Ministry of JUSTICE

Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill

HM Government's formal response to the Joint Committee on Human Rights' twenty-second Report of Session 2010-12

House of Lords

HL Paper 237

House of Commons

HC 1717

Joint Committee on Human Rights

30 January 2012

Contents

Legal Aid, Sentencing and Punishment of Offenders Bill

PART 1 – LEGAL AID

Clause 4 – Director of Legal Aid Casework

Independence of the Director of Legal Aid Casework

Comment by the Committee: We are not satisfied that the Bill provides sufficient institutional guarantees of the independence of the proposed Director of Legal Aid Casework to prevent any appearance of a conflict of interest arising when making decisions about the availability of legal aid to challenge decisions of the Government (paragraph 1.22)

The Government is satisfied that the Bill strikes an appropriate and proper balance between the importance of independent decision making in individual cases, and ministerial accountability for the administration of the legal aid scheme. The current statutory framework for legal aid in England and Wales established the Legal Services Commission (LSC) as the non-departmental public body responsible for administering civil and criminal legal aid schemes. The Lord Chancellor under the current framework has powers to direct the LSC to perform its statutory functions in a specified way – see for example section 5(6) of the Access to Justice Act 1999. This allows the Lord Chancellor to impose requirements on the LSC about the descriptions of services to be funded from any specified amount to be paid into the civil legal aid fund.

In March 2010, Sir Ian Magee published the conclusions of his review into the delivery of legal aid. A key recommendation was that consideration should be given to transferring the administration of the legal aid schemes to an executive agency of the Ministry of Justice. The Coalition Government announced in November 2010 that it would seek to legislate to abolish the Legal Services Commission when Parliamentary time allowed. The Bill therefore contains provisions to abolish the Legal Services Commission and transfer day-to-day administration of legal aid to the Lord Chancellor. In practice this means day-to-day administration will be carried out by civil servants in the Ministry of Justice, as part of the new executive agency. However, decisions on legal aid in individual cases will be taken by a statutory office holder; a civil servant designated by the Lord Chancellor as the Director of Legal Aid Casework. As a civil servant, the Director will be appointed on merit through a fair and open competitive process.

The purpose behind the creation of this statutory office is to ensure that there is no Ministerial involvement in individual legal aid funding decisions whilst strengthening the Lord Chancellor's accountability for the overall and day-to-day administration of the legal aid scheme. The Lord Chancellor will set the overarching guidance, procedures and criteria for legal aid which the Director will apply in taking individual funding decisions.

The Legal Aid, Sentencing and Punishment of Offenders Bill puts in place a number of measures to guarantee the independence of the Director in relation to individual funding decisions. In particular, the Director must make determinations in legal aid cases in accordance with the provisions of Part 1 of the Bill (clause 8(1)(b)) While the Lord Chancellor may issue directions and guidance to the Director, the Lord Chancellor is specifically prevented under clause 4(4) from issuing such directions or guidance about the carrying out of the Director's functions in relation to individual cases. The Bill requires at clause 4(5) any guidance or directions issued by the Lord Chancellor to be published, which ensures transparency in respect of content. It follows that the Lord Chancellor may not give such directions without them being published.

Under the Bill, the Lord Chancellor may, for example, use directions or guidance to set appropriate limits on the Director's powers of delegation. The Lord Chancellor may issue guidance or directions on the handling of information by the Director. We intend to issue guidance on the provision of exceptional funding under clause 9 of the Bill. Such guidance will guide the Director on the legal and other factors that he or she should take into account and apply to the individual circumstances of the case before him or her in making the decision under clause 9. The guidance on exceptional funding, which is required to be published, will also ensure transparency, so that applicants for such funding and their legal representatives know the general factors that the Director will apply when making a decision about an individual case.

Paragraph 1.16 of the Committee's Report raises a specific point about guidance and directions on categories of case that are in the scope of civil legal aid, such as judicial review. The Lord Chancellor is specifically prevented under clause 4(4) from issuing such directions or guidance about the carrying out of the Director's functions in relation to individual cases. This means that Ministers and their officials cannot interfere in the Director's funding determinations about individual cases. For example, it would prevent interference such as directing that all individual judicial reviews against a particular Government department should not be funded.

In terms of categories of case, in addition to the exceptional funding guidance we intend to publish for out of scope cases mentioned above, the Lord Chancellor will have a role in setting out criteria for categories of case that are within scope (such as judicial review). But the Bill provides that this role is by way of making secondary legislation (clause 10(2)). For in scope cases, the Director must determine whether an individual qualifies for legal aid in accordance with the regulations on financial eligibility made under clause 20 and the regulations setting out the merits criteria, which are to be made by the Lord Chancellor under clause 10 of the Bill.

The regulations under clause 10 will be contained in a statutory instrument subject to parliamentary oversight, and any directions and guidance issued by the Lord Chancellor under clause 4 will not be able to conflict with the criteria set out in those regulations. In making these regulations, the Bill requires that the Lord Chancellor must consider a set of statutory factors set out in clause

10, such as the public interest. When setting the merits criteria the Lord Chancellor is expressly required to consider the extent to which they ought to reflect the availability of resources to provide services and the appropriateness of applying those resources to provide the services having regard to present and likely future demands for the provision of civil legal services under Part 1 of the Bill. The merits criteria, rather than directions or guidance under clause 4, are the appropriate place for the Lord Chancellor to reflect the most appropriate use of resources, amongst other factors.

Clauses 11, 17 and 19 – Determinations

Independent right of appeal against determinations

Comment by the Committee: In the absence of a right of appeal against determinations to an independent court, tribunal or other body in all cases, and bearing in mind the lack of independence of the Director, we are not satisfied that sufficient guarantees exist against arbitrariness in the system for determining individual eligibility for legal aid. We recommend that the Bill be amended to require regulations to be made making provision for appeals against decisions of the Director to an independent court or tribunal (paragraph 1.28).

The Government is satisfied that the Bill provides sufficient guarantees against arbitrariness in the system for determining individual eligibility for legal aid. We do not consider it is necessary to amend the Bill to require regulations to be made making provision for appeals against decisions of the Director to an independent court or tribunal.

The Government remains of the view that a decision whether a person qualifies for legal aid is not in itself a determination of that person's civil rights and obligations within the meaning of Article 6(1). Notwithstanding that view, the Government's position is that the arrangements under the Bill create a system that contains substantial guarantees against arbitrariness. Those arrangements are the creation of the independent statutory office of the Director, who will be required to apply the provisions of Part 1 of the Bill. The Director will be protected against political interference in individual decisions by clause 4(4) of the Bill.

The Bill contains a power at clause 11 to make regulations, and these regulations will include detail of our proposed appeal system. These regulations will include much of the detail currently set out in the Funding Code Procedures created under the Access to Justice Act 1999.

It is intended to set out in the regulations the Legal Services Commission's existing appeal and review procedures including the use of Independent Funding Adjudicators (IFAs). IFAs are independent solicitors or barristers who consider the application and the merits of the client's case in full. Usually the

IFA will make their determination on the basis of the papers. However, if the IFA considers that it is in the interests of justice to hear oral representations before making a determination, the client, or any person authorised by the client, may attend before the IFA to make such representations. Where the Legal Services Commission or the IFA consider that the matter before the IFA is of exceptional complexity or importance, the matter may be referred to a panel of two or more IFAs sitting as a committee.

The IFA can make a binding determination on certain issues, such as the prospects of success, whether a case is of overwhelming importance to the client, the cost benefit of a case to a client, and whether a certificate should be discharged or revoked on the grounds of a client's conduct. All decisions to actually grant or refuse funding, or amend the terms of funding, are currently taken by the relevant Director of the Legal Services Commission, taking into account, where relevant, any determination by the IFA. If the appeal is unsuccessful, the client can make a fresh application for legal aid if they can provide further evidence to support their case.

For criminal legal aid, where decisions are taken by the Director under clause 17 or 19, provision for review or appeal may be made. Decisions on criminal legal aid can also be taken by a court under clause 18 or 19, where no issue as to independence or impartiality can arise.

Further, ultimately, decisions on legal aid funding made by the Director will be susceptible to judicial review.

Clause 9 – Exceptional cases

Exceptional funding

Comment by the Committee: We are concerned about whether the Bill's provision for funding exceptional cases is likely to make the right of access to justice practically effective. In many of the areas of law which are no longer in scope under the Bill, a decision on the availability of legal services will be required swiftly in order for the right of access to justice to be practically effective. We are not convinced that the provision in the Bill to fund exceptional cases, including where a failure to make the services available to a person would be a breach of their Convention rights or EU rights, is sufficient guarantee that the new legal aid regime will not create a serious risk that its operation will lead to breaches of Convention rights (paragraph 1.31).

The exceptional funding scheme, provided for by clause 9 of the Bill, is intended to ensure the protection of an individual's rights to legal aid under the European Convention on Human Rights as well as those rights to legal aid that are directly enforceable under European Union law.

The Government recognises that the exceptional funding scheme will need to be designed so as to avoid the risks raised by the Committee, in particular to ensure that those rights of access to justice referred to in clause 9 are protected in a way that is practically effective. We are confident that it is capable of being designed in a way that meets these concerns. The Ministry of Justice has been having detailed discussions with the Legal Services Commission about the operation of the new scheme. We have given careful consideration, amongst other issues, to the anticipated volume of applications, as well as any mechanisms that may need to be put in place for urgent cases. We intend to publish final proposals in due course.

Schedule 1

Legal aid for victims of domestic violence

Comment by the Committee: We welcome the Government's intention of preserving legal aid for victims of domestic violence. However, we are concerned about whether the Bill, as currently drafted, gives practical effect to the Government's intention, in view of three aspects of the Bill the effect of which is likely, in practice, to restrict the availability of legal aid for such victims (definition of domestic violence; list of forms of acceptable evidence; and the time limit on qualification for legal aid) (paragraphs 1.34 – 1.38)

The Government welcomes the Committee's support for the commitment to retain legal aid for victims of domestic violence. The Government does not, however, accept that the definition of "abuse" used in the LASPO Bill is narrower than that used in the ACPO guidance. The Bill's definition is broad and comprehensive, having been drafted deliberately and explicitly so as not to be limited to physical violence. It embraces mental as well as physical abuse, neglect, maltreatment and exploitation. These references would cover, for example, abusive behaviour relating to the family finances. The definition in the LASPO Bill would not exclude from scope any of the types of abuse covered by the definition used by the Association of Chief Police Officers which has been referenced by the Committee. Indeed, it is worth noting that in terms of the range of persons involved, the ACPO definition is actually narrower than that in the Bill, the Bill's definition being linked to that already used in the legislation governing family homes and domestic violence in Part 4 of the Family Law Act 1996.

There are good reasons for using the definition chosen for the Bill as opposed to that in ACPO guidance. The ACPO definition, because it is set out in guidance, is liable to change in a way that legislation is not. The recent consultation undertaken by the Home Office underlines this point1. In addition, the ACPO definition is an operational one, not designed as a legislative proposition which may fall to be construed by a court. Legislation serves a

[1] http://www.homeoffice.gov.uk/publications/about-us/consultations/definition-domestic-violence/dv-definition-consultation?view=Binary

different purpose, in that it sets the framework for the way in which the Legal Aid system will function and the definition has been drafted for that purpose.

The Government does not agree that the forms of evidence are too restrictive. In the first instance, legal aid will continue to be available in relation to home rights, occupation orders and non-molestation orders under Part 4 of the Family Law Act 1996, and also in relation to applications for injunctions following assault, battery or false imprisonment or in relation to the inherent jurisdiction of the High Court to protect an adult where these arise out of a family relationship.

The evidence criteria for private family law start from the position that victims of domestic violence should have the benefit of legal aid in such cases where they will be disadvantaged by facing their abuser as the other party. However, concerns were raised during consultation that this proposal could see a rise in unfounded allegations, and the Government does wish also to guard against that. Therefore the criteria need to involve clear, objective evidence of domestic violence so that funding is targeted on those cases where the victim needs assistance because of being intimidated or otherwise disadvantaged by the fact of facing the abuser in the proceedings.

The forms of evidence which it is intended to accept will meet a very high standard of objectivity. The Government is not questioning the integrity of victims, but has to consider where the greatest need arises. Were all cases in which an assertion of domestic violence is raised to qualify, without objective evidence, the effect would be to prevent effective focusing of assistance on those victims of domestic violence who would be unable effectively to present their case against the other party because of the history or risk of abuse by that party.

The Government has, however, listened to the concerns of those who feel that the currently proposed forms of evidence are too narrow, and is continuing to look at this issue, and in particular whether undertakings given in place of a domestic violence order maybe a sufficiently clear and objective indicator of abuse to be added to the list.

It should be borne in mind that the Government has proposed that a conviction for a domestic violence offence should be treated differently from other forms of evidence, so that, where the other party to private family law proceedings has been convicted of such an offence against the applicant victim, that conviction will count as evidence for the purposes of qualifying for legal aid for those proceedings, regardless of how long ago the conviction took place, with the sole exception of a case where the conviction is spent.

More generally, however, the Government considers that a period of twelve months is appropriate to protect victims and to enable them to deal with their private family law issues. If the criteria were to be re-established at a later date – for example, if a protective injunction is renewed or extended, or a second such injunction made – the time period would run from that later date.

So, in the example used by the committee, if the other party's conviction had been for a domestic violence offence against the victim, the conviction would be a qualifying form of evidence even though more than 12 months had passed. If the conviction had been for an unrelated offence, but there was a continued risk following the convicted partner's release, the victim would be able to apply for a protective order (for which legal aid will be available). Were the order to be made, it would be a qualifying form of evidence for the private family case.

It is also important to remember that legal aid will remain available for exceptional out of scope cases where the failure to provide such funding would amount to the breach of an individual's rights under the European Convention on Human Rights; in particular, article 6 ECHR.

Clause 12 – Advice and assistance for individuals in custody

Legal advice and assistance in the police station

Comment by the Committee: We are concerned that the introduction of means-testing for legal advice and assistance at the police station would hinder the effective exercise of the right of access to legal advice by an arrested and detained person. Bearing in mind the fact that the Government says that it has no current intention to introduce means-testing for advice and assistance at the police station, we recommend that Bill be amended to remove the power to introduce means-testing by regulation and so ensure that the introduction of such a significant change is contained in primary legislation and subjected to full parliamentary scrutiny (paragraph 1.43).

The Government notes the views of the Committee in its Report. As the Committee will be aware, during the course of debate in Lords Committee on 24 January 2012, the Government acknowledged the concerns raised about both the principle and the practicality of conducting a means assessment in the police station. While the Government remains of the view that those who can afford to pay towards the cost of their defence should do so whenever possible, we recognise that there would be more work to do to make the case for means testing police station advice and assistance. The Government therefore intends to table an amendment to clause 12 at Report stage that will remove the power to introduce means testing for initial advice and assistance at the police station in the future.

PART 2 – LITIGATION FUNDING AND COSTS

Human rights claims against multinational companies

Comment by the Committee: We are concerned about the implications for access to justice if CFA success fees and ATE insurance premiums are not to be recoverable from the losing party in claims brought against multinational companies by victims of alleged human rights abuses in developing countries. We accept the pressing need for appropriate safeguards against abuses, such as improper profiteering by lawyers and undue pressure on defendants to settle claims for which they may not be liable. We urge the Government to introduce amendments to the Bill which strike this delicate balance (paragraph 1.47)

The Government notes that, in reaching its view, the Committee has referred, in particular, to the evidence of Professor Ruggie, Leigh Day & Co. Solicitors and the Corporate Responsibility Coalition (CORE). We should say that Jonathan Djanogly MP, Parliamentary Under-Secretary of State, has previously written to Professor Ruggie and has met with representatives from Leigh Day & Co Solicitors, CORE and other organisations, including Oxfam and Amnesty International, to discuss the effects of the proposed reforms.

As we stated in our memorandum to the Committee of 31 October 2011, the Government considers that Professor Ruggie's concern that the changes to litigation funding in the Bill could "constitute a significant barrier to legitimate business-related human rights claims being brought before the UK courts in situations where alternative sources of remedy are unavailable" is misplaced. The Government would again draw the Committee's attention to the fact that no specific evidence has been presented to the Government by any individual or organisation to suggest that ending the recoverability of success fees and ATE insurance premiums from losing parties will result in such claims not being pursued in the future. The Government does not accept that there is any evidence to support the assertion that the existing costs rules and funding limitations already undermine the ability of such victims to seek legal redress.

As suggested in the earlier memorandum, claims which concern alleged human rights abuses in developing countries generally involve claims for personal injury or claims arising from environmental disasters. The Government maintains that sufficient safeguards, particularly in respect of personal injury claims (for example, the proposed 25% cap on success fees which may be recovered from damages, save for future care and loss and the introduction of qualified one way costs shifting (QOCS) and the continued availability of CFAs as well as alternative means of funding (for example, damages-based agreements) will ensure that claimants' damages will be protected and that legal representatives will be adequately rewarded. This will enable them to continue to fund potentially less successful litigation under "no win no fee agreements".

On that basis, and while noting the Committee's concerns, the Government does not accept that its proposed reforms undermine access to justice in respect of such claims. Rather, it is considered that the proposed reforms do, in fact, strike the right balance between protecting access to justice and making costs more proportionate, both in terms of the overall costs of litigation and the disproportionate costs which losing defendants are currently liable to pay under CFAs.

Clinical negligence and other claims

Comment by the Committee: We are concerned that the combination of taking clinical negligence out of the scope of legal aid and removing the recoverability of CFA success fees and ATE premiums may undermine the right of effective access to justice for the victims of such negligence. We are also concerned about the impact of the Bill's CFA proposals on the market for legal services in relation to other claims such as the vindication of a good public reputation and respect for personal privacy. We acknowledge the legitimacy of the Government's concerns about the operation of CFA success fees and the need for effective safeguards against abuse but we are concerned that under these proposals the

pendulum will swing too far in the direction of restricting access to court for worthy claims. We are not aware that any detailed modelling has been carried out of the effect of these proposals on the market for legal services and we call on the Government to make available to Parliament evidence of the assessment it has made of the likely impact of the proposals on the availability of legal services for different types of claim (paragraph 1.49)

The Committee has expressed concern about the combination of taking clinical negligence out of the scope of legal aid while removing the recoverability of CFA success fees and ATE insurance premiums and the possible undermining of the right to access to justice for victims of such negligence.

The Government has responded to concerns that expert reports in clinical negligence cases, which are often necessary to establish whether there is a case for bringing a claim, can be very expensive. Accordingly, clause 45 of the Bill enables the Lord Chancellor to make regulations to prescribe the circumstances in which ATE insurance premiums would be recoverable for such reports and the maximum amount that may be recovered. The recovery of ATE premiums in these cases, then, is not being abolished, but will be subject to appropriate regulation.

The Committee will also be aware that the Bill provides for an exceptional funding scheme which will ensure that some clinical negligence cases continue to receive legal aid if the failure to provide it would amount to a breach of an individual's rights to legal aid under the Human Rights Act 1998 or EU law.

In addition, personal injury claims will be subject to QOCS, which means that, not only will potential claimants still be able to obtain the reports necessary to determine whether they have ground to make a claim, but may issue proceedings in the knowledge that they will not be required to pay the defendant's costs if they should lose. In such cases, therefore, ATE insurance is likely to be unnecessary.

The Committee has also expressed concern about the effect of the proposed reforms on the market for legal services in relation to other claims such as defamation and privacy (and has made specific reference to the Dowler family's claim against News International), but acknowledges the legitimacy of the Government's concerns about the operation of success fees and the need for effective safeguards against abuse. However, the Government's concerns go beyond the possibility of abuse. High and disproportionate litigation costs hinder access to justice. They can also lead to a 'chilling effect' on journalism, and academic and scientific debate. As the Committee will recall, the European Court of Human Rights judgement in *MGN v the UK*[2] found the existing CFA arrangements with recoverability in that particular case to be contrary to Article 10 (freedom of expression) of the Convention. Changes are, therefore, necessary. Abolishing the recoverability of success fees and ATE insurance premiums from the losing side will rebalance the CFA regime to make it fairer for defendants and reduce the substantial additional costs that they have to pay under the current no win no fee regime.

Nonetheless, the Government is aware of concerns around access to justice and the ability of those with modest means to pursue claims against, amongst others, media organisations. However, the Government does not consider that it is necessary to make any special provision in relation to the costs of privacy or defamation proceedings, but will continue to monitor the position following the introduction of the CFA reforms and other reforms to the law and procedure for defamation claims upon which the Government has recently consulted and will consider, in the light of experience, whether any further changes are necessary.

The courts are currently piloting a process of costs management in defamation proceedings issued at the Royal Courts of Justice and the Manchester Civil Justice Centre. Under this process, the courts consider and manage the costs involved in the case as the case progresses, rather than at the end of the case as currently. A decision will be made in the light of the outcome of this pilot on whether to adopt the costs budgeting process for all defamation claims.

---

[2] *MGN Limited v the United Kingdom*, 18 January 2011 (Application No. 39401/04)

While the Government acknowledges that CFAs have helped to create a market for legal services which has made access to justice available to those who would not otherwise be able to afford to take legal action, those with meritorious claims will still be able to secure representation under CFAs. The Dowler family's claim, for example, was a strong one, as evidenced by the fact that they received an early apology and £2 million without issuing proceedings. It is likely that many lawyers would have been willing to act for them, and would have done so under the new regime.

For these reasons, the Government does not accept that access to justice will be restricted in respect of worthy claims.

The Committee has stated that it is not aware that any "detailed modelling has been carried out of the effect of these proposals on the market for legal services" and calls upon the Government "to make available to Parliament evidence of the assessment it has made of the likely impact of the proposals on the availability of legal services for different types of claim.".

In its Impact Assessment[3] the Government has explained in detail why it has not been possible to accurately monetise the aggregate impact of the proposals, including by type of claim[4]. In summary, this is a consequence of a lack of robust baseline data, plus the fact that the impacts depend on complex behavioural responses and market dynamics, both of which are unknown and cannot be robustly predicted. The Impact Assessment contains a qualitative analysis of the impact of the proposals, including on the legal services market.

The Government acknowledges in the Impact Assessment that a potential impact of the proposals is that fewer cases may be pursued in future, particularly those cases where there is a lower probability of success, or which involve highly disproportionate costs compared to the amount being disputed[5]. If this occurs, legal services providers, ATE insurers and other suppliers may, initially at least, experience a reduction in business/income as a result. However, such businesses are assumed to be able to substitute other business activity and hence incur only adjustment costs. Any costs to suppliers generally mirror the gains to claimants or defendants who pay for the services provided.

---

[3] *The Cumulative Jackson Proposals*, 24th April 2011; a copy of which is attached, but which may also be found at: www.justice.gov.uk/consultations/jackson-review.htm - the document, entitled *Impact Assessment*, may be found at the foot of the relevant page.

[4] See paragraphs 2.1 to 2.11 (Costs and benefits).

[5] See paragraphs 2.135 to 2.138 (legal services providers) and 2.139 to 2.142 (ATE insurance providers).

PART 3 – SENTENCING AND PUNISHMENT OF OFFENDERS

Indeterminate sentences

Comment by the Committee: We welcome the abolition of IPP sentences, which makes it less likely in future that prisoners will be detained in breach of their right to liberty under Article 5 ECHR, but consider that the Bill should also address the pressing issue of current IPP prisoners who have served the determinate part of their sentence (paragraph 1.51)

The Committee raises concerns about the situation of those currently in custody having received IPP sentences. The Government does not think it is right or appropriate to retrospectively alter sentences which were lawfully imposed by the court in order to give automatic release to such prisoners, simply because a policy decision has now been taken to repeal that sentence. Generally, sentences already imposed are not substantively altered by subsequent legislation.

The National Offender Management Service (NOMS) remains committed to implementing measures to support the progression of indeterminate sentence prisoners, particularly those with short tariffs, by the provision of accredited offending behaviour programmes, specialist treatment, support and non-accredited courses.

NOMS is using a range of measures to improve the progression of these prisoners through sentence, including improvements to assessment, sentence planning and delivery, and parole review processes.

NOMS continues to monitor outcomes to ensure further improvements are identified and implemented.

There have historically been issues around timely assessment of offenders and supplying the necessary level of interventions to meet demand, because IPPs have been used to a far greater extent than predicted. NOMS have already made significant improvements to increase supply of rehabilitation interventions for this group:

- Almost all IPP prisoners now have comprehensive needs assessments
- Better use is already being made of sentence plans to prioritise interventions for existing IPP prisoners where the need is greatest
- Work is underway to ensure programmes can be delivered more flexibly, supporting greater access, and inclusion of offenders with more complex needs such as learning difficulties
- There have been higher completions of rehabilitative programmes

A new specification for offender management, which will provide for the prioritisation of resources based on risk, will take effect from April 2012. This means that the higher the identified level of risk and likelihood of re-offending, the higher the level of service that will be provided. In particular, this will result in improved targeting of rehabilitative interventions for IPP prisoners.

A key rehabilitation stage for these prisoners is being able to demonstrate in open conditions or on temporary release that they have learnt new behaviours. NOMS have identified specific issues around waiting lists for IPP prisoners who have been assessed as suitable to be held in open conditions. Work is underway to improve the speed of allocation to open prisons, and a temporary release policy is being reviewed to consider whether suitable prisoners might be given access to temporary release from closed prisons.

Parole hearing processes have become more streamlined– with reviews made through a combination of written evidence and oral hearing- and significant resources have been deployed to increase the ability of the Parole Board to increase its throughput. This has significantly reduced backlogs for oral hearings and significantly increased the number of parole dossiers produced on time.

The Government is taking a power in the Bill to amend the risk test, both for current IPP prisoners, and for the new extended sentence. NOMS will continue to monitor the progress of current IPP prisoners once changes to the current sentencing law have been brought into force. The Government will consider the use of the power to change the release test, alongside careful consultation, if it appears that there is still a need to review the release test.

Clause 68 – Foreign travel prohibition requirement

Comment by the Committee: We welcome the Government's objective of increasing the use of community sentences in preference to imprisonment, but we are concerned about the proposed extension of foreign travel prohibition requirements. New powers which interfere with

ancient rights and liberties require strict justification by the Government and must be defined in a way which makes it as sure as possible that they will only be exercised proportionately. A prohibition on foreign travel may interfere with an individual's private and family life as well as their livelihood if foreign travel is necessary for their business. The fact that such a power will be "useful" does not in our view discharge the

Government's responsibility to demonstrate its necessity. We are also concerned that the lack of any link between a foreign travel prohibition order and the nature of the offence may lead in practice to disproportionate interferences with those rights (paragraph 1.57)

The Government notes the Committee's concerns about provisions in the Bill to enable the court to impose a foreign travel prohibition requirement (that is, a requirement that the offender may not travel to any country outside the British Islands).

The Ministry of Justice consulted in the *Breaking the Cycle* Green Paper about whether the existing framework of powers to restrict offenders' travel were sufficient for the courts. Some of the current restrictions are linked in statute to specific offending behaviour: for example, to sexual offences or football-related offences. More widely, it is a standard condition of a licence for an offender who is released on licence from the custodial portion of a determinate prison sentence of 12 months that the offender may not leave the UK. Such requirements exist in order to support the prevention of further offending and the protection of the public.

The power of the court to impose a foreign travel prohibition requirement will be generally applicable (i.e. it will be capable of being applied to any offender who falls within the scope of a community order or suspended sentence order). It is not restricted to specific offences or types of offender. The Government's view is that the requirement will be appropriate in a range of different situations, and that it is not necessary, appropriate or helpful to attempt to limit its scope of application expressly in the legislation.

It is of course right that the imposition of the requirement (insofar as it amounts to an interference with the ECHR 1950, Art. 8 or Prot. 1, Art. 1) must be justifiable in the terms envisaged by those Articles and the case law which has interpreted them. The Government does not consider that the Convention rights require the scope of the requirement to be limited to any particular type of offending, or to any particular class of offender. It considers that it is entirely appropriate, and compatible with the Convention rights, to make the requirement available generally.

The Government would make the general and important point that the requirement will be imposed by the court, which is a public authority for the purposes of the Human Rights Act 1998, s. 6, and must therefore act compatibly with the offender's Convention rights. The court will take into account representations made by the offender as to the appropriateness of the sentence, and the Government would draw the Committee's attention to the Criminal Justice Act 2003, s. 148(2), which imposes obligations on the court, when imposing a community sentence, to ensure that the requirements are the most suitable for the offender, and that the restrictions on liberty imposed are commensurate with the seriousness of the offence. Moreover, the Government notes that the provision gives the court power to specify particular countries to which the offender may not travel.

The court also has powers to amend or revoke a community order. The Government would expect these powers to be exercised in appropriate cases, which include ensuring that the requirement remains compatible with the offender's Convention rights.

The Government notes the Committee's comment that the right to leave one's own country is guaranteed by the International Covenant on Civil and Political Rights 1966 (the ICCPR), Art. 12(2). As the Committee notes, that right is not absolute, however. Article 12(3) provides that 'the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. The Government does not consider that cl. 68 gives rise to any issues under the ICCPR separate from those under the Convention rights as set out in the HRA 1998, Sch. 1.

OTHER ISSUES RAISED BY THE COMMITTEE

Potential increase in numbers of Litigants in Person

Comment by the Committee: We hope the Government will make clear during the Bill's passage through the House of Lords their assessment of the likely increase in the number of litigants in person and the associated cost to the public purse arising from the lengthier proceedings likely to result (paragraph 1.8)

The Ministry of Justice conducted a full review of the available literature on litigants in person, which was published alongside the consultation response[6]. Overall the review found that the evidence available on litigants in person tends to suggest a mixed impact on length of proceedings. This was affected by case type and how active the litigants were.

Subsequently, the Ministry of Justice also published the results of a case file review which informed the findings of the Family Justice Review. This found that a lack of legal representation was associated with shorter proceedings[7]. This illustrates the fact that the evidence is mixed: there is no clear correlation between litigants in person and increased case lengths.

It is important to note that the withdrawal of legal aid, and the subsequent likely increase in the numbers of litigants in person, will mainly affect private family cases. Legal aid is not currently provided for representation in most types of tribunal case.

[6] http://www.justice.gov.uk/publications/research-and-analysis/moj/litigants-in-person.htm
[7] http://www.justice.gov.uk/publications/research-and-analysis/moj/family-justice-children.htm

Whereas we expect a reduction in numbers being represented through legal aid in private family cases of 45,000 a year, this needs to be seen in the context of 10,000 likely additional mediations cases, as a result of our decision to prioritise this area. This will help offset additional burdens on the courts from dealing with litigants in person. The Government therefore stands by its statements in the final Impact Assessment that while the proposed reforms are likely to lead to an increase in the volume of cases where clients choose to represent themselves in court or at a tribunal, the extent of the increase is uncertain and there is no firm evidence that unrepresented cases on average impose additional operational cost burdens on courts and tribunals.

Produced by the Ministry of Justice

Alternative format versions of this report are available on request from LASPOBill@justice.gsi.gov.uk