MINISTRY OF JUSTICE

HOUSE OF LORDS SELECT COMMITTEE ON DELEGATED POWERS AND REGULATORY REFORM TWENTY FIRST REPORT OF SESSION 2011-12:

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL

GOVERNMENT RESPONSE TO THE REPORT

December 2011

LORDS SELECT COMMITTEE ON DELEGATED POWERS AND REGULATORY REFORM REPORT ON THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL

Ministry of Justice Memorandum

Introduction

i. The House of Lords Select Committee on Delegated Powers and Regulatory Reform published a report on 25 November 2011 into the *Legal Aid, Sentencing and Punishment of Offender Bill* (Twenty First Report of Session 2011-12).

ii. This response is the Governments response to that report and has been published at this stage in order that Peers can review the response before the start of Lords Committee Stage. The reply takes the form of responses to the conclusions in the Committee's report.

Issue 1: Clause 2 – Legal aid arrangements

The Committee makes the following point in its report:

The Committee draws clause 2(3) to the attention of the House in light of the lack of a provision in the Bill equivalent to section 25(2) of the Access to Justice Act 1999 (requiring, in relation to remuneration orders, the Lord Chancellor to consult the General Council of the Bar and the Law Society) or section 25(3) of that Act (requiring the Lord Chancellor to have regard to particular factors when making a remuneration order).

1.1 As the Committee noted, we have said that we will continue to engage the Bar Council and Law Society on remuneration matters wherever it is appropriate and constructive to do so. The absence of a statutory duty does not preclude this. Further, the matters referred to in section 25(3) of the Access to Justice Act are matters that fall to be taken into account when setting remuneration rates and we consider it unnecessary to include a reference to them on the face of the Bill. It may also be unhelpful to specifically list factors that must be considered when there may well be a range of other relevant factors that may, in the particular circumstances, also properly fall to be considered by the Lord Chancellor.

Issue 2: Clause 8 – Civil legal services

The Committee makes the following point in its report:

The Committee draws clause 8(2) 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.

2.1 The intention is that clause 8(2) will be a focussed power to omit services where, for example, funding may no longer be necessary and it will allow whole or parts of paragraphs to be omitted. Our intentions have been set out in our programme of reform in the response to the consultation paper[1] and are reflected in the Bill. Part 1 of Schedule 1 to the Bill sets out the areas for which we will continue to make funding available. Civil legal aid has been limited to these areas following a thorough review based on the importance of the issue, the litigant's ability to present their own case (including their vulnerability), the availability of alternative sources of funding and the availability of alternative routes to resolution. We have used these factors to prioritise funding on the highest priority cases, for example, where people's life or liberty is at stake, where they are at risk of serious physical harm or immediate loss of their home, or where children may be taken into care.

2.2 Given the importance of the issue of the scope of civil legal aid, of the need to safeguard public funds now and in the future and in light of the historic expansion of the cost to the tax payer of an ever increasing civil legal aid bill, we believe the scope of civil legal aid should be set out in primary legislation, which this Bill places before Parliament for approval. Accordingly we do not think that Ministers should to be able to bring areas back into the scope of civil legal aid by secondary legislation.

Issue 3: Clause 10 – Civil legal aid criteria

The committee makes the following point in its report:

"The Committee recommends that regulations under clause 10(1)(b) should be subject to affirmative procedure".

3.1 We have given careful consideration to what the Committee said in its Report about the procedure for the regulations under clause 10(1)(b) and it is our intention to bring forward an amendment at a later stage to provide for regulations under clause 10(1)(b) to, generally, be subject to the affirmative procedure. However, the amendment will also need to provide for a procedure, along the lines of (but not necessarily identical to) that in section 9(7) and (8) of the Access to Justice Act 1999 to allow for changes to be made quickly if appropriate.

Issue 4: Clause 12 – Advice and assistance for those in custody

The Committee makes the following points in its report:

[1] Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government Response* (2011).

"The Committee recommends that regulations under clause 12(3) be subject to affirmative procedure".

"The Committee also recommends that regulations under clause 12(9) should be subject to affirmative procedure".

4.1 The Committee recommends that regulations under clause 12(3) be subject to affirmative procedure. We have noted the views of the Committee in its Report. As the Committee will be aware, during the course of debate so far on the Bill, many points have been raised about the power in clause 12(3) to introduce means testing for advice and assistance for those arrested and held in custody at the police station or other premises. We are continuing to consider carefully all issues raised in relation to clause 12(3) and we will update the Committee on the outcome of this consideration as soon as possible.

4.2 The Committee recommended that regulations under clause 12(9) should be subject to affirmative procedure. Section 13 of the Access to Justice Act 1999, which makes provision, amongst other things, about advice and assistance for individuals who are arrested and held in custody at a police station or other premises, does not define what is meant by advice and assistance. We considered that it would helpful to do so in clause 12(8) of the Bill. If it were necessary to make regulations under clause 12(9) then, as we noted in the Delegated Powers Memorandum, such regulations would not alter the principle that advice and assistance should be provided, where necessary, to those in custody, but would be focused on the particular meaning of initial advice and initial assistance. Clause 12(9) will allow flexibility should the new definitions of initial advice and assistance in clause 12(8) be interpreted in practice as requiring the provision of more extensive initial advice and assistance than is necessary, for example if they were given a more expansive interpretation than the current meaning of advice and assistance in this context under the Access to Justice Act. However, we accept the Committee's recommendation that the affirmative procedure is appropriate.

Issue 5: Clause 15(4)(b) – Representation for criminal proceedings

The Committee makes the following points in its report:

"The Committee recommends that the power in clause 15(4)(b) should be subject to affirmative procedure".

5.1 Clause 15(3) provides that where an individual qualifies for representation for the purposes of criminal proceedings, representation is also available to that individual for the purposes of (a) any related bail proceedings and (b) any preliminary or incidental proceedings. Clause 15(4)(a) allows regulations to be made (a) specifying whether or not proceedings are or are

not to be regarded as incidental for the purposes of clause 15(3) and (b) providing for exceptions from clause 15(3).

5.2 There is no intention to exercise the power in clause 15(4)(b) to allow for exceptions to be made from clause 15(3)(a). The intended use of the power in clause 15(4)(b) is that to which reference is made in clause 15(5) which provides that regulations under clause 15(4)(b) may in particular make exceptions for proceedings taking place more than a prescribed period of time before or after the principal proceedings. This would mean that a new determination in relation to representation for the purposes of criminal proceedings would be required after the end of that period of time. For those reasons we continue to consider that the negative procedure is appropriate because the regulations will be dealing with minor and technical matters.

Issue 6: Schedules 7 and 8 – Costs in criminal cases

The Committee makes the following point in its report:

"The Committee considers that the use of the negative procedure in relation to the Lord Chancellor's power to set a maximum amount for legal costs awarded as part of costs to be paid out of central funds in a court other than the Supreme Court (contained in new s.16A(9) Prosecution of Offences Act 1985, to be inserted by paragraph 3 of Schedule 7) has not been sufficiently justified".

6.1 In determining the appropriate level of Parliamentary scrutiny in relation to powers which allow the Lord Chancellor to make procedural provisions in respect of the award of costs, we noted that procedural provisions in relation to legal aid funding, both under existing law and set out in this Bill (for example section 7 of the Access to Justice Act 1999 and clause 20 of this Bill), are generally subject to the negative resolution procedure. The negative resolution procedure is appropriate for such provisions in light of the level of detail required in respect of these matters and the need for variation from time to time.

6.2 We consider that the negative resolution procedure provides the appropriate level of scrutiny for procedural provisions in relation to funding for legal costs for much the same reason. Regulations governing payments from central funds in respect of legal costs are likely to be detailed and require amendment from time to time.

Issue 7: Clause 79(2) – Removal of fines limit

The committee makes the following point in its report:

"The Committee has commented (see para. 20) that the effect of cl. 79(2) is that future exercises of powers to create offences punishable by a fine of an unlimited amount will in some cases be subject to an inappropriately low level of scrutiny".

7.1 The Committee has noted (see para. 20) that it recommended in respect of the Health and Social Care Bill, cl. 31 that 'regulations creating a new offence with a maximum fine of more than level 4 [£2,500] should be subject to affirmative resolution.'[2] The provision became s. 35, and was amended to reduce the maximum to level 4.

7.2 As to the appropriate procedure for the creation of offences punishable with a maximum fine of an amount greater than level 4, the Government notes the Committee's position. There are in primary legislation a number of powers to create offences punishable with a maximum fine set at level 5 (£5,000) or more, which are exercisable using the negative resolution procedure. These include the power in the Health and Social Care Act 2008, s. 121 to create an offence punishable by a maximum fine set at level 5, which power is exercisable using the negative resolution procedure.[3] They also note that health and safety regulations under the Health and Safety at Work Act 1974, s. 15 are made via the negative resolution procedure. It is an offence under s. 33(1)(c) to contravene such regulations. The Health and Safety Offences Act 2008 increased the maximum fine which can be imposed for the offence to £20,000 on summary conviction.

7.3 The Government accepts that cl. 79(2) will have the effect in some cases that the Secretary of State may create, by way of secondary legislation subject to the negative resolution procedure, offences with are punishable with fines of an amount which is more than at present.

7.4 The Government would note that in relation to an offence which is triable either way, cl. 79 will not increase the overall penalty for the offence, since the Crown Court may on indictment impose a fine of an unlimited amount.

7.5 The Government does not consider that it is inappropriate to make this provision. Its policy is that the magistrates' courts should be able to impose unlimited fines in respect of all offences which carry a maximum fine of £5,000 or more. Clause 79(1) applies the new maximums to all current offences. It is plainly necessary, in order to give effect to the Government's policy, for some provision to be made in respect of powers to create offences. In the absence of some sort of provision, there would be an illogical inconsistency between offences created before and after the commencement of the Bill provisions.

7.6 A number of approaches are possible in principle. One is that expressed in cl. 79(2), which is to enlarge those powers in the Bill itself. Another would be to include in the Bill a power to enlarge those powers by order. Yet another would be to make provision that the exercise of a power to create an offence must be subject to the affirmative procedure where the maximum fine is to be more than a set amount.

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[2] See 6th Report of Session 2007-2008, para. 5.

[3] See s. 162.

7.7 The Government has taken the view that it is most appropriate to give effect to its clear policy aim by way of provision in the Bill itself, which will receive the highest level of Parliamentary scrutiny. It is not convinced that a separate power in the Bill to enlarge the powers by order would enhance scrutiny to any significant extent. It considers that it is neither necessary nor workable to apply an affirmative procedure to all existing powers in cases where they are exercised in such a way as to include an offence which carries an unlimited fine in the magistrates' court.

7.8 The enlargement represented by cl. 79(2) only applies to powers existing at the time of commencement, of course. Any new powers to create offences will need to be enacted in primary legislation.

7.9 The Government would note that the power in cl. 79(5) to disapply the effect of cl. 79(1) and (2) in specified cases is to be subject to the affirmative resolution procedure. This reflects the fact that, whereas the policy choice expressed in cl. 79(1) and (2) is given effect in the Bill itself, cl. 79(5) is intended to allow the Secretary of State to give effect to *different* policy choices (as to the nature and extent of cases where an increase in sentence or an enlargement of powers to create offences, are inappropriate).

7.10 More generally, the Government would comment that cl. 71 removes the maximum fine which may be imposed by the magistrates' courts, but it will remain the case that the amounts of fines imposed by the courts are enumerated according to guidelines produced by the Sentencing Council, and take into account both the seriousness of the offending and the offender's means. That set of principles of course reflects public law supervisory principles as to the need for proportionate sentencing.

7.11 The Committee has also asked (see para. 21) about the effect of cl. 79(2) on the power conferred by the European Communities Act 1972, s. 2(2), as a matter of Government practice. The Minister has a choice of subjecting instruments made under s. 2(2) to the negative or the affirmative procedure. The Government's position is that unless there is a clear reason for preferring the affirmative procedure the negative procedure should be used, and it considers that the same approach should be taken in respect of the exercise of the powers in s. 2(2) once cl. 79(2) comes into force.

7.12 It is aware that the Joint Committee on Statutory Instruments has stated the view that that if an instrument substantially affected the provisions of an Act of Parliament, the draft affirmative resolution procedure should be followed. The Government does not accept that the draft affirmative procedure should be used whenever primary legislation is amended, and does not consider that the enlargement occasioned by cl. 79(2) affects this position.

7.13 More generally, the Government would note that the limitation of £5,000 on the powers in the 1972 Act, s. 2(2) reflects the current maximum amount which the magistrates may generally impose. The Government does not consider that any particular issues are raised by changing the power in s. 2(2) to keep it in line with the general changes proposed in cl. 79(2).

Indeed, to do otherwise would create different maximum penalties for EU law offences and domestic law offences, which may well in a substantial number of cases raise issues around the EU law principle of equivalence.

Issue 8: Clause 80(2) and (4) – Increase of fines (existing offences)

The Committee makes the following points in its report:

"Clause 80(2) gives the Secretary of State power to make secondary legislation subject to the affirmative resolution procedure to increase the maximum penalty for an offence where the penalty is less than £5,000.[4] Clause 80(5) imposes a cap on the increase of £5,000 or level 4 if it is greater by the time the power in cl. 80(2) is exercised".

"The Committee objects to the power in spite of the affirmative resolution procedure requirement, and in spite of the limitation to £5,000 or level 4, whichever is greater".

8.1 The Committee notes that the argument that the power is necessary to keep such maximums in step with the levels as amended by the exercise of powers under cl. 81, depends on the justification for creating those powers. The Committee itself addresses that question at paras 29-33. The Government responds in detail below. But its view is that it is appropriate to set the amounts of levels 1 to 4 in secondary legislation, and that a power to amend fixed amounts of less than £5,000 is therefore necessary to retain a coherent sentencing framework in respect of fines, in light of any future decision that fines at levels 1 to 4 should be increased.

8.2 The Committee comments (see para. 26) that there is no explanation as to why the Bill itself cannot contain a Schedule of increases of penalties. The Government reiterates its comment (see Memo, para. 243) that 'it is … difficult to make sensible judgments about the level of increase without reference to proposed increases to levels 1 to 4.'

8.3 Clause 80(4) makes similar provision in respect of powers to create offences punishable by a fine of a maximum of less than £5,000 or, if higher, level 4. The Committee does not accept the Government's argument in this regard. In essence, the same arguments apply here as to cl. 79(2). Clause 80(4) is (similarly to cl. 80(2)) to be seen as necessary to retain a coherent sentencing framework in respect of fines (for both existing offences and existing powers to create offences), in light of any future decision that fines at levels 1 to 4 should be increased. The power in cl. 80(4) only applies to powers existing at the time of commencement. Any new powers will need to be enacted in primary legislation.

[4] This power does not apply where the maximum penalty is expressed as a level on the standard scale.

8.4 The powers in cl. 80(2) and (4) are both exercisable subject to the affirmative resolution procedure. The powers would, if exercised, give effect to policy decisions as to the appropriate levels of fines currently below £5,000, which would require greater scrutiny than can be given by the negative resolution procedure.

Issue 9: Clause 81- Standard Scale

The Committee makes the following points in its report:

Clause 81 gives the Secretary of State power by order to amend the amounts on the standard scale in the Criminal Justice Act 1982, s. 37(2).

The power is exercisable subject to the affirmative resolution procedure.

The Committee considers that the power is inappropriate. The Government considers that it is appropriate to set the maximum fine for offences at levels 1 to 4 by way of secondary legislation, and that that power should not be limited to increases to take account of the value of money. This will ensure that there is sufficient flexibility to take account of changes in policy as to the amounts which levels 1 to 4 represent.

9.1 This is distinct from questions of policy as to the relative seriousness of one offence when compared with another (which will have been considered and determined by Parliament or by specific secondary legislation when creating an offences). In this regard cl. 81(2) is an important safeguard, in that it prevents the Secretary of State from making secondary legislation which changes the ratio of one level to another. The power which is being given to the Secretary of State by cl. 81 is limited to giving effect to policy decisions about the *general* seriousness of offending.

9.2 The Government considers that the affirmative resolution procedure provides a significant safeguard in the context of an order such as that which would be made under cl. 81, which would effectively ask Parliament to approve (and give it the option of disapproving) a single proposition.

9.3 However, the Government notes the Committee's concern with regard to Clause 81. Further work is being done to explore whether those concerns can be mitigated.