to protect their legal rights. Examples posited included clients who required reasonable accommodation, people living in abject poverty and those in need of immigration advice and assistance. Polly advocated some creative antidotes to the deleterious effect of the legal aid austerity measures. Greater dissemination, and improved ease of use, of information available to assist vulnerable clients would be one advance. Greater judicial awareness of, and empathy for, the plight of such individuals was another. The benefits which can be brought to litigation through third party interveners was also touched upon, and highlighted later in conversation between OPBP faculty director Professor Sandra Fredman QC and Justice Abella of the Supreme Court of Canada.

Although the context of the UK austerity measures inevitably paints a grim picture for prospective litigants in public interest matters, the existence and quality of dialogue between practitioners, faculty and those who contribute to the work of OPBP engenders some hope. The symposium in particular affirmed the clear commitment within the profession to ensure that the public interest in fair and open justice is not extinguished for the sake of austerity.

Natasha Holcroft-Emmess is a London-based solicitor. She completed the BCL with distinction and is a frequent contributor to the Oxford Human Rights Hub Blog.

Clinical Legal Education as an Access to Justice Innovation

By Gráinne McKeever | 12th September 2014

Imagine you got grant funding to develop an access to justice research agenda. Your grant application proposes the appointment of a team of law graduates to conduct research within a particular advice organisation: to talk to all the clients who come for advice; to understand why, when and how clients seek legal help; to see the difficulties for clients in engaging with dispute resolution systems; to understand where the disconnect is between what clients need and what the system provides.

Imagine that, by the end of a 12-month research contract, the researchers themselves were trained advisers, who did not just observe other advisers but were also helping to meet unmet legal need, by providing advice and advocacy for the clients of this organisation. Imagine that while your researchers provided the knowledge base and data sets that allowed you to deepen your research on access to justice and legal need, they were simultaneously developing – individually and collectively – their own informed socio-legal analysis of these and related issues. Imagine that the quality of research and advocacy provided by your researchers was sufficient to gain them a LLM in Clinical Legal Education.

In September 2012, Ulster University's LLM Clinical Legal Education began with such an imagined process, but instead of grant-funded access to an external advice organisation, Law School staff developed an in-house legal laboratory in the shape of the Ulster Law Clinic, around which the LLM in Clinical Legal Education is constructed. Based on Nuffield-funded research conducted by this author for Law Centre (NI) (which identifies unmet legal need for users of social security and employment tribunals in Northern Ireland), the LLM in Clinical Legal Education was established to develop an understanding of the nature of this defined legal need. It achieved this by training graduate law students to provide advice and advocacy for members of the public with social security and employment law problems, while also creating a space for staff and students to reflect on and analyse the

manifestations and implications of the legal problems faced by Clinic clients.

The Ulster Law Clinic's thematic focus is on access to justice and the contribution that Clinic staff and students can make – practically and intellectually – to this enterprise. In recognition of this, the Northern Ireland Department of Justice provides an annual full-fees Access to Justice Scholarship, and scholarship recipients in turn provide the Department with an access to justice report based on the Clinic's work. As a pro bono enterprise, the model has been extremely effective. In 2013-14, ten student clinicians provided over 500 hours of legal support to members of the public, under the supervision of Ulster Law Clinic Directors, covering complex legal problems including discrimination, redundancy and social security overpayments.

The programme was awarded the 2014 LawWorks and Attorney General's award for best new pro bono activity in the UK and the current (government commissioned) review of Access to Justice in Northern Ireland points to the Ulster Law Clinic as an example of how alternative models of access to justice can be delivered. The programme has now captured international imagination and has been nominated for an Innovating Justice award by the Hague Institute for the Internationalisation of Law (HiiL) which recognises "novel ideas with a strong potential of delivering concrete justice results". The Ulster Law Clinic joins 17 other nominations from around the world, from India, to Malawi, to the US, but it is the only nomination from a Law School in the UK or Ireland, and only one of three nominations that come under a clinical legal education umbrella.

Nonetheless, the Ulster Law Clinic is built on the strong foundation of clinical legal education in these jurisdictions, and clearly demonstrates the value of clinical legal education in terms of access to justice, educational experience, community engagement and research development. In short, the HiiL nomination exemplifies the potential for clinical legal education to deliver concrete and innovative justice solutions that can inform and be informed by an access to justice focused research agenda.

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Valuing the Work of Community Lawyers' to Resolve Systemic Problems – The Productivity Commission Report on Access to Justice Arrangements in Australia

By Liz Curran | 16th January 2015

In the past decade or more in Australia, creeping managerialism and efforts to reduce funding of services under the guise of 'fiscal belt tightening' and efficiency have threatened and sometimes jeopardised the effectiveness of the legal system in being able to respond to community need. The Australian Productivity Commission's Final Report on 'Access to Justice Frameworks' was released on 3 December 2014. It acknowledges the value of community legal centres and legal aid as 'highly committed' and supports the systemic advocacy of these providers in ensuring and improving a fairer justice system in Australia.

Community lawyers (whose work is mainly with the most vulnerable and disadvantaged clients) are uniquely placed to see the 'revolving door' of problems in the community. Exposure to client experience and case work gives them a vantage point from which to identify how things might be adjusted to enhance human rights and improve confidence in the law. Such a perspective can see lawyers finding solutions to also circumvent unnecessary cost to the judicial and administration systems that come by repeat cases with the same issues coming before the courts. They can see where early intervention or prevention of the problems arising in the first place might come from improved community legal education or law reform and identify barriers to access to justice.

Lawyers, as officers of the court in Australia, also have obligations to uphold the rule of law, to ensure confidence in the legal system and its administration. Laws that are poorly drafted, negatively impact on or alienate certain sections of the community because of their disadvantage reduce community confidence in the legal system. It is therefore incumbent on lawyers as part of this primary duty, to work to protect the integrity of the legal system in such circumstances.

Lawyers in community legal can also explain the context, complexities and barriers their clients encounter. Part of the core definition of this service includes legal education in and with the community, advocacy and law reform. This multi-pronged service model averts the fragmented nature of legal work that often exists in the private profession. Many community legal centres in Australia are also increasingly co-locating or creating 'one stop shops' or outreach centre, integrating their services alongside non-legal service providers where the most vulnerable or hard to reach clients are likely to be. In addition, community lawyers can provide a consistent voice for those in the community who by reason of a lack of power, media control and social exclusion can be invisible. This befits a participatory democracy.

In the past decade, I have argued for the use of strategic casework with multiple strategies involving education, policy work, media awareness raising, law reform and participation in expert and other advisories, as critical work for community lawyers. This is an efficient and effective way of ensuring a good use of finite resources and a more efficient justice system. In a climate of ever reducing funding, greater targeting to those who need help the most and with increasing demand, I have argued that resources might be strategically utilised so as to work on public interest or other cases where the greatest need and impact can be derived for the greatest number. This strategic work does not however preclude or replace the importance of case work in individual settings such as care and protection of children, court and tribunal representation and advocacy in family law, criminal law and family violence, but ought to be a compliment to it.

The Productivity Commission's report makes many recommendations. This includes stable and sustainable funding, more closely connected to the realities of service delivery than is currently the case. It observes that Commonwealth funding for community legal centres has been largely ad hoc and historical. The Commission notes that record keeping and data collection imposed by government is unduly burdensome on services and not that useful and that there has been a disconnect between legal need and government funding and calls for funding to reflect the cost of service provision and indicators of need. To this end, the Commission stresses as a priority the need for evidence based research that is outcome based and consistently undertaken with a clearing-house to facilitate information. The Commission clearly endorses and acknowledges the important place of legal aid and community legal centres in systemic work and that the work is difficult and challenging but finds a home in the commitment and conviction of the legal assistance sector. It affirms the need for integrated, and holistic service delivery, the need for effective community legal education and the importance of the legal assistance sector working closely with the non-legal services to better reach and assist people in accessing legal help. It stresses that the sector is under-resourced, suggesting an injection of $200 million. Critically, the Productivity Commission underlines the importance of systemic law reform and policy work that can be critical in ensuring a just, accessible and smoother legal system.

It is hoped that an Australian Government, on the record as being sceptical and unwilling to fund systemic advocacy, will pay heed to this important report which points strongly to the need for government to value and support the critical work that the legal assistance sector given that legal problems, if unresolved, can have a big impact on lives.

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