

Legal Aid, Sentencing and Punishment of Offenders Bill

House of Lords Second Reading briefing - Monday 21 November 2011

The Law Society ('the Society') is the representative body for more than 145,000 solicitors qualified in England and Wales. The Society negotiates on behalf of the profession, and lobbies regulators, Government and others.

Key Points

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

- **Severely restrict the scope of civil legal aid**, including the abolition of legal aid for the victims of clinical negligence and in most civil and family law cases.
- **Potentially breach the UK's human rights obligations** by providing for exceptional case funding that is unlikely to adequately ensure practical and effective protection of the right of access to the courts.
- **Throw the courts system into chaos** by substantially increasing the number of litigants in person who may be ill-equipped to navigate the legal system alone.
- **Make conditional fee arrangements virtually inaccessible to most people** by reforming them in such a way as to make 'after-the-event' insurance too expensive for the majority of claimants.
- **Save considerably less than the Government claims** because of substantial knock-on costs to other departments. The Ministry of Justice has failed to undertake sufficient quantitative research into the potential extent of these additional costs.

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 has three parts: Part 1 aims to save the Ministry of Justice (MoJ) £350 million annually by removing several areas of law from the scope of legal aid; Part 2 seeks to bring in selected recommendations from Lord Justice Jackson's review of civil litigation funding; and Part 3 makes provisions relating to the sentencing and punishment of offenders. *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. In Schedule 1 the Bill sets out which areas of law will remain within scope of legal aid.
3. The Law Society's main concerns about Part 1 of the Bill can be summarised as follows:
4. **The Bill severely restricts the scope of civil legal aid** - The Government hopes to save £350 million annually by removing from the scope of legal aid every area of law except those expressly included in Schedule 1. This means that some areas of law, such as clinical negligence, are removed entirely, while others, notably immigration, family, employment and welfare benefit cases face severe restrictions.
5. *The Law Society believe 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 likely be brought back into scope.*
6. **The Lord Chancellor is granted the power to change scope provisions by regulation** - Under the Bill the Lord Chancellor will have a power to modify Schedule 1 by omitting further services from the scope of civil legal aid (Clause 8(2)).
7. *The Society considers that any such decision should be subject to full parliamentary scrutiny, particularly given how narrow are the categories remaining in scope after this Bill passes. When this issue was debated in Committee by members of the House of Commons the Minister justified the current wording of the clause by arguing that 'in the current fiscal climate we have to make tough choices about which civil legal services should continue to be funded by the taxpayer'¹. In light of the significant financial and social costs likely to be incurred by these cuts, the Society is of the view that the Lord Chancellor should be empowered to bring services back within the scope of legal aid in less austere times.*
8. *The Society therefore agrees with the recommendation of the House of Lords Constitution Committee in their report of 17 November 2011, in which they wrote: 'This provision should*

¹ [Jonathan Djanogly, Public Bill Committee, 6 September 2011](#)

*be amended to enable the Lord Chancellor not only to omit services from the scope of civil legal aid but also to add services to the scope of civil legal aid.*²

9. **Clinical negligence cases are removed from the scope of legal aid entirely** - As an alternative to legal aid the Government argues, as repeated by the Minister during the Report in the House of Commons, that 'alternative sources of funding, such as conditional fee arrangements, may be available for meritorious claims'.³
10. *The Society has very serious concerns about removing clinical negligence from scope; the effect of this cut will be that the most disadvantaged and vulnerable in society are left without legal redress. The Society does not agree that conditional fee arrangements are always viable funding alternatives in such cases. Clinical negligence cases commonly require substantial work to be undertaken by the lawyer in order to assess whether there is a valid claim. Under a CFA arrangement this work would be unfunded. No-win, no-fee lawyers are unlikely to be willing to undertake this intricate work without payment.*
11. **The Bill's definition of domestic violence may lead to unnecessary uncertainty** - The Government proposes that legal aid will no longer be routinely available for family law for ancillary relief cases or private children law cases. It is proposed that legal aid for these areas of law will only be available for applicants who have suffered domestic violence.
12. *However, the Law Society has serious concerns regarding the definition of domestic violence found in Schedule 1 of the Bill. Domestic abuse can take many forms. The definition contained within the Bill is excessively narrow. The Society sees no reason why the Government should not adopt the definition of domestic abuse provided by the Home Office and the Association of Chief Police Officers (ACPO). Given that the Minister argued during the Report in the House of Commons that 'the definition in the Bill would not exclude from scope any of the types of abuse covered by the definition used by the Association of Chief Police Officers'⁴ the Society suggests the Government remove any potential uncertainty by adopting the ACPO definition in the Bill.*
13. *Moreover, the facts by which the victim of abuse has to prove that abuse has occurred, and thereby obtain legal aid funding for resolving the other aspects of the case, do not include the giving of undertakings by the Respondent to an application for an injunction. A substantial proportion of injunction applications are resolved in this way. The giving of an undertaking avoids the victim of abuse having to give evidence and be cross-examined (often by the abuser in person) on the abuse. It provides as much protection as a Court order. And it resolves the matter in a hearing lasting a few minutes. If undertakings are not accepted as evidence of abuse, the victim of abuse will have to press for an injunction order to obtain funding for the other elements of the case. This will mean the victim has to go through the distress of being cross-examined, and the hearings will last hours instead of minutes, at substantial cost to the taxpayer. Furthermore, the experience will entrench the positions of the parties, meaning it is much less likely that other areas of dispute will be resolved without contested hearings, placing yet another additional financial burden on the taxpayer.*
14. **The proposed exceptional funding test is excessively narrow** - Clause 9 provides for a new exceptional funding regime to be applied, in individual cases, by a newly created civil servant, the Director of Legal Aid Casework. The Bill provides for legal services to be made

² [House of Lords Select Committee on the Constitution, 21st Report of Session 2010-12, 17 November 2011](#)

³ [Jonathan Djanogly, House of Commons, 31 October 2011](#)

⁴ [Jonathan Djanogly, House of Commons, 31 October 2011](#)

available in excluded cases where she determines that a failure to provide legal aid would be a breach of Convention rights or EU law entitlements.

15. *The Government claims that this provision would address most of the difficult issues that have been presented by many organisations against the scope cuts. However, the case law in the European Court of Human Rights on this issue has interpreted the right far more narrowly than the Government appears to have done. The Society therefore believes that the test needs to be widened if it is to keep within scope all of the cases that Parliament believes ought to be in scope.*
16. **The Bill provides for a single telephone 'gateway' to become mandatory** - 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.
17. 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.
18. *The 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 document⁵. 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.*
19. **Clause 12 threatens to limit advice and assistance at the police station** - Clause 12(1) concerns criminal legal aid in the context of advice and assistance for individuals in police custody. It provides that 'initial advice and initial assistance are to be available under this Part to an individual who is arrested and held in custody at a police station or other premises if the Director has determined that the individual qualifies for such advice and assistance in accordance with this Part (and has not withdrawn the determination)'.
20. *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. The House of Lords Constitution Committee raised similar concerns in their report of 17 November 2011, noting that 'the House may wish to consider whether Clause 12, as it is currently drafted, has the*

⁵ [Ministry of Justice Impact Assessment \(2011\), Cumulative Legal Aid Reform Proposals](#)

potential to undermine this right [to free legal advice at the police station]'.⁶ Many MPs raised serious points regarding the Clause at the Report Stage in the House of Commons, leading the Minister to state: 'I can confirm that we will... carefully review our approach to these clause issues as the Bill goes through its stages in another place.'⁷ The Society therefore sincerely hopes that the Government does not renege on this commitment during the Lords stages.

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

21. **The proposed cuts will end up costing taxpayers more in the longer term** - Despite requests from the Law Society that the MoJ quantitatively investigate 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 November⁸ 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.
22. The Society's concerns are shared by the Justice Select Committee who, 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'⁹.
23. In the absence of a comprehensive MoJ investigation into these costs the Law Society has commissioned King's College London to undertake independent research, assessing all available evidence as to the knock-on costs of the Bill's scope cuts. The report will be made available once complete.
24. **Cutting the deficit without restricting access to justice: the Law Society's alternative proposals** - The Society has shown that alternative savings of £375 million, 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 current approach.

⁶ [House of Lords Select Committee on the Constitution, 21st Report of Session 2010-12, 17 November 2011](#)

⁷ [Jonathan Djanogly, House of Commons, 2 November 2011.](#)

⁸ [Ministry of Justice Impact Assessment, \(2010\), Legal Aid Reforms: Scope Changes](#)

⁹ [Justice Select Committee \(2011\), Third Report: Government's proposed reform of legal aid](#)

25. The Society recognised some of the criticism's made of its alternative proposals, but stands by the majority of its savings plan. Taking into account the Ministry's comments the plans have undergone minor revision, but still show that there is a comprehensive, considered and costed alternative to the Government's decimation of civil legal aid.

Part 2: Reforms to civil litigation funding

26. Part 2 of the Bill seeks to introduce selected recommendations from the review into civil litigation funding arrangements undertaken by Lord Justice Jackson. These extensive reforms which, in the view of the Society, will have very serious implications for the practical ability of many thousands of people to access justice, were debated for just 30 minutes by MPs during the Bill's Report Stage¹⁰.
27. **Recoverability of 'success fees' and 'after-the-event' insurance premiums in Conditional Fee Arrangements (CFAs)** - The current regime governing CFAs was introduced in the mid-1990s by the last Conservative Government in order to mitigate for cuts in civil legal aid which were also made at the time, by providing an alternative funding route for those who could not afford to pursue litigation and who were not eligible for legal aid. Where there is a CFA, the solicitor shares in the risk of losing the case. If the case is won the lawyer's base costs are usually recoverable from the losing party and the lawyer can recover an additional uplift - or 'success fee' - which can be up to 100 per cent of the base costs in those cases which proceed to trial. In many other cases that settle earlier than trial the success fee is in fact considerably less.
28. 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. 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.
29. 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 in the Bill 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'.

¹⁰ [Hansard \(HC\), 2 November 2011.](#)

30. *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'¹¹.*
31. *Furthermore, the proposals are predicated on the flawed view that claimants have no interest in costs. Quite apart from the obvious point that claimants are likely to be highly interested in issues affecting their well-being it is also clear that the solicitor taking the claim has a strong interest in not running bad cases for which they will not be paid for as they are taken on a 'no win, no fee' basis.*
32. 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. **The ATE market is likely to collapse** - meaning claimants in many deserving cases will not risk taking a case because of the profound financial risks if the case is lost
 - 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.
33. **While not in the Bill, Qualified One Way Costs Shifting (QOCS) will be introduced** - The Government believes that this will act as a substitute for the removal of the recoverability of ATE insurance premiums from the defendant. QOCS essentially means that there is a deviation from the usual rule where the loser pays winners costs (the 'costs follow the event' rule). A losing defendant would continue to be liable for the costs of a winning claimant, but a losing claimant would pay for a winning defendant's costs where, and to the extent, it is reasonable for them to do so. Conduct and financial resources will be taken into account, and if the claimant is considered to have sufficient funds, the successful defendant's costs will be payable.
34. *The Society is of the view that 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. **Uncertainty will lead to satellite litigation costs** - It is extremely likely that this is going to lead to 'satellite litigation' (where proceedings are issued not related to the main issue in a matter, but matters which are ancillary to it) as parties seek to determine the extent of the terms 'acted unreasonably' or being of 'sufficient

¹¹ [Common Sense, Common Safety](#)

financial means'. The move will therefore not serve to reduce civil litigation costs, but will in fact increase them.

- c. **This position actually restricts access to justice for a defendant** - In practical terms there may be a disincentive for defendants (or their insurers) to defend a claim, no matter how strong a defence they feel they have. Thus businesses may have to settle unmeritorious personal injury claims for economic reasons.
- d. **A system whereby a winning claimant will recover their costs, but a winning defendant must bear their own introduces a fundamental inequality between litigating parties** - QOCS could therefore serve to restrict access to justice for defendants. Not all defendants will have the support of an insurance company. The regime could therefore be particularly detrimental to private individuals and small businesses.

35. One particular negative expression of the introduction of financial uncertainty could be to restrict many 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 legislation¹².

36. ***The likely result of the Government proposals is obvious: the decimation of the market that allows claimants to insure themselves against the risk of losing a case and facing substantial adverse costs liability. Being unable to accept these risks, claimants simply will not be able to bring cases. Thus it is the case that, when combined, Parts 1 and 2 of the Bill represent a serious affront to access to justice.***

37. **At the end of Part 2 is a proposal of very great concern to the Society: namely to amend defendant cost orders (DCOs)** - In Clause 52 and Schedule 6 of the Bill the Government has sought to amend the *Prosecution of Offenders Act 1985* so that the Lord Chancellor has the power to cap the amounts that courts award. The Bill's explanatory notes state: 'This Bill will provide the Lord Chancellor with a power to do so 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 where legal aid is available.'¹³ The consequences of the proposed change are that:

- a. There will be no Defendants' Costs Orders for individuals in the Crown Court (except in appeal cases) as contributory legal aid is available.
- b. In the Magistrates Court Defendants' Costs Orders will be capped at legal aid hourly rates.
- c. There will be no Defendants' Costs Orders in any circumstances for companies/corporate bodies.

38. ***The Society considers the Government's proposals to be both unfair and illogical; even more so when the Government is doing nothing to reduce the burden on the legal aid fund by forcing wealthy defendants whose assets have been restrained to pay for their own defence, rather than granting them free legal aid and inflating the cost of legal aid to the taxpayer.***

¹² [BBC News, \(2011\), 'Dowlers back no-win, no-fee legal system' \(23 September 2011\)](#)

¹³ [Legal Aid, Sentencing and Punishment of Offenders Bill, Explanatory Notes](#)