



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

**Briefing for Public Bill Committee
House of Commons**

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JUSTICE is an all-party law reform organisation committed to the advance of human rights and the rule of law. It is also the United Kingdom section of the International Commission of Jurists.

These suggested amendments are in respect of Part 1 of the Bill and complement our 'Legal Aid, Sentencing and Punishment of Offenders Bill Second Reading Debate - Briefing on legal aid provisions' of June 2011.

We note that there will be many organisations proposing amendments to this Bill. We oppose many of the cuts to eligibility and scope which the government wishes to introduce through secondary legislation. We support amendments from the Law Society and others on this issue.

A substantial amendment proposed by this Bill to the legal aid scheme is the abolition of the Legal Services Commission and the introduction of a 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 which introduced a similar scheme with the Legal Services Act 2011 ('LSA 2011 NZ'). The New Zealand legislation preserves a right of independent appeal which we think is crucial.

Clause 1 – Lord Chancellor’s functions

Amendment 1

Page 1, line 5, after subsection (1) insert new subsection 1A

(1A) The provision of legal aid must promote and ensure access to justice by:

- (a) providing legal services to those unable to afford it;
- (b) ensuring equality of arms; and
- (b) delivering services in the most effective and efficient manner.

Briefing

The Bill commences with no commitment to ensuring access to justice, a fundamental feature for the provision of legal aid. Similar wording as above is seen in the LSA 2011 NZ and should be adopted here to emphasise the government’s commitment to access to justice, which the Lord Chancellor himself affirmed ‘is vital for a democratic society’ and was something on which he would not ‘compromise’. This amendment is important to ensure that such a statement is made at the start of the Bill to set the tone for these provisions and the whole purpose in providing legal aid.

Clause 2

Amendment 2

Page 1, line 13 after 'secure' and before 'the' insert 'through the internet or otherwise'

Briefing

The Government proposes major restrictions on the advice for which people will be eligible. Accordingly, it faces an even greater duty than at present to ensure that there is access to sufficient information for people. This amendment is designed to allow ministers to be pressed more precisely on how they intend to discharge this duty.

Amendment 3

Page 2, line 29, leave out subsection (c)

Briefing

This amendment is proposed to remove any suggestion that legal aid should be provided dependent on the 'class' of the individual. This is also a probing amendment to establish what it is intended by 'class'. Whilst we accept that the Lord Chancellor may need to adapt the provision of services by (a) area or by (b) the type of case, we disagree that the type of person is a relevant consideration to the Lord Chancellor's duty to provide legal aid to ensure access to justice.

Clause 4 – Director of Legal Aid Casework

Amendment 4

Page 3, line 18, leave out subsection (4) and replace with new subsections (4A and 4B) –

(4A) The Director must, except to the extent that section (4B) applies, act under the direction of the Lord Chancellor.

(4B) The Director must act independently when performing any functions or duties under this Part

Briefing

This proposed amendment is taken from the LSA 2011 NZ. It is of vital importance that the independence of the Director is set out in plain terms. The previous wording suggests that this must only be in relation to individual cases but we submit that all of the duties undertaken in his role must be independent from that of the Lord Chancellor.

Amendment 5

Page 3, Clause 4 at end add:

- (7) A decision of the Director on eligibility for legal aid may be appealed to the Legal Aid Tribunal which shall
- (a) consist of the chairperson and other members appointed under the subsection below;
 - (b) act independently when performing any functions or duties.
- (8) The functions of the Tribunal are to—
- a. consider applications for review of decisions of the Director on eligibility;
 - b. conduct and determine reviews of decisions of the Director on eligibility.
- (9) The Lord Chancellor must,—
- c. appoint members of the Tribunal of sufficient number to deal promptly with all reviews and who between them have experience in a range of legal areas and types of proceedings; and
 - d. appoint one of the members as the chairperson of the Tribunal.
- (10) The primary function of the chairperson is to ensure that the Tribunal performs its functions in accordance with this Act in an efficient and effective manner.

Briefing

This provision is modelled on the LSA 2011 NZ. It allows an appeal from a decision of the Director of Legal Aid Casework to an independent tribunal. In this way, it would preserve the independence of the decision-making process once the Legal Services Commission has been abolished. 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 which substantively is made against another minister or, even, himself.

Legal Aid

CIVIL LEGAL AID

Clause 8 – General Cases

Amendment 6

Page 5, line 32, leave out 'omitting' and insert 'including'

Page 5, line 33, leave out 'from' and insert 'in'

Briefing

The amendment allows the Minister the power to bring matters back within scope and prevents matters being excluded from scope merely by amending primary legislation by secondary legislation without further parliamentary scrutiny.

Alternative

Page 5, line 31, leave out subsection (2)

Briefing

By omitting this section the Lord Chancellor will not be able to take further areas out of scope without further parliamentary scrutiny. This amendment must be the minimum requirement of this section.

Clause 9 – Exceptional Cases

Amendment 7

Page 6, at end of subsection (3) insert new subsection –

- () that it is necessary because:
 - (i) of the nature of the case; or
 - (ii) of the individual’s particular circumstances; or
 - (iii) it is in the wider public interest; or
 - (iv) it is in the interests of justice to do so.

Briefing

The proposed amendment is appropriate to ensure that the test for exceptional cases is not limited to the Convention rights but also considers each individual case to see whether exceptional circumstances arise which warrant legal aid.

Clause 10 – Qualifying for civil legal aid

Amendment 8

Page 6, line 38, leave out subsection (b) and subsections (2) to (6) and replace with

–

() must consider the following:

- (a) that access to justice is fundamental,
- (b) that equality of arms must be ensured,
- (c) the benefit which may be obtained by the services being provided,
- (d) the importance for the individual of the matters in relation to which the services would be provided
- (e) the nature and seriousness of the act, omission, circumstances or other matter in relation to which the services are sought
- (f) if the services are sought by an individual, in relation to a dispute, the individual's prospects of success in the dispute,
- (g) the public interest
- (h) the availability to the individual of services provided other than under this Part and the likelihood of the individual being able to make use of such services and the suitability of these services in meeting the obligations under subsections (a) of this section.

Briefing

This amendment proposes to insert this text onto the face of the Bill thereby ensuring that the criteria to which an individual qualifies for legal aid will face parliamentary scrutiny. The wording above has been largely taken from the original Bill but removes any reference to costs of services or availability of resources which we say are irrelevant to the consideration of whether someone should be entitled legal aid, and thereby access to justice. This is emphasised by the introduction of subsection (a) which highlights that the first and overriding consideration should be to ensure access to justice. This supports the Lord Chancellor's statement to the House on 29 June 2011, when he said 'access to justice is fundamental'.

Clause 11 – Determinations

Amendment 9

Page 7, line 39, leave out subsection (b) and reorder numbering accordingly

Page 8, line 5, leave out subsection (h) and reorder numbering accordingly

Page 8, line 8, before subsection (4) insert –

() Regulations made under subsection (2) must include provision requiring individuals who are the subject of a determination to be informed, in writing, of the reasons for making or withdrawing a determination’.

() If the Director has declined an application for legal aid under this Part, the Director must, in writing, advise the applicant of the decision and of his or her right to seek—

(a) a reconsideration of the decision under section (); and

(b) a review of any reconsideration of that decision under section ().

Page 8, line 16, leave out ‘may’ and insert ‘must’

Briefing

This amendment ensures that individuals are informed in writing of the reasons for a determination by changing a power to do so into a duty. It also makes it plain that a reconsideration, review and appeal to an independent Tribunal must be offered and available in the event of a refusal to grant legal aid (see our proposals at Amendment 5).

Amendment 10

Page 8, line 12, after 'Part' insert –

and whether, in all the circumstances, it is reasonable to take this into account

Briefing

This amendment allows for a broader consideration as to whether to rely on an individual's compliance with requirements imposed by this Part. It is important to allow individuals to be able to explain why they may not have done so, especially as those requirements are not set out on the face of the Bill.

CRIMINAL LEGAL AID

Clause 12 – Criminal Legal Aid

Amendment 11

Page 8, line 23, leave out from 'if' to 'determination'

Page 8, line 26, leave out subsections (2) to (7)

Page 9, line 18, leave out subsection (9) and replace with –

'Section 20 and 26 (2) do not apply in respect of this section'

Reorder numbering accordingly.

Briefing

On 29 June 2011, the Lord Chancellor confirmed 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 was repeated by the Parliamentary Under-Secretary of State for Justice (Mr Jonathan Djanogly) who confirmed that 'we do not intend to stop paying for police station advice'.

We are grateful for these statements. As a result, this amendment takes all out reference to the power to take away access to legal advice in the police station due to financial reasons or any other criteria (including removing the application of Section 20 (financial eligibility)). Should such a substantial and controversial change be considered later on, this must not happen through secondary legislation but must be a matter of parliamentary scrutiny.

By disapplying Section 26, this ensures that advice given at the police station is given face-to-face and not by some other means. 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. We submit that this is vital in the interests of justice and must be maintained.

Clause 14 – Advice and assistance for criminal proceedings

Amendment 12

Page 10, line 24, leave out subsection (b) and reorder numbering accordingly

Page 10, line 36, leave out subsection (h) and reorder numbering accordingly

Page 10, line 39, before subsection (8) insert –

() Regulations made under subsection (7) must include provision requiring individuals who are the subject of a determination to be informed, in writing, of the reasons for making or withdrawing a determination’.

() If the Director has declined an application for legal aid under this Part, the Director must, in writing, advise the applicant of the decision and of his or her right to seek—

(a) a reconsideration of the decision under section () ; and

(b) a review of any reconsideration of that decision under section ().

Page 10, line 42, leave out ‘may’ and insert ‘must’

Briefing

As above in respect of civil legal aid, this amendment ensures that individuals are informed of the reasons for a determination by changing a power into a duty to do so. It also makes it plain that a reconsideration, review and appeal to an independent Tribunal must be offered and available in the event of a refusal to grant legal aid (see our proposals at Amendment 5)

Amendment 13

Page 8, line 12, after 'Part' insert –

and whether, in all the circumstances, it is reasonable to take this into account

Briefing

As above, this amendment allows for a broader consideration as to whether to rely on the compliance with requirements imposed by this Part. It is important to allow individuals to be able to explain why they may not have done so, especially as those requirements are not set out on the face of the Bill.

Clause 16 – Qualifying for representation

Amendment 14

Page 12, line 5, replace subsection (b) with subsection (a) and vice versa

Briefing

This amendment may be subtle but we think it is important to stress that the interests of justice are the fundamental consideration above financial considerations.

Amendment 15

Page 12, line 19, after 'represented' insert new subsection –

() whether it will ensure equality of arms

Briefing

We suggest this amendment to ensure that equality of arms is a consideration in granting legal aid in criminal proceedings where neither party should be procedurally disadvantaged (Article 6 of the Human Rights Act 1998).

Amendment 16

Page 12, line 20, leave out subsection (3)

Briefing

This amendment ensures that the Lord Chancellor will not be able to limit the factors as to why criminal legal aid should be granted without further parliamentary scrutiny.

Clause 17 – Determinations by Director

Amendment 17

Page 12, line 42, leave out subsection (b) and reorder numbering accordingly

Page 13, line 9, leave out subsection (h) and reorder numbering accordingly

Page 13, line 16, before subsection (5) insert –

() Regulations made under subsection (3) must include provision requiring individuals who are the subject of a determination to be informed, in writing, of the reasons for making or withdrawing a determination’.

() If the Director has declined an application for legal aid under this Part, the Director must, in writing, advise the applicant of the decision and of his or her right to seek—

(a) a reconsideration of the decision under section () ; and

(b) a review of any reconsideration of that decision under section ().

Page 13, line 22, leave out ‘subject to subsection (7) and section 19(3)’ and subsection (7).

Briefing

As above, this amendment ensures that individuals are informed of the reasons for a determination by changing them into duties to do so. It also makes it plain that a reconsideration, review and appeal to an independent tribunal, must be offered in all circumstances and available in the event of a refusal to grant legal aid whether final or provisional (see our proposals at Amendment 5)

Amendment 18

Page 13, line 18, after 'Part', insert –

and whether, in all the circumstances, it is reasonable to take this into account

Briefing

As per determinations above, this amendment allows for a broader consideration as to whether to rely on the compliance with requirements imposed by this Part (especially as those requirements are not set out on the face of the Bill).

Clause 18 – Determination by court

Amendment 19

Page 13, line 36, leave out subsection (b) and reorder numbering accordingly

Page 14, line 1, before subsection (3) insert –

‘ () Regulations made under subsection (3) must include provision requiring individuals who are the subject of a determination to be informed, in writing, of the reasons for making or withdrawing a determination’.

() If the Director has declined an application for legal aid under this Part, the Director must, in writing, advise the applicant of the decision and of his or her right to seek—

(a) a reconsideration of the decision under section () ; and

(b) a review of any reconsideration of that decision under section ().

Briefing

As above, this amendment to ensure that individuals subject to the legal aid procedure are informed in writing of the decision of the Court, and their right to a review and reconsideration of that decision by an independent Tribunal (see our briefing at proposed amendment 5).

Amendment 20

Page 14, line 3, after 'Part' insert –

where it is in the interests of justice for such matters to be taken into account

Briefing

This amendment allows judicial discretion in respect of whether to take a person's non-compliance into account (especially as those requirements are not set out on the face of the Bill).

Amendment 21

Page 14, line 9, leave out subsection (5)

Briefing

This amendment removes the very wide provision to allow the regulations to 'include consequential provision modifying an Act or instrument'. It is submitted that parliamentary scrutiny should not be avoided through use of secondary legislation as anticipated by this provision.

Clause 19 – Provisional Determination

Amendment 22

Page 14, line 30, leave out subsection (3)

Briefing

We submit that a right to appeal should exist in respect of a provisional determination and this amendment seeks to ensure this.

Clause 20 – Financial Resources

Amendment 23

Page 14, line 41, after 'determination)' insert 'subject to Section 12 of this Part'

Briefing

As stated above, this amendment removes the possibility of financial resources playing a part in the consideration of legal advice for those held at the police station or other premises (see our comments at Amendment 11).

Amendment 24

Page 15, line 1, leave out subsection (b) and reorder numbering accordingly

Briefing

This is a probing amendment. The section appears to propose that regulations may say when a person is financially eligible for the services. The part we take issue with is the suggestion that exceptions may be made to this. It is unclear whether such exceptions would result in matters being taken out of general scope and therefore we seek clarification on this issue.

Clause 22 – Payment for Services

Amendment 25

Page 17, line 15, leave out section (3) and reorder numbering accordingly

Briefing

We fundamentally disagree with the possibility of individuals being made to pay amounts which 'may exceed the cost of civil legal services provided'. As charges and costs can be applied under the proposed section (2) of this Clause this section seems superfluous, save for this aspect which must be rigorously contested as fundamentally flawed. This amendment seeks to clarify this.

Clause 26 – Choice of provider of services etc

Amendment 26

Page 20, line 38, after 'means' insert –

where, having regard to all the circumstances of the case and the needs of the individual, it is in the interests of justice to do so (subject to Section 12 of this Part)

Briefing

This amendment is to ensure that legal advice is given by means as necessary in the interests of justice.

This Clause appears to have been inserted to support the Government's proposals for a call centre for all civil cases. Such a call centre should only take place on a non-exclusive basis where it is in the interests of justice to do so. It is unlikely to prove an easy substitute for face to face advice in many cases and will fail to deal with those with low communication skills or complicated cases.

In addition, the reference to Section 12 in this amendment ensures that face-to-face advice must be provided to individuals held at a police station or other premises, when requested (see our comments to Amendment 11).

Clause 27 – Position of providers of services

Amendment 27

Page 21, line 38, leave out ‘except to the extent that regulations provide otherwise’

Briefing

This provision appears to be allowing regulations to stipulate when privilege and client-lawyer relationship can be altered. We fundamentally disagree that there should be exceptions to this rule, particularly those set down by secondary legislation and this amendment seeks to remove this exception.

Transitional and savings provisions, amendments to other enactments, and repeals

Amendment 28

Clause () – Review of Part 1 of the Act

Page 28, line 33, after ‘Crown’ insert new clause –

Clause () Review of Part 1 of the Act

() Three years past the date on which Royal Assent is given to this Act the Government must establish a Committee to undertake a review of the implications of Part 1 of the Act.

() Such a review must consider the impact of the legal aid cuts on the quality of justice within each branch of civil and criminal law on individuals and the public at large

() The Committee must consider public consultation and expert evidence

() The outcome of said review must be published publically

() Amendments, including reinvestment, must be suggested should it be shown that access to justice and the quality of justice generally has been unduly adversely affected by this Part.

Briefing

This amendment supports our proposal that there should be a further review in three or four years, before the end of this Parliament, when the current financial crisis is averted.

The Secretary of State argues that the proposals for cuts are not just required by the Treasury: they are ‘inherently desirable’. We accept 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. As stated to the House by Sir Alan Beith MP (Berwick-upon-Tweed) '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'. 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.

SCHEDULES

The case against the proposed cuts to scope will be the subject of many other briefings and amendments. We largely leave those arguments to others although direct reference to Appendix 1 of our Briefing for the Second Reading in the House of Commons which sets out our general objections.

JUSTICE
July 2011