

Written evidence from the Law Society of England and Wales (NSB0002)

Introduction

1. The Law Society of England and Wales is the independent professional body that works globally to support and represent 200,000 solicitors, promoting the highest professional standards and the rule of law.

Do the damages provisions (clauses 57-60) that potentially restrict damages awarded to a person to reflect misconduct of a terrorist nature, respect the right to a fair trial (Article 6 ECHR) and the right to an effective remedy for a breach of Convention rights (Article 13 ECHR) and the right to peaceful enjoyment of possessions (Article 1 of Protocol 1)?

2. In practice, these clauses mean that if a person sues the state for harm caused in a case that has, at any stage or any time, involved evidence related to the intelligence services or is related to national security, their damages could be reduced. There is no minimum threshold of involvement for invoking this provision.
3. This could create a perverse scenario in which the state itself is able to make submissions about national security of limited significance to the case that would then bring the clause into effect.
4. It is therefore open to abuse by the Government, putting claimants at a significant disadvantage. This is compounded by the claimant potentially being unable to challenge the significance of the of these submissions, as it is likely to be closed material and the details may not be known to them or their lawyers.
5. The provisions do not require that the matter for which a claimant is seeking damages for the actions of the state be directly related to terrorist activity. This means that if a claimant who was placed under surveillance sought damages for harm caused by the state, these damages could be limited or reduced to zero, even if their actions at the time had nothing to do with criminal activity.
6. We understand and support the Government's aim to prevent funds from damages being used to support terrorism, but we do not believe the proposals in this Bill are proportionate to achieve this.
7. The Government should clarify how these powers would protect the public. It should also tighten the broad application of these powers, set minimum thresholds for the involvement of the intelligence services, and put in place safeguards for when foreign intelligence services are involved to ensure their activities are compliant with UK law.

8. As an additional safeguard, the Bill should include an evidence threshold that must be met, demonstrating that any damages will be used for terrorism before restrictions come into force. Should the Government be negligent it should still face consequences for its actions, with the funds instead going to a charitable or voluntary cause, potentially one supporting the victims of terrorism.
9. These steps will go some way to protecting the right to a fair trial.

Are the restrictions on civil legal aid for those convicted of terrorism offences (clause 62) justified and fair?

10. The Law Society does not believe the restrictions on civil legal aid within the Bill are justified or fair. They pose a significant risk to access to justice and it is unclear how, if at all, the measures will protect the UK's national security.
11. It is fundamental to the rule of law that our justice system rests on the clear principle that every judgment relies on the merits of the case brought before the court. We should not automatically be excluding people from legal advice and support because of unrelated convictions. To do so will diminish access to justice in our country and could affect the objectivity of our legal system.
12. The restrictions as drafted are broad and do not require that the application for civil legal aid be in any way connected to their original conviction. This could mean that a person convicted of terrorism two decades before would not be able to rely on civil legal aid to secure an injunction against a domestic abuser. This would reduce any concept of rehabilitation from our justice system. It could also mean those detained under the Mental Health Act are deprived of their liberty without access to a lawyer.
13. Additionally, if a person were convicted of a terrorism offence that was later abolished, they would still be barred from civil legal aid, despite the change in the law. This appears to introduce a new criminal penalty that is applied retrospectively, in breach of the ECHR.
14. This measure will likely create large volumes of bureaucracy for the Legal Aid Agency, as it will have to confirm whether every applicant for civil legal aid has a previous conviction for terrorism. This may significantly increase the costs to the public purse, while it is unclear how this measure would contribute to public security and safety.

In particular, given the well-known difficulties in accessing Exceptional Case Funding, is this reliance on such funding sufficient to ensure adequate access to justice?

15. The Law Society does not believe that relying on access to Exceptional Case Funding (ECF) is sufficient to ensure adequate access to justice.
16. ECF is a very bureaucratic process, for both the applicants and for the Legal Aid Agency (LAA) that administers it. This puts in place a significant obstacle to access to justice

given the extra work and uncertainty use of this process will create.

17. Relying on ECF for this would also mean that everyone affected by this provision would qualify for ECF, therefore meaning the funding was not exceptional. The Bill introduces a process whereby access to legal aid for Part 1 Schedule 1 cases ('general case services') is prohibited for those convicted of a terrorist offence (save for some limited exceptions) but continues to allow the award of legal aid for those cases where the LAA has made an exceptional case funding (ECF) determination.
18. This means that every case that is 'in scope' for legal aid will, for individuals that have a terrorist conviction, have to go through an EFC process. Even if a person is detained under the Mental Health Act or seeking an urgent injunction from a violent partner, they will have to apply for ECF. There is no emergency process for ECF applications. Solicitors are unable to grant exceptional funding themselves, and all applications for ECF must be sent to the Legal Aid Agency. The Legal Aid Agency's target time for responding to an initial application is 25 working days. The target time for responding to an urgent application is ten working days.
19. We cannot see that any case that is 'in scope' would fail the ECF process and therefore do not understand why the discretion of the Director of LAA casework and the additional bureaucracy that entails is required for these cases. We would like the government to provide us with hypothetical examples of cases that are 'in scope' but would fail the ECF process. This seems illogical, adding both an administrative burden to the LAA and unnecessary costs to the public purse.
20. If ECF was refused by the LAA, there would not be automatic access to legal aid to challenge the refusal through judicial review. Funding would also be affected by this provision, in turn creating another ECF application. This would mean further bureaucracy and would create an illogical process.
21. The completion of ECF applications are not covered by legal aid either and are usually completed on a pro bono basis by the lawyers representing their clients. However, because this process can take many hours of work, solicitors are reluctant to undertake it unless they have a high degree of confidence that the application will be granted, meaning that many people with meritorious cases are unable to access ECF. This poses another barrier to access to justice as not all practitioners are in a position to provide pro bono services.

Does the Bill give rise to any other human rights concerns?

22. The Government indicated that they would be introducing a Foreign Influence Registration Scheme (FIRS) as part of this Bill. We understand the intention is to bring an amendment containing provisions for the introduction of this scheme in the coming months.

23. The Law Society supports the intention behind such a scheme; however, we would advocate for a clear protection for legal professional privilege (LPP). LPP is a fundamental right that protects the integrity of our justice system. It is important that clauses related to FIRS receive appropriate scrutiny to safeguard the fundamental right of LPP.
24. The legal profession is already heavily regulated, which ensures the highest possible standards and safeguards consumers. We would therefore support the inclusion of provisions which feature in Australia's equivalent scheme, to exempt LPP from the scope of the scheme and provide for a broader exemption from registration requirements for certain activities that relate primarily to, or are incidental to, the provision of legal advice and/or representation in certain proceedings/processes. This will ensure adequate protection for access to justice.

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