

Concessions and amendments to the Legal Aid, Sentencing and Punishment of Offenders Act 2012

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The Law Society ('the Society') is the representative body for 145,000 solicitors in England and Wales. The Society negotiates on behalf of the profession, lobbies regulators, Government and others and has a public interest role in working for reform of the law

Key points

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 received Royal Assent on 1 May. The Law Society has devoted considerable time and resources to lobbying the Government and Parliament on the contents of the Act since it was first introduced in June 2011. This briefing summarises the concessions and amendments to the Act over that period

- The role of the Director of Legal Aid Casework – The Government responded to the Society's concerns about the decision-making independence of the new Director.
- The future scope of civil legal aid – Pressure from the Society led to the extension of scope in several areas and a major concession: the ability to increase future scope by regulations.
- Legal aid in domestic violence cases – Responding to widespread concern, the Government altered the definition of domestic violence, expanded the range of evidence necessary for legal aid eligibility and expanded the time-limit applying to evidence from 12 to 24 months. This extension also applies to private family law child protection proceedings.
- Police station advice – The Society's pressure led to a Government u-turn in relation to a possible power to means test legal advice and assistance for people held in custody.
- Frozen assets – Combined pressure from the Law Society and the Bar Council led to the Government commitment to explore options for recovering legal aid costs in the future.
- Mandatory telephone gateway – The Government responded to the Society's concerns by removing community care from the pilot scheme.
- Civil litigation funding reforms – The Society's lobbying resulted in a delay in implementation of the reforms and a major concession for victims of asbestos poisoning.
- Ban on referral fees – Pressure from the Society led to guarantees from ministers that the ban, which the Society supports, would not impact on the legitimate marketing activities of solicitors.

The Role of the Director of Legal Aid Casework

1. The Act transfers the responsibilities of the Legal Services Commission to the Ministry of Justice, to be overseen by a new civil servant: the Director of Legal Aid Casework. The Society expressed serious concerns about the decision-making independence of the Director from ministerial influence, particular in relation to individual applications for legal aid in "exceptional cases" not otherwise supported in the Act.
2. Annual report - Following pressure, the Government introduced a new Clause 5, requiring the Director to produce and lay before Parliament an annual report detailing how the Director has carried out his or her functions during that time, including details of directives from ministers.

3. A stronger statement of independence - Further pressure led to the Government conceding on the need for the Act to contain, in Clause 4, a firm statement of the Director's independence from ministers when carrying out his or her functions in relation to individual cases.

The future scope of civil legal aid

4. The Society had serious concerns about the inflexibility of the Act's structure, which states in statute those legal services that will be funded, and, in Bill form, contained no mechanism to allow legal services to be added in the future should fiscal conditions improve or negative consequences emerge.
5. New power to add services to civil legal aid in the future - Responding to concerns about the inflexibility of the Bill, particularly in light of a Law Society backed report by King's College London which identified almost £140m of costs arising from possible unintended consequences, the Government amended Clause 9(2) to allow for new services to be added to the scope of legal aid in the future via regulations should the need arise.
6. In addition to this major concession, the pressure from the Society and others secured amendments to the Bill to retain civil legal aid provision in the following areas:
 - a. Domestic child abduction cases – The Government initially sought to restrict legal aid to international abduction cases. Following lobbying and casework evidence submitted by the Society the Government conceded that legal aid should remain for “seek and find” orders in relation to domestic abduction as well.
 - b. Special educational needs issues – The Government was pressured into extending proposed legal aid provision for SEN issues to individuals aged 25 and under (from 18 and under) so as to include further and higher education.
 - c. Clinical negligence – Parliamentary briefings from the Society led to the Government retaining legal aid for clinical negligence cases involving a baby up to 8 weeks old, suffering from neurological injury. Ministers stated that almost all other child clinical negligence cases would be covered by exceptional funding. The Government's original intention had been to remove legal from 100 percent of clinical negligence proceedings.
 - d. Victims of human trafficking – Extensive criticism by the Society and immigration law practitioners led to legal aid being retained for victims of human trafficking for advice on their immigration status and to bring employment claims and other civil claims arising from the trafficking incident.
 - e. Welfare benefits entitlement appeals – The Government conceded the need for legal aid to be retained for advice, assistance and representation in the Upper Tribunal and higher courts, and also made a promise to investigate a scheme providing legal aid in the first tier tribunal where a point of law was at stake.

Legal aid for victims of domestic violence

7. The Government consistently stated that its objective was to retain legal aid for all victims of domestic violence. However, the Society expressed serious concerns about the limited definition of domestic violence used, the narrow range of evidence to be acceptable for the purposes of proving domestic violence when applying for legal aid, and the proposed 12 month time limit applying to such evidence.
8. ACPO definition of domestic violence put into the Act – Many were concerned that the narrow definition of domestic violence could lead to many meritorious cases being denied legal aid. Following pressure, the Government conceded an amendment to the Act to include the same definition as that used by the Association of Chief Police Officers and the Courts.

9. Guarantee that a broader 'evidence gateway' will be elaborated in regulations – The Government responded to concerns from the Society and women's organisations by guaranteeing that when set out in regulations the evidence gateway would additionally include: an undertaking in injunction proceedings, evidence of admission to a refuge, evidence from a social services department and appropriate evidence from a GP or other medical professional.
10. Time limit extended from 12 to 24 months – The Government originally proposed that evidence of abuse could only be accepted in support of an application for legal aid if the evidence had arisen in the previous 12 months. This was doubled following pressure. No time limit will apply where an unspent conviction against the abusing party is in place.
11. Guarantees that the time limit extension applies to child abuse cases – Assurances were obtained from ministers that the two year time limit will apply to evidence of abuse in other private family law proceedings, for instance Special Guardianship Orders.
12. Legal aid to remain in immigration cases under the domestic violence rule – In an earlier concession, the Government agreed in August that legal aid should remain for immigration proceedings in applications for indefinite leave to remain under the domestic violence rule.

Police station advice

13. The Act originally contained a sub-section empowering the Lord Chancellor to impose a means test on the provision of legal advice and assistance for individuals held in custody.
14. Provisions to means test police station advice removed – Following objections from the Society and human rights groups the Government conceded that the measure was inappropriate and removed the powers from the Act.

Frozen assets

15. Currently, under the Proceeds of Crime Act 2002, a defendant's restrained assets cannot be used to fund their legal defence, and, once unfrozen, are diverted to the Home Office. Amendments, supported by the Society, would have ended this situation, thereby relieving pressure on the legal aid fund.
16. A guarantee that the Government is working on releasing frozen assets to fund legal defence – In response to amendments at the Bill's Report Stage in the House of Lords, the minister said: 'I can assure noble Lords that my department is currently working with the Home Office and the Attorney General's Office to explore options that might allow the Government to recover legal aid costs wherever possible' (HL, Col. 142, 12 March 2012).

Mandatory telephone gateway

17. The Act contains powers for the Government to make a telephone advice line the sole means of access to legally aided services. Pressure from the Society led to substantial compromises from the Government in this area.
18. Community care law no longer included in the pilot scheme – the Government proposed to pilot mandatory telephone services in four areas: debt, discrimination, special educational needs and community care. Following pressure, the Government compromised and removed the latter.
19. Guarantees of provision of face-to-face advice for vulnerable clients – In response to the Society's concerns about the impact on vulnerable clients, guarantees were received from the Minister that 'Not only will there be an exemption for emergency cases, those in detention and under-18s, but even where a case is in scope and not in those groups, face-to-face advice will always be available where deemed to be required' (HC, Col. 204, 17 April 2012).

Civil litigation funding reforms

20. The Act sets the framework for the implementation of the reforms to civil litigation funding arrangements first set out in Lord Justice Jackson's review in 2009. Pressure from the Society and others led to two major concessions.
21. An exemption for asbestos poisoning victims – The Government conceded that victims of mesothelioma, caused by exposure to asbestos, should be exempt from the proposed reforms to the operation of no win, no fee agreements until after a full review of the effects of the reforms on those claims.
22. Guarantees in relation to the proposed QUOCS regime – The Government gave assurances in relation to two Society priorities: (1) that there will be no means test to decide whether a losing claimant should be protected by Qualified One-Way Costs Shifting; and (2) there will be no minimum payment that a claimant will have to pay under the proposed regime.
23. A delay in the implementation of the reforms until April 2013 - The Government accepted that the implementation of the proposed Part 2 reforms to civil litigation funding and costs should be delayed to April 2013, the same time as the legal aid changes will come into effect.

Ban on referral fees

24. The Act contains provisions to ban the payment of referral fees in personal injury cases. The society supported the intention of the ban, but raised specific concerns with the MoJ.
25. Guarantee that the ban will not apply to legitimate solicitor-to-solicitor payments – Pressure from the Society led to the Minister stating on the record that solicitor-to-solicitor payments would not be covered: 'The Government do not believe that that kind of relationship, where a solicitor transfers business and takes a reasonable charge for the work already done, is covered by this ban' (HL, Col. 1618, 1 Feb 2012).
26. Guarantee that ban will not apply to pooled marketing arrangements – Following pressure the Minister stated on the record that 'The pooling of marketing resources... in our view does not in itself breach the prohibition on referral fees' (HL, Col. 1626, 1 Feb 2012)

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