

The Government's Power *only* to Omit Further Legal Aid Services in the Future

Legal Aid, Sentencing and Punishment of Offenders Bill Joint Briefing

House of Lords, Report Stage

Under Clause 8(2) of the Bill the Lord Chancellor will have the power to modify Schedule 1, and thereby change the future scope of legal aid, *only by omitting further services*.

The current wording is unnecessarily restrictive denying the Lord Chancellor powers which he may require in the future (e.g. to amend drafting defects and address new legal needs). The House of Lords Select Committee on the Constitution accordingly recommended that: *'The provision should be amended to enable the Lord Chancellor not only to omit services from the scope of civil legal aid but also to add services to the scope of civil legal aid'*.

This briefing supports **the Amendment to Clause 8 in the name of Lords Pannick, Woolf, Faulks and Hart** which amends Clause 8(2) to enable the Lord Chancellor not only to omit services but also add them in the future when required. We support the Amendment for the following reasons:

- **The Lord Chancellor may need to remedy unintended consequences.** Concerns have been raised - by senior judges, the Civil Justice Council and academics among others - that the withdrawal of legal aid in certain areas of law will lead to substantial knock-on costs, including an increase in litigants-in-person. Faced with such costs the Lord Chancellor may wish to expand the scope of legal aid to ameliorate these effects.
- **The Clause restricts the Lord Chancellor's ability to correct drafting errors.** The Bill specifies in considerable detail which types of cases come within the scope of legal aid, and in which circumstances. Errors and omissions have already been identified and amended. It is possible that others will emerge after the Bill is enacted.
- **New legal needs may emerge.** The Lord Chancellor should not be prevented from including services to meet needs which emerge at a later date. For example, the current legal aid scheme has been sufficiently flexible to meet the previously hidden needs of trafficked women, spouses from abroad who suffer domestic violence and domestic slaves.
- **The Clause undermines the Government's justification for the cuts.** The Government partially justifies the cuts by the current fiscal situation. It is wrong that the Government should be restricted from expanding the scope of scope of legal aid, should it so wish, when the financial situation improves.
- **The Clause fundamentally alters the status quo.** Under the Access to Justice Act 1999 unless a category of law is specifically excluded it is covered by legal aid, giving the Act sufficient flexibility to incorporate new legal needs. The Bill is exclusive, so that in order to attract legal aid, a category of law must be explicitly listed in Schedule 1. Unless the Schedule can be amended to add *and* omit it lacks the flexibility previously provided.

The Government is against the weight of expert and professional opinion:

House of Lords Select Committee on the Constitution, 17 November 2011

'The provision should be amended to enable the Lord Chancellor not only to omit services from the scope of civil legal aid but also to add services to the scope of civil legal aid'.

House of Lords Delegated Powers and Regulatory Reform Committee, 25 November 2011

'The Committee has concerns about Clause 8(2), and those concerns were not allayed by the explanation in the memorandum that this was merely an updating provision... we draw it to the attention of the House because it is not limited to routine updating and may legitimately be used to make substantial omissions from Schedule 1'.

Lord Faulks (Committee Stage debate, HL, Col. 350, 16 January 2012)

'Although the Lord Chancellor can remove legal aid from the scope in areas he thinks appropriate, he is not given the concomitant power to restore legal aid. There are two circumstances in which he or his successor might want to do that. The first is if there was an improvement in the economy... Should matters improve, there should be an opportunity for the Lord Chancellor to restore legal aid within the terms of the Bill... [and second] however well planned the cuts are-I know that much criticism is made, particularly by the party opposite, of the lack of an impact assessment-it is difficult to be absolutely confident about the effect'.

Baroness Butler-Sloss (Committee Stage debate, HL, Col. 351, 16 January 2012)

'I find it absolutely astonishing that the Government should, in Clause 8, have an arrangement whereby they can delete legal aid but they cannot bring it back. It is particularly astonishing because a number of judges who know what they are talking about-two Supreme Court judges who have been judges in the Family Division and the present president of the Family Division-all say that this is a false economy. I very well understand that it is absolutely necessary to cut the legal aid bill. However, if the Government cut it in the wrong way, as I suggest they are doing... they cannot put it back if it requires primary legislation'.

Lord Goodhart (Committee Stage debate, HL, Col. 352, 16 January 2012)

'From long service on the Delegated Powers Committee, I am satisfied that it would be acceptable to use the affirmative procedure to use Clause 8(2) to delete services that now exist under Schedule 1... From that, it follows that we should make it as easy as possible to reconstruct the provisions that have been cut and that ought to be restored when the financial situation permits. That would be done most swiftly by including in the Bill the ability to introduce powers to add new services by the affirmative procedure, as well as a power to remove existing services'.

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