

Legal Aid, Sentencing and Punishment of Offenders Bill

Second Reading, House of Commons
29th June 2011

The Law Society is the professional body for over 145,000 solicitors qualified in England and Wales. The Society regulates and represents the solicitors' profession, and has a public interest role in working for the reform of the law.

The Law Society has deep concerns about many aspects of the Bill, and the following briefing highlights only the broad areas of most significant concern. More detailed briefing on any of the points is available upon request.

The Society is particularly interested in the following aspects of the Bill because of the potential adverse impact on the rule of law and the interests of justice:

- **Part 1: Legal Aid**
- **Part 2: Litigation Funding and Costs**
- **Schedules 6 and 7: Costs in Criminal Cases**

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Part 1: Legal Aid

Removal of areas from scope

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 wholly unable to resolve their problems in the absence of support through legal aid. There will be complex individual cases within the categories of law that are not suitable for alternative sources of advice or funding that may be available for some cases in the areas being axed.

The Ministry of Justice relies on its proposed exceptional funding test. Yet that test to bring cases back into scope is set at such a high level - that it would be a breach of the client's human right of access to the Court not to provide legal aid - that very few cases will be brought back into the scheme. The Government's own impact assessment published on 21st June 2011 estimates that in most categories of law, a maximum of 5% of cases will be brought back into scope (more in housing and clinical negligence), after 645,000 cases have been taken out of the system. The Society does not believe that this reflects the number of vulnerable people who will be unable to resolve matters without the assistance of legal aid.

Knock-on costs

The Law Society believes that the cuts to legal aid will create significant additional costs to the public purse. Examples include the following:

The Administrative Justice and Tribunals Council has identified in its response to the Green Paper that cutting early advice for matters that go to tribunal will lead to more misconceived applications to the Tribunals and to worse preparation and identification of the key issues. This will have knock-on costs both for the Tribunal service and the (usually) Government department that has to respond to the application.

Citizens Advice has identified that expenditure on social welfare law advice saves significantly more than it costs¹:

- For £1 spent on Housing advice, the government saves £2.34
- For £1 spent on Debt advice, the government saves £2.98
- For £1 spent on Benefits advice, the government saves £8.80
- For £1 spent on Employment advice, the government saves £7.13

Professor Richard Moorhead of Cardiff University has identified that the impact of litigants in person on the family courts will be that they require more court interventions, they take longer, their cases are more badly prepared and they are less likely to settle, and thus more likely to have a contested final hearing². This has implications for the litigant, their opponent, and the Court service, as well as CAFCASS and any medical or other experts instructed in the case.

¹ *Towards a business case for legal aid* - CAB paper to Legal Services Research Centre 8th International Conference, July 2010

² *Litigants in Person: Unrepresented Parties in First Instance Proceedings*, Moorhead and Sefton, 2005

AVMA (Action Against Medical Accidents) has identified that the saving of £16 million on legal aid for clinical negligence cases will be outweighed by the increased damages paid as a result of the 10% enhancement of damages proposed as part of the reform of no win no fee arrangements. Moreover, the NHS will in future be unable to recover the costs of successfully defending a claim, which will add further costs onto the health budget, to the benefit of insurance companies.

The Law Society has also identified that where an individual involved in a divorce is unable to make a claim against their spouse's pension because they have no advice on the procedure, and there is no liquid asset present out of which to pay legal costs, the result may well be that that individual is reliant on state benefits unnecessarily, or to a greater extent than should have been the case, for the whole of their retirement years.

These are the mechanics by which increased costs will inevitably be incurred by other Government departments. The Society has called on the Government to undertake a cross-departmental analysis of the likely impact of these costs, but this has not been done.

Alternative savings

The Law Society proposed a package of alternative savings that in our view would save the Government £384 million, as against their target figure of £350 million.

The Ministry purports to have rebutted our proposals in its response to the Green Paper. However, its reasons for rejecting our ideas do not stand up to scrutiny.

Some of the grounds of rebuttal are simply factually wrong. For example, the Ministry claims that the Society has estimated a reduction in volumes in the Magistrates Court of 50%, when in fact what the Society has done is estimate that only 50% of Magistrates Court hearings are legally aided.

Another common theme in the Ministry response is that the Society's assumptions are questioned. The Society have always been open about the fact that some of our savings figures were necessarily based on estimates drawn from the experience of those working in the relevant fields, as the Society does not have access to hard data. To the extent that hard data exists, the Ministry of Justice either controls it or has access to it. Yet despite questioning whether our assumptions are justified, the Ministry has not produced any data whatsoever to indicate that they are not. The Society is keen to have a debate about our proposals, and to discuss any evidence there might be to show that our assumptions are wrong. The Ministry has not produced any such evidence.

Moreover, the Ministry's own figures for the savings they expect to generate from their measures are not notably robust either. Much of the data that would support or undermine our figures would also be required to justify the Ministry's own figures. For several of their proposals, the Ministry readily admitted that the level of savings was "not quantifiable". It is hard to see how the Society could meet a higher standard of supporting data than the Ministry achieved.

The Society will need to make some marginal adjustments to our proposals, for example because the Government has now rejected some of the measures the Society has accepted from the Green Paper. But the Society remains of the view that the substantial majority of our package of £384 million remains valid.

New means test for police station advice

Clause 12 of the Bill introduces an entirely new power to dictate a means test for legal advice given to individuals at police stations.

Under the existing system, those arrested are automatically entitled to free advice from a solicitor, which is paid for from the legal aid budget. In less serious cases, this advice can be given via telephone, but otherwise the advice must be received in person.

Under this proposal, the director of legal aid case work, as designated by the Lord Chancellor, would have to determine “that the individual qualifies for such advice or assistance’ in accordance with a new test set out in the act. This test would consider both ‘means’ and ‘interests of justice’. In each individual case a determination will have to be made of the detained person's financial position and whether their case has sufficient merit. There has been no consultation whatsoever on this provision.

The right to speak to a solicitor when detained in the police station is an important bulwark against abuses of power against individuals who are entirely under the control of individual police officers. In addition, it serves as a protection for the police against false allegations of such abuses. It has been a cornerstone of our justice system for the past 25 years, having been introduced in the light of the abuses by the West Midlands and Metropolitan Police in the 1970s and early 1980s.

The proposal also presents enormous practical difficulties. Primarily, no consideration appears to have been given to how these tests would be conducted within the timescales that the police are required to operate, or how an arrested person would be able to prove their means once detained.

The Society understands that it is not intended that the clause would be used immediately, but is included to retain future flexibility. However, now is the only opportunity Parliament has to debate the issue. Given the grave implications for the rule of law in the criminal context, the Society opposes the clause in principle and consider that such powers are inappropriate until such time as the Minister is able to present a comprehensive policy for their use, developed after appropriate consultation.

Clause 26 - Choice of Provider of Services etc

The Law Society has significant concerns about the restriction of choice of solicitor, which will be expanded on in due course

Part 2: Litigation Funding and Costs

Key Points

- In the Law Society's view, the Government proposals for reform of the way civil court cases are funded directly threaten the public's access to justice.
- The Society believes that the adverse effects of these proposals to society, to the taxpayer and to business will be profoundly troubling. These sweeping changes were not contained within any party manifesto during the last general election nor included in the Coalition Agreement. These proposals do not appear to solve any real or identified set of public policy issues - rather they appear to be designed to deal with unjustified perceptions of problems that don't exist in practice.
- The Government's proposals are modelled on a recent report by Sir Rupert Jackson, a Court of Appeal judge. However, Sir Rupert Jackson was explicit in saying that the proposals formed a single interlocking package, which would only operate as envisioned if the reforms were introduced as a whole. But when the Government published its plans it was clear that many of the proposals had been 'cherry picked', with a variety of changes and modifications. Indeed, the important proposals stating that legal aid should be retained in many types of civil case and that referral fees for personal injury claims should be abolished or limited were omitted. The report had stated that it was a vital necessity that there should be no further cutbacks in legal aid eligibility or availability - but legal aid is now being substantially cut by the very same Bill.
- The Society believes that this is not a good example of proper, evidence-based policy development: and because of this, the Government now also risks introducing uncertainty and instability into the civil justice system, with consequent years of satellite litigation and increased disputes about the costs of cases, rather than their merits.
- In the mid 1990s the last Conservative government introduced Conditional Fee Agreements (based on a 'no win, no fee' basis) in order to alleviate the cuts in civil legal aid that were also made at the time. The current Government, in a dual assault on access to justice, is now further reducing the scope of civil legal aid while introducing changes to 'no win, no fee' agreements that will make them much harder to be used in future. This may well mean that only the very affluent will have access to civil justice in future - and the ability to enforce their legal rights.
- But while there will be many losers if the proposals are implemented (including accident victims, victims of negligence and wrong-doing, small and large businesses and even the Government itself) there will be a set of very clear winners - the general liability insurers - who wholeheartedly support these plans. While the Government is with one hand quite rightly trying to place the victim at the heart of the criminal justice system, it is with the other removing the victim from the heart of the civil justice system - and replacing them with the insurance lobby.

- The impetus behind the reforms is to deal with the mistaken perception of a so-called 'compensation culture', which as stated in a recent review by Lord Young of Graffham which was commissioned by the Prime Minister³:

"the problem of the compensation culture prevalent in society today is, however, one of perception rather than reality."

- In appendix A to the report Lord Young confirmed that amongst the many stakeholders who had responded to his call for evidence:

"there was a general agreement that the rise of a compensation culture is largely a myth perpetrated by the national press".

- The proposals in the Bill therefore introduce damaging changes to deal with a supposed compensation culture that doesn't actually exist.
- The Law Society therefore calls for these proposals to be paused while the true implications are properly examined.

Making Success Fees and After The Event (ATE) Insurance Premiums Non-Recoverable: unjust, unfair and unworkable

The Government's intention is to repeal provisions originally introduced to protect access to justice for those accident victims who would no longer qualify for legal aid, by making success fees and ATE premiums non-recoverable.

The availability of legal aid up until that time had protected claimants from adverse costs orders and any liability for their own solicitor's costs; this meant that meritorious accident victims whose financial circumstances prevented them from taking on these risks were able to pursue their cases and obtain compensation. The consequences of the changes will be:

- Abrogation of the restitution principle, as injured victims will no longer receive 100% of their compensation. Victims who have suffered harm due to the wrongdoing of others will lose a significant proportion of their damages. Many victims with catastrophic injuries will lose out in that their damages will be reduced and/or solicitors will not take on their case due to complexity and restriction on success fees;
- In non-damages claims, for example in contract or debt matters, the creditor may lose a significant proportion of the monies legally due under the contract. As a result, many businesses will suffer;
- Due to the steady rise of ATE premiums, which is likely to continue due to QOCS (see below), claimants could be liable to pay even greater amounts in addition to the solicitors success fee;
- The legal services market is unlikely to be willing to absorb the greater losses that cases of lower value, higher risk and/or higher complexity would present under these proposals, with an accordingly drastic reduction in the availability of access to justice for claimants with these types of claims. Even compensation of an amount as little as £500 can represent a significant sum of money to many people.

³ *Common Sense, Common Safety* October 2010

Example: Making Success Fees non-recoverable

Michael has been badly injured due to someone else's negligent behaviour, and wishes to pursue a claim for compensation. He plans to use the compensation to pay for the adjustments he will have to make to his life as a result of the injury.

Michael cannot afford the costs of hiring legal representation and he is not eligible for legal aid, so he finds a solicitor willing to take his case under a conditional fee ('no win - no fee') agreement. These agreements allows his solicitor, Lucy, to charge a 'success fee', the purpose of which is to compensate Lucy for the risk of not being paid in the cases she does not go on to win. This allows Lucy to provide people like Michael access to justice even in cases that are not certain to win, for example, in cases of greater complexity.

If Michael were to win his case under the existing rules, Lucy's success fee would be taken from the defendant, along with the legal costs of the case. This would mean Michael would receive the full amount of his compensation and could make the necessary adjustments to his life. Under the Government's proposals, success fees would not be recoverable from the losing party, but would instead come from up to 25% of Michael's compensation. Michael would be left with only three-quarters of his compensation, potentially leaving him to rely on the state for additional help.

In cases where there were difficult legal issues, the facts were more complex, or the defendant was insisting on taking the case to a full trial, the amount of success fee due to Lucy could substantially exceed the 25% of Michael's damages - but under the changes she could not recover more than this 25%. Because of this shortfall Lucy would therefore be less able to cover the costs of those CFA cases she lost, and as a business decision would be forced to stop providing representation for people with these kinds of difficult but meritorious cases.

Example: Making ATE premiums non-recoverable

When considering whether to pursue his case, Michael realises that if he loses, he will incur a level of debt that he will be unable to cope with, which could mean bankruptcy or losing his home. In order to mitigate this risk, Michael takes out After the Event (ATE) insurance, which means a single manageable premium is paid for a policy that will cover the costs should he lose.

Under the present rules, this is again payable by the losing party, meaning that if Michael wins, he will still receive his full compensation.

Under the Government's proposals, the cost of the ATE premium would no longer be paid by the losing side. This means Michael will now have to pay the premium - even further reducing his damages.

Qualified One Way Cost Shifting (QOCS) In Personal Injury Cases

Under this proposed change to personal injury cases (which is likely to be made by changes to the rules of court made alongside the Bill) defendants would continue to pay the claimant's legal costs if the claim is successful (but not the success fees or ATE premiums).

Claimants however, even if they do win the case, will be forced to pay the defendants' legal costs if the claimant was shown to have 'acted unreasonably' or was of 'sufficient financial means'. The consequences of this change will be:

- The creation of legal uncertainty for claimants, as they would not know from the outset what, if any, costs liability 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; in practice this would manifest as the risk of losing their homes, facing bankruptcy or falling into serious debt;
- This uncertainty would lead to satellite litigation ('costs wars'), as parties sought to determine the extent of the terms 'acted unreasonably' or being of 'sufficient financial means'. Even if unsuccessful claimants were required to make a minimum payment towards the defendant's costs, the same type of litigation would arise over the defendant seeking their full costs based on unreasonable claimant behaviour;
- 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.

Example: Qualified One Way Costs Shifting in Personal Injury

Michael continues to deliberate whether to take his case forward. This is mainly a financial question, as if Lucy did not think Michael's claim had a reasonable chance of winning on the legal questions, she would not have agreed to represent him.

Michael would be primarily worried about whether he would be liable to pay the other party's costs. Under the QOCS proposal, Michael would not have to pay the defendant's costs if he loses, unless he is shown to have acted 'unreasonably' or is of 'sufficient financial means'. Far from making it an easier decision, these uncertain terms, undeveloped in the proposals and with no history of case law in this context, would make it very hard for Michael to judge his total financial liability if he loses. He could well be inhibited from pursuing his claim for this reason, regardless of his chances of success.

If Michael were to try to mitigate this risk by taking out ATE insurance, he would find it harder to do so under the proposals; the increased uncertainty would be reflected by an increase in the premium payable, or simply reduced availability. If he won, this higher premium would of course further diminish the compensation he receives.

To take the alternative perspective, Michael's opponent could be a business or any one of many public service providers, including the Police, the NHS or a local authority. Even if they were to be successful in defending Michael's claim, they would be liable to pay their own costs, which in complex personal injury claims could be very substantial. These bodies would have to spend increasing amounts to defend themselves (with a correlating impact on the public purse, either through lost tax revenue or greater public spending). Businesses might also have to settle claims early even if they had good prospects of success at trial.

Why general damages to be increased by 10% is too little, too late

The Government is proposing to increase damages for pain and suffering in personal injury cases, paid to successful claimants, by 10%. Despite the mismatch of this figure with the 25% of damages that claimants may now lose, this change has been justified on the basis that it will make up for claimants having to pay success fees and ATE premiums. The consequences of this change will be:

- Impossible to police in practice. There will be no way of knowing if 10% is added to damages in cases which settle without judicial intervention (that is, do not go all the way to trial and have damages awarded by the court);
- The proposed increase would not compensate claimants for the loss of at least 25% of their damages through now having to pay success fees and ATE premiums;
- Many cases are settled by the acceptance of a "global" figure and in those cases it is impossible to distinguish between general damages and special damages in any case.

Example: General damages increase by 10%

Michael receives an offer of settlement from the other party, which in practice would be offered and paid for by their insurer. Under the proposals, Michael would be entitled to a 10% increase on the existing level of compensation paid out on the type of injury he has.

However, neither Michael nor Lucy would have any way of knowing whether this settlement represented 110% of the typical compensation paid before this change to the system was implemented. There is no way that this could be policed, and insurance companies would have a strong financial incentive to keep the details of compensation payouts obscure, to the detriment of successful claimants (and to the benefit of the companies' shareholders).

Even if Michael did receive 10% more damages than he otherwise would have, he would still receive less than full compensation because the increase would in the vast majority of cases not cover the success fees and ATE premium taken from his damages.

Who are the winners and the losers from the proposals?

Low to Middle Income Earners - Losers

The proposals could have a devastating impact on access to justice, at a time where legal aid is already under threat. CFAs were deliberately introduced to facilitate access to justice for middle income people who did not qualify for legal aid, in the context of successive cuts to legal aid funding.

Proposals to make claimants pay CFA success fees from their damages will cripple access to justice through this remaining route. With the amount of success fee limited to 25% of the value of the claim, many claims will be uneconomical to pursue, particularly those of lower value, high risk, or great complexity. Provision of CFAs in these cases will accordingly vanish, leaving people with no route to obtaining justice.

Businesses - Losers

In a volatile and depressed economic climate, the proposals would saddle small and medium sized businesses with extra costs, and in some cases make it impossible for them to pursue money owed to them in court.

The effects of the proposals on the ATE market would mean businesses would find it harder to protect themselves from the risks of losing a case and then having to pay the defendant's costs. Businesses would be inhibited from taking action to recover debts in future.

Businesses would also have to pay for their legal costs out of any damages they win. If a business had a dispute over money owed to them it would be much harder to pursue a claim, allowing bad debtors to escape without paying.

Finally, firms who faced claims for personal injury would be similarly disadvantaged; QOCS would mean that businesses may have to pay their own costs even if their defence was successful. Even though such losses are normally insured, there would still normally be an excess to pay on the policy, putting the business directly out of pocket when it has been proved to have done nothing wrong.

Taxpayers - Losers

Under the proposals, claimants would not be entitled to the full amount of their compensation, up to 25% of which would be used to pay success fees, in breach of the principle of restitution. Where the restitution principle is not adhered to, the state - and therefore the taxpayer - would be liable to pick up the costs of this shortfall; for example, an accident victim who was not fully compensated could well have to rely on the state for additional assistance, with an according cost to the taxpayer.

Entirely separately, the legal uncertainty arising from the introduction of QOCS would result in lengthy costs wars, as parties tested the limits of the law, unnecessarily taking up vast quantities of court time and resources.

The insurance industry - Winners

While the proposals include a 10% increase in damages, which in practice is typically paid by insurers, this rise will be impossible to police. In addition to the difficulties in assessing whether the courts are consistently enforcing this increase, there will be no mechanism for determining whether this increase is being applied in settled cases.

Were insurance companies not to consistently pay the increase, experience shows that these savings would not even be passed on to consumers in the form of lower premiums, but rather used to increase the profits of the insurance industry.

Furthermore, winning claimants would effectively be underwriting the costs of losing claimants from their damages. The Society believes this burden should properly sit with insurers as it does now, whose resources allow them to spread this risk more effectively. The catastrophic impact of the proposals on access to justice, particularly when combined with planned reductions of scope for legal aid, has not been assessed by the Government.

Schedules 6 and 7: Costs in Criminal Cases

Costs from Central Funds

Section 16 of the Prosecution of Offences Act 1985 gives courts the power to award costs to successful defendants of such an amount 'as the court considers to be reasonably sufficient to compensate the defendant for any expenses which he has properly incurred in the proceedings.'

This scheme came under scrutiny by the last Government, who decided to take advantage of a regulation making power contained in the Act to set rates or scales for payments of costs out of central funds and to introduce a scheme which limited recoverable costs to legal aid rates.

Under this proposal it would in future have been possible for a person to be prosecuted by the state - to be found not guilty - but then face a large bill for costs if they had used their own private solicitor (or a specialist firm) to defend themselves. The Society believes that if the state wrongfully prosecutes - then the state should bear the costs, not the acquitted defendant.

The Law Society consequently took a judicial review of the previous Government's decision to introduce this scheme on the basis that such a proposal undermined the rule of law and the interests of justice. The review was successful and the Regulations were overturned by the High court.

The Court said:

"The new regulations involve a decisive departure from past principles. They jettison the notion that a defendant ought not to have to pay towards the cost of defending himself against what might in some cases be wholly false accusations, provided he incurs no greater expenditure than is reasonable and proper to secure his defence. Any change in that principle is one of some constitutional moment. It means that a defendant falsely accused by the state will have to pay from his own pocket to establish his innocence. Whatever the merits of that principle, I would be surprised if Parliament had intended that it could properly be achieved by sub-delegated legislation which is not even the subject of Parliamentary scrutiny."

R (on the application of the Law Society of England and Wales) v Lord Chancellor (www.bailii.org/ew/cases/EWHC/Admin/2010/1406.html)

The Ministry of Justice decided that it would not appeal against the Court's judgment that the regulations were invalid. This was a decision made by the new Government, elected in May 2010 which had inherited the case from the last Labour Government.

The current Bill (under Schedules 6 and 7, given effect by clause 52) will now provide the Lord Chancellor with a power to cap the amounts that the courts award for the purposes of proceedings in England and Wales, other than in relation to costs incurred in proceedings in the Supreme Court. It will also largely prevent orders being made in respect of legal costs (that is, lawyers' fees, charges and disbursements including expert witness costs) where legal aid is available. Thus it will effectively re-introduce the previous proposals but now via primary legislation.

The Law Society maintains the view if the state wrongfully prosecutes - then the state should bear the costs - not the acquitted defendant and opposes these proposals.