
# Legal Aid, Sentencing and Punishment of Offenders Bill
# Second Reading Debate

## Briefing on legal aid provisions

## 29th June 2011

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1. 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.

2. The case against the proposed cuts has been well aired and will be the subject of many other briefings. We largely leave those arguments to others though Appendix 1 sets out our general objections. We wish in this briefing to concentrate on three points which must not be overlooked in this bill:
    - First, the Scottish Legal Aid Board has notably been able to avoid the kind of cuts proposed or implemented in relation to the English system. It is worth pressing ministers on why the Scots appear to have been so more successful than the English in controlling and reducing expenditure.
    - Second, the provisions designed to allow the abolition of the Legal Services Commission should be amended to provide greater independence.
    - Third, there remain matters on which the Lord Chancellor should be invited to give more detail. One difficulty with this bill is that so many of its provisions are enabling and require secondary legislation. Indeed, the drafting suggests on a number of occasions that secondary legislation can be used to overrule the provisions of the Act.

**The comparison with Scotland**

3. Legal aid in Scotland has progressively diverged over the last decade from that in England in Wales. The Scots have avoided grandiose schemes and have quietly implemented a range of modest reforms which have allowed them not only to control the budget but also to raise eligibility. Indeed, in 2009, income eligibility limits for civil legal aid were more than doubled to £25,000 from £10,306. This extension means that contributions are sometimes 100 per cent of costs but the applicant is protected from a costs order if they loose. The Scots have allowed such extensions of eligibility through close management of criminal matters and, for example, they have deployed small numbers of defence lawyers employed directly by the Scottish

Legal Aid Board (SLAB) as public defenders – including as duty solicitors - and to provide a degree of competition over cost with the private profession. SLAB has also taken a robust view on the strength of the case required to be eligible for civil legal aid. In 2011-12, SLAB faces an 8 per cent cut in both its administrative costs and the Legal Aid Fund that it administers.

4. Ministers might be pressed on why they think that the Scots seem able to manage their scheme without the Draconian cuts envisaged for England.

5. In particular, ministers should be pressed on their plans for the future of the police station duty solicitor scheme. There are reports that the government intends to replace the physical attendance of solicitors or their accredited representatives with telephone or video connections. It appears the framework for such actions has been set down in Clause 26 of the Bill which permits the Lord Chancellor to provide legal services by telephone or by other electronic means (Para 2). However, the need for actual presence has been underlined by a number of interested bodies, including the European Court of Human Rights, the Committee for the Prevention of Torture and the UN Human Rights Committee and Council.

**Abolition of the Legal Services Commission and replacement by Director of Legal Aid Casework (The Director)**

6. The Bill contains proposals to abolish the Legal Services Commission and to protect the independence of individual decision making by creating a Director of Legal Aid Casework.

7. This is a proposal which was actually taken from a review of New Zealand's legal aid scheme and has recently been implemented in the New Zealand Legal Services Act 2011 which received the Royal Assent in April. The equivalent to the Director is the Legal Services Commissioner. The Commissioner is under a statutory duty to act independently (s71(2)). A person aggrieved by a decision of the Commissioner has the right to apply for a reconsideration (s51). There is also a subsequent right of appeal to an independent Legal Aid Tribunal under s52:

> 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—

(a) manifestly unreasonable; or

(b) wrong in law.

8. States have generally found that it is desirable to have a body with some independence from government to administer legal aid. This is the common form in countries like Canada, Australia and the United States. It has generally been states like those formerly in the Soviet Union that have resisted this trend. The key reason for this is to insulate decision-making in individual cases from ministers and those responsible to them.

9. The independence of the Director is somewhat artificial. He or she must be a civil servant (clause 4(1)). The Lord Chancellor can require the Director to delegate decision-making to some other person, who might or might not be a civil servant (clause 5 (5)). There is no express duty on the Director of independence as in New Zealand. There is also no right of appeal to an independent tribunal as in New Zealand. The latter is surely the minimum acceptable element in decision-making in individual cases.

**More clarity required**

10. 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. This is unacceptable in basic constitutional principle.

11. The Bill sets out a decision-making process for the grant or refusal of civil legal aid which is hideously complicated. Clause 10 requires the Director to apply a merits test to an applicant which takes account of regulations made by the Lord Chancellor (which he must create based on 10 separate factors which notably focus on cost issues). The provisions relating to the scope of civil legal aid now take up 24 pages of text in Schedule 1 to the Bill. This is setting up a system which is so horrendously complicated that its likely inadequacy is predictable.

# Appendix 1

# Proposed cuts to legal aid

### Cuts aimed at clients more than lawyers

12. The consultation paper 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.

### Weakest groups targeted

13. The Ministry of Justice's own impact assessments indicate that around half a million people will lose entitlement. The Ministry's own equality impact assessment acknowledges that the losers will be predominantly women (57 per cent), 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 …*[1] *disproportionate impact on [Black and Minority Ethnic clients] …* [2] *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] …*[3]

### Contrast with government policy for international commercial legal and court services

14. The government's planned cuts for domestic clients out of the justice system contrasts with a press release earlier this week on 16th May in which the Ministry of Justice announced:

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

> *Plans to strengthen the UK's reputation as a world leader in legal services were unveiled by Justice Secretary Kenneth Clarke and Minister for Trade and Investment Lord Green today. The Action Plan is a key part of the government's Plan for Growth, and aims to encourage overseas commercial clients to make use of UK legal services, with particular emphasis on the potential benefits for businesses.*

It would be regrettable if the government's policy is to encourage overseas clients to use courts which have been cleared of domestic clients by cuts to legal aid.

**Cuts claimed as inherently desirable**

15. The Secretary of State argues in his introduction to the consultation paper 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. Whatever cuts are made in the short term, the Ministry must commit to a root and branch review of the quality of justice within each branch of civil and criminal law. In addition, the government should commit to re-investing in legal aid where cuts have been made which experience indicates have jeopardised adequate access to justice. There should be a further review in three or four years, before the end of this Parliament, when the current financial crisis is averted.

**Cuts might be made to legal aid if a holistic approach applied**

16. 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 which involves consideration of 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 on demand after, say, a year's marriage. This is the sort of fundamental reform which needs to be considered.

**Constitutional right to 'equal justice' should be recognised**

17. The consultation paper 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 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.

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

> *Our consideration of the justification for public funding for civil and family cases is based on an assessment of the justification for public funding for civil and family cases 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.*[4]

These issues focus too much on inputs: what matters is the output. What is important is that people get a fair determination of a dispute. In relation to family law, it is patently absurd to make proposals for legal aid in family cases.

19. If legal aid is to be removed from one party, (for example in divorce) the government must consider whether legal representation should be banned for both. The alternative will allow an advantage to the richer one.

20. This will be a real problem in divorce cases where richer men will oppose the demands of poorer women who will be deprived of legal assistance.

[4] Para 2.27

**Misrepresentation of existing legal aid scheme**

21. 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 …[5]'. 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.

**The end of most face to face advice**

22. The proposed call centre for all civil cases is an interesting idea. It would merit an experiment on a non-exclusive basis (as has occurred in Ontario, Canada for example). However, it is unlikely to prove an easy substitute for face to face advice in many cases. It will fail to deal with those with low communication skills or complicated cases. Its proposed link with a referral service from which it receives referral fees provides an inherent potential conflict of interest which will need some considerable thought to overcome. Only as an afterthought were emergency cases excluded from a requirement to use the hotline.

**Women will be excluded in matrimonial cases**

23. Mediation is the right way forward for dealing with divorce cases but research in this country and in the US indicates that it will not work for all. We would argue that one of the reasonable functions of the state is to assist individuals through difficult divorce cases. We advocate the introduction of divorce on demand and without conditions to minimise disputes. A foreseeable consequence of the proposal to retain legal advice in cases of domestic violence is that such allegations will rise: in many cases, these are

[5] *Impact Assessment; Cumulative Legal Aid Reform Proposals* para 12

suppressed because the ‘victim’ calculates - or is advised - that they will not affect the result.

**Cuts to scope ill-judged**

24. We welcome the preservation of funding for public and human rights law services but the pattern of civil provision becomes extremely fragmentary under the proposals. It will be hard to advise on entitlement and one can predict a succession of judicial review applications challenging negative decisions by the call centre.

25. It is wrong to remove legal aid from clinical negligence cases. These are manifestly not suitable for funding by conditional fee agreements because of the high initial costs of establishing liabilty and consequent uncertainties over the chances of success. They were deliberately excepted from the general policy of funding by such agreements exactly for this reason.

**Conclusion**

26. These proposals were rushed; thought up before a new government had time to understand existing provision and need as much of a pause as did the proposed legislation for the NHS.