Legal Aid, Sentencing and Punishment of Offenders Bill

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Introduction and Summary of Legal Aid Provisions

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists.

2. JUSTICE opposes the cuts to legal aid and assistance which lie behind many of the enabling provisions of the legal aid part of this Bill and the relevant schedules. JUSTICE is concerned that this Bill will allow major cuts to legal aid which:
   (a) Will, if implemented, cause significant and widespread hardship to individuals already in desperate situations;
   (b) Threaten the rule of law through too harsh a restriction on access to justice;
   (c) Ignore the impact of its provisions on the operation of the justice system as a whole.

3. In launching the consultation paper prior to the Bill, the Lord Chancellor acknowledged in April that 'access to justice is the hallmark of a civilized society'. The same point was put in a slightly different way by the Master of the Rolls in a recent speech:
   an effective justice system has three facets:
   (i) making clear and effective laws,
   (ii) enforcing those laws effectively and clearly through the legal system, and
   (iii) ensuring the law and the legal system are accessible to all.[1]

Constitutional right to 'equal justice' should be recognised

4. The consultation paper - and current government thinking - gives insufficient attention to the fundamental reason why the state should provide access to justice. The paper should do more to recognise that the objective is to provide what, in the US, would be termed 'equal justice' ie an equally just result for both parties, regardless of their resources. This should be a fundamental

[1] Lord Neuberger, 'Justice in a Time of Economic Crisis and the Age of the Internet', 13 October 2011.

constitutional principle and, indeed, it is the phrase engraved on the outside of the US Supreme Court. The duty of a democratic state should be to ensure that members of society abide by, and benefit from, the provisions of the law. A major test of a state's capacity to deliver equal justice is the extent to which any dispute is determined on its inherent legal merits, and is not unduly influenced by the imbalance of resources between the parties.

5. As a consequence of its limited approach, the consultation paper focuses too narrowly on the right to legal services.

> 'Our consideration of the justification … is based on an assessment of the nature of the rights involved, the client's ability to represent his or her own case and the availability of alternative assistance, remedies or funding.'[2]

These issues focus too much on inputs: what matters is the output. The justification for legal aid funding should be that, without it, the citizen would stand a considerable risk of getting an unfair result a legal dispute.

6. The removal of legal aid from one party to a dispute manifestly destroys the possibility of a level playing field where the other has the resources to be represented. This is what will largely happen in matrimonial cases where women, predominantly, will lose representation and men retain it. The same inequality will arise elsewhere – for example, where the state is represented in a welfare benefits appeal case beyond the initial tribunal but the claimant is not.

Weakest groups targeted

7. The government proposes cuts to civil legal aid of an estimated total of around £450m a year when fully implemented. Roughly two-thirds of these will come from cuts directed at those who are currently legally aided clients and one-third from remuneration cuts to solicitors and barristers expected to do the same work as now but for less money.

8. The Ministry of Justice's own impact assessments indicate that around half a million people will lose entitlement. Its equality impact assessment acknowledges that the losers will be predominantly women (57 per cent),

[2] Proposals for the Reform of Legal Aid in England and Wales, para 2.27

from ethnic minorities (26 per cent) or ill or disabled (20 per cent). These cuts are targeted at the weakest in society. The Ministry concludes;

> We have identified the potential for the proposals to have a disproportionate impact on women …[3] disproportionate impact on [Black and Minority Ethnic clients] … [4] Our initial conclusion, therefore, is that we cannot rule out that there may be a disproportionate impact relative to the population as a whole [in relation to disabled or ill clients] …[5]

Cuts claimed as inherently desirable

9. The Secretary of State argues that the proposals for cuts are not just required by the Treasury: they are 'inherently desirable'. JUSTICE accepts that there is nothing sacrosanct about current levels of expenditure and it supports proposals for cuts where acceptable results in terms of fairness can be obtained. However, it is manifestly clear that many of these cuts are not desirable at all and would not be made if the Ministry were not under pressure to deliver savings to the Treasury for other reasons.

10. As a result, whatever cuts are made in the short term, the Ministry must commit to a root and branch review of the quality of justice. It should commit to re-investing in legal aid where cuts have been made which experience indicates have jeopardised adequate access to justice, and as and when resources become available. The Bill should contain a requirement of further review in three or four years.

Failure to take a holistic approach

11. If there are acceptable cuts to be made to the legal aid budget then they will derive from a holistic approach to the delivery of services taking into account substantive law, procedure, methods of adjudication and systems of delivery as well as legal aid. Just as one example, it may be that considerable savings would be made to matrimonial costs if divorce were available without any

[3] *Legal Aid Reform: cumulative impact – Equalities Impact Assessment* para 1.35
[4] As above, para 1.37
[5] As above para 1.39

conditions on a 'no fault' basis. Some of the proposals set out in the recent *Family Justice Review* would go some way to fit in to a holistic approach to making savings across the family justice system. For example, the review suggested that uncontested divorces should be dealt with on an administrative basis, thereby freeing valuable judicial time.

> 'The process for initiating divorce should begin with the online hub and should be dealt with administratively by the court, unless the divorce is disputed.'[6]
>
> 'Administrative handling of divorce applications could release perhaps 10,000 judicial hours on a crude estimate.'[7]

12. 'No fault' divorce was explored by the Law Commission in the late 1980s; proposed for adoption in legislation by Lord Mackay as Lord Chancellor in the mid-1990s and dropped in 1995 as offensive to morality. However, this is the sort of proposal that is required if greater attention is to be given by governments to the cost of legislation than hitherto.

Misrepresentation of existing legal aid scheme

13. The consultation paper displays a shaky grasp of history. The Impact Assessment on the consultation paper says that 'The scope of legal aid has expanded beyond its original intentions …'[8] Actually, the Legal Aid Act 1949 was promoted with very wide objectives that were explained to the House of Lords as providing:

> 'Legal advice for those of slender means and resources so that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right.'

This is precisely the kind of wide approach to scope and eligibility under attack in the consultation paper.

Ten key issues

14. For the purposes of this Briefing, JUSTICE concentrates on the following ten issues on which improvement might be made to legal aid provisions in the Bill:

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[6] *Family Justice Review* para 131
[7] As above, para 5.10
[8] *Impact Assessment; Cumulative Legal Aid Reform Proposals* para 12

1) A **purpose clause** should be inserted into clause 1 **to ensure access to justice**;
2) There should be a **pilot of the proposed shift from 'face to face' advice to a 'telephone gateway'**;
3) **Independence** is required for the proposed Director of Legal Aid Casework and a **right of appeal** introduced against the Director's decisions;
4) **Further reductions in scope** should require primary legislation and not be implemented by statutory instruments;
5) The **definition of 'domestic violence' and the evidence required to prove it should be widened**;
6) There should be no removal of **clinical negligence** cases from the scope of legal aid;
7) There should be no removal of **social welfare law** from the scope of legal aid, at least when they involve appeals to the courts or the Upper Tribunal;
8) The criteria for **exceptional cases** should be extended**;**
9) Ensuring **police station advice is non-means tested and face-to-face advice;**
10) A **review of Part One of the Act** three years following Royal Assent.

Issue 1: Clause 1: a purpose clause

15. The Bill contains no commitment to ensuring access to justice. The reform of legal aid administration proposed in the Bill follows recent legislation in New Zealand (Legal Services Act 2011(NZ) (LSA (NZ)). This contains a statement in section 3 of the overarching purpose of the Act that, although in general terms, reaffirms the government's commitment to access to justice in a desirable way:

> 'The purpose of this Act is to promote access to justice by establishing a system that—
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> (a) provides legal services to people of insufficient means;
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> and
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> (b) delivers those services in the most effective and efficient manner.'

16. This Bill simply begins with a statement of the powers of the Lord Chancellor:

> 'The Lord Chancellor must secure that legal aid is made available in accordance with this Part.'

Issue 2: Clause 1: the need to pilot the end of 'face to face' advice

17. The consultation paper that preceded the Bill proposed the end of legal advice in its current face to face form by a single 'hotline' gateway. This has the potential to be kind of Legal Aid Direct, similar to the NHS Direct. The idea merits consideration and should be trialled. However, the scheme should be piloted on a small scale for a fixed period of time as a preliminary measure in order to ensure the scheme's feasibility.

18. JUSTICE is encouraged that the Justice Minister gave assurances at Committee Stage that the single telephone gateway scheme will initially be confined to a finite number of legal areas, namely: 'debt, community care, discrimination—meaning claims relating to the contravention of the Equality Act 2010—and special educational needs.'[9]

19. However, how long the mandatory telephone gateway will apply to just these four areas of law is unclear, as are the measures which the government would undertake in order to ensure the pilot was sufficiently reviewed before the gateway was extended. An assurance has been given by the Justice Minister in this regard, but it is vague: 'we will review implementation of the mandatory single gateway and mandatory specialist advice over the telephone for the four areas of law, and we will use the outcome of that review to determine any expansion of the helpline to other areas of law in due course.'[10]

20. A duty should be included in the Bill in order to ensure that sufficient consideration is given to the success or otherwise of the government's proposal. A pilot scheme would allow the government time to monitor and address some key concerns regarding the implementation of a single

[9] HC Debates col 290, 6 September 2011
[10] HC Debates col 296, 6 September 2011

telephone gateway service so that these can be ironed out were the scheme to be fully implemented.

21. A telephone gateway service is unlikely to be appropriate for all users. Those with language difficulties, learning difficulties or mental health problems would be put at a distinct disadvantage in being compelled to use a telephone advice system; the government are at risk of excluding vulnerable people from accessing meaningful and effective legal advice.

22. Thus, the provision of face-to-face advice needs to be protected. JUSTICE is encouraged that the government has acknowledged that the single telephone gateway would not be appropriate for the following types of cases: 'emergency cases: instances where the client has previously been assessed by the mandatory single gateway within the last 12 months as requiring face-to-face advice and are seeking further help from the same face-to-face provider to resolve linked problems; clients in detention, including prisons, detention centres and secure hospitals; and children, defined as those under 18.'[11]

23. However, the government has failed to deal with those who have low communication or language skills. Potential users may be deterred from using a telephone advice system due to perceptions that such a system is impersonal. Often, those who seek legal advice are facing a legal problem are suffering anxiety and are not always as able to easily articulate the issues they face. It is a concern that the confidence that is instilled in meeting a legal advisor face-to-face will be lacking from a telephone advice service, and so users of the telephone advice system will not be as open about the legal problems they face. This is best exemplified by users who may be victims of domestic abuse; such clients have a tendency to only disclose such abuse once a relationship of trust and confidence in the legal advisor has been developed.

24. It seems likely that gateway staff operating the single telephone gateway, who would be the compulsory first port of call for individuals seeking advice, will lack any specialist legal training. The Justice Minister confirmed in Committee

[11] HC Debates col 294, 6 September 2011

that: 'Gateway operators will not offer the callers any advice tailored specifically to their circumstances, so legal qualifications will not be a contractual requirement.'[12] It would appear that the gateway staff will be asked to make a judgment about whether an individual has a potential case requiring advice and so whether that individual is then referred to a specialist adviser or not. There is a danger that legal issues will go unrecognised and so unpursued. The current proposals appear to expect unqualified staff to make difficult legal judgments on inadequate facts from clients who find it difficult to communicate by telephone.

Issue 3: Clause 4: the Director of Legal Aid Casework

25. A substantial change proposed by this Bill to the legal aid scheme is the abolition of the Legal Services Commission and the introduction of the Legal Aid Casework Director ('The Director') who is established to bring the system back under the control of the government as a civil servant. This mirrors a recent change brought in by the New Zealand government. The New Zealand legislation creates a statutory duty that the Director must conduct his role, powers and functions independently of the government (see LSA s71 (2) (NZ)).

26. It is of vital importance that the independence of the Director is set out in plain terms. There needs to be adequate provision in the Bill to ensure no government interference with how legal aid is administered. JUSTICE foresees that difficulties may arise where decisions are taken by ministry official about whether legal aid should be granted for their minister to be sued.

27. The New Zealand legislation allows an appeal from a decision of the Director of Legal Aid Casework to an independent tribunal. This is the minimum that is required to prevent the Lord Chancellor being seen as 'a judge in his own cause' and to avoid the absurdity of the Lord Chancellor being sued for refusal of legal aid in a judicial review application against himself.

28. The New Zealand legislation also allows a person aggrieved by a decision of the Commissioner the right to apply for a reconsideration (see s51). There is

[12] HC Debates col 294, 6 September 2011

also a subsequent right of appeal to an independent Legal Aid Tribunal under s52. In addition, an aided person or an applicant for legal aid may apply to the Tribunal for a review of the Commissioner's reconsideration of a decision referred to in subsection (2) on the grounds that it is 'manifestly unreasonable; or wrong in law'.

29. In Committee, the Justice Minister gave assurances that the government would provide a mechanism for independent appeal via an adjudicator as opposed to a Tribunal: 'There are currently review arrangements under the Access to Justice Act 1999, and it is our intention to continue with the current arrangements, including the use of independent funding adjudicators, rather than moving to another model, such as that of New Zealand.'[13] JUSTICE is of the view that an independent Tribunal would be best placed to effectively appeal decision of the Director. However, we consider that, at a minimum, the assurance given by the Justice Minister should be expressly stated in the Bill given the crucial importance the procedure of an independent appeal is to the legitimacy of the Director and the fair administration of legal aid.

Issue 4: Clause 8: No Henry VIII clauses

30. The Bill, as drafted, allows Ministers to amend primary legislation by statutory instrument. An example is Clause 8(2) which allows the Lord Chancellor to amend Schedule 1 in such a way by cutting scope but not increasing it. This is unacceptable in basic constitutional principle; likely to be unwieldy in practice and politically undesirable. It creates a major 'Henry VIII clause' in which secondary legislation can be used to reduce the effect of primary legislation without adequate supervision by Parliament. .

Issue 5: Clause 8, Schedule 1: domestic violence

31. The government proposes that legal aid will no longer be routinely available for private ancillary relief cases or 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 but this is defined too restrictively.

[13] HC Debate col 317, 6 September 2011

32. JUSTICE is encouraged that the Secretary of State has said that he is committed to ensuring that the legal aid system operates in such a way as to afford protection to those who suffer domestic violence:

> 'The Government is committed to supporting victims of domestic violence …We recognise that the state has a role to play in helping claimants to obtain protection and consider that those in abusive relationships need assistance in tackling their situation… we consider that victims of abuse may be particularly vulnerable. We have therefore concluded that the importance of the issue and characteristics of the litigants are such that funding is justified…'[14]

33. However, JUSTICE shares widespread concern at the definition of domestic violence in Schedule 1. Domestic violence can take many forms. The government's current proposals for the definition of domestic violence are too limited. The government should adopt the definition of domestic violence quoted by the Association of Chief Police Officers (ACPO) and which is apparently shared by the government for other purposes, such as prosecution:

> 'any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults, aged 18 and over, who are or have been intimate partners or family members, regardless of gender and sexuality.'[15]

34. It is desirable to have a cross-governmental approach to an issue such as domestic violence. This would provide consistency and clarity. We can see no reason why the government could object to the use of this definition, unless it is for financial reasons. This was denied by the Minister: 'others suggested that, for the government, money comes before safety, but that is entirely rejected.'[16]

35. Accordingly, the usual definition should be used. Ministers should be pressed on why government seeks to operate on two definitions of such a major phenomenon that is so important to women.

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[14] *Proposals for the Reform of Legal Aid in England and Wales*, p 4.64
[15] National Policing Improvement Agency *Guidance on Investigating Domestic Abuse* 2008
[16] HC Debate col 688, 31 October 2011

36. Domestic violence is widely unreported. Research report conducted recently by Rights of Women showed that 54 per cent of the women surveyed did not report violence to the police or apply to the courts for a protective order.[17]

37. In these circumstances, the government have set the bar too high:

> 'Legal aid will be available for victims of domestic violence in private family law cases in which one of [these] criteria is met.
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> 'The first criterion is that a non-molestation order, occupation order, forced marriage protection order, or other protective injunction against the other party is either in place or has been made in the past 12 months. The second is a criminal conviction for a domestic violence offence committed by the other party against the applicant for funding, unless the conviction is spent. The third is that there are ongoing criminal proceedings against the other party for a domestic violence offence by that party against the applicant for funding. The fourth is that the applicant for funding has been referred to a multi-agency risk assessment conference as a high-risk victim of domestic violence and a plan has been put in place to protect them from violence by the other party. The final criterion is that there has been a finding of fact in the family courts of domestic violence by the other party, giving rise to the risk of harm to the victim.' [18]

38. This is too restrictive. In particular, undertakings must be included in the list of relevant evidence of domestic violence. Proceedings under part IV of the Family Law Act 1996 commonly conclude with the perpetrator giving an undertaking to the court for the protection of the victim. Undertakings being used in this way offer a number of advantages: the proceedings are resolved having secured the appropriate protection to the victim and without proceedings continuing to a full contested hearing. This has obvious advantages both for the reduced anxiety of the victim in avoiding giving oral evidence in court, and for the savings made for the public purse. However, if undertakings are not recognised as satisfactory evidence of domestic

[17] *Women's Access to Justice: a research report*, Executive Summary, page 1
[18] HC Debate col 358, 6 September 2011

violence for legal aid purposes, the inevitable knock-on effect will be that victims will be disinclined to accept undertakings as they will disqualify them from further legal aid. This would not only be a false economy for the government but would cause further trauma to the victim. We are encouraged to see that in relation to the inclusion of undertakings as evidence of domestic violence, the Justice Minister at Report Stage in the Commons appeared to acknowledge the issue and said that: 'I will look at that issue further.'[19] Ministers might be pressed on the result of their further consideration.

39. There should be no 12 month time limit for evidence, as is the government's current proposal. Post-separation violence is a common, long term problem. A former victim spoke at the All Party Parliamentary Group on Domestic and Sexual Violence meeting on 31st October 2011 and described the 12 month evidence time limit as a complete failure to understand the dynamics of abuse.

40. The Justice Minster gave an indication in Committee that the government considered that the forms of evidence of domestic violence that would be accepted would be best dealt with in secondary legislation as opposed to primary legislation.[20] JUSTICE does not agree. The type of evidence that the applicant for legal aid will have to provide is crucial to ensuring that victims of domestic violence are afforded legal aid and therefore access to justice; for this reason, this should be subject to proper parliamentary scrutiny.

Issue 6: Clause 8, Schedule 1: Clinical Negligence

41. Clinical negligence will be removed completely from scope by the Bill. JUSTICE has particular concerns about this. The effect of this cut will mean that the most disadvantaged and vulnerable in society are left without legal redress. There will be a predictable media outcry after the discovery of the first baby to be born with catastrophic injuries for whom any chance of a clinical negligence case is excluded.

42. The Justice Minster has indicated that a viable funding alternative for clinical negligence claims is provided by conditional funding agreements (CFAs).

[19] HC Debate col 687, 31 October 2011
[20] HC Debate col 358, 6 September 2011

However, JUSTICE does not agree that these are viable funding alternatives for clinical negligence claims. Claims of this sort are manifestly not suitable for funding by CFAs. Clinical negligence cases frequently involve tricky and complex issues of causation. Often, it is necessary to obtain expensive medical reports on the issue of causation at the start of a clinical negligence case in order to assess the merits of the claim. It will be extremely difficult to secure funding under a CFA and insurance to pursue the claim prior to securing this expert medical. The potential claimant or their families will be expected to fund a policy, which is far from satisfactory and for many will be an impossibility.

43. The Justice Minister has said that the exceptional funding scheme in clause 9 will alleviate the impact of the removal of clinical negligence from scope: 'where CFAs are not available, the exceptional funding will allow funding to be granted in individual excluded cases.' [21] However, clause 9 as it is currently drafted only allows for funding where the failure to provide funding would be a breach of Convention Rights or EU law; a very restricted and limited test.

44. In committee, the Justice Minister accepted that this issue is a problem: 'one aspect of clinical negligence cases is the significant up-front costs involved in obtaining expert evidence. Following consultation, the Government accept that this is a significant problem, which is why the Bill introduced a tightly drawn power to allow the recoverability of after-the-event insurance premiums in clinical negligence cases. Details will be set out in regulations.' [22]

45. Sir Rupert Jackson believed that legal aid should continue to be available to fund clinical negligence claims: 'Legal aid is still available for some key areas of litigation, in particular clinical negligence, housing cases and judicial review. It is vital that legal aid remains in these areas. However, the continued tightening of financial eligibility criteria, so as to exclude people who could not possibly afford to litigate, inhibits access to justice in those key areas. In my view any further tightening of the financial eligibility criteria would be unacceptable.'

[21] HC Debate col 709, 31 October 2011
[22] HC Debate col 339, 6 September 2011

46. This is supported by the NHS Litigation Authority: '*Overall, we are strongly in favour of retaining legal aid for clinical negligence cases using current eligibility criteria*.' In light of such comments, we are astounded by the government's stance.

47. Of all the potential amendments in discussion, the retention of clinical negligence within the scope of legal aid is the most cost-friendly concession that would still allow the government to uphold its deficit-reduction agenda in the main. As highlighted at Report Stage in the Commons by Karl Turner MP: 'The cost to the government of funding clinical negligence case out of the legal aid budget of £2.2 billion is £17 million- less than 1%.'[23]

48. An alternative to the proposal of bringing clinical negligence back into scope in its entirety would to be to make provision for the granting of legal aid to investigate a claim in the early stages, and for the obtaining of expert medical reports as to causation and liability. Once the strength of the claim had been properly assessed, it would be more feasible to then fund legal representation to pursue the claim.

49. JUSTICE was encouraged to see that the Justice Minister at Report Stage in the Commons did speak of the possibility of future concessions relating to clinical negligence: 'we always have an open mind on these issues.'[24] Ministers should be pressed on this issue.

Issue 7: Clause 8, Schedule 1: Social welfare or 'poverty' law – particularly appeal cases

50. The government intends to make the vast majority of its savings from the exclusion of civil matters from legal advice, reversing a policy which Conservative ministers began in 1972 of extending legal advice in precisely this way.

51. The consequences of this exclusion will be grave. The government is aware of this but asserts that savings must be made but it has not looked at this issue in the round. There might, for example, be a case for high level welfare

[23] HC Debate col 697, 31 October 2011
[24] HC Debate col 711, 31 October 2011

benefit advice to be given by agencies which, like the Child Poverty Action Group, employ lay and legal advisers. But there is a need for advice which the Government must acknowledge. Its own staff get into difficulties in relation to the law but they have access to in-house lawyers.

52. Furthermore, the exclusion of welfare benefits appears to be total for all levels of case. Therefore, legal aid (except in very exceptional cases) will not be available even for major cases that have progressed to the courts by way of the appeal system. The government justify their proposal on two arguments. First, welfare benefits advice is a financial problem and that the forum for challenging decisions on welfare benefits is user-friendly: 'the issues are not generally of sufficiently high importance to warrant funding, and the user-accessible nature of the tribunal will mean that appellants are able to represent themselves.'[25] Neither consideration applies to cases which are appealed through the Upper Tribunal and to the Courts.

53. The identity of those affected is frankly acknowledged by the government: 'we recognise that the class of individuals bringing these cases is more likely to report being ill or disabled'[26], and yet legal aid is still not deemed justifiable.

54. Individuals who are eligible for welfare benefits are dependent upon the state to make good decision making and assess benefits correctly. Where errors are made, individuals need to be able to challenge these effectively. Furthermore, we note that the state or agents of the state frequently err in the administration of a complex welfare system, making it all the more reason why individuals should not be deprived of a means of challenging the state's errors. 'The benefits system… generates 160,000 appeals, over half of which are decided in the appellant's favour'.[27]

55. The effect of these and other cuts to poverty law will be compounded by the large scale demise of agencies formerly funded in part through legal aid. There will be a major reduction in the assistance available to people from charitable NGOs. Evidence given to the Commons Committee highlighted that organisations which the government expect to absorb the advice seekers

[25] Proposals for the Reform of Legal Aid in England and Wales, para 4.219
[26] As above, para 4.217
[27] Yvonne Fovargue, HC Debate col 369, 6 September 2011

excluded by legal aid are actually under threat and facing reduction in their resources. Julie Bishop, Director of the Law Centres Federation, said:

'*a minimum of 40% of our funding will be removed…. The short of it is that for law centres alone 80,000 people will not be served*.'[28]

Also expressing concern was Gillian Guy, Chief Executive of Citizens Advice, who face an:

> *'80% cut in funding. That would mean that about 450 advisors would go from within the Citizens Advice system. Clearly, that starts to hit… at the viability of bureaux*.'[29]

Simon Pugh, Head of Legal Services at Shelter, expressed similar worries for their organisation:

> '*if the proposals got through we would lose approximately 45% of our income from legal aid… We would not expect our charitable fundraising to be able to expand sufficiently to fill up that gap*.'[30]

Issue 8: Clause 9: wider definition of exceptional cases to be funded

56. The definition of exceptional cases to be funded by legal aid should be extended for self-evident reasons to a wider range of cases. This should allow legal aid where necessary because:
    (i) of the nature of the case;
    (ii) of the individual's particular circumstances;
    (iii) it is in the wider public interest; or
    (iv) it is interests of justice.

Issue 9: Clause 12: Police station duty solicitors

57. In relation to Clause 12, the Lord Chancellor confirmed on 29 June 2011, that 'At the moment, the Bill replicates a provision taken from an earlier Bill by the Labour party. It appears to give a power to take away the right to legal aid. It appears to give a power to take away access to legal advice in the police station. The last Government legislated to do that but never did it. We have no current intentions of doing it'. This assurance was repeated by the Justice

[28] HC Debate col 106, 14 July 2011
[29] HC Debate col 107, 14 July 2011
[30] HC Debate col 106, 14 July 2011

Minister who confirmed that 'we do not intend to stop paying for police station advice'.

58. We are grateful for these statements. However, more alarmingly, at Committee stage, the Justice Minister stated that the government intended through clause 12 to introduce 'flexibility' in the Bill in order to allow for means-testing at the police station to be implemented at a future date: 'At some time in the future, it might be seen as something to bring forward, and at that point we would have to look carefully at the practicalities—how it is conducted in other countries and how it might be done cost-effectively—and there would then be a full consultation. But we are not at that point now.'[31]

59. The government has a duty to provide legal assistance during police station interviews. This has recently been re-affirmed in a case in which JUSTICE intervened and which related to Scotland: *Cadder v HM Advocate* (*Cadder v HM Advocate* 2010 UKSC 43).

60. Not only do we believe that means-testing for police station advice is wrong in principle, we also consider that it is completely impractical. Detainees will not have available to them the necessary financial information and evidence required to carry out a means assessment, and any such scheme would lead to lengthy delays and the driving up of costs and resources.

61. We query why, if the government are currently committed to advice at the police station remaining non-means tested and face-to-face, this is not reflected in the drafting of the Bill. We are encouraged to see that the Justice Minister has given an indication of being willing to re-think clause 12 at Report Stage: 'I appreciate that there are many deeply held concerns across the House… I can confirm that we will, therefore, carefully review our approach to these clause issues as the Bill goes through its stages in another place.'[32]

[31] HC Debate col 440, 8 September 2011
[32] HC Debate col 1006, 2 November 2011

Issue 10: Review

62. The cuts in this Bill are so Draconian that they should trigger automatic review in three or four years, before the end of this Parliament, when the current financial crisis is averted. As Sir Alan Beith MP (Berwick-upon-Tweed) stated in the House of Commons 'the Bill is part of a necessary process of reform in… legal aid, but it needs … a great deal of monitoring when it comes into force'.

Introduction and Summary of Sentencing Provisions

63. We strongly welcome the Bill's provisions on the **cautioning and remand of children**. These measures will help to ensure that children are not inappropriately escalated through the youth justice system (which enhances the likelihood of reoffending) and that those accused of minor offences who present no risk to public safety do not await trial in damaging custodial settings.

64. We have serious concerns about some of the other sentencing provisions, in particular, the **extension of curfew requirements** to up to 16 hours a day, and the **presumptive minimum sentence** for the new offences of threatening with a weapon/bladed article. We believe that these elements should be removed from the Bill.

65. We also oppose **clause 120**, which would provide for the transit of those imprisoned or detained by foreign courts through the UK to third countries. We believe that this clause would create a serious risk that the UK would allow prisoner transit in breach of its international and Human Rights Act obligations not to send people from the UK to a state where they may be subject to serious human rights violations including torture.

66. We welcome the repeal of **IPPs**. These sentences have proved unworkable and unlawfully detained many prisoners passed the appropriate sentence that they should have served due to an ill thought out regime which was almost impossible to satisfy. However, we have serious concerns about replacing

these sentences with **mandatory life sentences**, which has historically been reserved for murder.

Clause 61 – Duty to give reasons for and to explain effect of sentence

Page 43, line 28 [*Clause 61*], substitute "(8)" for

> **"(8) Where the court imposes a sentence that may only be imposed in the offender's case if the court is of the opinion mentioned in –**
>
> **(a) section 148(1) of this Act (community sentence), or**
>
> **(b) section 152(2) of this Act (discretionary custodial sentence),**
>
> **the court must state why it is of that opinion."**

67. We welcome the duty in clause 60 to consider the making of a compensation order and the general duty in clause 61 to explain, in ordinary language, the reasons for and effects of the sentence when passing sentence. There is a lack of public understanding of the effect of many sentences – particularly those of imprisonment – in terms of time to be served in custody, release on licence, etc, which compromises confidence in the system. We have also been concerned at prisoners' lack of understanding of indeterminate sentencing (IPP).[33]

68. We are, however, concerned that the Bill would remove current duties upon sentencers to explain the court's consideration of the thresholds for a community or custodial sentence – ie why the relevant threshold has been passed in the particular case. While implicit in the general duty, the court's attention to these thresholds must not be diluted. The amendments above would ensure that courts remain under specific duties to give reasons why they is of the opinion that an offence is so serious that only a custodial sentence is appropriate, or why it is sufficiently serious that a community sentence should be imposed.

Clauses 67 and 75 – curfew requirements

Page 50, clause 67, leave out clause

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[33] See Prison Reform Trust, *Unjust Deserts: Imprisonment for Public Protection,* 2010.

Page 57, clause 75, leave out clause

OR

Page 50, line 21 [*clause 67*], after "hours)" insert "before "A relevant" add "Subject to subsection (2A)"

Page 50, line 21 [*clause 67*], at end insert

> **"( ) After subsection (2) add**
>
> **"(2A) A relevant order may not impose a curfew requirement specifying periods that amount to more than twelve hours in any day unless the court would, but for the availability of a curfew requirement of between twelve and sixteen hours in any day under this section, be of the opinion in section 152(2) of this Act."**

Page 57, line 22 [*clause 75*], after "hours)" insert "before "A youth" add "Subject to sub-paragraph (2A)"

Page 57, line 22 [*clause 75*], at end insert

> **"( ) After sub-paragraph (2) add**
>
> **"(2A) A youth rehabilitation order may not impose a curfew requirement specifying periods that amount to more than twelve hours in any day unless the court would, but for the availability of a curfew requirement of between twelve and sixteen hours in any day under this paragraph, be of the opinion in section 152(2) of this Act."**

69. We have serious human rights concerns regarding the extension of curfew requirements in clauses 67 and 75 to a maximum of 16 hours per day for up to 12 months. A curfew for so many hours a day could, in some cases, constitute a deprivation of liberty for the purposes of Article 5 European

Convention on Human Rights if other aspects of the sentence were unusually destructive of the life the person would otherwise have been living.[34] In order to be lawful, a deprivation of liberty must fall within one of the categories listed in Article 5. One is 'the lawful detention of a person after conviction by a competent court' (Article 5(1)(a)). The government's somewhat cursory human rights compliance assessment in relation to these clauses states that they will be lawful under Article 5 because they fall within Article 5(1)(a). However, we believe that there is a strong argument to the contrary: if the custody threshold has not been passed (as a matter of domestic law), then the imposition of a curfew constituting a deprivation of liberty would be contrary to domestic law and therefore not 'lawful' for the purposes of Article 5(1)(a).

70. In addition to their potential illegality, we believe that such long curfews are undesirable. They will limit the offender's capacity to carry out positive rehabilitative activities and can contain the offender in premises where they may perpetuate or fall victim to domestic violence, abuse or neglect. The lengthening of curfew is particularly inappropriate in the case of children for these reasons, not least because of the correlation between children suffering neglect and/or abuse and those who commit offences. It seems that the adult provision in clause 67 has been copied for children in clause 75 without consideration of children's differing characteristics and circumstances, contrary to the UN Convention on the Rights of the Child principle that the youth justice system should be distinct from that for adults and to the Convention's requirement that to take into account the desirability of reintegrating children into the community as productive adults.[35] We therefore believe that clauses 67 and 75 should be removed from the Bill.

71. Our first two amendments would leave out clauses 67 and 75. The second two would limit the application of curfews between 12 and 16 hours to cases where the custody threshold would have been passed but for the availability of curfews between 12 – 16 hours. This is intended to encourage sentencers

[34] *Secretary of State for the Home Department v AP* [2010] UKSC 24 & 26.
[35] See Article 40 UNCRC.

to give effect to the Minister's stated intention 'that the provision will replace sentences where people would otherwise have gone to custody'.[36]

Clause 83 and Schedule 11 – Amendment of enactments relating to bail

Page 196, [*Sched 11, para 12*], leave out lines 31 to 34 and insert:

(a) commit an offence on bail by engaging in conduct that would, or would be likely to, cause physical or mental injury to a person other than the defendant; or

(b) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person.

Page 197, [*Sched 11, para 23*], leave out line 45. Page 198, *[Sched 11, para 23]* leave out lines 1 to 5 and insert:

"(2) For sub-paragraph (b) substitute:

(b) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person."

Page 198, line 28 [*Sched 11, para 27*], leave out from "would" to end of line 36 and insert:

"(i) commit an offence on bail by engaging in conduct that would, or would be likely to, cause physical or mental injury to a person other than the defendant; or

(ii) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person."

72. Schedule 11 to the Bill would subject bail in adult cases[37] where a person has been accused or convicted of an imprisonable offence, or where a person has

[36] *Hansard*, Committee debate, 14th sitting, House of Commons 15 September, 2011, col 460, Parliamentary Under Secretary of State (Crispin Blunt MP).

[37] Except those to which s25 Criminal Justice and Public Order Act 1994 applies, that is to say, a person charged with or convicted of homicide or rape after a previous conviction for such an offence.

been released on bail but fails to surrender to custody, to a new test where bail could not be withheld if there were no real prospect that the person would receive a custodial sentence upon conviction, unless he might, if released on bail, commit an offence involving domestic violence. It would also remove the court's power where an adult was accused or convicted of a non-imprisonable offence to remand them in custody on grounds of likelihood of failure to surrender to custody or previous arrest for breach of bail plus likelihood of failure to surrender, to commit offences or interfere with witnesses/obstruct the course of justice – but would create a new ground for withholding bail on the grounds that he might commit an offence involving domestic violence.

73. JUSTICE is concerned that the new test leaves no residual discretion to the court to withhold bail even where there is strong evidence that a defendant will commit a violent offence, intimidate witnesses or otherwise interfere with the course of justice if released/if he remains at liberty. The exceptions in the Bill relating to domestic violence are, we believe, confined to too narrow a class of case, while in other cases – for example where there is a substantial risk of violent intimidation of a victim of crime not of the same household as the defendant – there is no equivalent protection.

74. We further question the new 'no real prospect' test: first, it may be very difficult for a court at an early stage in criminal proceedings (or even up to the end of a trial/guilty plea) effectively to assess any likely sentence in the case; and secondly, there may be a legitimate expectation created by its conclusion that there is no such real prospect. The sentencing court with full relevant information before it may, however, take a different view of the case and there should be no question of its being influenced or, particularly, bound by the court's earlier view.

75. We therefore believe that the reforms to the Bail Act proposed in the Bill are misconceived and that better changes could be made that would, for example, prevent bail from being withheld on the grounds of likelihood of failure to surrender to custody in minor cases while leaving other criteria for withholding bail unchanged.

Clause 113 – Abolition of certain sentences for dangerous offenders

76. We welcome the Minister's conclusions that indeterminate sentences have proved unworkable and that these will be repealed. Many people have been detained for far longer periods under sentences of imprisonment for public protection (IPP) than is proportionate to their crime and in ways completely unforeseen when the scheme was initiated. As the Minister has indicated, it was an unmitigated disaster which has left people languishing in prisons with their release date entirely uncertain.[38]

77. We certainly support the repeal of sections 225(3) to (4) and 226(3) to (4) to ensure no further convicted people are sentenced to an IPP. However, what is not clear is how the problem of those currently serving an IPP who should be released will be resolved (see *clause 117*).

Clause 114 – Life Sentence for second listed offence

Page 91 [*clause 114*] leave out clause

78. We are extremely concerned to see that the proposed method of mitigating the anticipated effect of repeal of the IPP is to create new mandatory sentences of life imprisonment. This approach labours under the assumption that the public will be concerned that dangerous criminals will otherwise be released from prison. Should any such public opinion be expressed in our view the Government has the responsibility to correct it not create additional sentences which impose restraint upon the independence and discretion of the courts.

79. Mandatory life sentences are currently limited to murder. The sentence was applied to murder when the death penalty was repealed.[39] The reasons for this can be gleaned from Sydney Silverman MP who introduced the private member's bill which led to the final repeal of the death penalty for all homicide offences:

[38] The Today Programme, BBC Radio 4, 26th October 2011
[39] Under the Homicide Act 1957 and thereafter the Murder (Abolition of the Death Penalty) Act 1965.

> But what is true, and what I would advise the House not to depart from, is that murder, whether grave, or not so grave, is a crime unique, a crime in its own category, and a crime which society is bound to condemn by enacting a mandatory sentence for it, whatever happens afterwards in the administration of it.[40]

80. The Law Commission recommended in 2006 that homicide should be categorised to limit the mandatory life sentence further to the most serious types of murder.[41] However, the previous Government in a subsequent summary of responses to its consultation paper reiterated:

> The mandatory life sentence reflects the seriousness of killing with an intention to at least cause serious harm and was supported by Parliament during the passage of the Criminal Justice Bill in 2003. The penalty for murder is an essential element in maintaining public confidence in the justice system which this government will maintain.[42]

81. Furthermore, the distinction between murder and other crimes was stated quite succinctly by the United States Supreme Court when it abolished the death penalty for crimes other than murder:

> The court concludes that there is a distinction between intentional first-degree murder, on the one hand, and non-homicide crimes against individuals, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but in terms of moral depravity and of the injury to the person and to the public, they cannot compare to murder in their severity and irrevocability.[43]

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[40] HC Deb 25 June 1965 Vol 714 c2191

[41] Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304, November 2006, paras 1.35-1.38

[42] Ministry of Justice, *Murder, manslaughter and infanticide: proposals for reform of the law - Summary of responses and Government position*, CP(R) 19/08, 14 January 2009 , para 121. See also Maria Eagle (then Justice Secretary):

> Murder is the most serious crime and it is essential that the law reflects this. The Government remains committed to retaining the mandatory life sentence and the sentencing principles for murder set out in the Criminal Justice Act 2003 (Ministry of Justice Press Release, *Government launches consultation into review of murder law*, 12 December 2007)

[43] *Kennedy v. Louisiana*, 554 U.S. 407 (2008)

82. Suggesting that there is a need for a mandatory life sentence ignores the current sentencing framework which already recognises the need for severe penalties for serious crimes. Inflicting grievous bodily harm with intent, and rape, both carry maximum life imprisonment sentences by statute. The sentencing guidelines for serious assault and sexual offences already indicate sentences ranging between 9 to 12 years and 6 to 19 years respectively.[44] These guidelines are developed by experts considering carefully and independently the complexities the sentencer has to take into account. The judiciary is then best placed when considering the particular circumstances of the offence to decide the appropriate custodial term.

83. Whilst the Minister has indicated that the mandatory life sentence should be reserved for the most serious of crimes such as violent rape which without medical advances would have resulted in murder,[45] the proposed amendment does not limit the mandatory sentence to these types of crime. Rather, schedule 16 includes an extremely wide range of offences to which the seriousness and previous offence conditions proposed in clause 114 can attach. Seriousness is defined in new s224A(3) as an offence such as to justify the imposition of a sentence of imprisonment for 10 years or more. There is no further indication of what the appropriate term for the life sentence should be. In contrast schedule 21 of the Criminal Justice Act 2003 sets out in detail how minimum terms for mandatory life sentences for murder should be approached and provides categories from whole life terms down to 12 years. This schedule has been criticised by the present Government as overly prescriptive and in need of reform.[46] Yet with such a wide range of offences attracting a possible mandatory life term under the proposed amendment, there seems to be a distinct lack of clarification about which offences the Government considers need mandatory life sentences and how the judiciary should approach this obligation.

84. In JUSTICE's view the mandatory life sentence should be reserved to murder. By doing so the punishment underlines the distinctly serious nature of taking another person's life. The sentencing provisions for other serious offences are

[44] Sentencing Council, *Assault Definitive Guideline* (13 June 2011); Sentencing Guidelines Council, *Sexual Offences Act 2003 Definitive Guideline* (2007)
[45] Today Programme, *supra.*
[46] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010, para 170

already appropriate, as are the sentencing guidelines through which the judiciary impose custodial terms. The repeal of IPPs should not consequently impact adversely upon the sentencing practice which the courts follow for serious crime and, without the additional dangerousness determination, impose appropriate custodial punishments. The most effective way to ensure prisoners are not released to commit further dangerous offences is to ensure that offender programmes are in place, irrespective of the sentence imposed. We do not agree that a case has been demonstrated to support the extension of the mandatory life sentence in the way proposed.

Clause 117 - Power to change test for release on licence of certain prisoners

85. Clause 117 will introduce the power to change the test for release on licence of certain prisoners by order. It is not clear what 'conditions specified in the order' will be required to achieve this. These were not indicated in Debate. We do not agree that this should be determined at a later date by way of secondary legislation unless the proposed conditions are indicated.

Clause 120 – Transit of prisoners

Page 100, clause 120, leave out clause

86. Clause 120 would allow the transit of prisoners/detainees through the UK (except Scotland) who have been sentenced/detained by foreign criminal courts or by foreign laws similar to the Repatriation of Prisoners Acts and are being sent to third countries. JUSTICE has serious human rights concerns about this provision, which would raise the prospect of the UK detaining and allowing transit through its jurisdiction of a person who may a) have been imprisoned after an unfair process/trial and/or subject to inhuman/degrading treatment or torture; b) may have been removed from the state from which he/she arrived in UK territory illegally and/or contrary to international human rights law/refugee law and/or c) may be on his/her way to a state where he/she may be subject to further human rights violations eg re right to life, prohibition on torture/inhuman or degrading treatment (including by prison conditions), or unfair trial. We note that in Committee the Minister gave an

assurance regarding the death penalty, but our concerns regarding other major human rights violations are not allayed.

87. While the Human Rights Act 1998 (HRA) would of course apply in these circumstances, so that the Minister would be in breach of s6 HRA if, for example, a person was transferred out of the UK under this provision to a state where they were at real risk of torture or inhuman or degrading treatment, there is a risk that firstly, violations occurring in the sending state (eg unfair trial) or the likelihood of violations in the receiving state (eg re prison conditions) will not be known to the Minister and further, that the timescale will not allow for these concerns to be properly aired and investigated in a fair process that gives the prisoner/detainee the right to make representations. There is no provision in clause 105 for the detainee to claim asylum in the UK, to appeal against his removal from the UK to the receiving state or to alert the Minister to the likelihood of human rights violations in the receiving state or to those that have occurred in the sending state.

88. Article 3 of the European Convention on Human Rights prohibits the removal of a person to a state where they are at real risk of being subjected to torture or inhuman or degrading treatment or punishment and mandates the state to conduct an independent and effective investigation into allegations of Article 3 ill-treatment. Article 13 ECHR requires a person to be given an effective remedy if their ECHR rights are violated; Article 6 fair trial obligations, including the right to access to a court, may also apply in these circumstances. Further, Article 3 of the UN Convention Against Torture prohibits a state from expelling, returning or extraditing a person to a state where there are substantial grounds for believing that he would be subjected to torture.

89. We therefore oppose the inclusion of this clause in the Bill. If the UK is to be party to 'transit' arrangements, which we do not support due to the inherent risks of human rights violations that are difficult to investigate in the UK but where the UK's responsibility is engaged by the transit, then such orders should be made by the High Court in a transparent, Article 6 compliant judicial process where the prisoner/detainee is present and represented.

Clause 128 – Offences of threatening with article with blade or point or offensive weapon in public or on school premises

Page 110 [*Clause 128*], leave out lines 6 to 16

Page 110 *[Clause 128],* line 117 after 'in considering' leave out from 'whether' until 'sub-section (5)' and insert 'sub-section (4)'

Page 110 *[Clause 128]*, leave out lines 14 to 25

Page 110 *[Clause 128],* line 26 after 'in considering' leave out from 'whether' until 'sub-section (7)' and insert 'sub-section (6)'

90. While we have no objection in principle to the creation of the offence of threatening with an article with a blade or point or an offensive weapon (*clause 128*), we question whether it is necessary since other offences already exist to address the relevant behaviour; for example, along with offences of having an offensive weapon/bladed article in a public place, offences such as common assault, robbery/attempted robbery (in the context of which such threats will often be made) and offences under section 4 Public Order Act 1986.

91. We are, however, strongly opposed to the clause's presumptive minimum sentences of 6 months' imprisonment for adults and 4 months for children aged 16 or over, for these offences. Such minimum sentences distort the sentencing framework – since they can result in other, more serious, offences of a similar nature receiving a lesser sentence. Further, there is much to be admired in the current system whereby the Sentencing Council sets the guidelines to which courts must have regard but from which they can depart where the interests of justice demand it. This ensures a measure of consistency through guidelines created by experts while allowing the sentencer in full position of the facts to do justice in the individual case. The prevailing considerations of culpability and harm by which seriousness is assessed for the purposes of sentencing guidelines are sensible and we believe that Parliament should allow the system to be followed for all new offences rather than setting a presumptive minimum for one offence while other, similar offences are subject to guidelines (for example, the recent

definitive guideline on assault offences). In particular, extending the mandatory sentence to require young people to serve an automatic term of detention ignores the causes of gang related weapon offences, the vulnerable position many young offenders are in and ultimately will reinforce their criminal activity rather than stemming it.[47] The SCYJ has said in its briefing on this clause:

> Children and young people carrying knives do so for reasons of fear and fashion and have little understanding of the distant consequences of the courtroom and prison cell…. Knife crime is a very serious problem, particularly in some urban areas. However, latest statistics suggest that the problem is lessening and thus that existing sentences and prevention programmes are working.[48]

92. Our suggested amendments would therefore remove the presumptive minimum sentences from this clause. We would retain the duty to set out in s44 Children and Young Person's Act 1933 to consider the welfare of the child when sentencing for the new offence.

JUSTICE
November 2011

[47] SCYJ, *Custody for Children: The Impact* (February 2010) http://www.scyj.org.uk/files/the_impact_of_custody_-_position_paper_FINAL.pdf
[48] Available on the SCYJ website http://www.scyj.org.uk/