

Legal Aid, Sentencing and Punishment of Offenders Bill

Briefing for Parliamentarians - October 14 2011

Key Points

The Legal Aid, Sentencing and Punishment of Offenders Bill will:

- Seriously restrict access to justice for many of the most vulnerable people in society.
- Abolish civil legal aid for victims of clinical negligence and in most civil law cases.
- Throw the courts system into chaos by substantially increasing the number of litigants in person with little or no legal knowledge.
- Lead to higher government spending rather than cutting the deficit

The Law Society is therefore very concerned about the Legal Aid, Sentencing and Punishment of Offenders Bill. The Society's concerns are shared by a substantial number of organisations, charities and advocacy groups, including Citizens Advice, Shelter and the Women's Institute among others.

This briefing note provides only a short introduction to the Society's concerns with the Bill in its present form. If you would have any questions or would like to arrange a personal briefing session please do get in touch.

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Background

1. The Bill contains three parts which would implement two starkly different government policies. Parts 1 and 2 make significant changes to the system for funding legal advice and assistance. If implemented they will severely restrict access to justice and create alarming gaps in protection. Part 3 introduces changes to the sentencing regime. *This briefing concerns parts 1 and 2 of the Bill.*

Part 1: Changes to legal aid

2. Part 1 provides for the abolition of the Legal Services Commission. It proposes that the Lord Chancellor take over the governance of the system and be granted wide powers to make general prescriptions via secondary legislation. A new civil servant, the 'Director of Legal Aid Casework' will handle the assessment of eligibility in individual cases.
3. **Removal of areas from scope** - The government hopes to save £350m by removing a substantial number of areas from the scope of legal aid altogether. These include clinical negligence, the vast majority of immigration, family, employment and welfare benefit cases. The Lord Chancellor is granted the power to further narrow (but not expand) the scope of legal aid provision in the future via secondary legislation.
4. *The Law Society believes it is wrong in principle to remove substantial areas of law from scope. By removing areas of law rather than considering individual cases, the Bill ensures that serious injustice will be done. No account is taken of the ability of an individual to address their problems by other means. Clients with physical or mental health difficulties, or low levels of education, may be unable to resolve their problems in the absence of support through legal aid. To address this the MoJ relies on its proposed exceptional funding test (Clause 9). Yet the threshold of this test - that it would be a breach of a client's human right of access to the court not to provide legal aid - means that very few (just 5%) of cases will be brought back into scope.*
5. **Restriction of availability of advice at the police station** - Clause 12 of the Bill restricts the provision of legal advice and assistance in the police station to those who qualify for it on the basis of financial conditions, other (as yet unspecified) criteria and the 'interests of justice' as determined by the Director of Legal Aid.
6. *Originally introduced in the Police and Criminal Evidence Act 1984 in response to several high profile abuses of police power, the provision of free legal advice in the police station is a cornerstone of our justice system. The Law Society opposes the clause in both practice and principle: In practice no consideration has been given as to how a means test would be conducted given the time restricted environment in which the police operate nor to how an arrested person would be able to prove their financial position. In principle this change, which was not consulted on, seriously undermines a fundamental tenet of our justice system and could potentially contribute to miscarriages of justice, as occurred prior to its introduction in the 1980s.*
7. **Introduction of a single gateway for advice** - The Bill seeks to make it mandatory for those seeking to access legal aid in those areas where it remains to enter the system via a telephone gateway. Clients will no longer be entitled to walk in off the street to a law centre or CAB, or phone up their local firm for an appointment. Instead, their only right of access to legal aid will be through a national telephone service. Only if the telephone service decides that they need face to face advice will they have a right to see an advisor in person. This is to be limited initially to four areas of law, but the Government has stated its intention to extend this to all other areas.

8. The first point of contact will be the operator service, whose staff will not be required to hold any legal qualification. These unqualified staff will determine whether the client is eligible for legal aid; whether they need general information or specialist advice; and whether they should be entitled to receive advice face-to-face rather than over the telephone.
9. *The Law Society believes that the government's intention to deliver legal services through a single telephone gateway represents an insensitivity to the difficulties this will present to many of those attempting to access the system; particularly those with complex or distressing legal problems and/or for clients with language and learning difficulties. Furthermore the case for proceeding with the gateway plan was all but destroyed when the claimed savings from the move were reduced from £60m in the MoJ's November 2010 Impact Assessment, to just £2m in the June 2011 document¹. Given that the available research suggests that a move to telephone advice may well stop a significant number of people from getting advice at all, and deliver worse outcomes for those who do access the service, the Law Society urges the government to reconsider pushing ahead with this proposal.*

Knock-on costs: Cuts to legal aid are a false economy

10. **The proposed cuts will end up costing taxpayers more in the longer term** - Despite requests from the Law Society that the MoJ investigate fully the potential knock-on costs for other departments the Ministry has failed to do so. The concept of knock-on costs does not originate from the Law Society, rather the Ministry's own Impact Assessment published in November² 2010 stated the following costs of the proposals:
 - a. Reduced social cohesion - For instance, failure to apply the rule of law fairly may generate an inclination not to respect rules and regulations and not to comply with social norms and expectations, generating social costs.
 - b. Increased criminality - This may arise if unresolved civil or family disputes escalate, or if criminal means are used to resolve disputes in the future, or if a lack of legal aid encourages people to take advantage of those less able to defend themselves.
 - c. Reduced business and economic efficiency - Failure to enforce rights and not applying the rule of law may undermine work incentives, increase business uncertainty and hinder the operation of markets.
 - d. Increased resource costs for other Departments - If civil and family issues are not resolved effectively people might continue to rely upon the state.
 - e. Increased transfer payments from other Departments - Similar to the above, reduced resource transfers from the legal aid fund might lead to increased financial transfers to the poorest, e.g. via welfare benefits or tax credits.
11. The Justice Select Committee, in their third report, noted with concern the MoJ's failure to undertake a comprehensive assessment of the knock-on costs arising from the cuts to legal aid. The Committee noted: 'we are surprised that the government is proposing to make such changes without assessing their likely impact on spending from the public purse and we call on them to do so before taking a final decision on implementation'³.
12. These are just some examples of how cuts to legal aid will incur increased costs elsewhere. In the absence of a comprehensive MoJ investigation into these costs the Law Society has commissioned King's College London to undertake its own research which will be published shortly.

¹ [Ministry of Justice Impact Assessment \(2011\), Cumulative Legal Aid Reform Proposals](#)

² [Ministry of Justice Impact Assessment, \(2010\), Legal Aid Reforms: Scope Changes](#)

³ [Justice Select Committee \(2011\), Third Report: Government's proposed reform of legal aid](#)

13. **Cutting the deficit without restricting access to justice: the Law Society's alternative proposals** - *The Law Society has shown that alternative savings of in excess of those being sought by the government could be made while maintaining access to legal aid for those areas now under threat, and without risking the substantial knock-on costs that will be incurred as a result of the MoJ's approach.*
14. *The Society recognises some criticisms of our alternative proposals, but stands by the majority of its proposals. The Society will therefore be making some marginal adjustments to alternative savings proposals and publishing these shortly.*

Part 2: Reforms to civil litigation funding

15. **Background** - In the mid-1990s the last Conservative government introduced conditional fee arrangements (CFAs, or more commonly no-win, no-fee agreements) in order to alleviate the cuts in civil legal aid that were also made at the time. The current government is now seeking to further reduce the scope of civil legal aid while also introducing substantial changes to the way CFAs operate that will make them much harder to be used in the future, limiting many people's access to justice.
16. **The current situation applying conditional fee arrangements** - CFAs may be used to fund all types of civil litigation except family cases. They are intended to provide access to justice for those who cannot afford to pursue litigation and who are not eligible for legal aid.
17. Where there is a CFA, the solicitor shares with the client the risk of losing the case. If the case is lost, the solicitor will charge a success fee on top of the usual fees. This is intended to compensate the solicitor for taking on the risk of not being paid. The level at which the success fee is set reflects the risk involved and can be up to 100% of the base cost.
18. Under a CFA, even if a client does not have to pay his or her own lawyer if the case is lost, (s)he may still have to pay the opponent's legal costs and both sides' disbursements. To cover these, clients are often advised to take out 'after the event' (ATE) insurance.
19. The 1999 Access to Justice Act permitted the recovery from the losing party in legal proceedings the extra costs associated with CFAs (ATE insurance and success fees). Until then these had been deducted from the client's damages.
20. In November 2008 Lord Justice Jackson was appointed to conduct a review of civil litigation costs. The review reported in January 2010 and some of the review's recommendations have now been incorporated into the present Bill. The main proposals will:
- a. **Abolish recoverability of success fees in CFAs; but**
 - Allow for a success fee to be deducted from damages (capped at 25% of the compensation); and
 - Provide for a 10% increase in damages for the injury itself (with no increase on the overall award) to mitigate for the acknowledged damage this will cause.
 - b. **End recoverability of ATE; but**
 - Provide for Qualified One Way Costs Shifting (QOCS). Under this proposed change defendants would still pay the claimants legal costs if the claim is successful (but not the success fee or the ATE premiums). Claimants however, even if they do win, will be forced to pay the defendant's legal costs if the claimant was shown to have 'acted unreasonably' or was of 'sufficient financial means'.

21. *The Law Society believes that these reforms are being pushed through to tackle a problem which doesn't exist. These changes - which appeared in no party's manifesto, nor in the coalition agreement - are premised on an alleged 'compensation culture', a phenomenon which has been shown again and again to be a problem of perception rather than substance. Indeed Lord Young recently noted in his report Common Sense, Common Safety that among most of those giving evidence: 'There was a general agreement that the rise of a compensation culture is largely a myth perpetrated by the national press'⁴.*
22. *The proposals in the Bill therefore introduce damaging changes to deal with a supposed compensation culture that doesn't actually exist.*
23. *The government's intention is to repeal provisions originally introduced to protect access to justice for those victims who would no longer qualify for legal aid, by making success fees and ATE premiums non-recoverable. The consequences of the changes will be:*
- a. **Abrogation of the restitution principle** - injured victims will no longer receive 100% of their compensation.*
 - b. **In non-damages cases the creditor may lose a significant proportion of the monies legally due under contract** - as a result of which business will suffer.*
 - c. **ATE premiums will rise** - meaning claimants could be liable to pay even greater amounts in addition to the solicitors success fee*
 - d. **The legal services market is unlikely to be willing to absorb the greater losses that cases of lower value, higher risk or greater complexity would present** - solicitors will be disinclined to take on anything but the most winnable cases, restricting access to justice for many and prohibiting important test case litigation.*
24. *Furthermore, the government's proposal to move to a system of QOCS will have a number of adverse and unintended consequences:*
- a. **The creation of legal uncertainty for claimants** - as they would not know from the outset what, if any, costs they may face. This would act as a bar to justice, as claimants would not be able to proceed without the risk of serious and uncertain financial liability.*
 - b. **This uncertainty would lead to satellite litigation ('costs wars')** - as parties sought to determine the extent of the terms 'acted unreasonably' or being or 'sufficient financial means'.*
 - c. **Businesses would unjustly have to consider settling unmeritorious personal injury claims for economic reasons due to the risk of paying their own high legal costs even if a claim against them is unsuccessful***
25. *One particular negative expression of the introduction of financial uncertainty could be to restrict (non personal injury) cases to only the super-rich, who are able to absorb the potential financial losses. This is starkly expressed in the case of the Dowler family, who suggested in a letter to Nick Clegg and David Cameron in September that they would not have felt able to bring their case against the News of the World under the proposed legislation⁵.*

⁴ [Common Sense, Common Safety](#)

⁵ [BBC News, \(2011\), 'Dowlers back no-win, no-fee legal system' \(23 September 2011\)](#)