

Legal Aid, Sentencing and Punishment of Offenders Bill – Part 1

House of Lords Committee Stage- Tuesday 20 December 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.
- **Potentially jeopardise the fundamental right of legal advice in the police station.** Clause 12 gives the Lord Chancellor the power to introduce a means and merits test for advice in custody, raising the possibility that miscarriages of justice may occur.
- **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 Part 1 of 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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Part 1: Changes to legal aid

1. 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.
2. The Law Society's main concerns about Part 1 of the Bill can be summarised as follows:
3. **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.
4. *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.*
5. **The Lord Chancellor is granted the power to change scope provisions by regulation** - Clause 8 of the Bill allows the Lord Chancellor to omit further services from the scope of legal aid by regulation, but not to include them again in the future.
6. *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.*
7. **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'.²
8. *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. In the most complex and distressing cases, establishing whether a victim of clinical negligence has a legitimate case to pursue involves interpreting extensive medical reports and witness statements. No win, no fee*

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

² [Jonathan Djanogly, House of Commons, 31 October 2011](#)

lawyers will in many cases be unable to undertake this highly skilled work without payment.

9. **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.
10. *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'³ the Society suggests the Government remove any potential uncertainty by adopting the ACPO definition in the Bill.*
11. *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.*
12. **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 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.
13. *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.*
14. **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.

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

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.

15. 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.
16. *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 document⁴. 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.*
17. **Clause 12 threatens to limit advice and assistance at the police station** - Clause 12 of the Bill gives the Lord Chancellor the power to restrict the provision of legal advice and assistance in the police station to those who qualify for it on the basis of criteria, which may include the introduction of financial means testing.
18. *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. 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.'⁵ 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

19. **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 November⁶ 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.

⁴ [Ministry of Justice Impact Assessment \(2011\), Cumulative Legal Aid Reform Proposals](#)

⁵ [Jonathan Djanogly, House of Commons, 2 November 2011.](#)

⁶ [Ministry of Justice Impact Assessment, \(2010\), Legal Aid Reforms: Scope Changes](#)

- 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.

20. 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'⁷.

21. 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, authored by Dr Graham Cookson, can be read on the King's College website [here](#). However the key findings can be summarised as followed:

- a. The Government's economic argument for cutting legal aid for civil justice problems – that it will produce £270 million in savings – has been seriously undermined.
- b. Based on the limited data available the report conservatively estimates cuts to legal aid in three areas of law – family, welfare and clinical negligence – designed to save £239 million will cause unintended extra costs of £139 million.
- c. The result is a net saving of just £100m per annum – 42% of the Government's prediction and less than 0.1% of the total annual fiscal deficit.⁸ The Government's reforms will do substantial damage to access to justice for an insubstantial saving.
- d. The report echoes the position of the Justice Select Committee and the Public Accounts Committee that since numerous costs are impossible to estimate due to a lack of data, it would be irresponsible to introduce such substantial reforms without first undertaking a full assessment of their possible knock-on costs.
- e. In clinical negligence cases the knock-on costs could be as much as three times (£28.5m) the Government's original estimated savings (£10.5m).
- f. In social welfare law there could be net knock-on costs amounting to £35m, resulting in a net saving of just 39% of the Government's estimate.
- g. In family law the Government may realise just 40% of its predicted saving, with predicted knock-on costs of £100m, set against a saving of £170m proposed by the Government.

⁷ [Justice Select Committee \(2011\), Third Report: Government's proposed reform of legal aid](#)

⁸ ONS, Statistical Bulletin: Public Sector Finances, November 2011.

22. **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.
23. 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.