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Legal Aid, Sentencing and Punishment of Offenders Bill

Bill No 205 of 2010-12

RESEARCH PAPER 11/53 27 June 2011

This Research Paper has been prepared for the second reading of the *Legal Aid, Sentencing and Punishment of Offenders Bill*. The Bill covers a diverse range of issues, including legal aid; litigation funding and costs; sentencing; bail, remand and release on licence; prisoners' pay and employment; out of court disposals and knives.

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Research Paper 11/53

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Summary

The *Legal Aid, Sentencing and Punishment of Offenders Bill* had its first reading on 21 June 2011, was published the following day and will have its second reading on 29 June 2011.

The Bill's provisions cover a diverse range of issues:

Legal aid: The Bill would reverse the position under the *Access to Justice Act 1999*, whereby civil legal aid is available for any matter not specifically excluded. The Bill would take some types of case out of scope for legal aid funding and cases would not be eligible for funding unless of a type specified in the Bill. As it stands, the Bill would allow the Lord Chancellor by order to omit services from this list but confers no power to add new services. The Bill paves the way for further changes (through secondary legislation) to the financial criteria for eligibility for civil legal aid and extends the scope for means-testing for criminal legal aid. The Bill would also abolish the Legal Services Commission.

Litigation funding and costs: The Bill makes various provisions in respect of civil litigation funding and costs, taking forward the recommendations of the Jackson Review and the Government's response to that review. The Bill's provisions cover (amongst other things) conditional fee agreements, damages-based agreements and other matters relating to civil litigation funding and costs in divorce and dissolution proceedings. It also deals with costs that might be awarded from central funds in criminal cases.

Sentencing: Following the consultation in the Green Paper *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders,* the Bill makes changes to sentencing provisions. Examples include: giving courts an express duty (rather than the current power) to consider making compensation orders where victims have suffered harm or loss; reducing the detailed requirements on courts when they give reasons for a sentence; allowing courts to suspend sentences of up to two years rather than 12 months; and amending the court's power to suspend a prison sentence. New powers would allow curfews to be imposed for more hours in the day and for up to 12 months rather than the current six, and courts would have more discretion with regard to various orders for young offenders. In addition, the Bill would repeal provisions in the *Criminal Justice Act 2003* which would have increased the maximum sentence a magistrate's court could impose from six to 12 months. These were part of plans to introduce a new form of sentence ("Custody Plus") for people with sentences of under a year. However, they never came into force because of resource constraints. There are also changes to remove some of the restrictions on the use of recalls to prison.

Bail and remand: changes in the Bill on bail and remand aim to reduce the number of those who are unnecessarily remanded into custody. Under the new "no real prospect" test, people would be released on bail if they would be unlikely to receive a custodial sentence. There were mixed reactions when this was proposed, with many welcoming the move, but some questioning whether the outcome of a court case could be predicted at the outset in this way. Where a person aged under 18 has to be remanded into custody, the Bill would ensure that in most cases they would be remanded into local authority accommodation.

Release on licence: The Bill amends provisions relating to the release and recall of prisoners. The Bill's provisions include (amongst other things) the simplification of the calculation of crediting periods of remand on bail, additional restrictions for early release on Home Detention Curfew and the supervision of young adult prisoners released from sentences of less than 12 months.

Prisoners' pay and employment: The Bill gives the Secretary of State new powers to make prison rules about prisoners' employment, pay and deductions from their pay. The intention is that prisoners should make payments which would support victims of crime.

Out of court disposals: Here, the Bill introduces a penalty notice with an education option and provision for conditional cautions to be given without the need to refer the case to the relevant prosecutor. New conditions could be attached to a conditional caution given to a foreign national offender without leave to enter or stay in the United Kingdom. There would also be a new kind of youth caution, and youth conditional cautions would be amended.

Knives: The Bill would create a new offence of threatening with an offensive weapon or an article with a blade or point thereby creating an immediate risk of serious physical harm. A minimum sentence of 6 months imprisonment would normally be given to persons over 18 found guilty of this offence.

1 Introduction

The *Legal Aid, Sentencing and Punishment of Offenders Bill* had its first reading in the House of Commons on 21 June 2011 as Bill 205 of 2010-12, was published the following day and is due to have its second reading on 29 June 2011. The Government has also published Explanatory Notes. Information about the Bill is available via the Bill Gateway on the Library intranet; on the Bill page on the Parliament website; and on the Government's Justice website.

Clause 117 sets out the territorial extent of the Bill. The majority of the Bill's provisions extend to England and Wales only, but certain provisions also extend to Scotland or Northern Ireland or both. The Bill addresses non-devolved and devolved matters. Full details are included in the Government's Explanatory Notes.[1]

The Bill has 4 Parts and 16 Schedules and was preceded by a number of separate consultations:

- Part 1 deals with legal aid. The Coalition document promised a fundamental review of legal aid to "make it work more efficiently".[2] The Green Paper *Proposals for the reform of legal aid in England and Wales* was published on 15 November 2010 and the Government's response to the Green Paper consultation was published at the Bill's first reading.

- Part 2 deals with deals with litigation funding and costs. On 15 November 2010, the Ministry of Justice launched a consultation, *Proposals for reform of civil litigation funding and costs in England and Wales*. This consultation sought views on implementing a package of proposals made by Lord Justice Jackson in his *Review of Civil Litigation Costs: Final Report*. On 29 March 2011, the Government published its response to the consultation, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations*. Part 2 would also enable the Lord Chancellor to cap the amount of legal costs that might be awarded from central funds to a successful defendant, witness or successful appellant in a criminal case; in the case *of R (on the application of the Law Society of England and Wales) v Lord Chancellor* in June 2010,[3] the court held that the Lord Chancellor did not have power to do so under existing legislation.

- Part 3 of the Bill covers a range of issues to do with sentencing and the punishment of offenders. The Government published proposals for consultation in December 2010 in its Green Paper, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*.[4] The Government published its response to the consultation, *Breaking the Cycle: Government Response*, on 21 June 2011, along with the Bill.

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1 Paragraphs 43-49
2 HM Government *The Coalition: Our Programme for Government* May 2010
3 [2010] EWHC 1406 (Admin)
4 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders,* Cm 7972, December 2010

2 Is there a case for reforming legal aid?

2.1 Legal aid now: the basics

The current legal aid scheme is not a system of direct provision by the state but, rather, one in which the government funds private practitioners to provide the service. It is, in essence, the same as it was when founded in 1949 although, in the intervening years, numerous changes have been made to the way in which the scheme is organised and managed. The Labour Government, for example, oversaw more than 30 reviews and consultations.

The current scheme was established by the *Access to Justice Act 1999* (the 1999 Act), which set up the Legal Services Commission (LSC) as a non-departmental public body to administer the scheme. Help with legal costs is available at different levels:

- Legal Help
- Help at Court
- Family Help
- Family Mediation
- Legal Representation
- Controlled Legal representation
- Legal aid for criminal cases

The Community Legal Service's *Step-by-Step Guide to Legal Aid* for civil cases also outlines the circumstances in which the various types of help might be available. Even when legal aid is granted, some costs may still fall to the recipient (by way of a lump sum, monthly instalments or a statutory charge).

To receive funding, civil cases must meet criteria relating to both **financial eligibility** and **merits**. Similarly, in criminal cases, since 2 October 2006 defendants at the magistrates' courts must pass both the **means test** and the **interests of justice test** to be eligible for legal aid. Since January last year, "people who can afford it" had been paying towards their defence in the Crown Court in five early adopter areas and the scheme was rolled out across the rest of England and Wales from April 2010.

These issues are described more fully in the Library standard note *Legal aid: controversy surrounding the Government's plans for reform* (SN 05840, 27 January 2011). Some of the commentary and critique surrounding Labour's reforms is also summed up there.

2.2 The Government's stance on legal aid

The Coalition document promised a fundamental review of legal aid to "make it work more efficiently".[5] An article in the *Independent* in June 2010 examined ways in which government departments, including the Ministry of Justice, might cut their budgets by 25 per cent and speculated that legal aid spending might be reduced by a third.[6]

In a speech to the Centre for Crime and Justice Studies, the Lord Chancellor and Secretary of State for Justice, Kenneth Clarke, spoke at length about the need to re-examine the nature and scope of legal aid funding. He wanted, he said, to balance necessary financial constraints with the true interests of justice. There were questions of when it was reasonable for the taxpayer to fund a person's legal costs and when that person should be expected to

5 HM Government *The Coalition: Our Programme for Government* May 2010
6 "How Do You Cut The State by a Quarter?" *Independent* 24 June 2010

meet their own costs, perhaps through insurance. Some disputes should, he argued, be taken out of the jurisdiction of the courts.[7]

The Green Paper *Proposals for the reform of legal aid in England and Wales* was published on 15 November 2010. In the foreword, Kenneth Clarke argued that the legal aid system has grown far beyond what had been intended in 1949. Previous, piecemeal attempts at reform had failed and tough choices lay ahead.[8] The Green Paper prompted 5000 submissions and representations.

The Government's response to the Green Paper consultation was published at the Bill's first reading. The Ministry of Justice's reform programme is set out at page 80 onwards.[9] Many of the Government's plans for changes to legal aid do not appear on the face of the Bill, as they will be enacted through secondary legislation (regulations) or other means.

2.3 How does legal aid spending in England and Wales compare with that in other countries?

In his speech in June, Kenneth Clarke drew attention to the comparative cost of legal aid spending in England and Wales:

> Our legal aid system has grown to an extent that we spend more than almost anywhere else in the world. France spends £3 per head of the population. Germany; £5. New Zealand, with a comparable legal system, spends £8. In England and Wales, we spend a staggering £38 per head of population.[10]

This contention was examined by the Justice Committee in its report on the Government's proposed reform of legal aid.[11] Combining data from a report from the University of York[12] commissioned by the Ministry of Justice and a bi-annual report from the European Commission for the Efficiency of Justice (CEPEJ), the Committee concluded that the cost of legal aid per inhabitant in England and Wales was higher than in Scotland and Northern Ireland, Ireland, ANZAC countries and continental European countries, although the Committee's figures also indicated that there had been a drop of almost 39% (from €56.2 to €34.5) in England and Wales's costs between the period of the study and 2008:

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7 *The Government's vision for criminal justice reform* 30 June 2010

8 Ministry of Justice *Proposals for the reform of legal aid in England and Wales* Cm7967, November 2010: p3

9 Ministry of Justice *Reform of Legal Aid in England and Wales: the Government Response* Cm 8072, June 2011

10 *The Government's vision for criminal justice reform* 30 June 2010

11 Justice Committee *Government's proposed reform of legal aid* HC 681 2010-11: March 2011

12 Roger Bowles and Amanda Perry *International comparison of publicly funded legal services and justice systems* Ministry of Justice Research Series 14/09, October 2009

Comparative costs of legal aid per inhabitant, from 2006 CEPEJ data

		€
Australia	1	13.05
Canada		11.84
New Zealand		14
France		4.8
Netherlands		21.1
Norway		32.4
Ireland		15
England and Wales	2	56.2
Northern Ireland		55
Scotland		46.9

1 - ANZAC costs relate to 2004 data from the University of York study

2 - This had fallen to 34.5 Euro by 2008

Source: Justice Committee *Government's proposed reform of legal aid* HC 681 2010-11: March 2011: page 14

The Committee considered the factors contributing to high costs, and noted the views of Professor Roger Bowles of York University, who had said that

> "on almost all of the components of the [legal aid] expenditure" more was spent in England and Wales than in the comparator countries; he attributed this to a "particularly unusual combination of … high volumes [of cases supported] and high costs per case." According to the report [by the University of York], other contributory factors are: high income ceiling on eligibility; wide (if narrower than previously) coverage of areas of law; and the adversarial legal tradition of a common law country which necessitates a higher level of representation in court.[13]

On criminal legal aid, the University of York study had found that expenditure was being driven by the comparatively high number of legally-aided criminal cases; this was attributable to a combination of higher rates of recorded crime in England and Wales, a high proportion of cases being brought to court and a higher proportion of those defendants receiving legal aid. The Committee also compared the ceilings for eligibility in England and Wales and other countries:

> 27. Despite the income ceilings at which defendants were eligible for legal aid in criminal cases being high in England and Wales, they were not significantly disproportionate to those of other high income EU countries (with the exception of France) but were much higher than levels in the ANZAC countries; it should be noted that the period of this study coincided with the abolition of means-testing, which has since been reinstated in both Crown and Magistrates' Courts.

It was suggested, in a recent article in the Guardian, that one of the reasons our legal aid system was "the most expensive in the world" was down to the cost of administration. It may

[13] Justice Committee *Government's proposed reform of legal aid* HC 681 2010-11: March 2011: para 25

be that structural differences between justice systems could also account for differences in legal aid expenditure and mean that this should not be looked at in isolation.[14]

On civil legal aid, the Committee noted that, although the number of civil and family cases legally-aided in England and Wales was higher than in other countries, the variance was not as large as it was for criminal cases. Average spending on each case was 30% higher.[15]

Nonetheless, the Committee was cautious about making international comparisons of costs. There were difficulties in collating reliable quantitative data[16] and significant differences in how data had been gathered and reported.[17] Professor Bowles had suggested that the British data might have been collected in a critically different way from that of other countries. The Committee remarked too that no judgements had been made about the quality (rather than the cost) of the various services. It quoted the view of the Director of Civil, Family and Legal Aid Policy at the Ministry of Justice:

> In seeking to learn how best to reduce costs from other jurisdictions, Ms Albon admitted that the Ministry of Justice had found it "difficult to find some other area, look at it and think they are providing a much better and cheaper service than us. Mostly, when they are spending a lot less, it is because they are buying a lot less." [18]

2.4 Is there a consensus on the need for change?

The Library standard note *Legal aid: controversy surrounding the Government's plans for reform* summarises the controversy in the Commons over the impact of the proposed changes and some of the reaction to the Green Paper outside Parliament.[19]

The Opposition has agreed with the Government that the legal aid budget needs to be reduced, but there has been little agreement about how those reductions should be made.

When the Green Paper was announced, Sadiq Khan (the shadow Lord Chancellor and Secretary of State for Justice) remarked that the legal aid budget of more than £2 billion was not sustainable.[20] In a Westminster Hall debate, shadow Justice Minister, Andy Slaughter outlined how the Labour Government might have reduced legal aid expenditure if it had won another term. Social welfare would, he said, have been exempt from cuts:

> There would have been cuts under a Labour Government. In some respects, we would have made cuts to private family law, although we should look again at the definition of domestic violence (...) We would, I think, have taken a much more forensic look at criminal legal aid, which has just been brushed over. However, we would not have made cuts to social welfare legal aid.[21]

The Law Society, although vociferously opposed to the Government's intended changes, has suggested cuts of its own. It has been running a campaign Sound Off For Justice and has formulated its own alternative cost-saving measures which would, it says

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14 "So we can't afford legal aid? Look at the costs without it", *Guardian.co.uk,* 22 June 2011. See also Roger Bowles and Amanda Perry *International comparison of publicly funded legal services and justice systems* Ministry of Justice Research Series 14/09, October 2009, p36

15 Justice Committee *Government's proposed reform of legal aid* HC 681 2010-11: March 2011: para 28

16 Justice Committee *Government's proposed reform of legal aid* HC 681 2010-11: March 2011: para 30

17 Justice Committee *Government's proposed reform of legal aid* HC 681 2010-11: March 2011: para 35

18 Ministry of Justice *Reform of Legal Aid in England and Wales: the Government Response* Cm 8072, June 2011: para 34

19 SN 05840, 27 January 2011

20 HC Deb 15 November 2010 c663

21 HC Deb 14 December 2010 c207WH

- save £384m from the legal aid budget without removing areas of support
- increase productivity in courts
- lead to more efficient prosecutions
- make better use of technology
- apply penalties for wasting court time
- limit earnings and travel expenses and
- make the financial sector pay for its own fraud cases.[22]

At a press conference on the day of the Bill's first reading, the Prime Minister, David Cameron, was asked whether ─ as the discount of 50% of sentence for a guilty plea which had been mooted as part of a package of measures on sentencing reform had now been abandoned and offsetting savings were therefore needed ─ legal aid would be cut again. In reply, he said that no further reductions to the legal aid budget were being proposed:

> You'll see in the Bill that's published there's big plans for reducing the cost of legal aid. We do have the most generous system anywhere in the world for legal aid in the United Kingdom and I think that it's right that we make these savings. We're not proposing further savings on top of what has already been announced but there are other large parts of the budget that Ken will be addressing.[23]

3 What does the Bill mean for legal aid?

This section of the paper examines the main provisions of the Bill as they relate to legal aid. Further commentary is available in the Explanatory Notes.

3.1 What will the Bill's impact be for service providers and their clients?

The Ministry of Justice's various impact assessments for the legal aid reforms are available on its website.

The impact assessment for the cumulative legal aid proposals was published on the day of the Bill's first reading. It offers the Ministry of Justice's estimate of the likely impact on legal aid clients, both in client losses (that is, the value of legally-aided services not received and the increased contributions from clients) and the number of clients affected:

[22] Law Society "Our alternative savings: a fairer way forward" [updated 25 March 2011]
[23] Number 10 PM's press conference on sentencing reforms 21 June 2011

Impact on Legal Aid clients (by case & volume) 2009/10 [1]

Policy Area	Cumulative change in Legal Aid resource transfers	Approximate cumulative change in client numbers
Scope proposals		
Reduction in scope [2,3]	-£280m	-600,000
Increase in mediation	+£10m	10,000
Net scope proposals	*-£270m*	*-590,000*
Eligibility proposals: service reductions [3]	-£5m	-4,000
Eligibility proposals: increased payments	-£5m	-10,000
Supplementary legal aid scheme	-£7m	n/a
Client impact total	**-£290m**	**-605,000**

Note:

1 All figures have been rounded therefore the totals may not sum to the individual components.
2 Savings include both Legal Help and Legal Representation and use the 2009/10 figures w hich include legal help telephone and face to face volume and spend (Legal Help and legal representation).
3 Assumes all Legal Representation cases also received Legal Help therefore the impact of clients is assumed to relate to the volume of Legal Help clients impacted.

Source: Ministry of Justice *Cumulative legal aid reform proposals: Impact assessment* MoJ090 21 June 2011: table 1, page 10

The impact assessment also estimates the impact on legal aid providers by case and volume:

Impact on Legal Aid providers (by case & volume) 2009/10 [1]

Policy Area	Estimated change in cumulative provider income	Approximate change in client numbers
Scope reforms (net of mediation)	- £270m	-590,000
Civil & Family fee reforms	- £50m	n/a
Criminal fee reforms	- £100m	n/a
Eligibility proposals: service reductions [2]	- £5m	-4,000
Expert Fee Reforms	- £10m	n/a
Provision of telephone advice	- £1m to £2m	0
Provider impact total	**-£440m**	**-595,000**

1 All figures have been rounded therefore the totals may not sum to the individual components.
2 Assumes all Legal Representation cases also received Legal Help therefore the impact of clients is assumed to relate to the volume of Legal Help clients impacted.

Source: Ministry of Justice *Cumulative legal aid reform proposals: Impact assessment* MoJ090 21 June 2011: table 1, page 12

In discussing the risks and uncertainties, the Ministry of Justice remarked that:

> To mitigate any potential risk that clients may not be able to access legally aided services the Government intends to work with the LSC to ensure that they have robust mechanisms in place to identify any developing market shortfall and that they are able

> to respond promptly, effectively and appropriately, should this materialise in any form. This will be accompanied by the development of a client and provider strategy covering civil, family and criminal legal aid work, which will include consideration of the best way that services remaining in scope can be bundled in future procurement rounds to ensure that clients are able to access the services they need. In the longer term, the move to competition is designed to ensure that legal aid services are procured at a rate the market is able to sustain.[24]

On the consequences for small firms, it said:

> 56. Small firms will be affected by the legal aid reforms. The reforms are likely to reduce the number of cases entitled to receive legal aid and negatively affect a large proportion of legal aid service providers. The majority of legal aid providers are small firms therefore, when comparing to the legal services population as whole, small legal aid providers are likely to be disproportionately affected by the proposed reforms. However, if the impact of the proposals on small legal aid providers is compared to the legal aid service provider population only, then small firms are unlikely to be disproportionately affected.[25]

Another impact assessment examines equality impacts.[26] It covers the cumulative impact of all proposals, examining the impacts on clients and providers in the changes to the scope of legal aid (studied category by category), financial eligibility, remuneration, the Community Legal Advice telephone helpline, alternative sources of funding and expert fees.

3.2 The Lord Chancellor's role in providing and administering legal aid

The Bill's provisions

Clause 1 of the Bill places a duty on the Lord Chancellor to make legal aid available in accordance with part 1 of the Bill and enables the Lord Chancellor to provide general information about the law, the legal system and the availability of advice. Legal aid is defined in **clause 1(2).**

Clause 2 enables the Lord Chancellor to make grants or loans available to people providing services or facilitating the provision of services, to enable individuals to obtain services or to establish or maintain a body to provide or facilitate the provision of services **(clause 2(2)).** These arrangements may be different in different areas of England and Wales, for different descriptions of case or for different classes of person **(clause 2(5)).** This would enable flexibility, the Explanatory Notes suggest, and allow arrangements to be piloted.[27]

The Lord Chancellor may make regulations about the remuneration for those providing legal aid services (**clause 2(3**)) and may set and monitor standards for those services **(clause 3(1))**. On remuneration, the Explanatory Notes point out that these powers could be used to set fee levels for lawyers and experts providing services.[28] The Government's response to the Green Paper consultation outlines what the Ministry of Justice intends. For criminal legal aid, an overall fee of £565 would be introduced for either way cases deemed suitable for summary trial (with the fee split between litigation and advocacy) and the lower and higher standard fee in the magistrates' court would be enhanced.[29] For civil and family cases, the Ministry of Justice intends (amongst other things) to reduce all fees and hourly rates by 10%

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24 Ministry of Justice *Cumulative legal aid reform proposals: Impact assessment* MoJ090 21 June 2011: p 15
25 Ministry of Justice *Cumulative legal aid reform proposals: Impact assessment* MoJ090 21 June 2011: p 16
26 Ministry of Justice *Reform of Legal Aid in England and Wales: Equality impact assessment* 21 June 2011
27 Para 56
28 Para 55
29 Ministry of Justice *Reform of Legal Aid in England and Wales: the Government Response* Cm 8072, June 2011: page 82

and to restrict the use of Queen's Counsel in family cases using criteria similar to those applied in criminal cases.[30]

A civil servant must be designated as the Director of Legal Aid Casework **(clause 4)**. The Lord Chancellor could delegate functions to the Director **(clause 5)** but could not give directions or guidance to the Director on individual cases **(clause 4(4)).** This, the Explanatory Notes argue, would protect the Director's independence.

The Bill would abolish the Legal Services Commission. In its place there would be an executive agency within the Ministry of Justice administering the delivery of legal aid.[31] This enacts one of the recommendations of the report by Sir Ian Magee CB on the *Review of Legal Aid Delivery and Governance* which was accepted by both the previous and current government.[32]

Clause 36 provides for the abolition of the Legal Services Commission, with **Schedule 4** dealing with the transfer of the LSC's employees and property.

3.3 Civil legal aid

Areas of civil and family law to be taken out of scope for legal aid

In the Green Paper *Proposals for the reform of legal aid in England and Wales*, the Ministry of Justice set out its plans for changing the scope of legal aid in civil and family matters, by keeping some areas within scope and removing others. [33] These plans are discussed in some detail in the Library standard note *Legal aid: controversy surrounding the Government's plans for reform*.[34]

The Bill's provisions: Concessions and changes since the Green Paper

For the most part, the Bill's provisions on the scope of legal aid mirror the proposals within the Green Paper but there have been some changes, to reflect concerns expressed in response to that Green Paper. In his written ministerial statement on the day of the Bill's first reading, Kenneth Clarke said

> Following careful consideration, today's response makes some significant changes in matters of detail (...) Following consultation, we are strengthening specific provisions to ensure availability in private family cases for victims of domestic violence, for children at risk of abuse or abduction and for Special Educational Needs cases.[35]

Reacting to the Bill, the *Law Gazette* drew attention to the changes.[36] On the *Guardian's Butterworth and Bowcott law blog*, legal affairs correspondent, Owen Bowcott, remarked that:

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30 Ministry of Justice *Reform of Legal Aid in England and Wales: the Government Response* Cm 8072, June 2011: page 84

31 Bill 205-EN, para 14

32 Sir Ian Magee CB *Review Of Legal Aid Delivery And Governance,* March 2010. For further discussion of this report, see the Library standard note *Legal aid: controversy surrounding the Government's plans for reform* (SN 05840, 27 January 2011)

33 Cm7967, November 2010

34 SN 05840, 27 January 2011

35 HC Deb 21 June 2001 c11WS

36 Catherine Baksi and John Hyde "Government set to press ahead with legal aid cuts and Jackson reforms" *Law Gazette* 21 June 2011

> Critics of the bill pointed out that granting legal aid only [to] those who endured physical attacks from partners would provide a perverse incentive for anyone in divorce proceedings to exaggerate their domestic ordeals, further embittering separations.
>
> Legal aid to help children with special educational needs has also been restored. Excluding it would have saved the Ministry of Justice barely £1 million and would have caused a political outcry.[37]

Definition of domestic violence

The way in which the Government's proposed reforms to legal aid would or would not affect cases involving domestic violence ─ and the apparent narrowing of the extent of the domestic violence provisions ─ proved particularly controversial. The Library standard note on legal aid for victims of domestic violence summarises some of that controversy.

In the Green Paper, the Ministry of Justice argued that, because of clients' vulnerability, domestic violence should remain within scope for legal aid. The Green Paper did not, however, offer any definition of domestic violence, although it did refer to **abusive relationships** and to **physical harm**.[38]

The Legal Services Commission's current Funding Code Criteria (July 2007) are couched in terms of **harm,** saying that the criteria apply to "proceedings seeking an injunction, committal order or other orders for the protection of a person from harm (other than public law children proceedings)".[39] Its *Decision Making Guidance* (Volume C, part C) points out that funding for domestic violence cases is available more widely than for other family cases and there is no one definition of domestic violence or abuse:

> The Code Criteria in section 11.10 are not limited to any particular definition of domestic violence or abuse but instead cover all applications to fund legal representation in family proceedings seeking an injunction, a committal order or other orders for the protection of a person from harm (other than public law children proceedings). Funding is not limited just to persons who have suffered actual physical violence.[40]

Another area in which domestic violence would be pertinent would be in private law children and family cases. The Green Paper argued that legal aid should not routinely be available for ancillary relief proceedings or private law family and children proceedings, but different considerations applied where there was an "ongoing risk of physical harm from domestic violence" and where clients might be unable to assert their rights and might face intimidation because of the risk of harm.[41] As domestic violence would be the basis for the exception to the usual rule of not funding private law children and family cases, evidence of domestic violence would have to be supplied and the Green Paper listed the circumstances in which such cases would remain within scope:

- ancillary relief, or private law children and family proceedings, where the LSC is funding ongoing domestic violence (or forced marriage) proceedings brought by the applicant for legal aid, or has funded such proceedings within the last twelve months and an order was made, arising from the same relationship;

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37 2.07pm, 21 June 2011
38 Cm 7967, November 2010, para 4.64
39 Para 11.10.1: Scope
40 Para 20.32: Domestic Violence and Abuse
41 Ministry of Justice *Proposals for the reform of legal aid in England and Wales* Cm 7967 November 2010: para 4.154ff and 4.205ff

- ancillary relief, or private law children and family proceedings, where there are ongoing domestic violence (or forced marriage) proceedings brought by the applicant for legal aid, where the applicant has funded proceedings privately or has acted as a litigant in person, or where there have been such proceedings in the last twelve months and an order was made, arising from the same relationship;

- ancillary relief, or private law children and family proceedings, where there is a non-molestation order, occupation order, forced marriage protection order or other protective injunction in place against the applicant's ex-partner (or in the case of forced marriage, against any other person); and

- ancillary relief, or private law children and family proceedings, where the applicant's partner has been convicted of a criminal offence concerning violence or abuse towards their family (unless the conviction is spent).[42]

In its report on the Government's proposals for reform, the Justice Committee pointed to some of the concerns about the definition of domestic violence that witnesses – including the President of the Family Division, Sir Nicholas Wall - had drawn to their attention:

> 83. Sir Nicholas Wall, President of the Family Division, was also concerned about the apparent narrowness of the proposed definition. He said
>
> > I think the Government is very ill advised to concentrate on violence in the context of domestic violence. "Domestic abuse" is the term which we currently use because much domestic abuse is not violent. It is psychological, often financial and emotional... if the Green Paper stands we will be forced to deal with abuse in terms of violence, but abuse is much broader. The ACPO definition of domestic abuse is much, much broader than physical violence. Indeed, common sense dictates that.

The Committee called on the Government to reconsider its plan to use domestic violence as a gateway to legal aid funding or, failing that, at least to ensure that the definition of domestic violence encompassed non-physical abuse.[43]

The Green Paper attracted more than 5000 responses and it was reported in the legal press that the Ministry of Justice was looking again at the definition of domestic violence, in the light of the concerns expressed.[44]

The question of how domestic violence should be defined for legal aid has also been raised several times in the House. As the standard note records, the difficulty of defining a domestic violence case was raised during a Westminster Hall debate in December 2010.[45]

In March 2011 the junior justice minister, Jonathan Djanogly, confirmed to Robert Buckland (a member of the Justice Committee) that the Ministry of Justice was revisiting the definition.[46] At the end of another Westminster Hall debate in May 2011 on legal aid, Jonathan Djanogly was responding to Members' questions and concerns about the definition of domestic violence when the debate ran out of time.[47]

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42 Ministry of Justice *Proposals for the reform of legal aid in England and Wales* Cm 7967 November 2010: para 4.67
43 HC 681 2010-11, March 2011, pages 37-9
44 Catherine Baksi **"**Pressure prompts review of 'domestic violence' legal aid definition" *Law Gazette* 21 March 2001
45 HC Deb 14 December 2010 c193WH
46 HC Deb 29 March 2011 c160
47 HC Deb 11 May 2011 c476WH

The Government's response to the Green Paper consultation explained how the criteria for applications in cases alleging domestic violence would be amended:[48]

> 23. The Government accepts that, to ensure that victims of domestic violence are protected, the criteria for the domestic violence exception originally proposed in the consultation need to be widened, whilst maintaining the requirement for objective evidence of domestic violence. We have therefore decided to accept some additional circumstances as evidence of domestic violence, so that the criteria should target legal aid to genuine cases without providing an incentive for unfounded allegations of domestic violence. As with the original proposals, only one of these criteria would need to be met:
>
> - there are ongoing criminal proceedings for a domestic violence offence by the other party towards the applicant for funding;
> - the victim has been referred to a Multi-Agency Risk Assessment Conference (as a high risk victim of domestic violence) and a plan has been put in place to protect them from violence by the other party; or
> - there has been a finding of fact in the family courts of domestic violence by the other party giving rise to the risk of harm to the victim, but the victim has not already been granted legal aid.
>
> 24. However, the Government is concerned that one of the original criteria proposed for the domestic violence exception, where there are ongoing proceedings for a domestic violence order (such as a non-molestation order or an occupation order) or forced marriage protection order, but an order has not yet been made, could lead to false claims of domestic violence for the purpose of securing legal aid. For this reason, the Government has decided not to include this criterion in the domestic violence exception.[49]

Children at risk of abuse or abduction

The Green Paper *Proposals for the reform of legal aid in England and Wales* noted that legal aid in private law children and family cases (where domestic violence was not present) was available for a range of proceedings, amongst them prohibited steps and specific issue orders. It argued, though, that it was not generally in the best interests of the child for essentially personal matters to be brought before the courts – especially as the Family Law Review would simplify court procedures and so benefit individuals unwilling or unable to resolve matters informally – and thus private law children and family matters with no domestic violence element should be taken out of scope. International child abduction would, however, remain in scope, as would Rule 9.5 and Rule 9.2A cases, where children being separately represented received Legal Help and Representation.[50]

The Government's response to the Green Paper consultation set out how cases in which a child was at risk of abuse but the local authority was not seeking to take the child into care would be kept within scope for legal aid:

> 27. The Government accepts that legal aid should be routinely available in these circumstances, provided that there is objective evidence of the risk of abuse. We have therefore decided to extend the approach to the criteria for the domestic violence

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48 Ministry of Justice *Reform of Legal Aid in England and Wales: the Government Response* Cm 8072, June 2011

49 Pages 15-16

50 Ministry of Justice *Proposals for the reform of legal aid in England and Wales* Cm7967 November 2010: p69-70

> exception in private law family cases to provide legal aid for the party seeking to protect the child in cases where:
>
> - there are ongoing criminal proceedings for a child abuse offence against the person from whom the protective party is seeking to protect the child; or
> - a local authority has put a Child Protection Plan in place to protect the child who is the subject of the proceedings from abuse by or including abuse by the person from whom the protective party is seeking to protect the child; or
> - there is a relevant finding of fact by the courts that child abuse on the part of the person from whom the protective party is seeking to protect the child has occurred.

Paragraph 30 of the Government response lists those circumstances, any one of which would be accepted as evidence of domestic violence or child abuse.[51]

Similarly, the Ministry of Justice agreed that its proposals on international child abduction should be modified, to cover the prevention of abduction:

> -32. The Government recognises that, to ensure consistency in the application of our policy on child abduction, we need to modify our proposals. We have therefore decided that legal aid should be available for an application to obtain (but not to oppose) an emergency order specifically to prevent the abduction of a child from the United Kingdom. However, it will not routinely be available to make an application to remove a child from the jurisdiction.[52]

In most instances, measures to prevent the abduction of a child would take the form of a prohibited steps order (or a specific issue order).

Education cases: children with special educational needs

The Green Paper *Proposals for the reform of legal aid in England and Wales* argued that, although matters to do with education were important to the litigants, they did not involve the threats to life or safety, liberty or the roof over their heads that litigants in other types of case might face. Given too that the litigation may arise from personal choices (or may be seeking monetary compensation), education cases were of lower objective importance and so all education cases should be taken out of scope for legal aid. On the question of legal aid in matters to do with the education of children with special educational needs (SEN), the Green Paper argued that legal advice for those attending tribunals was not justified, particularly as the tribunal was designed to be accessible to individuals without legal assistance and other sources of help were available.[53]

Some of the debate in the Commons about the removal of legal aid from education cases and the ability of other providers to fill (or not) the gap so created is discussed in the Library standard note *Legal aid: controversy surrounding the Government's plans for reform*.[54] More recently, the issue of children with SEN was aired in a Westminster Hall debate on legal aid, opened by Julian Huppert on 11 May. Dr Huppert argued that removing legal aid from such cases would send the wrong message and, moreover, mediation would not solve every problem.[55] Responding to the debate, Jonathan Djanogly reiterated that in many of the

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51 Pages 16-17
52 Page 17
53 Ministry of Justice *Proposals for the reform of legal aid in England and Wales* Cm7967 November 2010: p64-5
54 Library standard note 05840, 27 January 2011
55 HC Deb 11 May 2011 c456WH

cases being removed from the scope of legal aid, other forms of resolution should be possible.[56]

The Government's response to the Green Paper consultation said that the Government had been persuaded ─ mainly by arguments concerning the overlap with discrimination, the similarity to community care, equalities and the caring responsibilities of parents whose children have SEN ─ to keep legal aid funding for SEN cases within scope:

> 64. We have also noted that current proposals by the Department for Education and Skills to reform SEN procedures, and in particular their plans to mandate mediation, would mean that in future the cases which reach the tribunal would be the more complex and intractable cases where parents may be less able to present their case effectively.
>
> 65. For these reasons, we are persuaded that legal aid should continue to be available, as it is currently, for legal advice in preparation for the First-tier (Special Educational Needs and Disability) Tribunal and for the Special Educational Needs Tribunal for Wales, and for legal advice and representation at the Upper Tribunal (and higher courts). However, we do not consider that legal aid should be extended to cover representation at the First-tier (Special Educational Needs and Disability) Tribunal or the Special Educational Needs Tribunal for Wales. We consider that the user-friendly and accessible nature of the tribunal, with legal aid available for legal advice, will mean that legal aid for representation will not generally be necessary.[57]

Paragraph 2 of Part 1 of Schedule 1 enables the provision of civil legal services in relation to matters arising under part 4 of the *Education Act 1996* (special educational needs). Even so, the general exclusions set out in **Part 2 of Schedule 1** ─ which exclude (amongst other things) civil legal services in relation to negligence and breach of statutory duty ─ will apply. So too will the exclusions and exceptions in Part 3 of Schedule 1 relating to advocacy. The Explanatory Notes explain how this would work:

> Legal aid in the form of advocacy may be made available for appeals in the Upper Tribunal on a point of law from decisions made by the First-tier (Special Educational Needs and Disability – SEND) Tribunal or the Special Educational Needs Tribunal for Wales under Part 4 of the Education Act 1996 (see paragraph 15 of Part 3 of Schedule 1).[58]

The Bill's other provisions

Just as clause 1(2) defines **legal aid**, so **clause 7** defines **legal services**.

Clause 8 provides that, in civil cases, legal services may be available if the case is of a type set out in **part 1 of Schedule 1. Clause 8(2)** allows the Lord Chancellor by order to omit services from Schedule 1 but confers no power to add new services. Thus, the list of civil legal services to be offered may shrink but cannot expand. The Explanatory Notes remark that these provisions reverse the arrangement in the 1999 Act, whereby civil legal aid is available for any matter not specifically excluded.[59]

Exceptionally, the Director of Legal Aid Casework may **(clause 9)** authorise the provision of services in a case that would otherwise be outside the scope of legal aid, if the test in **clause 9(3)** is met. The Explanatory Notes describe when this situation might arise:

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56 HC Deb 11 May 2001 c475WH
57 Page 127
58 Para 592
59 Para 82

> 92. It will be necessary to provide legal aid to an individual under clause 9(3)(a) where the withholding of services would clearly amount to a breach of Article 6 of the ECHR ('right to a fair trial'), Article 2 of the ECHR ('right to life') or any other provision of the Convention giving rise to an obligation to provide such services. There will be a breach of an individual's rights to the provision of legal services under European Union law where the withholding of such services would be clearly contrary to the rights reaffirmed by Article 47 of the Charter of Fundamental Rights, or to the rights to legal services that are conferred on individuals by EU instruments.
>
> 93. *Subsection (3) (b)* provides that an exceptional case determination may also be made where the Director considers that the failure to provide legal services would not necessarily amount to a breach of an individual's rights, but that it is nevertheless appropriate for the services to be made available, having regard to the risk of such a breach occurring.

A different test applies where advocacy is being sought for proceedings at an inquest under the *Coroners Act 1988* into the death of a member of the individual's family, where the Director must make a wider public interest determination in relation to the individual and the inquest **(clause 9(4)).**

To qualify for legal aid, an individual would also have to satisfy the Director of Legal Aid Casework that their financial resources were such that they were eligible **(clauses 10 and 20)** and they fulfilled other criteria, to be set out in regulations **(clause 10).** The Bill goes on to state **(at clause 10(3))** that, in setting the criteria, the Lord Chancellor should consider a range of factors, including

- the likely cost of providing the services and the benefit obtained by them
- the importance for the individual of the matters in question or dispute
- the nature and seriousness of the act, omission, circumstances or other matter in relation to which the services are sought
- the availability to the individual of alternative services and the likelihood of the individual being able to make use of them
- the individual's prospects of success and
- the public interest.

These factors are (the Explanatory Notes observe at paragraph 19) similar to the criteria that the LSC must consider now when setting the Funding Code criteria. The Government's response to the Green Paper consultation indicates that the merits test may exclude any case that might be funded by other means:

> The merits criteria for civil legal aid will be amended so that civil legal aid may be refused in any individual case suitable for alternative funding, such as a Conditional Fee Agreement. [60]

Part 1 of Schedule 1 sets out the types of civil legal services that may be made available. For each type of civil legal service, exclusions will apply, either specific to that type of service (and set out paragraph by paragraph in the Schedule) or general exclusions set out in **Part 2** (excluded services) or **Part 3** (advocacy: exclusions and exceptions). The effect of Part 3 is to exclude advocacy from the services provided unless the type of advocacy is listed there.

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[60] Ministry of Justice *Reform of Legal Aid in England and Wales: the Government Response* Cm 8072, June 2011: page 82

To illustrate this, the Explanatory Notes cite the example of inquests under the *Coroners Act 1988* into the death of a member of the individual's immediate family.[61]

3.4 Criminal legal aid

The Bill's provisions

The Bill enables individuals in custody at a police station or other premises to obtain initial advice and initial assistance, usually from a duty solicitor **(clause 12(1)).** The Director of Legal Aid Casework must determine whether individuals qualify for these services, having regard to the interests of justice **(clause 12(2)).**

This part of the Bill would also extend the scope for means-testing. Advice and assistance is not currently means-tested under the equivalent provisions of the 1999 Act, but **clause 12(3)** would enable the Lord Chancellor to require the Director to apply the means-testing provisions of clause 20 and any other criteria specified within the regulations.

The provisions in **clause 14** on advice and assistance for criminal proceedings broadly reflect (the Explanatory Notes say) the existing provisions in section 13(1)(b) of the 1999 Act. **Clause 14(2)** specifies who may receive services under this clause.

In deciding whether an individual qualifies for representation for the purposes of criminal proceedings, the Director or a court must apply the means-testing provisions of clause 20 and an interests of justice test (**clause 16(1) and (2)).** The interests of justice test is five-fold, examining whether:

- the individual would be likely to lose their liberty or livelihood or reputation
- the proceedings raise a substantial question of law
- the individual may be unable to understand the proceedings or state their own case
- witnesses may need to be traced, interviewed or cross-examined and
- it is in the interest of another person that the individual have representation.

Clauses 17 and 18 deal with the power of the Director and of the court to determine whether an individual is eligible for representation in legal proceedings. They represent a departure from the 1999 Act, as the Explanatory Notes explain:

> 135. Subsection (1) provides that the Director may determine whether an individual is eligible for representation for criminal proceedings unless the court is authorised to do so under clause 18. This reverses the default position in the Access to Justice Act 1999 where the decision as to whether to grant legal aid is for the court unless the LSC is given the power to make the decision. However, over recent years, most decision-making powers have transferred in practice to the LSC and there are now only limited circumstances in which the court can make a determination.

The Explanatory Notes go on to explain how the courts exercise their current powers.[62]

3.5 Financial resources

The Green Paper's proposals relating to mean-testing – including the abolition of capital passporting and capital disregards, the minimum capital contribution and other changes relating to income eligibility — are described in the Library standard note *Legal aid: controversy surrounding the Government's plans for reform*.

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[61] Para 84
[62] Para 141

The Bill's provisions

Clause 20 is intended to introduce a common format for assessing financial eligibility for civil and criminal legal aid, to replace the separate provision for different types of legal aid within the 1999 Act. It is (according to the Explanatory Notes) a "basic rule" that only the financially eligible should receive legal aid. The eligibility rules will be made in regulations by the Lord Chancellor **(clause 20(2)).** The Government's response to the Green Paper consultation sets out how financial eligibility criteria will be changed:

> 5. We will introduce the following reforms to financial eligibility in civil and family proceedings:
>
> i. to apply the same capital eligibility rules to applicants in receipt of "passporting" benefits as other applicants for legal aid, as set out in the consultation;
>
> ii. to retain the 'subject matter of the dispute disregard' and to cap it at £100,000 for all levels of service, as set out in the consultation;
>
> iii. to increase the levels of income based contributions to a maximum of approximately 30% of monthly disposable income, as set out under option 1 of the consultation.[63]

The Explanatory Notes comment that the resources of the legal aid applicant's partner may also be taken into account.[64]

Clause 21 enables the Director to seek information about an individual's means from the Secretary of State for Work and Pensions, the Commissioners of HM Revenue and Customs and the Department for Social Development or Department of Finance and Personnel in Northern Ireland. The information may only be sought for the purpose of establishing whether the individual is financially eligible for legal aid **(clause 21(1)). Clause 21(3))** lists the information which may be sought from the Secretary of State for Work and Pensions or the Department for Social Development or Department of Finance and Personnel in Northern Ireland. **Clause 21(4)** lists the information which may be sought from the Commissioners of HM Revenue and Customs.

Clause 32 specifies limited circumstances, such as the investigation or prosecution of an offence, in which information about financial resources which has been disclosed under clause 21 or clause 32(1) may be disclosed. Otherwise, such information must be protected. **Clause 33** provides for the protection of other information not covered by clause 32. Exceptions to the bar on disclosure are set out in **clause 34.** Misrepresentation or intentional failure to comply with requirements to provide documents or information would attract criminal penalties **(clause 35).**[65]

According to the Explanatory Notes, **Clause 22** largely reflects powers in the 1999 Act relating to payments for services, creating a single provision applicable (for the most part) to both civil and criminal legal aid.[66] **Clause 22(1)** articulates another "basic rule", that an individual who receives legal aid can only be required to pay for those services where regulations require them to do so. Individuals may **(clause 22(2))** be required to

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63 Ministry of Justice *Reform of Legal Aid in England and Wales:* the Government Response Cm 8072, June 2011: page 82

64 Paras 150-2

65 On summary conviction, there would be a fine not exceeding level 4 on the standard scale (currently £2,500), but the offence would not be punishable by imprisonment (as is the current offence under section 21 of the 1999 Act).

66 Para 159

- pay the cost of the services;
- pay a contribution towards those costs of a prescribed amount or;
- pay a prescribed amount in respect of administration costs.

The Explanatory Notes observe that this list is not exhaustive. Payment may be by periodic payments, one or more lump sums, out of income or out of capital (**clause 22(8)**).

In civil disputes, legally-aided persons may be required to pay more than the cost of the services provided, to create a "Supplementary Legal Aid Scheme" **(clause 22(3)).** Provision for such a scheme already exists, as the Explanatory Notes point out.[67]

The Bill also provides for enforcement, where payments have not been made **(clause 23)**. Overdue sums may be treated as a civil debt. For criminal legal aid, regulations might be made **(Schedule 2)** authorising a court to issue a motor vehicle order for the sale of a vehicle. For civil legal aid, a statutory charge may arise against any property recovered or kept by the individual receiving legal aid, either in proceedings or in any settlement of a dispute, and any costs payable to the individual **(clause 24(1)). Clause 25(1)** limits the costs that can be awarded against a person receiving civil legal aid to the amount that is reasonable having regard to all the circumstances including the financial resources of the parties and the conduct of the parties during the case.

The regulation-making powers in clause 23 are (according to the Explanatory Notes) similar to powers in the 1999 Act relating to criminal legal aid. Clause 25 "substantially reproduces" other provisions in the 1999 Act.

3.6 Choosing a service provider

Clause 26 provides, in effect, that the individual receiving legal aid does not have an unfettered choice about how that legal aid will be provided or who will provide it. The Explanatory Notes cite the example of the Lord Chancellor arranging for some services to be provided only by telephone or other electronic means. The Government's response to the Green Paper consultation has more to say about the telephone gateway ─ which would be mandatory in some areas of law ─ and the expansion of telephone advice:

> 4. We will:
>
> - implement a mandatory single telephone gateway limited to the following areas of law: debt (insofar as it remains in scope), community care, discrimination (claims brought under the Equality Act 2010) and Special Educational Needs subject to the exceptions set out at paragraph 148;
>
> - introduce a phased expansion of the provision of specialist telephone advice into the areas of law remaining in scope; and
>
> - run a pilot scheme which will further examine the feasibility of offering the option to clients to pay for advice over the telephone.[68]

In civil cases, as now, the individual will have to select a provider with whom the Lord Chancellor has a contract. In criminal proceedings, however, the individual may choose their

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67 Para 162

68 Ministry of Justice *Reform of Legal Aid in England and Wales: the Government Response* Cm 8072, June 2011: page 82

own legal representative, subject to regulations which may (for example) limit that choice to a specified group of providers.[69]

3.7 Other provisions

The Lord Chancellor must publish a code of conduct for civil servants and employees of any body providing legal aid services to an individual **(clause 28).**

Civil legal services will be made available only on connection with English and Welsh law, except where specified otherwise and where foreign law is relevant to determining any issue relating to the law of England and Wales **(clause 31).**

Civil and criminal legal aid may be made available to a **legal person,** in other words a body corporate or other legal entity other than an individual **(Schedule 3).**

3.8 Commentary on the Bill

The UK Human Rights blog has offered an overview of the Bill's implications for legal aid and the reaction from the legal professions and the legal blogosphere:

> There is a lot in the bill. In terms of its long term effect on the justice system, the most important parts relate to legal aid and litigation funding; that is, the options available to claimants to fund their cases – for example, no-win-no-fee arrangements or government funding. The reforms have been long-heralded, and the government has now responded to its consultations on both (see here for legal aid and here for litigation funding).
>
> (...)
>
> On the legal aid and litigation funding aspects of the bill, the Ministry of Justice has largely implemented its plans as advertised despite the widespread opposition within the legal community to the changes (see Maria Roche's previous post summarising some of the 5,000 consultation responses).
>
> (...)
>
> Meanwhile, on the blogs, the Nearly Legal Blog have posted a scathing response to the bill, arguing that we should be absolutely clear that this bill is a knowing, deliberate removal of assistance and representation from some of the least well off – both financially and socially – in the country and those least able to fight back politically. As any provider can attest, it is massively – if indirectly – discriminatory against women, ethnic minorities, the disabled and those on low income or subsistence benefits.
>
> Nearly Legal also highlight the long heralded abolition of the Legal Services Commission, which until now has handled requests for state funding of litigation. Now, The MoJ will take legal aid funding decisions in house, with no prospect of possible conflicts of interest at all. Honest.[70]

As the UK Human Rights blog mentioned, the Law Society did lambast the Bill:

> Today's Legal Aid, Sentencing and Punishment of Offenders Bill is more destructive to access to justice than we first thought possible. It is the single biggest attack on state-funded legal advice for the poor and vulnerable since the legal aid system was introduced.

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[69] Explanatory Notes, Paras 179-81

[70] Adam Wagner "Legal Aid, Sentencing and Punishment of Offenders Bill – the aftermath" 22 June 2011

> (...)
>
> The bill will:
>
> - lead to higher government spending, rather than help cut the deficit
> - increase criminality, adding to pressure on prison places, and
> - abolish civil legal aid for victims of medical negligence and in most civil law cases

The Law Society lamented that the Government had not adopted any of its alternative savings package, which would (it argued) have made a bigger contribution to cutting the deficit than Kenneth Clarke's proposals.[71] The Chairman of the Bar was equally critical:

> Continual misrepresentation on the cost of the legal aid system should fool no one. The Justice Select Committee found that looking at the system in the round, the UK's expenditure is average for Europe. We will be well below average after these cuts.
>
> (...)
>
> The Government seems to have decided to settle for a second rate criminal justice system rather than to strive to ensure a system which this country needs and deserves.

He also argued that the Bill would have dire effects on the legal professions:

> Regrettably, those most affected by these cuts, as the Government knows, are experienced lawyers, women lawyers and BME lawyers. If firms cease to trade, those who need legal advice will have to travel further to find help, and we fear that the quality of the service which they receive will be significantly reduced. [72]

The human rights group Justice argued that the Bill would lead to "economic cleansing" of the civil courts:

> Courts and lawyers will be only for the rich. The poor will make do as best they can with no legal aid and cheap, privatised mediation. There will be no equal justice for all – only those with money.[73]

Liberty, too, voiced concerns that many people would be denied access to the law:

> Post-war Governments in Britain believed that universal access to justice was as important as access to education and healthcare. Today, the Coalition Government proposes to ensure that court doors in England and Wales are effectively locked to anyone other than criminal defendants and the super-rich.
>
> Shami Chakrabarti, Director of Liberty, said:
>
> "The Government says – we are all in this together- but how many MPs would choose to go to court without a lawyer if their partner denied them access to their child? Is it right that only criminal defendants and professional footballers should get legal advice? Politicians have spent years wagging their fingers at "fat cat lawyers" but today's slap in the face goes to ordinary families, children and the disabled."

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71 Law Society "Legal aid and sentencing bill: Law Society comment" 21 June 2011
72 Bar Council "Access to Justice will be systematically deprived by legal aid proposals" 21 June 2011
73 Justice press release "Legal aid reform: danger of 'economic cleansing' of the civil courts" 21 June 2011

Liberty also pointed to what it described as "false economies":

- Our courts will be thrown into chaos by litigants in person with no legal knowledge. Judges will be turned into social workers as they are forced to deal with non-legal issues.

- Issues which could have been dealt with earlier with simple advice will be left to escalate. Short term savings will lead to long term cost burdens.[74]

On the *Guardian's Butterworth and Bowcott law blog*, Anthony Hurndall, founder of the Centre for Justice, referred to "a further erosion of one of the three central pillars of the welfare state – free access to justice".[75] Steve Hynes, the director of the Legal Action Group, called the Bill's provisions "penny wise but pound foolish" and criticised their effects on the very poorest:

> The bulk of [these legal aid cuts] fall on the sort of face to face advice services which can deal with legal problems before they spiral out of control and lead to expensive court cases.
>
> LAG calculates that the £49m in legal aid cuts to housing, welfare benefits, debt and employment will ultimately cost the government £286.2 million in costs to other public services. In other words, £1 of expenditure on civil legal help saves the government around £6 in other public expenditure.
>
> Advice on benefits for example is excluded from the legal aid scheme under the Bill (see schedule 1 part 2 s15). At a time when the government is in the process of introducing the Welfare Reform Bill they are cutting off people's means to get advice on benefits. It's hard not to conclude this is a conspiracy against the very poorest to deny them access to justice.[76]

The Justice for All coalition of charities, trade unions and others also argued against the Bill's effect on the poor:

> There are already too many advice deserts in England and Wales. Many of the two in three people who are deemed 'not poor enough' for legal aid cannot afford to pay for legal advice and representation and are increasingly struggling to get the help they need as other government and charitable advice and information services are being cut. The new Bill will exclude even more people from legal aid, leaving them unable to enforce their rights to fair treatment at work, safe shelter, decent education and health care and to manage their debts and bring or keep their families together.[77]

In the wake of the Bill's hostile reception ─ and complaints that concerns raised during the consultation had been ignored ─ Jonathan Djanogly insisted that the consultation responses had "shaped the Government's direction of travel":

> 'I want to make it absolutely clear that we have considered each of the responses presented to us. We had a significant team working on it,' he added.
>
> He said the government had 'looked carefully' at the Law Society's proposals for alternative savings.

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74 Liberty press release "Access to justice barred for most people in Britain" 21 June 2011
75 3.20pm, 21 June 2011
76 2.30pm, 21 June 2011
77 Justice for All "Legal aid cuts a further blow to the poorest" [undated]

> These had been ruled out as over 50% involved the introduction of new taxes, which the Treasury is 'not keen on', or suggested that the MoJ should penalise other sections of government.
>
> (...)
>
> 'Penalising other departments is simply robbing Peter to pay Paul. There's no saving for the taxpayer,' he said.

The president of the Law Society vowed to "fight on":

> Urging the profession to continue its opposition to the changes, Lee said: 'The fight will go on, we'll fight on every clause.'[78]

4 Litigation funding and costs

Part 2 of the Bill covers civil litigation funding and also costs in criminal cases

4.1 Funding civil litigation

Who pays the costs in civil litigation?

The costs in civil litigation usually "follow the event". This means that the loser generally pays the winner's legal costs (in addition to their own legal costs), although sometimes the loser will not be ordered to pay the full costs incurred by the winner. Where the winner's full costs are not recovered from the losing party, the winner may have to pay any shortfall to their own lawyer.

What is a conditional fee agreement?

Conditional fee agreements (CFAs), which are commonly referred to as "no win, no fee" agreements, may be used to fund all types of civil litigation except family cases. They cannot be used in criminal cases. CFAs are intended to provide access to justice for those who cannot afford to pursue litigation and who are not eligible for public funding (legal aid). However, it is open to anyone to use a CFA and they have been used by claimants – for example, wealthy celebrities in defamation cases - who, it is claimed, would have been able to pursue litigation on a standard or hourly fee basis.

Where there is a CFA, the solicitor shares with the client the risk of losing the case. If the case is lost, the solicitor will not charge the client for the work done. However, if the case is won, the solicitor will charge an additional success fee on top of the normal fees. This is intended to compensate the solicitor for the risk of not being paid and for the delays in getting paid. The level at which the success fee is set reflects the risk involved and can be up to 100% of the base cost; the Government has stated that this level of success fee appears to be unexceptional for cases which go to trial.[79] A lower success fee may be payable if a case is settled at an earlier stage. In some personal injury claims (road traffic accident cases, employers liability accident and disease cases) there are currently fixed success fees.[80] A solicitor is not obliged to accept a case on a CFA basis, and will take into account the merits of the case and its likely outcome in deciding whether to accept a case and, where the success fee is not fixed, the success fee to be charged.

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78 Catherine Baksi "We did listen on legal aid, Djanogly insists – but Law Society's Lee vows to fight on 'every clause'" *Law Gazette*, 21 June 2011

79 *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations,* Consultation Paper CP 13/10, November 2010, Cm 7947, p24

80 These fixed success fees are set out in Part 45 of the Civil Procedure Rules. The fixed success fee percentage varies depending on the type of claim and the stage at which it concludes. They include a 100% success fee for claims which conclude at trial.

Under a CFA, even if a client does not have to pay his or her own lawyer if the case is lost, (s)he may still have to pay the opponent's legal costs and both sides' disbursements (other expenses or charges, such as fees for expert witnesses if they are needed). To cover these costs, clients may be advised to take out an 'after-the-event' (ATE) insurance.

The *Access to Justice Act 1999*, which came into force in April 2000, among other things, permitted the recovery from the losing party in legal proceedings of the extra costs associated with CFAs (the success fee and the ATE insurance premium). Until then, these costs were deducted from the client's damages and the Law Society recommended a voluntary cap of 25% of the damages recovered. It also permitted the recoverability of a self-insurance element by membership organisations such as trade unions to cover their costs of indemnifying members against having to pay the costs of the winning party.

An attempt by the previous Government to reduce the maximum success fee percentage from 100% to 10% for defamation cases was defeated in the Commons' First Delegated Legislation Committee in March 2010,[81] and was not re-introduced before the election.

In January 2011, in a case brought by the publisher of the *Daily Mirror*, the European Court of Human Rights ruled that the recovery of 100% success fees by lawyers in a privacy case represented a significant violation of freedom of expression (Article 10).[82]

Further information about conditional fee agreements is set out in a Library standard note, *No win, no fee agreements: proposals for change.*[83]

What is a damages-based agreement?

Under damages-based agreements (DBAs), which are sometimes referred to as contingency fees, a lawyer is again only paid if the case is won and does not receive any payment if the case is lost. However, DBAs differ from CFAs in that they allow the lawyer to claim a proportion of their clients' award of damages as their fee. At present, solicitors are not permitted to act under DBAs in civil litigation but they may act under DBAs in non-contentious business, including contested cases before tribunals.

4.2 Concerns about the costs of civil litigation

The issue of costs in civil litigation was addressed by Lord Woolf in his report, *Access to Justice,* published in 1996. Lord Woolf said that, to ensure access to justice, the civil justice system should "offer appropriate procedures at a reasonable cost". He considered that the system at that time was "too expensive in that the costs often exceed the value of the claim". The *Access to Justice Act 1999* subsequently introduced a range of reforms affecting civil litigation. However, in 2010, Lord Woolf acknowledged that the reforms had not achieved a control over costs:

> Although the general opinion a decade later is that the recommendations I made have benefited civil procedure, it is undoubtedly the fact that one of their objects has not been achieved: the control of costs. The process, as has already been indicated in this debate, is now far too expensive.[84]

In January 2010, the Lord Chief Justice, Lord Judge, voiced concerns about the level of costs: "The judiciary has been concerned for some time that the costs of civil litigation are

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81 First Delegated Legislation Committee, *Draft Damages-Based Agreements Regulations 2010 Draft Conditional Fee Agreements (Amendment) Order 2010,* 30 March 2010

82 *MGN Ltd v UK* Case Reference Application No 39401/04 18 January 2011

83 SN/HA/5844, 31 March 2011

84 HL Deb 25 March 2010 c1166

disproportionate and excessive".[85] Similarly, Lord Neuberger, the Master of the Rolls, has referred to the costs generated by civil litigation as being "disproportionate".[86]

In its consultation, *Proposals for reform of civil litigation funding and costs in England and Wales* (considered below), the Government set out how costs associated with CFAs had given rise to concerns that claimants had little interest in keeping costs down:

> Under the current arrangements, claimants on CFAs generally have no interest in the costs being incurred on their behalf, because win or lose they do not have to pay anything towards those costs. High success fees and ATE insurance premiums significantly increase costs with the claimant having no incentive to keep these costs down. Success fees are probably being set too high (except where they are fixed) which arguably overcompensates claimant lawyers and impacts disproportionately on defendants. The benefits for access to justice for claimants in CFA cases have therefore been achieved at a substantial additional cost to defendants.[87]

The Ministry of Justice has indicated the trend of increasing claimants' costs in personal injury claims over the past five years, both in relation to damages, and to defendants' costs:

> A leading supermarket reported that the average costs paid out to claimants has increased by 40% between 2005 and 2010; 60% of the money paid out goes to claimant lawyers, and only 40% to the injured party. The figures for the NHS Litigation Authority (NHSLA) are similar. Over the same period, the claimants' costs paid have increased by about 45% (whereas the NHSLA's own legal costs have declined by about 30%). A general liability insurer has indicated that in 1999 claimant solicitors' costs were equivalent to just over half the damages agreed or awarded at 56%. By 2004, average claimant costs were 103% of the damages. By 2010 average claimant costs represented 142% of the sums received by the injured victims. The insurer also indicated that whilst average damages paid had increased since 1999 by 33%, average claimant costs paid (including disbursements and ATE premiums) have increased by 234%.[88]

The Access to Justice Action Group (AJAG), has spoken of the irreducible minimum amount of work that needs to be done in any case:

> AJAG also disputes government figures, saying the same costs will be incurred on a case worth £2,500 – which includes most work accident cases – as one worth £9,000 or £10,000, because the amount of work is roughly the same.
>
> "There is an irreducible minimum that needs to be done in any case, and that has already been established in RTA cases by the fixed costs agreement," the group said.
>
> "... The only way that can be avoided is by not allowing claimants in lower-value cases to have lawyers to pursue their claims and to make them do it as litigants in person, where they will be up against experienced insurance company reps."[89]

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85 Judicial Communications Office news release, "Jackson Review calls for a package of reforms to rein in the costs of civil justice", 14 January 2010

86 *Ibid*

87 p20

88 *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations*, March 2011, p10

89 "Personal injury claimant lawyers hit back at CFA reforms", *Solicitors Journal,* 28 March 2011

4.3 The Jackson Review

In November 2008, Sir Anthony Clarke, who was then Master of the Rolls, appointed Lord Justice (Sir Rupert) Jackson to conduct a review of legal costs. The purpose of the review was "to carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost".[90] The review commenced in January 2009. Lord Justice Jackson published a Preliminary Report on 8 May 2009, and a Final Report in January 2010, which included the following key findings and recommendations:

- Proportionality - the costs system should be based on legal expenses that reflect the nature/complexity of the case;
- Success fees and after the event insurance premiums to be irrecoverable in no win, no fee cases (CFAs – Conditional Fee Agreements), as these are the greatest contributors to disproportionate costs;
- To offset the effects of this for claimants, general damages awards for personal injuries and other civil wrongs should be increased by 10%;
- Referral fees should be scrapped - these are fees paid by lawyers to organisations that 'sell' damages claims but offer no real value to the process;
- Qualified 'one way costs shifting' - claimants will only make a small contribution [to] defendant costs if a claim is unsuccessful (as long as they have behaved reasonably), removing the need for after the event insurance;
- Fixed costs to be set for 'fast track' cases (those with a claim up to £25,000) to provide certainty of legal costs;
- Establishing a Costs Council to review fixed costs and lawyers' hourly rates annually, to ensure that they are fair to both lawyers and clients;
- Allowing lawyers to enter into Contingency Fee Agreements, where lawyers are only paid if a claim is successful, normally receiving a percentage of actual damages won; and
- Promotion of 'before the event' legal insurance, encouraging people to take out legal expenses insurance e.g. as part of household insurance.[91]

In his final report, Lord Justice Jackson identified CFAs as "one of the major drivers of excessive costs".[92] The fear of costs could lead opposing parties to settle cases even if their prospects of success were good; Lord Justice Jackson highlighted defamation cases as a particular example of this. He considered that the costs burden on defendants was excessive; that access to justice was only practicable if the costs of litigation were proportionate; and that the concept applied to both claimants and defendants.[93]

Lord Justice Jackson's view was that the CFA regime provided the opportunity for lawyers to "cherry pick" the most promising cases. This would undermine the justification for the

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90 Judicial Communications Office news release, "Lord Justice Jackson appointed to undertake review of civil costs", 3 November 2008, The terms of reference for the review are set out in the *Review of Civil Litigation Costs: Final Report*, p2

91 Judicial Communications Office news release, "Jackson Review calls for a package of reforms to rein in the costs of civil justice", 14 January 2010

92 Final report, p48

93 Final report, p41

success fee. He also said that, if the entire package of proposed reforms was introduced, "Most personal injury claimants will recover more damages than they do at present, although some will recover less.[94]

The Lord Chief Justice, Lord Judge, and the Master of the Rolls, Lord Neuberger, both welcomed the report.

4.4 CFAs' role in the "compensation culture": Lord Young of Graffham's report

In October 2010, Lord Young of Graffham, who was then the Prime Minister's adviser on health and safety law and practice, published his report *Common Sense, Common Safety*. The report followed a Whitehall-wide review of the operation of health and safety laws and the growth of the "compensation culture". The Prime Minister and the Cabinet accepted all of the recommendations put forward by Lord Young.[95]

The report called for restrictions on advertising for "no win, no fee" compensation claims and a reform of the way personal injury claims are handled. Lord Young criticised the operation of the CFA system and fully endorsed the recommendations of the Jackson Review:

> The 'no win, no fee' system gives rise to the perception that there is no financial risk to starting litigation; indeed some individuals are given financial enticements to make claims by claims management companies who are in turn paid ever-increasing fees by solicitors. Ultimately, all these costs are met by insurance companies who then increase premiums. However, any employer not covered by accident insurance faces bankruptcy, which encourages them to follow every recommendation of their health and safety consultant, no matter how absurd.
>
> (…)
>
> The incentives for claiming compensation have to change. The system must be fair and proportionate without placing an excessive financial burden on the losing party.[96]

4.5 Government proposals to reform CFAs and DBAs

On 15 November 2010, the Ministry of Justice launched a consultation, *Proposals for reform of civil litigation funding and costs in England and Wales*. The consultation closed on 14 February 2011.[97] This consultation sought views on implementing a package of Lord Justice Jackson's proposals for reforming CFAs, DBAs and other aspects of civil litigation funding and costs. A Ministry of Justice press release indicated that the key intention was to reduce the potential costs for people who have been sued in "no win no fee" cases.[98]

The Government considered that Lord Justice Jackson's primary recommendations for the reform of CFAs provided a basis for fundamental reform of the existing arrangements. Furthermore, it considered that the recommendations could lead to:

- a significant reduction in legal costs
- significant savings to the taxpayer, as the funder of central and local government (against whom many CFA funded claims are brought) and

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94 Final report, p176

95 *Lord Young restores common sense to health and safety*, Number10.gov.uk, 15 October 2010

96 Executive summary, p11

97 *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations,* Consultation Paper CP 13/10, November 2010, Cm 7947

98 Ministry of Justice news release, *Clarke unveils plans for radical reform of justice,* 15 November 2010

- the opportunity to rebalance appropriately the risks of litigation between claimants and defendants.[99]

The Ministerial Foreword set out the Government's approach to reform:

> In seeking to rebalance the costs of civil cases, we are endeavouring to ensure: that necessary claims can be brought; that reasonable claims should be settled as early as possible; that unnecessary or frivolous claims are deterred; and that as a result costs overall become more proportionate.[100]

The proposals in the consultation paper derived from Lord Justice Jackson's recommendations but in some areas the Government acknowledged possible issues or concerns and suggested modifications. Detailed information is available in the consultation paper.

On 29 March 2011, the Government published its response to the consultation, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations*.[101] The response document stated that over 600 formal responses had been received and that, in general, defendant representatives supported the Government's primary proposals; claimant representatives and after the event insurers opposed them; but a large proportion of those who opposed the primary proposals recognised that change was inevitable and did not argue for the status quo to be maintained.[102] The Government confirmed that it would proceed with proposals set out in the consultation paper including:

Abolishing general recoverability of CFA success fees and ATE insurance premiums from the losing party

This means that CFA funded parties would be responsible for paying the success fee and the ATE insurance premium themselves.

Lord Justice Jackson considered that this would ensure that claimants on CFAs took an interest in the costs being incurred on their behalf. The consultation paper included the following comment on the effect of this proposal:

> Abolishing recoverability means reverting, to an extent, to the CFA arrangements which existed prior to the Access to Justice Act 1999 changes and would deal with the concerns around high costs arising out of 100% success fees and ATE insurance premiums while preserving access to justice for claimants. Sir Rupert argues that the CFA arrangements prior to April 2000 were satisfactory and opened up access to justice to a range of people. He points out that success fees and ATE insurance premiums are not recoverable in Scotland where the equivalent speculative fee agreement system works satisfactorily. Sir Rupert is convinced that if recoverability were abolished then success fees and ATE insurance premiums would become subject to market forces. Claimants would shop around for lower success fees and ATE insurance premiums. Currently as claimants generally pay nothing, win or lose, there is little control on the success fees and ATE insurance premiums, and the burden of both falls onto defendants. While it is true that these costs can be challenged on assessment, there are additional costs and delays associated with that process.

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99 *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations,* Consultation Paper CP 13/10, November 2010, Cm 7947 p13

100 *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations,* Consultation Paper CP 13/10, November 2010, Cm 7947, p4

101 Cm 8041

102 p5

> Further, given that any assessment necessarily comes at the end of a case, it is too late to avoid a 'chilling effect' from the fear of high costs. In any event, defendants arguably do not have the appropriate market information to challenge the ATE insurance premiums.[103]

Claimants (or their insurer if they had taken out ATE insurance), or their solicitors, would be required to pay the claimant's disbursements in unsuccessful cases, depending on what had been agreed between them.

The response document indicated that the Government would make one change to Lord Justice Jackson's key recommendations; ATE insurance premiums to cover the cost of expert reports in clinical negligence cases would be recoverable:

> The Government is concerned about the high costs of expert reports which can be required in clinical negligence cases before a meritorious claim can be pursued….
>
> These expert reports can be expensive and we need to provide a means of funding them to ensure that meritorious claims can be brought by those who cannot afford to pay for these reports upfront.[104]

The details would be set out in regulations. The Government said that it would continue to engage with claimant and defendant representatives and general liability insurers, to ensure that joint expert reports could be commissioned wherever possible so that ATE insurance would not be necessary.

The recoverability of the self-insurance element by trade unions and other membership organisations, equivalent to the ATE insurance premium, would also be abolished.

Increasing general damages by 10%

Lord Justice Jackson put forward a number of proposals designed to assist claimants with the financial impact of abolishing their ability to recover success fees and ATE premiums. One of these was an increase of 10% in general damages for non-pecuniary loss such as pain, suffering and loss of amenity in claims for personal injury and other civil wrongs. This would help towards paying the success fee.

Capping the damages that may be taken as a success fee in personal injury cases

In personal injury cases, the success fee would be capped at 25% of the damages awarded, excluding any damages referable to future care or future losses. The Government considers that claimants who have been compensated for personal injury should have their damages protected from having too much deducted by their lawyer as a success fee.

Subject to this cap, the maximum success fee that a lawyer might agree with a client under a CFA would remain at 100% of base costs.

Introducing a regime of qualified one-way costs shifting in certain cases

Lord Justice Jackson proposed the concept of qualified one-way costs shifting (QOCS) in certain categories of case "on grounds of social policy, where the parties are in an asymmetric relationship".[105] The Government has agreed that QOCS should be introduced

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[103] *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations,* Consultation Paper CP 13/10, November 2010, Cm 7947 ppp25-6 (footnotes omitted)

[104] *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations*, p11 and p6

[105] Final report p89

in personal injury cases, including clinical negligence cases. This means that an individual claimant would not be at risk of paying the defendant's costs should the claim fail (except in limited prescribed circumstances); the defendant (described by the Government as "typically in personal injury cases ... a relatively well-resourced body") would still have to pay the costs of a successful individual claimant.[106] The Government has decided to examine the experience of QOCS in personal injury claims before considering whether it should be extended further.

QOCS is intended to assist claimants by reducing the financial risk of litigation and therefore the need for ATE insurance, so preserving an element of their damages which might otherwise be used to pay ATE insurance premiums. The consultation paper states that personal injury claimants would only have to pay a winning defendant's costs where it was reasonable to do so, based on the claimant's own wealth or their unreasonable behaviour during the case.[107] The Government intends to continue to discuss with stakeholders how the rules should be drafted, including whether any minimum payment to a successful defendant's costs should be payable by the losing claimant in order to prevent speculative claims.[108]

Reforming Part 36 of the Civil Procedure Rules (offers to settle)

Part 36 of the *Civil Procedure Rules* provides a process whereby parties are encouraged, via a system of penalties and rewards, to make and accept reasonable offers to settle. Lord Justice Jackson considered that the current arrangements discouraged claimant offers. He proposed strengthening the Part 36 arrangements by increasing by 10% the reward available to claimants who are successful in obtaining a judgment which is at least as advantageous as their own offer to settle, made earlier in the proceedings. Claimants might be encouraged, therefore, to make more offers and defendants encouraged to accept reasonable offers made. A claimant who had entered into a CFA, and who equalled or beat his or her own rejected offer at trial, would be able to use the additional amount awarded under Part 36 towards paying the success fee and ATE insurance premiums that would no longer be recoverable from the defendant.

Part 36 of the Civil Procedure Rules would also be reformed to make clear that where a money offer is beaten at trial, by however small a margin, the costs sanctions available under Part 36 would apply. This would reverse the decision of the court in *Carver v BAA.*[109]

Allowing damages-based agreements (DBAs) in civil litigation

This would increase the funding options available to claimants. DBAs would be subject to similar requirements for parties to the agreement as for CFAs, eg the amount of the payment that lawyers could take from the damages in personal injury cases would be capped at 25% of damages (excluding for future care and loss).

Introducing a new test of proportionality in costs assessments

The intention would be that only reasonable and proportionate costs could be recovered from the losing party.

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106 *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations*, p7

107 *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations,* Consultation Paper CP 13/10, November 2010, Cm 7947 p8

108 *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations*, p7

109 [2008] EWCA Civ 412

Increasing the costs recoverable by successful litigants in person.

The rates have not increased since the mid-1990s. A Ministry of Justice official has confirmed that the rates will be increased in line with earnings inflation since they were last set.[110]

4.6 What else is the Government doing to address rising costs in civil litigation?

The Government has acknowledged that there is more to be done to address the issue of high costs in civil cases than dealing with the CFA regime and introducing the associated measures outlined above:

> Much of Sir Rupert's Final Report addressed issues of costs and case management, and work on this is being taken forward by the judiciary. In addition, the consultation paper *Solving disputes in the county court*, which the Government is publishing simultaneously, is seeking views on changes to streamline the civil process in the county courts. This includes Lord Young's proposal for extending the current process for RTA personal injury claims to all personal injury claims and on introducing a scheme of fixed recoverable costs for claims under £25,000 as proposed by Sir Rupert.[111]

4.7 The Bill: civil litigation funding

Part 2 of the Bill deals with payments for legal services in civil cases. Much of the detail of the proposed reforms would be included in regulations. A detailed explanation of the clauses is included in the Government's Explanatory Notes published with the Bill.[112] A very brief indication of the subject matter of each clause is set out below:

- **Clause 41** would remove the recoverability of the CFA success fee from the losing party in any proceedings. It would also enable the Lord Chancellor to prescribe a cap, expressed as a percentage of specified damages, that may be taken as a success fee in certain types of proceedings; regulations would be made under the affirmative resolution procedure. The Government has previously indicated that the success fee would be capped at 25% of the damages awarded in personal injury claims, excluding any damages referable to future care or future losses.

- **Clause 42** would enable DBAs to be used in the types of civil litigation cases where it is currently possible to use a CFA; this means that it would not be possible to use a DBA in family proceedings or criminal cases, or in proceedings of a description prescribed by the Lord Chancellor. The Lord Chancellor would have power to prescribe the information which a legal representative must provide to a claimant prior to entering a DBA and the maximum amount which may be paid under the DBA from the claimant's damages.

- **Clause 43** would remove the general recoverability of ATE insurance premiums from the losing party to civil proceedings. However, the Lord Chancellor could make regulations to allow the recoverability of ATE premiums in certain clinical negligence proceedings but only to the extent that the premiums relate to the cost of an expert report or reports and in accordance with any prescribed maximum amount.

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[110] Personal communication 24 June 2011

[111] *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations*, p15

[112] Bill 205—EN

- **Clause 44** would abolish the recoverability of the self-insurance element by trade unions and other membership organisations, equivalent to the ATE insurance premium.

- **Clause 51** deals with offers to settle. The Explanatory Notes set out the context for the provision:

> The costs sanctions against a defendant for failing to accept a claimant's offer to settle generally amount to considerably less than the sanctions against a claimant for failing to beat a defendant's offer to settle. Consequently, there is less incentive for a defendant to accept a reasonable offer from the claimant than for a claimant to accept a reasonable offer by the defendant.

Clause 51 would enable rules of court to be made to allow the court to order payment of an additional amount to claimants by defendants who do not accept a claimant's offer to settle, and where the court then gives judgement for the claimant that is at least as advantageous as the claimant's offer. The additional amount would, in the case of monetary claims, be an amount not exceeding a prescribed percentage of the award to the claimant. For non-monetary claims or mixed monetary and non-monetary claims, the Lord Chancellor would have the power to specify whether the additional amount would be calculated by reference to the claimant's costs, the amount of money awarded or the value of any non-monetary benefit awarded to the claimant.

4.8 Reaction to the proposals

Consumer Justice Alliance

The Consumer Justice Alliance (CJA) states that it was formed:

> to highlight the impact that Lord Justice Jackson's proposals on Civil Litigation will have on injured victims. The CJA is made up of representatives from charities, victims' groups, insurers and law firms, all of whom feel the need to act against the potentially serious implications of the Jackson's recommendations.[113]

It criticised the Government's proposals:

> The Consumer Justice Alliance (CJA) believes that the Government's proposals would ultimately mean that many victims, entitled to rightful compensation, would be unable to obtain proper legal representation due to the financial constraints that the new system would create. No such constraints would be placed on those defending these cases, including large insurance firms and Government bodies, creating an inequality of arms and an unlevel playing field.
>
> Nigel Muers-Raby, Chairman of the Consumer Justice Alliance, said:
>
> "This Government is pushing through sweeping and dangerous reforms with alarming speed. The Government knows full well that by publishing such a wide-ranging Bill, it is the controversial sentencing aspects that will grab the headlines.
>
> "However, buried in the Bill, you can see that thousands of injured people will suffer as a result of what is being proposed today – the door to justice is effectively being slammed in their faces. Every day across the country, victims of accidents or negligence have to confront a future in the face of life-changing injuries. The Bill threatens their ability to seek proper legal representation and to receive the compensation they need to begin to rebuild their lives. We all understand the state of

[113] Consumer Justice Alliance website at 23 June 2011

> the economy and the Ministry of Justice's need to cut costs. But is it right that injured victims should foot the bill?"
>
> (…)
>
> The CJA is deeply concerned that the Government's overarching justification for their reforms is a blanket assertion that a 'compensation culture' exists in the UK. The Government has put forward no evidence whatsoever that such a culture exists. The implication that people are making 'spurious' claims for compensation, following life-changing injuries, is deeply insulting to victims – and to the courts who assess their claims. Put simply, the CJA believes that the Government's proposals will only deter victims with rightful claims from being able to seek justice.[114]

Access to Justice Action Group

The Access to Justice Action Group (AJAG) states on its website that "The immediate focus of AJAG's work is to ensure that as proposed reforms progress, the rights of claimants are properly taken into account and their access to justice maintained". AJAG has published a lengthy document commenting on the Government's proposals in which it recognises the Government's concerns over the cost of litigation, and advances alternatives which it believes achieve the Government's policy objectives "whilst maintaining access to justice for the many". AJAG does not agree that there is a compensation culture or that success fees and ATE premiums should cease to be recoverable in their entirety, but accepts that some restrictions may be appropriate to meet the Government's objectives. Other comments include the following:

> 1.3 "No win, no fee" claims are not the preserve of the wealthy. The typical male claimant is aged under 39 and has an income of just over £29,000. The typical female claimant is aged under 44 and has an income of just over £19,000. 53% of claimants earn less than £25,000 per year and only 18% over £40,000.
>
> 1.4 Overall it can be calculated that almost 3 million people benefitted from this form of funding over the last 5 years, mainly but not exclusively for personal injury cases, an average of almost 600,000 per year. The system has therefore been a very important contribution to access to justice for ordinary people on average and below average incomes.
>
> 1.5 The Government's plans cannot be seen in isolation from developments since the Jackson report, and others in the pipeline... Given that by the end of these plans, only a tiny proportion of personal injury cases will not be subject to fixed costs, the proposals are a sledgehammer to crack a nut. The cases that will be affected are those which are of higher value and more complexity, precisely those which should not be subject to the regime proposed. (...)
>
> 1.7 ... it is essential to recognise that success fees and ATE insurance provide important checks and balances, acting as a brake on both unmeritorious cases and "cherry picking", which the proposed QOCS alternative does not. Many more weak cases would proceed without these case reviews, especially in clinical negligence, which would significantly increase NHS litigation costs. Without recoverable ATE, risk aversion by claimants will mean many perfectly good but problematical cases will fall by the wayside, as claimants will not be able to afford to take the risk of adverse costs orders.

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[114] Consumer Justice Alliance, *Legal Aid, Sentencing and Punishment of Offenders Bill: 'Buried' proposals will block justice for injured victims, warns Consumer Justice Alliance,* 21 June 2011

1.8 Moreover, the lack of disbursement funding is one of the inevitable consequences, if ATE recoverability is ended generally. Without ATE, the claimant is left in the position of having to underwrite what could be a very high and unaffordable bill, especially for high cost, pre investigation, uncertain merits cases, like industrial disease. The disbursements in maximum severity cases would be prohibitive. The proposed use of ATE for clinical negligence disbursements is not commercially viable. This is a real barrier to access to justice. In the same context, we believe that not for profit membership organisation self insurance should be continued.

1.9 It should be remembered that the system of recoverability of success fees and ATE premiums was mainly to solve the access to justice problems of the "MINELAS" ("middle income not eligible for legal aid") who did not qualify for legal aid, as much as it was a replacement for legal aid in personal injury claims, when that ceased as a result of the Access to Justice Act 1999. The proposed changes, especially QOCS, will reproduce that lacuna in access, especially for the middle classes.

1.10 Whilst AJAG in principle does not believe it is right or fair to deduct costs from a claimant's damages in principle, AJAG considers that a fair compromise would be to permit success fees to remain partially recoverable on a 50% basis, giving the claimant a stake in the costs decisions, but not losing the benefits of the wider spread of risk that recoverability brings. ...

1.11 Fixed success fees are part of the only recently formed comprehensive agreed package for RTA cases in the portal system and are working. We see no merit in interfering with a system that is bedding down well, is seen to be fair, based on consensus, and was only recently introduced after a long and difficult genesis.

1.12 The proposed 10% uplift in general damages would not compensate claimants for losing up to 25% by way of success fee. ...

1.14 The biggest barrier facing a claimant considering bringing a claim is the claimant's fear of the personal costs consequences of litigation. The subjectivity of the proposed QOCS arrangements leads to uncertainty for litigants, and in particular claimants... The QOCS proposal will only apply to personal injury, but the removal of recoverability applies to all types of case. This creates prohibitive risks for all non-PI litigants.(...)

1.16 QOCS does not provide an answer as to who would fund the disbursements in a claim which does not prove successful, again leaving the claimant exposed to an uncertain legal bill…

1.18 AJAG believes a better alternative to QOCS through a revised ATE system can be developed that would achieve the objectives of the Government by controlling both claimants' and defendants' costs, maintaining access to justice, reducing unmeritorious claims, solving the disbursement conundrum, and preserving the ATE market, fully worked details of which we set out in this paper...[115]

The Law Society

The Law Society has voiced a number of concerns:

The review of civil litigation costs and funding by Lord Justice Jackson -

- lack of impact assessments

[115] Access to Justice Action Group, *Reforming Civil Litigation Funding in England and Wales- Implementation of Lord Justice Jackson"s Recommendations, The Government"s Response, Access to Justice Action Group Comments,* at 23 June 2011

- largely opinion based
- took no account of the impact of the new streamlined road traffic accident (RTA) process, which will account for approximately 80 per cent of all personal injury claims

Government proposals -

- will not comply with interlocking/whole package proposals of Lord Justice Jackson
- insufficient/inaccurate impact assessments conducted
- victims who have suffered harm due to the wrongdoing of others will lose a significant proportion of their damages
- many businesses may suffer if they have to pay success fees
- restriction of success fee to 25 per cent of damages will mean that many claims will be uneconomic to pursue, particularly those of lower value or great complexity

Qualified one way costs shifting -

- likely to dramatically reduce the availability/affordability of ATE products, which will still be required for non-personal injury claims
- will create uncertainty for claimants as they will not know from the outset what, if any, adverse costs liability they may face
- will lead to satellite litigation ('costs wars')
- unsuccessful claimants could lose their homes, face bankruptcy or fall into serious debt
- may result in an increase in litigation costs for successful defendants (especially local authorities and/or SMEs due to certain "self insurance" type arrangements and in public liability cases).

10 per cent increase in damages -

- impossible to police – there will be no way of knowing if 10 per cent is added to damages in cases that settle without judicial intervention
- according to Lord Justice Jackson's figures, nearly 40 per cent of claimants will be worse off.[116]

Other responses

The following articles include selections of quotes from interested parties;

- Suzi Ring, "Government confirms Jackson civil litigation reforms and legal aid cuts", *legalweek.com* 21 June 2011
- Catherine Baksi and John Hyde, "Government set to press ahead with legal aid cuts and Jackson reforms", *Law Society Gazette,* 21 June 2011

[116] Law Society website, *Legal Aid, Sentencing and Punishment of Offenders Bill, a*t 23 June 2011

A press release issued in March 2011 by the Association of British Insurers spoke of the proposed reforms as being "good news for genuine claimants".[117]

4.9 What is happening to the proposed reforms not included in the Bill?

Other reforms proposed by the Government do not require primary legislation. A Ministry of Justice official has confirmed that qualified one way cost shifting; the test of proportionality in costs assessments; reversal of the decision in *Carver v BAA* and increasing the rates for successful litigants in person will be dealt with through changes to the Civil Procedure Rules.[118] The official also said that the Senior Judiciary have agreed to look into the proposal to increase general damages by 10%.[119]

4.10 Legal costs in ancillary relief proceedings

What is ancillary relief?

During or after a divorce, annulment of a marriage, judicial separation, or dissolution of a civil partnership, the court can make an order for financial provision. This is also known as ancillary relief and can involve, for example, the division of property, pensions, and the payment of maintenance.

Government proposal

The Government has proposed that all legal aid, other than family mediation services, should be excluded from the scope of the scheme for all ancillary relief cases other than those where domestic violence is present.[120]

In the Green Paper *Proposals for the reform of legal aid in England and Wales*,[121] the Government recognised that there might be a financial imbalance between the parties involved and proposed giving the court power to order one party to make a payment to the other to fund legal representation costs:

> 4.159 We do, however, recognise that in spite of efforts to engage in negotiation prior to and during ancillary relief proceedings, some cases will still reach court. In family matters, except in very limited circumstances, the parties are generally expected to meet their own legal costs. In some cases, there may be an imbalance in the financial position of the parties during the proceedings which may disadvantage one party, particularly in the absence of publicly funded legal assistance.
>
> 4.160 At present, lump sum orders in ancillary relief proceedings can only be made after Decree Nisi. The current court rules state that "the general rule in ancillary relief proceedings is that the Court will not make an order requiring one party to pay the costs of the other", except in some circumstances relating to the conduct of a party in the proceedings. There is provision in legislation to allow the Court to make an interim order for the payment of a lump sum but this remains unimplemented.
>
> 4.161 We propose to make changes to the courts' powers to enable the Court to redress the balance in cases where one party may be materially disadvantaged, by giving the judge the power to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party. In doing so, the Court

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117 *Government plans to reform legal system will mean a better deal for genuine claimants and insurance customers says the ABI*, 29 March 2011

118 A Ministry of Justice official has confirmed that it is anticipated that reversing *Carver* and the litigant in person rates will be implemented by means of an amendment to the Civil Procedure Rules with effect from 1 October 2011.

119 Personal communication 23 June 2011

120 See section 3.3 of this paper above

121 Cm7967, November 2010

> would also incentivise the contributing party to negotiate a settlement. The materially disadvantaged party could apply for an order at any stage of the proceedings, where they could demonstrate that they could not reasonably procure legal advice by any other means (as is currently permissible under maintenance pending suit provisions). Any order made would include the payee's undertaking to pay the sum to their legal representative to cover the costs of the proceedings. This would be credited against any ultimate liability that the payer might have to pay or part-pay towards the costs. Although these proposed changes to the courts' powers are not a precondition for the proposed changes in scope, we would anticipate that this power to award interim lump sum orders would be brought into effect either in advance of or at the same time as any changes to the scope of legal aid.

The Government's response to the Green Paper consultation indicated that responses on this issue had mainly been received from legal practitioners:

> While the majority supported the proposal, many argued that it would only have a practical application in a very small number of cases. It was also argued that any potential applicant would need funding for advice on whether such an application could be made. [122]

The Government said that it accepted that this reform would not apply in all cases, but considered that it had the potential to provide a route to private funding of legal costs in some cases currently funded by legal aid. The Government confirmed its intention to introduce the reform largely on the basis set out in the consultation.[123]

The Bill: legal costs in ancillary relief proceedings

Clause 45 would enable the court to order that, in divorce, nullity of marriage or judicial separation proceedings, one party should pay to the other an amount which would enable the applicant to secure legal services (of a specified description, provided in a specified period or for the purposes of a specified part of the proceedings), but only if the applicant would otherwise not be able to afford to pay for legal services or to secure a loan to pay for legal services. The court could order payment by instalments, or to be deferred, and an order could be varied.

Clause 46 sets out a list of matters to which the court would have to have regard in deciding whether to make or vary a legal services order.

Clause 47 would extend the court's power to order the sale of property in order to give effect to a legal services order.

Clauses 48, 49 and 50 would make similar provisions in relation to civil partnership proceedings as those included in clauses 45 to 47.

4.11 Costs in criminal cases: reimbursement of defence costs out of central funds

Under section 16 of the *Prosecution of Offences Act 1985* (POA 1985), the courts may order that an acquitted defendant, who has privately funded his legal representation, should have his legal costs reimbursed out of central funds. Orders may also be made following a successful appeal against conviction or sentence.

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[122] Ministry of Justice *Reform of Legal Aid in England and Wales: the Government Response* Cm 8072, June 2011, p35

[123] Ministry of Justice *Reform of Legal Aid in England and Wales: the Government Response* Cm 8072, June 2011, p36

Section 16(6) of the POA 1985 provides that the order will be "of such amount as the court considers reasonably sufficient to compensate [the defendant] for any expenses properly incurred by him in the proceedings".

There are two ways of ascertaining the amount to be reimbursed. The first is for a court to specify the amount to be paid when it makes a costs order at the time of the hearing; if the acquitted defendant agrees to that figure, this is the amount paid from central funds. The second (and more common) way is for the amount to be determined in accordance with the procedure set out in the *Criminal Cases (General) Regulations 1986* (the 1986 Regulations).[124]

Under section 20 of the POA 1985, the Lord Chancellor has the power to make regulations governing the award of costs in criminal cases. He is specifically authorised to fix:

> the scales or rates of payments of any costs payable out of Central Funds in pursuance of any costs order, the circumstances in which and conditions under which such costs may be allowed and paid and the expenses which may be included in such costs.[125]

Prior to October 2009, this power had never been exercised and no prescribed rates for the recovery of defence costs were in place. There was, therefore, no "cap" on the amount that could be recovered from central funds: the appropriate amount was entirely in the court's discretion.

Section 18 of the POA 1985 provides that the court may order the accused to pay a successful prosecutor such costs "as it considers just and reasonable".

4.12 The imposition of a cap in October 2009

In November 2008, the previous Government launched a consultation to examine ways of restricting access to central funds, as payments out were consistently exceeding the budgeted amount. The consultation presented a number of options, the third of which was the introduction of a cap under which acquitted privately funded defendants would only be able to recover costs at legal aid rates, rather than at the commercial rates their private lawyers had actually charged:

> 4. Since private rates for legal representation are much higher than legal aid rates, if a privately funded individual or company has recourse to Central Funds, the cost to the taxpayer can be significant. This is particularly true in complex cases involving charges against a company and on occasion claims from Central Funds under private rates can run into several million pounds for a single case...
>
> (…)
>
> 7. (…) We believe that it is now the time to consider whether it is counterintuitive to pay privately funded rates in criminal cases when the legal aid system pays both sustainable fee levels for practitioners and ensures a sufficient level of quality for clients. We believe that there is a strong case for reforming the current payment of legal costs from Central Funds to ensure that we are balancing effectively the need to pay fair rates in criminal cases to practitioners whilst using taxpayers' money effectively and responsibly.[126]

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[124] SI 1986/1335

[125] *Prosecution of Offences Act 1985*, section 20(1)(a)

[126] Ministry of Justice, *The Award of Costs from Central Funds in Criminal Cases: Consultation Paper CP28/08*, 6 November 2008, pp4-5

The draft Impact Assessment provided at Annex 1 of the consultation document suggested that implementing option 3 would result in savings of approximately £20 million a year to the central funds budget.

The consultation closed on 29 January 2009 and the Ministry of Justice published a summary of responses on 8 June 2009.[127] The summary indicated that 93 responses had been received and that, overall, respondents favoured continuing with the existing system.[128]

The consultation's first question was described by the Criminal Bar Association as "a leading question of the most obvious type … in a form that would be permitted by no judge because it so firmly suggests the answer desired":[129]

> **Do you agree that Central Funds payments should be reformed to ensure that the taxpayer does not subsidise disproportionately high private rates for legal representation in criminal cases?**

The majority view was that existing private rates were not disproportionately high.[130]

In response to a question on capping payments from central funds at legal aid rates, the summary said:

> **4. Do you agree that it is appropriate to cap payments from Central Funds to the relevant legal aid rates for individuals who have failed the means test in the magistrates' court or on appeal to the Crown Court? Please provide supporting reasons for your answer.**
>
> 66 respondents disagreed with this suggestion. Only six agreed. This proposal was attacked as being very unfair to those who were deemed to need representation by reason of passing the interests of justice test, but having failed the means test would have no option but to obtain legal services in the open market. Respondents said that the level at which the means test was set excluded many workers on average incomes from legal aid. Solicitors would not be able to provide the same level of service if working to legal aid rates, which are able to be as low as they are due to volume of work and guaranteed payment. Defendants would either have to pay higher than legal aid rates and forfeit the difference if acquitted, or try to persuade lawyers to conduct work at legal aid rates, when they were in no position to negotiate lower rates.[131]

The response of the majority to the question on suggested amendments to the Government's proposed options was that the current system was fair and worked:

> **6. What amendments, if any, would you make to any of the options outlined should we decide to progress with the reform of Central Funds payments? Please provide supporting reasons for your answer.**
>
> The majority view was that the current system was fair and worked in practice. Any changes were commonly seen as unjust, and potentially counter-productive in terms of increased unrepresented defendants, which might involve additional costs in terms of

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127 Ministry of Justice, *The award of costs from Central Funds in criminal cases: Response to consultation CP R 28/08*, 8 June 2009

128 *Ibid*, p5

129 Criminal Bar Association, *Response to the Consultation Paper concerning the Award of Costs from Central Funds in Criminal Cases*, 19 January 2009, para 3

130 Ministry of Justice, *The award of costs from Central Funds in criminal cases: Response to consultation CP R 28/08*, 8 June 2009, p6

131 Ministry of Justice, *The award of costs from Central Funds in criminal cases: Response to consultation CP R 28/08*, 8 June 2009, p7

> longer hearings and increased instances of miscarriages of justice. Some respondents agreed that the system could be changed, but suggested waiting until the results of the National Taxing Team taking over responsibility for magistrates' courts Central Funds claims were known, as this might reduce the costs to Central Funds...[132]

However, despite the opposition expressed by the majority of consultation respondents, the previous Government indicated that it nevertheless intended to proceed with the introduction of a cap:

> Because private rates vary enormously on a case by case basis, this makes the Government's ability to predict and control spend from Central Funds difficult. Paying private rates from public funds also creates a two-tiered system. It remains entirely at the discretion of individual law firms as to the rates they charge to their private clients. However, individuals who can afford to pay private rates are relying on the taxpayer to refund these costs where they are acquitted. The Government believes therefore that awarding costs from Central Funds at legal aid rates is fair, reasonable and proportionate.[133]

The changes were introduced by the *Costs in Criminal Cases (General) (Amendment) Regulations 2009,*[134] which came into force on 31 October 2009; an overview is set out in the associated Explanatory Memorandum.

The 2009 Regulations introduced a cap on the amount recoverable from central funds. The Lord Chancellor exercised the power given to him under section 20 of the POA 1985 to set rates and scales for payments from central funds to apply to costs orders made in respect of proceedings commenced on or after 31 October 2009.[135] No new primary legislation was enacted in order to implement this change.

Press coverage drew particular attention to the impact of the change on people who bring court proceedings to challenge fixed penalty notices for minor motoring offences. Such defendants are not usually eligible for legal aid and therefore have limited options other than to pay privately for legal representation.[136]

In response, a Ministry of Justice spokesman was quoted as saying:

> "We have no intention of preventing someone from challenging what they believe to be an unfair prosecution in court, but it must be done at a fair and sustainable rate.
>
> "To ensure best value for the tax payer this change will ensure that anyone who pays privately for their legal representation and is acquitted of their motoring offence will be reimbursed at the rates payable under legal aid."[137]

4.13 The Law Society's challenge

In January 2010, the Law Society filed a judicial review application that sought to overturn the 2009 Regulations, arguing that they were "unlawful and grossly unfair". A Law Society press release quoted Stephen Parkinson, senior partner at criminal law firm, Kingsley Napley, which had been instructed to act on behalf of the Law Society:

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132 *Ibid*, p8
133 Ministry of Justice, *The award of costs from Central Funds in criminal cases: Response to consultation CP R 28/08*, 8 June 2009, p 12
134 SI 2009/2720
135 Ministry of Justice, *Rates and scales in respect of defendant's costs orders*, 30 October 2009
136 "Innocent motorists to be asked to pay court costs", *Telegraph*, 28 September 2009
137 *Ibid*

> "People do not choose to be prosecuted. Where they are prosecuted and then acquitted, it is grossly unfair that under the new scheme they only get back a fraction of their costs. By contrast, successful prosecutors are entitled to recover their "just and reasonable costs" which can work out at much more than legal aid rates. This underlines the inequality of the new scheme."[138]

The High Court handed down judgment on 15 June 2010, finding in the Law Society's favour and ruling that the 2009 Regulations were unlawful:

> The new regulations involve a decisive departure from past principles. They jettison the notion that a defendant ought not to have to pay towards the cost of defending himself against what might in some cases be wholly false accusations, provided he incurs no greater expenditure than is reasonable and proper to secure his defence. Any change in that principle is one of some constitutional moment. It means that a defendant falsely accused by the state will have to pay from his own pocket to establish his innocence. Whatever the merits of that principle, I would be surprised if Parliament had intended that it could properly be achieved by sub-delegated legislation which is not even the subject of Parliamentary scrutiny.[139]

A Law Society press release said:

> The point at issue in the litigation was relatively simple: can the Lord Chancellor in setting rates or scales decide what is "reasonable" to allow the defendant, even if as a consequence the amount that will be recovered falls well short of the amount the defendant actually incurred?
>
> In his judgment given today, Lord Justice Elias made it clear that the statute does not allow the Lord Chancellor to decide what is reasonable. In setting out a scheme of rates and scales, he has to respect the statutory purpose set out in the Prosecution of Offences Act. The Act was intended to provide reasonable compensation for successful defendants. By implementing rates and scales which did not compensate defendants the Lord Chancellor had acted unlawfully.[140]

4.14 Other criminal costs issues on which the previous Government consulted

In its 2008 consultation on the award of costs from central funds, the previous Government also consulted on two further issues:

> Do you agree that it is right that individuals who are eligible for legal aid in Crown Court cases, but choose instead to pay privately for their legal representation, should not be able to reclaim their costs from Central Funds in future?
>
> Do you agree that individuals who have failed the Interests of Justice test in the magistrates' court or on appeal to the Crown Court should no longer be able to claim any legal costs they have incurred back from Central Funds?[141]

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138 Law Society press release, *Law Society issues groundbreaking legal action to overturn unfair Government regulation*, 11 January 2010

139 *R (on the application of the Law Society of England and Wales) v The Lord Chancellor* [2010] EWHC 1406 (Admin), at para 56

140 Law Society press release, *Law Society hails High Court victory against plans to make the innocent pay their own defence costs*, 15 June 2010

141 Ministry of Justice, *The Award of Costs from Central Funds in Criminal Cases: Consultation Paper CP28/08*, 6 November 2008, p19

In its response to the consultation, the previous Government said that it had decided not to pursue either of these options, to which a majority of respondents to the consultation had disagreed.[142]

4.15 The Bill: costs in criminal cases

Clause 52 and **Schedules 6** and **7** deal with costs in criminal cases. The Government's Explanatory Notes published with the Bill include a detailed explanation of each of the provisions and also summarise their intent:

> In the case of *R (on the application of the Law Society of England and Wales) v Lord Chancellor* in June 2010, the court held that the Lord Chancellor cannot cap the amounts that the courts award. This Bill will provide the Lord Chancellor with a power to do so for the purposes of proceedings in England and Wales, other than in relation to costs incurred in proceedings in the Supreme Court. It will also largely prevent orders being made in respect of legal costs (that is, lawyers' fees, charges and disbursements including expert witness costs) where legal aid is available.[143]

The Explanatory Notes state that the proposals would raise £40 million savings in cash terms in 2014/15, and that it is expected to take three years from the implementation date until the full savings are incurred.[144]

Schedule 6 would enable the court, where the court considers it appropriate, to reduce the amount awarded to the accused. The Explanatory Notes indicate that the court may do so, for example, because the accused has been convicted of some offences but acquitted of others.[145]

The power to make a defendant's cost order would be subject to any regulations made under section 20 of the POA 1985, as amended by Schedule 6 of the Bill.

A new section 16A would be inserted into the POA 1985 to set out when a defendant's costs order might include an amount in respect of the accused's legal costs. "Legal costs" is a narrower term than "costs" which includes the accused's travel expenses and subsistence allowance.

Legal costs would not be awarded from central funds except in specified conditions. People who would automatically qualify for legal aid would effectively be excluded from meeting these conditions and so would not qualify for a legal costs order.[146] The Lord Chancellor would have power to make regulations to amend the availability of legal costs; the Explanatory Notes state that the Lord Chancellor would be able "to prescribe that legal costs are not to be available in respect of cases that do not pass the interests of justice test".[147] These are proposals on which the previous Government had consulted but decided not to pursue.

New section 16A(9) provides that amounts awarded by a court in respect of legal costs, other than legal costs incurred in proceedings before the Supreme Court, might not exceed an amount specified in regulations by the Lord Chancellor.

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142 Ministry of Justice, *The award of costs from Central Funds in criminal cases: Response to consultation CP R 28/08*, 8 June 2009, pp11-12
143 Paragraph 9
144 Paragraph 536
145 Paragraph 282
146 Ministry of Justice official, personal communication, 23 June 2011
147 Paragraph 286

Other provisions would deal with the costs of private prosecutors and of witnesses and appellants not in custody.

Paragraph 6 of **Schedule 6** would insert a new subsection 1(A) into section 20 of the POA 1985 (which enables the Lord Chancellor to make regulations). The Bill would give the Lord Chancellor the power to provide for the amounts that the courts may award to defendants from central funds, other than in relation to costs incurred in proceedings in the Supreme Court. This might be by specifying costs or scales or by making other provision as to the calculation of the sum. The amount that results from the application of the regulations would not need to be reasonably sufficient or necessary to compensate the recipient. The Explanatory Notes state that "It is intended that regulations will provide for the payment of amounts in respect of legal costs that are broadly equivalent to legal aid rates".[148] These regulations would be subject to the negative resolution procedure.

Similar restrictions as those outlined above would apply to the amounts awarded by courts in England and Wales in respect of costs incurred by persons who make representations to the court in the course of references made by the Attorney General, and persons who are discharged following extradition proceedings.

Schedule 7 would make similar provisions in relation to the legal costs of an appellant in the Court Martial Appeal Court as to civilian courts in Schedule 6, and would also remove the restriction on successful appellants against sentence receiving costs.

5 Sentencing and punishment of offenders – background

Part 3 of the Bill covers a range of issues to do with sentencing and the punishment of offenders.

The Government published proposals for consultation in December 2010 in its Green Paper *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*.[149] The consultation period closed on 4 March 2011, and there were over 1,200 responses. The Government has not published a summary of these. A number of organisations have made their own responses available online. A selection of these is listed in the Appendix of this Research Paper.

The Government published its response to the consultation on 21 June 2011,[150] along with the Bill. Details were given in a Written Ministerial Statement,[151] and also in an oral statement by Kenneth Clarke.[152] The Prime Minister also held a press conference on the Bill on the same day, the transcript of which is available online.[153] Other papers relevant to the consultation are available from the Ministry of Justice website.[154]

The Regulatory Impact Assessment on the Government's response to the consultation indicates that total savings from the proposals would by £80 million in 2014/15, with a reduction in prison places of 2,650 by the same year. Not all the changes listed are to be achieved through the legislation, however.

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148 Paragraph 294
149 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders,* Cm 7972, December 2010
150 Ministry of Justice, *Breaking the Cycle: Government Response*, Cm 8070, June 2011
151 HC Deb 21 June 2011 cc9-12WS
152 HC Deb 21 June 2011 cc165-189
153 Prime Minister's Office Press Release, *PM's press conference on sentencing reforms* 21 June 2011
154 Ministry of Justice *Breaking the cycle consultation page* (on 22 June 2010)

5.1 Reform proposals *not* included in the Bill (as introduced)

Greater reductions in sentences for those who plead guilty

A controversial proposal which the Government has dropped was to increase the maximum possible discount to sentences for a guilty plea from one third to one half. Offenders who plead guilty will usually receive a reduced sentence, the rationale being that this saves court time, money and distress to victims and witnesses. The discount is usually one third where the guilty plea was entered at the first opportunity, although it can be less for later guilty pleas. *Breaking the Cycle* included a proposal to increase the maximum reduction in sentence for a guilty plea from one third to one half. The Ministry of Justice had estimated that this change would have resulted in a reduction of 3,400 in prisoner numbers in 2014/15, and financial savings of £130 million.[155] Further details are given in Library Standard Note 5974, *Reductions in sentence for a guilty plea.*[156] A furore followed remarks made by Kenneth Clarke about rape in a radio interview in May 2011[157] and the Government has now abandoned this proposal. The Prime Minister described the decision in his press conference on 21 June 2011:

> In the Green Paper we consulted on a proposal to increase the current discount available for an early guilty plea at the earliest possible stage to 50%. For the most serious crimes we have concluded this would certainly not be right. The sentence served would depart far too much from the sentence handed down by the judge and this is simply not acceptable. We also looked at whether the 50% discount could only be applied to less serious crimes, but again we reached the same conclusion: the sentence would be too lenient, the wrong message would be sent out to the criminal and it would erode public confidence in the system. What's more, in reaching our conclusions we considered the strong views expressed by serious people working in the criminal justice system that 50% was just too high and that we needed to find better ways of speeding up the process for victims and witnesses and for the police and the courts. So there will be no change to the current position on early guilty pleas for any category of case. The money that would have been saved through this proposal will be saved through greater efficiency in other parts of the Ministry of Justice budget.[158]

Changes to mandatory life sentences for murder

Another proposal which generated considerable interest but is not in the Bill concerns mandatory life sentences for murder. An offender given a mandatory life sentence who is released from prison will remain on licence for the rest of his or her life. When sentencing an offender convicted of murder, the court will set a minimum term which must be served in custody before the offender can be considered for release on licence. When setting this, the court must select one of the "starting points" specified in the 2003 Act. The appropriate starting point will depend on the seriousness of the offence and the age of the offender. The court then has to look at aggravating and mitigating factors and then at previous convictions, bail and guilty pleas. Library Standard Note SN/HA/3626 *Mandatory life sentences for murder* provides an overview of this topic.

In *Breaking the Cycle,* the Government indicated that it would look at "simplifying" the current legislation on murder sentencing. However, the paper emphasised that the Government had "no intention of abolishing the mandatory life sentence":

> 170. A key part of simplification will involve Schedule 21 to the Criminal Justice Act 2003. It is essential that we preserve Parliament's role in setting the sentencing

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[155] Ministry of Justice, *Impact Assessment MOJ051*, December 2010, p21
[156] 19 May 2011
[157] See for example "Ken Clarke: Regret but no apology", BBC News, 18 May 2011
[158] Prime Minister's Office Press Release, *PM's press conference on sentencing reforms* 21 June 2011

> framework for murder. We have no intention of abolishing the mandatory life sentence or of prompting any general reduction in minimum terms imposed for murder. However, Schedule 21 is based on ill-thought out and overly prescriptive policy. It seeks to analyse in extraordinary detail each and every type of murder. The result is guidance that is incoherent and unnecessarily complex, and is badly in need of reform so that justice can be done properly in each case.

However, there are no provisions on this in the Bill.

Proposals which may be added as Government amendments or brought forward in a future bill

In his press conference on 21 June, the Prime Minister highlighted three changes which would be made by this Bill. Only one of those three is in the Bill as introduced in the Commons – the new offence of threatening with a knife in public or in school premises, which would have a mandatory custodial sentence for adults. The other two may be introduced through government amendments at a later stage, although it is possible they may be part of a separate bill. These are:

- A criminal offence of squatting[159]
- Provisions relating to householders who use reasonable force to defend themselves against burglars[160]

The Prime Minister's comments on these three provisions were as follows:

> The legislative proposals that Ken Clarke is setting out today are one part of that approach. They include a tough package to fight crime, putting the system on the side of the victim. So, first, tough action on knife crime, which has been the cause of so many tragedies in our communities. Even after all these tragedies far too many people still think they can go out armed with a knife. We need to send the clearest possible message that this simply has to change. So we will introduce, for the first time in legislation, a compulsory jail term for anyone threatening someone with a knife.
>
> Second, anyone who's had squatters in their property will know how incredibly difficult it is to get them out, so we are proposing and will briefly consult on a criminal offence of squatting, to be introduced in this forthcoming Bill.
>
> Third, the public have rightly been outraged by some prosecutions of home owners defending their property from criminals. So we'll put beyond doubt that home owners and small shop keepers who use reasonable force to defend themselves or their properties will not be prosecuted.[161]

At the press conference, the Prime Minister also announced that there would be further consultation on some sentencing and parole issues which would result in further legislation in the autumn. Again, it is not clear at this stage whether this would be through government amendments or in a separate bill:

> The consultation also raised significant concerns about the effectiveness of indeterminate sentences – so-called 'IPPs' – introduced by the last government. We have inherited a system that is unclear, inconsistent and uncertain. Unclear because actually a large proportion of the public don't really know what indeterminate sentences

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159 Further background on this issue can be found in Library Standard Note 355, *Squatting*, 28 March 2011

160 Further background on this issue can be found in Library Standard Note 2959, *Householders and the Law of Self Defence,* 30 June 2010

161 Prime Minister's Office Press Release, *PM's press conference on sentencing reforms* 21 June 2011

> are or how they work. Inconsistent because they can mean that two people who commit the same crime can end up getting very different punishments. And uncertain because victims and their families don't have any certainty about the sentence that will be served or when their assailants will be let out. So we're going to review the existing system urgently with a view to replacing it with an alternative that is clear, tough and better understood by the public. Let me set out what this alternative would involve.
>
> First, there'd be a greater number of life sentences, including mandatory life sentences for the most serious repeat offenders. I think life sentences are well understood and liked by the public.
>
> Second, instead of serious sexual and violent offenders being released half way through their sentence, we propose they should spend at least two-thirds of that sentence in prison and that such offenders should never again be released early without the parole board being satisfied that it's safe to let this happen.
>
> Third, we also propose there should be compulsory programmes for dangerous offenders while they're in prison to make them change their ways and not commit more crimes when they are eventually released. And we will re-examine the parole board arrangements for the rehabilitation of those with indeterminate sentences to ensure that real work is done to reform offenders while they're in prison.
>
> Now, the review I'm announcing today will assess these changes and consider how such a new sentencing framework would allow us to replace the existing regime. We'll come forward with legislation in the autumn. In the meantime, indeterminate sentences will continue to be available to the courts as they are now. And let me be clear. The changes we propose will need to maintain or strengthen the protection of the public so they can have full confidence in the system. This is a non-negotiable red line for me and for this government. The public need to know that dangerous criminals will be locked up for a very long time. I'm determined that they will be.

6 Sentencing provisions

6.1 Background

The present sentencing regime has evolved over many years. There have been a number of major statutes in recent years which have attempted to bring a coherent overall structure to sentencing. The first of these was the *Criminal Justice Act 1991* which set out requirements on courts with regard to custodial and non-custodial sentences. After a series of Acts in subsequent years, the *Powers of Criminal Courts (Sentencing) Act 2000* consolidated sentencing law, but parts of it were amended before it had fully come into force, and further amendments were made by the *Criminal Justice Act 2003*. This Act, in turn, has been amended by others.

The regime of issuing sentencing guidelines for courts has also changed several times in recent years. Before 2004, sentencing guidelines were laid down by the Court of Appeal Criminal Division in the form of guideline judgements. In 1998, the *Crime and Disorder Act 1998* created the Sentencing Advisory Panel (SAP). This was a quango which existed to promote consistency in sentencing by providing advice to the Court of Appeal Criminal Division. Between 2004 and 2010, the Sentencing Guidelines Council (SGC) operated under provisions in the 2003 Act, although still with advice from the SAP. In 2010, the position changed again, when the *Coroners and Justice Act 2009* replaced the SAP and the SGC with the Sentencing Council.

In its Coalition Agreement, the Government promised to conduct a full review of sentencing,[162] and *Breaking the Cycle* set out the initial conclusions from that work in chapter 4, commenting that an overhaul of the sentencing framework was "long overdue".[163] It proposed to "move all offenders to a single sentencing framework", and posed questions about the best way to achieve this. The response from the Sentencing Council said that this kind of codification would be of great benefit, and would probably be a task for the Law Commission:

> The Council believes it would be extremely valuable to consider the codification of sentencing law. There are currently a vast number of statutory provisions in different Acts that take effect on different categories of offenders in different ways. The Council believes that the codification of the framework would benefit all those in the criminal justice system by streamlining the process and promoting greater consistency in sentencing. Codification also has the potential to realise considerable efficiency savings due to the potential reduction in time and resources that are currently required to go through the existing legislation. If clarified, the Council also believes that public confidence in sentencing and in the wider criminal justice system is likely to be improved. The Council recognises that any work on codification would be likely to be initiated by the Law Commission and wrote to them on this topic in October 2010.The Council believes that there would be a significant benefit to all involved in the criminal justice system, and the wider public, if priority were given to the harmonisation of the variety of early release frameworks and schemes that currently apply in different ways dependent on offence date and sentence length. [164]

The response from the Criminal Sub-Committee of the Council of HM Circuit Judges called for consolidation into one single sentencing Act, but also noted that this would take a great deal of time.[165]

This Bill does not represent a "fundamental revision" of the sentencing framework, which is clearly a huge task. However, it does take some small steps towards simplifying and consolidating the law in certain areas – see particularly the discussion on clauses 93-102 below. As noted above, the Government has indicated that there will be a further review of Indeterminate Sentences for Public Protection in the coming months. It remains to be seen whether there will be any more far-reaching review with a view to consolidating and simplifying sentencing law.

6.2 The Bill's general sentencing provisions

Compensation orders

The idea of making offenders pay compensation to their victims has a long history, but it is only since the 1970s that it has become a regular and significant part of sentencing.[166] The current statutory requirements are contained in sections 130-134 of the *Powers of Criminal Court (Sentencing) Act 2000*. Section 130 allows the court to consider making an order requiring the offender to pay compensation for any personal injury, loss or damage resulting from the offence. Where the offence has resulted in death, the offender can be made to

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[162] HM Government, *The Coalition: Our Programme for Government*, May 2010, p23

[163] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010

[164] Sentencing Council, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders - Response from the Sentencing Council*, 2011, Q32

[165] The Criminal Sub-Committee of the Council of HM Circuit Judges, *Breaking the Cycle – Observations of the Criminal Sub Committee of the Council of HM Circuit Judges*, March 2011, pp7-8

[166] See Andrew Ashworth, *Sentencing and Criminal Justice*, 2010, pp 322-27, for a discussion of the history of compensation orders.

make payments for funeral expenses or bereavement. If the court does not make a compensation order, it must give reasons.

Breaking the Cycle said that the Government would "encourage greater use of compensation orders, and consult on creating a positive duty for sentencers to consider making a compensation order if there is a direct victim who has suffered harm or loss".[167] Accordingly, **clause 53** places courts under an express duty to make such orders in any case where they would be allowed to do so under section 130.

Duty to give reasons for, and explain the effect of, a sentence

Section 174 of the *Criminal Justice Act 2003*[168] states that any court passing sentence on an offender must state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed. It must also explain to the offender in ordinary language—

- the effect of the sentence,
- where the offender is required to comply with any order of the court forming part of the sentence, the effects of noncompliance with the order,
- any power of the court, on the application of the offender or any other person, to vary or review any order of the court forming part of the sentence, and
- where the sentence consists of or includes a fine, the effects of failure to pay the fine.

Explanations of sentences are generally given orally rather than in writing.

A legal textbook on the *Criminal Justice Act 2003* states:

> Section 174 imposes a general duty on courts to give reasons for, and to explain the effect of, the sentence which is being passed on an offender. The section brings together in one place various obligations to give reasons, and to provide explanations, which a sentencing court already has by virtue of various legislative provisions. It also adds in some new ones. While nobody can doubt the importance of a sentencing court giving reasons for the sentence it has passed on an offender, the onerous nature of these diverse requirements is striking to see, especially now that they are gathered together in one place. It should not be forgotten that these obligations apply to lay magistrates, and to part-time sentencers such as recorders, as much as they do to the full-time judiciary.[169]

Clause 54 replaces section 174 with a new version of the section "retaining a general duty to explain a sentence and reducing the specific requirements on the court".[170]

Community orders

In 2000, the Labour Government ordered a fundamental review of sentencing and its impact on reoffending. The result was the Halliday report, which was published in July 2001.[171] The report noted the proliferation of community orders in recent years, which it saw as an obstacle to consistent sentencing. It recommended, amongst other changes, scrapping a

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167 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010, p20

168 as amended by *Coroners & Justice Act 2009*

169 Blackstone's *Guide to the Criminal Justice Act 2003* p205

170 *Explanatory Notes*, p46, paragraph 308

171 Home Office, *Making Punishments Work: A Review of the Sentencing Framework for England and Wales*, July 2001

number of distinct orders and presenting these as requirements within a single generic "community sentence".[172] Accordingly, the *Criminal Justice Act 2003* overhauled the range of community orders for adults, subsuming most of them into a new "community order" with various possible requirements including unpaid work, curfews and drug and alcohol treatment.

Breaking the Cycle criticised what it saw as an "overly centralised approach" to community orders, stating that the Government wished to change them in order "to give providers more discretion to supervise offenders and secure the best reduction in reoffending".[173]

At present, while an order must specify a date by which all its requirements must have been complied with, there is no express provision about when the order itself comes to an end. **Clause 55** provides that a community order comes to an end on the date specified. However, this is subject to a provision where there is an unpaid work requirement, so that the order continues in force until that requirement is complied with.

Clause 56 deals with breaches of orders. At present, schedule 8 of the 2003 Act gives courts the option of dealing with the breach either by varying the order to make its requirements more onerous or revoking it and re-sentencing the offender as if he had just been convicted. Clause 56 gives the court the new option of taking no action in relation to the breach. It also provides a new power to fine an offender in relation to a breach. In that case the order will continue in force.

Suspended sentence orders

Courts have had powers to suspend prison sentences since the *Criminal Justice Act 1967*. Before the *Criminal Justice Act 2003*, it was only possible to suspend a sentence in exceptional circumstances, but that restriction was abolished from April 2005. Under section 189 of the 2003 Act, a court may make a suspended sentence order where it imposes a sentence of between two weeks and 12 months. The sentence can be suspended for between six months and two years. The court must also order the offender to comply at least one "community requirement". These are the same kinds of requirements which can form part of a community sentence (for example, unpaid work or drug rehabilitation). Once suspended, the prison sentence will not take effect unless the offender fails to comply with the community requirement, or is convicted of a further offence during the period of the suspension.

Breaking the Cycle consulted on whether courts should be given more flexibility:

> We also propose to reform the suspended sentence order. We recognise that the power to suspend a custodial sentence can be a useful tool in cases where the threat of custody is sufficient to incentivise an offender to reform. We are considering whether we should allow courts to impose a suspended sentence for a custodial period of longer than the current 12 months and providing a new choice as to whether or not to impose community requirements. This would give courts more discretion to make best use of suspended sentences, and to target resources spent on community requirements on those who would most benefit from them in respect of punishment and rehabilitation.[174]

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[172] Ibid, paragraph 6.6

[173] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010, p58 and 11

[174] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010, p58

Clause 57 would enable courts to suspend longer sentences of imprisonment (up to two years rather than 12 months) and give courts discretion as to whether or not to impose community requirements. **Clause 58** would give the court a new power to impose a fine for breach of a suspended sentence, as an alternative to sending the person to prison. The fine could be up to £2,500.

Requirements under community orders and suspended sentence orders

Clauses 59-64 amend the provisions governing the imposition of various requirements for community orders or suspended sentence orders. For example, a court can impose "programme requirements" under which an offender could be required to follow an accredited programme to address particular aspects of offender behaviour, such as alcohol or drug addiction. **Clause 59** reduces the number of things which the court must specify when imposing such a requirement.

Breaking the Cycle said that the Government would "make curfews tougher to punish offenders and give communities respite from their criminal behaviour".[175] Accordingly, **clause 60** would increase the maximum period of hours in the day for which the curfew could apply from twelve to sixteen hours. It would also increase the maximum period for which a curfew could be imposed from six to twelve months.

Clause 61 introduces a new express power to prohibit offenders from travelling outside the British Isles, to add to existing possible requirements restricting movements, such as curfews and residence requirements. **Clauses 62 to 64** would give courts greater discretion in relation to drug rehabilitation, and alcohol and mental health treatment.

Youth sentences

Clauses 67-70 make changes to various orders which courts can impose on young offenders.

Community orders

Background to the Labour Government's changes to the youth justice system can be found in Library Standard Note 5896, *Young offenders: What next?* As part of these changes, the *Crime and Disorder Act 1998* introduced a range of new interventions and sentences, including new community orders, including reparation orders requiring young people to make reparations to victims, and parenting orders designed to reinforce and support parental responsibility.

Further remedies were then added to these, such as referral orders which were introduced in 2002. The result was a wide range of possible disposals. The *Criminal Justice and Immigration Act 2009* rationalised these with effect from November 2009. Part 1 of this Act replaced many of the existing orders with new youth rehabilitation orders, which give the court a menu of different requirements to impose upon the young offender.[176] These include requirements to participate in certain activities, to undergo supervision or to obey a curfew. Most of them were modeled on existing provisions, although there were some modifications. Further background to the changes can be found in Library Research Paper 07/65, *The Criminal Justice and Immigration Bill* (9 August 2007) which was prepared for the Bill's second reading.

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[175] Ibid, p14
[176] Section 1

Custody

Young people may be sentenced to a period of imprisonment under a Detention and Training Order (DTO) or under "Section 90/91"[177] which covers murder and other very serious offences. The DTO can be given to 12 to 17-year-olds and the length of the sentence can be between four months and two years. The first half of the sentence is spent in custody while the second half is spent in the community under the supervision of the YOT.

Detention may take place in Prison Service young offenders' institutions (YOIs), privately run secure training centres (STCs) or Local Authority Secure Children's Homes (LASCHs).

The Bill makes changes to the provisions governing referral orders, detention and training orders and youth rehabilitation orders.

Referral orders

Referral orders were introduced by the *Youth Justice and Criminal Evidence Act 1999* and, after pilots, were implemented nationally in April 2002. A referral order is now the main sentence given to a young person who pleads guilty on a first time conviction, unless the charge is serious enough to warrant custody, or so minor that the court proposes to give an absolute discharge. They require young people to attend a Youth Offender Panel, which is made up of two local volunteers and a YOT member. The panel, with the young person, their parents or carers and the victim (where appropriate) agree a contract lasting between three and 12 months with the aim of preventing reoffending. *Breaking the Cycle* sought views on how referral orders could be made more flexible.

The provisions governing referral orders are contained in sections 16 to 17 of the *Powers of Criminal Courts (Sentencing) Act 2000*, as amended. These contain a discretionary power for the court to make a referral order or discharge offenders where they have pleaded guilty to an offence even if it is not their first offence. However, the court may only do this where the offender has not previously received a referral order, or has received one but is recommended as suitable for another by an "appropriate officer".[178] Under the present discretionary power, the court has to choose between making a referral order or absolutely discharging an offender. **Clause 65(1)** amends the discretionary power so that the court would be able to choose to conditionally discharge the offender instead. **Clause 65(2)** would remove the restriction on offering referral orders to young offenders with previous convictions. They would no longer need to be recommended as suitable, and there would be no limit on the number of referral orders which a repeat offender could receive.[179]

Detention and training orders

Clause 66 would extend the powers of the court to punish an offender who has breached their DTO by failing to comply with the supervision requirements. It would add a new power for the court to impose an additional period of supervision to the current power to impose a period of detention for a breach. It also makes changes to the periods of supervision or detention.

Youth rehabilitation orders

Clause 67 mirrors the changes to the curfew requirements for community orders for adult offenders (see **clause 60** above). Thus the curfew could apply for sixteen rather than twelve hours per day, and the requirement could last for twelve months, rather than six at present. **Clause 68** would give courts greater discretion about mental health treatments. **Clause 69** makes changes to the rules on the duration of youth rehabilitation orders, and **clause 70**

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[177] Of the *Powers of the Criminal Courts (Sentencing) Act 2000*
[178] Section 17(2B) and 17(2C)
[179] *Explanatory Notes*, p53

increases the maximum fine for breach of an order to £2,500; it is currently £250 if the offender is under 14, or £1,000 in other cases.

Repeal of uncommenced provisions – Custody plus and intermittent custody

Clauses 70-72 repeal provisions in the *Criminal Justice Act 2003* which have never been brought into force.

Section 154 of the 2003 Act would have increased the maximum prison sentence that could be imposed in a magistrates' court from six months to twelve months. It was intended to "give magistrates greater sentencing powers of up to 12 months so that they can hear and sentence more cases appropriate to them".[180] The increased powers would be linked to the introduction of a new sentence to be known as "custody plus":

> **Reform of short custodial sentences**
>
> 5.22 The Government believes that existing short-term custodial sentences, where the offender is released from prison at the halfway point of sentence, often with no community support or supervision afterwards, are usually ineffective. Short custodial sentences with no support or supervision after release do not allow the correctional services to do any meaningful behavioural or rehabilitation work with offenders and reoffending rates for short-term prisoners are high.
>
> 5.23 Although short prison sentences will continue to be appropriate for some offenders, we want to ensure they support our overall aim of reducing reoffending. The best way of achieving this is to have proper support, supervision and follow through of education programmes, drug treatment and anger management schemes in the community. The consultation on sentencing reform showed that there was widespread recognition of the need to make short sentences more effective in this respect.
>
> **CUSTODY PLUS**
>
> 5.24 For this reason, the Government will introduce a new sentence of Custody Plus, which will be served partly in custody and partly in the community. This sentence could eventually replace all custodial sentences of up to 12 months. 5.25 Custody Plus will consist of a maximum period of 3 months in custody served in full, followed by a compulsory period of supervision in the community, within an overall sentence envelope of up to 12 months. During the period in the community, the offender will be subject to rigorous requirements, which will be designed to address the particular factors that underlie their criminal behaviour and cause them to reoffend. The Pre-Sentence Report will set out the individual needs for each offender and ensure that components of the community sentence are tailored to the individual offender.
>
> 5.26 The supervisory part of the sentence should flow on seamlessly from the custodial one to ensure that the offender is given the best possible opportunity of rehabilitation. Should the offender not complete any one of the elements making up the community supervision period, they are likely to return to custody.
>
> 5.27 Chapter 4 outlines how, subject to legislation, we will extend magistrates' sentencing powers from 6 months to 12 months. This change will allow magistrates to pass a sentence of Custody Plus.[181]

In response to a Parliamentary Question in 2006, the Labour Government indicated that custody plus would not be introduced until adequate probation resources were available.[182]

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[180] Home Office, *Justice for All*, CM 5563, July 2002, p12
[181] Ibid, pp92-93

A later PQ in October 2006 said that the Government's decision to defer custody plus reflected "the prioritisation of prison and probation resources towards more serious offenders."[183]

The 2003 Act also provided for "intermittent custody orders", which would have allowed "part time" imprisonment, such as at weekends or during parts of the day or night. The Labour Government had piloted intermittent custody. However, a Home Office research report found that whilst it had had some success, it was relatively expensive and appropriate for only a minority of offenders.[184] The then Justice minister, David Hanson, said in a Written Answer in March 2008 that "(t)he infrequency with which the disposal was likely to be used was not considered to justify the cost of implementation".[185]

Clause 72 and **schedule 9** repeal those provisions in the 2003 Act which would have introduced custody plus and intermittent custody. There has been some criticism of this because the Conservative manifesto contained a commitment to "extend the length of custodial sentences that can be awarded in a Magistrates' Court from six to twelve months".[186]

7 Bail and remand

Chapters 2 and 3 of Part 3 of the Bill deal with bail and remand. The Government's aim is to ensure those awaiting trial are not unnecessarily remanded into custody, thus reducing the numbers of those in custody. The intention is that only those who would be likely to receive custodial sentences if convicted will be remanded into custody. This principle would apply both to adults and children.

The Regulatory Impact Assessment on the Government's Response to *Breaking the Cycle* estimates that reducing the use of remand in custody will save between 1,200 and 1,400 prison places in 2014/15, saving £40 million in the same year.[187]

The Bill also changes the way the courts would have to deal with children who cannot be granted bail. It would provide that most of these children would have to be remanded to local authority accommodation rather than youth detention accommodation. There would be exceptions, however, for example for those charged or convicted with serious offences or those with a recent history of absconding.

7.1 Bail - the existing law

The *Bail Act 1976* (as amended) sets out the general law on bail. Section 4 of the Act creates a presumption in favour of bail. However, this right does not apply if one of the exceptions specified in Schedule 1 applies or if section 25 of the *Criminal Justice and Public Order Act 1994* applies.

The principal exceptions in Schedule 1 include cases where the offence is punishable by imprisonment and there are substantial grounds for believing that the defendant would abscond, commit an offence or interfere with witnesses while on bail. There are also

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182 HL Deb 4 May 2006 c565
183 HL Deb 18 October 2006 cWA185
184 Clarissa Penfold et al, *The intermittent custody pilot: A descriptive study*, Home Office Online Report 23/06, 2006
185 HC Deb 20 March 2008 c1357W
186 Conservative manifesto, *Invitation to Join the Government of Britain*, 2010, p56; see "Tories plot to ambush Clarke", *Sunday Times*, 26 June 2011, p2
187 Ministry of Justice, *"Breaking the Cycle" - Government Response Impact Assessment*, MOJ092, 21 June 2011

provisions to allow bail to be denied if the defendant needs to be kept in custody for his own protection or, if he is a child or young person, for his own welfare.

In the 1976 Act, a "child" is defined as one who is under the age of 14, and a "young person" is one who has reached 14 but is under 17. This leaves 17 year olds to be treated as adults, which some regard as an anomaly, and inconsistent with the *United Nations Convention on the Rights of the Child*. As noted above, young people can be detained in Prison Service or privately-run Prison Service young offenders' institutions (YOIs), privately run secure training centres (STCs) or Local Authority Secure Children's Homes (LASCHs).

Under section 25 of the *Criminal Justice and Public Order Act 1994* the presumption in favour of bail under section 4 of the 1976 Act does not apply to a person who has been charged with or convicted of certain serious offences (such as murder or rape) if they already have a previous conviction for any such offence. Section 25 provides that such a person shall only be granted bail if there are "exceptional circumstances" which justify it.

Bail can be with or without conditions. Detailed legal guidance on the legislation governing bail is available on the Crown Prosecution Service website.

7.2 Consultation on the changes to bail

The main proposals on bail and remand in *Breaking the Cycle* were as follows:

Adults

For adult defendants, there should be a new "no real prospect" test, which would mean that people would be released on bail if they would be unlikely to receive a custodial sentence if found guilty:

> 179. In order to make best use of prison to punish serious and dangerous offenders, we also need to rethink how we use it for remand. When it is used properly, remand in custody helps to keep the public safe, and bail legislation has rightly been strengthened recently to reflect that priority better. Clearly the courts must be able to remand defendants in custody in serious cases, and where there is a risk of reoffending of a sort that would cause injury. However, each year several thousand people are remanded in custody awaiting trial for offences for which they would be unlikely to receive a custodial sentence if they were convicted, because the offence of which they are accused is not serious enough to warrant it. In these cases custodial remand achieves little. There are limits to what the criminal justice system can properly do with unconvicted prisoners. The Government therefore intends to remove the option of remand in custody for defendants who would be unlikely to receive a custodial sentence. This will not impede justice. If a defendant fails to attend, the trial will proceed in their absence, unless there is good reason why it should not. [188]

Children and young people

For younger defendants:

- There would be a "single remand order" for all under 18s (thus including 17 year olds as young people)
- Responsibility for this group, together with funding, would gradually be transferred to local authorities to give them the incentives to invest in alternative strategies

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[188] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010,p53

- A similar "no real prospect" test would be applied to young people, so that those who would be unlikely to receive a custodial sentence would no longer be remanded in custody:

> 245. Whilst custodial sentences for young people have been reducing, the use of custodial remand has not been falling at the same rate. Young people on remand now account for 28% of the custodial population. Evidence shows that 57% of young offenders on remand do not go on to receive a custodial sentence. To remedy this we need to ensure that local authorities have the right incentives to invest in alternatives strategies for this group of young people.
>
> 246. The current remand legislation for young people consists of a mixture of different frameworks for deciding where a young person is remanded and who pays, depending on the young person's age and gender. This needs simplifying. To achieve this we propose to create a single youth remand order for 12–17 year olds. This would, gradually and with an associated transfer of funding, transfer the full costs of all remand to local authorities. Placements of remanded young people would still be commissioned and managed centrally and the local authority would be charged for this service.
>
> 247. By creating a single order, we will address the current anomaly of 17 year olds being treated as adults in remand legislation. We will ensure that the structure is fully compatible with the United Nations Convention on the Rights of the Child which provides that a child means all persons under the age of 18.
>
> 248. Pending the introduction of a single youth remand order, we propose to use the existing legal framework to make local authorities gradually responsible for the full cost of court ordered secure remand, while retaining the central function to place children in secure custodial remand. This complements our wider move towards paying by results and giving local agencies more flexibility and responsibility in providing services.
>
> 249. We also propose to amend the Bail Act to remove the option of remand for young people who would be unlikely to receive a custodial sentence. This would affect the 57% of young people on remand who are currently acquitted or receive a community sentence. This is consistent with the proposals for adults set out at Chapter 4.[189]

7.3 Responses to the consultation

Responses to these proposals were mixed. Many welcomed them, but others questioned whether in practice it would be possible to predict the outcome of court cases at the outset.

The law reform and human rights organisation Justice was supportive of the proposals, although it pointed to the need to retain the power to remand in cases where offenders might interfere with witnesses, or where this was necessary for protection or welfare.[190] Liberty also supported the changes:

> We also strongly support measures to remove the option of **remand** for defendants unlikely to receive custodial sentences. The deprivation of liberty involved in imprisonment can lead to family breakdown, loss of employment and wider social stigmatisation. As a result, Liberty strongly believes that prison should be reserved for those convicted of or awaiting trial for offences of a serious nature which are likely to justify the imposition of custody after proper consideration of the nature of the crime

[189] Ibid, pp71-2
[190] Justice, *Response to Sentencing Green Paper Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, March 2011, p8

> and any mitigating or aggravating factors. We further welcome plans to create a single **remand** regime for all minors, recognising the unique position of children in the criminal justice system and addressing the injustice created by **remand** legislation which treats 17 year olds as adults.[191]

Similarly, the Corston Coalition (which campaigns for a shift from imprisonment to community sentencing for vulnerable women offenders) said it was "delighted" with the proposal for a "no real prospect" test. The Prison Reform Trust supported the Government's proposals, but thought the Government should go further by raising the minimum age to custodial remand from 12 to 14.[192]

By contrast, the Criminal Sub-Committee of the Council of HM Circuit Judges was opposed to the "no real prospect" test:

> We are wholly opposed to the proposal that a Court should form a view whether a defendant might eventually receive a non custodial sentence and, having formed that view, be required to release that defendant on bail. We do not believe that inappropriate decisions are being made nor do we believe that offenders are being remanded in custody when that is not considered to be the proper course. This proposal is based upon the misconception that the outcome of the process is a guide to the situation at the outset. It is not:
>
> i The initial bail decision is taken at an early stage before all relevant information is available both about the offender and about the offence.
>
> ii Courts apply the Bail Act criteria considering risk posed by the offender.
>
> iii At an early stage in the process the Court is in no position to predict sentence but likely outcome is taken into account when the risk is assessed.
>
> iv Even if an initial assessment of a likely outcome is possible there are many factors that come into play between the institution of proceedings and the sentencing decision. There are, for example, cases where other matters come to light or where the offender is unable or unwilling to engage in a community sentence.
>
> v A previous offending pattern may make it very unlikely that an offender will attend the sentencing hearing or refrain from offending in the period prior to the sentencing hearing. [193]

The Sentencing Council had similar concerns, pointing (amongst other things) to the "significant challenge" in anticipating a sentence before the full details of the case had been heard", and also to the possibility that the defendant could interfere with witnesses.[194] The Commissioner for Victims and Witnesses pointed to concerns expressed by victims' groups:

> Victims' groups during consultation have expressed alarm about proposals to remove the option of remand where the offence with which they are being charged is unlikely to attract a custodial sentence.

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[191] Liberty, *Liberty's Response to the Ministry of Justice's Proposals on the Effective Punishment, Rehabilitation and Sentencing of Offenders*, March 2011, pp6-7

[192] Prison Reform Trust, *Prison Reform Trust submission to the Ministry of Justice: Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders,* p28

[193] The Criminal Sub-Committee of the Council of HM Circuit Judges**,** *Breaking the Cycle – Observations of the Criminal Sub Committee of the Council of HM Circuit Judges*, March 2011, p10

[194] Sentencing Council, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders - Response from the Sentencing Council*, 2011, p7

> The removal of a remand in custody for defendants unlikely to receive a custodial sentence does not recognise the other safeguards which the Bail Act provides. For example, in cases of domestic violence, the charge may be unlikely in the particular circumstances of the case to lead to a custodial sentence. But if the offender could not provide an alternative address and a custodial remand, even for a temporary period, would prevent that person reoffending and the obvious dangers of interfering with prosecution witnesses, then this is a valid use of remand.[195]

7.4 The Bill's provisions

Clause 73 and **schedule 10** would introduce the "no real prospect" test by amending schedule 1 of the *Bail Act 1976*. As noted above, schedule 1 contains the exceptions to the general presumption in favour of bail. Schedule 10 of the Bill amends this, so that these exceptions will no longer apply where there is no real prospect that the defendant will be sentenced to a custodial sentence. Paragraph 12 inserts a new exception to the right to bail which is not subject to the new "no real prospect" test. This new exception to bail relates to a person who, if released on bail, might commit an offence by engaging in conduct involving domestic violence.

In this part of the Bill, there is a distinction made for under-18s. They will continue to be subject to the exceptions in schedule 1 to the 1976 Act. The Explanatory Notes explain that this is to ensure that those young defendants who would otherwise be given bail under the new "no real prospect" test can continue to be given "looked after" status by the local authority.

Clause 74 provides that children awaiting trial or sentence (or those subject to extradition proceedings) must be remanded in local authority accommodation **unless** certain conditions are met. If one of two sets of conditions are met, the young person would be remanded to youth detention accommodation. They are set out in **clauses 81-82** (or **clauses 83-84** for extradition cases).

The first set covers the **seriousness of the offence** (which must be violent or sexual or punishable by fourteen years imprisonment if it had been committed by an adult).

The second set covers the **behaviour of the defendant** while on remand – for example, whether they have a recent history of absconding or committing imprisonable offences on remand, or if they are alleged to have committed the present offence whilst on remand. When the court is applying this set of conditions, the offence in respect of which the offender is charged or convicted must be an imprisonable offence in any event.

Clause 74(5) defines a "child" as a person under the age of 18, thus removing the anomaly regarding 17 year olds. **Clause 75** sets out the arrangements for remand to local authority accommodation, and clause 76 allows the courts to impose conditions on a child who is so remanded. Requirements for electronic monitoring are set out in **clauses 77-79.**

8 Crediting periods on remand

It was noted in section 7 of this Research Paper (above) that many, including the Government, consider that an overhaul of sentencing law is necessary. The Bill aims to go some way towards simplifying the law. One of the proposals *Breaking the Cycle* which was designed to help with this process was to:

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[195] Commissioner for Victims and Witnesses, *Green Paper Response – Commissioner for Victims and Witnesses*, 4 March 2011, p13

- create a simpler way to calculate the impact of time spent remanded in custody on the time that should be served as part of a prison sentence and remove the burden from the courts to do this[196]

The present law on this is contained in section 240 of the *Criminal Justice Act 2003*. This was introduced in response to difficulties which had existed in the past, and which had been noted by the 2001 Halliday report on sentencing:

> 7.2 The present framework has caused great difficulties in relation to sentence calculation (the means of translating the sentence of the court into a period of custody), in particular the counting of remand time. The basic principles – namely that time spent on remand or in police custody reduces any sentence of imprisonment, but must not be counted more than once – are now fairly clear. But the application of these principles has been, and can still be, ambiguous as a result of the successive tranches of legislation and judgements by the courts which overlay the basic statutory provision in Section 67 of the Criminal Justice Act 1967. An attempt to devise a workable system whereby remand time is taken into account by the courts was embodied in section 9 of the Crime (Sentences) Act 1997 (now section 87 of the Powers of Criminal Courts (Sentencing) Act 2000) – but the provision was never brought into force because of the difficulties of calculating police detention and court custody time. [197]

Section 240 applies where the person has been remanded in custody for the offence for which he was convicted, or for a related offence (based on the same facts or evidence). Normally, the court must direct that the number of days for which the offender was remanded in custody is to count as time served by him as part of the sentence. However, if in the court's opinion, it would be "just in all the circumstances" not to give such a direction, it has discretion not to do so.[198]

The Sentencing Council said in its response to *Breaking the Cycle* that simplification would be beneficial, but warned that the scheme would have to avoid the risks of legal action in the event of wrong calculations.

> The Council is interested in the proposal to create a simpler way to calculate the impact of time spent on remand on the time that should be served as part of a prison sentence and remove the burden of this calculation from courts. The Council would be keen to see further detail of how this might be done in practice. In line with the comments the Council makes below about the importance of sentences being clear and transparent and explained in court the Council is cautious to see that the implementation of this proposal does not detract from the clarity of the explanation that might be given. The Council believes that a simplification of the operation of the existing regimes relating to remand would be beneficial. Such a simplification might draw from the schemes under the 1967 and 1991 Criminal Justice Acts and include a presumption that the time spent in custody or on electronic curfew count towards sentence unless the court sets out a reason why they should not apply, whether in total or in part. The Council recognises that previous schemes resulted in challenges to the calculations in the form of judicial reviews and also civil claims against the prison

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196 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010, p51

197 Home Office, *Making Punishments Work: A Review of the Sentencing Framework for England and Wales*, July 2001, paragraph 7.2

198 Section 240(4). The provision also allows the court not to make a direction to count periods in remand as time served under rules made by the Secretary of State to cover concurrent and consecutive sentences – i.e. the *Remand in Custody (Effect of Concurrent and Consecutive Sentences of Imprisonment) Rules 2005* (SI 2005/2054)

> authorities for unlawful detention and would be keen to see that any revised scheme avoided these risks as far as was possible.[199]

Clause 90 would replace section 240 with a new section 240ZA. Under this, instead of the court directing the remand time to be counted towards a prisoner's sentence, this would be calculated and applied administratively. There would no longer be discretion to disapply any such time. Subsections (4) to (9) make the detailed provisions.[200]

Clause 91 deals with the treatment of periods of remand on bail subject to electronic monitoring ("tagged bail"). Currently section 240A of the 2003 Act gives a power to direct that time spent remanded on tagged bail counts towards any subsequent sentence imposed, provided that the sentence is imposed for the same offence for which the defendant is remanded or a related offence. Two days successfully completed on tagged bail count as one day of the sentence. The new provisions sets out a number of detailed steps, but these do not add any substantial changes. The main provision is still that each day on tagged bail effectively counts as half a day against the sentence.

9 Release on licence

9.1 Background

For many years, there have been rules in place to allow prisoners to be released, either automatically or following a review of their case by the Parole Board or the Secretary of State, before the end of their sentence. These have been designed to assist rehabilitation in the community by enabling the probation service to supervise and recall offenders to prison if they reoffend or breach conditions set for them.[201] The rules also assist rehabilitation and discipline within the prison, particularly for more serious offenders who need parole before they can be released.

One of the reasons why the law which determines how long prisoners have to remain in prison can be so complex is that, when changes are made, they may not be retrospective. This means that different groups of offenders are treated differently, usually according to when they committed their offence. Also if the relevant provisions have not been consolidated, it can mean looking at several statutes (together with associated Commencement Orders which contain savings, repeals, savings of repeals and transitional provisions) to see which rules apply.

Until quite recently, changes in the law on early release for prisoners on fixed term sentences had left a complex situation. After the *Criminal Justice Act 2003* first came into force, there were different regimes in place for prisoners depending (in part) on whether their sentences had been committed before 4 April 2005. Prisoners on fixed term sentences who committed their offences after that date were, with certain exceptions,[202] released automatically at the half way point. Those whose offences were committed before that date (or serving sentences of less than 12 months regardless of the date of offence) came under the rules contained in the *Criminal Justice Act 1991*. Those sentenced to less than four years were released automatically at the half way point. Prisoners with longer sentences would be eligible for release after the half way point, but only subject to a recommendation from the Parole Board. If they did not receive this, they would eventually be released at the two-thirds point of their sentence.

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199 Sentencing Council, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders - Response from the Sentencing Council*, 2011, Q32

200 For example, for time on remand in connection with other matters and to prevent double counting in the case of consecutive or concurrent sentences

201 In the case of those sentenced to 12 months or more

202 such as certain violent or sexual offenders

The position was simplified to some extent by the *Criminal Justice and Immigration Act 2008*. All prisoners serving determinate sentences of 12 months or more are now automatically released after serving half their sentence, unless their sentence is of four years or more for a specified sexual or violent offence listed in Schedule 15 of the 2003 Act, in which case they remained subject to the 1991 Act discretionary release by the Parole Board between the half and two-thirds point. As a result of the 2008 Act, the automatic release at the half way point provision now applies retrospectively to many prisoners sentenced to four years or more for offences committed before 4 April 2005, unless they are in the excluded sexual or violent category. The Parole Board still deals with these sexual and violent cases, as it does those of people convicted for indeterminate sentences, such as life imprisonment or Indeterminate Sentences for Public Protection.

9.2 Early release for prisoners serving less than 12 months – interpretation problems

Clause 93 and **schedule 12** deal with prisoners serving less than 12 months. People in this group have been automatically released unconditionally at the half way point of the sentence for many years. As was discussed under **clauses 70-72** above, the previous Government had intended to introduce a new sentence called Custody Plus for this group under the *Criminal Justice Act 2003*. Had the relevant provisions been brought into force, these prisoners, like longer term prisoners, would have been released on licence for part of their sentence and subjected to a range of conditions designed to assist with their rehabilitation. However, for reasons of limited resources and competing priorities, these provisions were never implemented. As a result, the law governing early release for this under 12 month group was still to be found in section 33 of the *Criminal Justice Act 1991*. This, along with other provisions in Part II of the 1991 Act, had been repealed for most purposes. However, it remained in force for this group as a result of the saving provisions in the *Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions) Order 2005/950*.

This state of affairs meant that it was difficult to find the relevant legislation and it was also very unclear how to combine a less than 12 month sentence (still governed by the 1991 Act) with another sentence of 12 months or more under the 2003 Act, where all the offences were committed after 4 April 2005. These difficulties and the way in which the saving provision was drafted resulted in successful legal action by a prisoner who was serving three consecutive sentences for offences committed after the 2003 Act came into force but were subject to a mixture of the 1991 and 2003 Act release provisions.[203] In June 2010, the Supreme Court handed down a judgment which fundamentally changed the way in which such 'mixed Act' sentences must be applied, with particular regard to how such prisoners' Home Detention Curfew (HDC) eligibility dates are calculated.

Previous judgments by the Court of Appeal had upheld the approach adopted by prisons whereby 'mixed Act' sentences could not be aggregated. This meant the HDC eligibility period could only be calculated on the basis of the last of the sentences to be served (rather than on the total aggregate length of all the sentences combined) and could, therefore, be considerably shorter. The Supreme Court considered this to be unfair and not the correct way to apply mixed Act sentences.

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[203] *R. (on the application of Noone) v Governor of Drake Hall Prison*, 30 June 2010, [2010] UKSC 30. For a synopsis, see Supreme Court Press Summary: *R (on the application of Noone) (Appellant) v The Governor of HMP Drake Hall and another (Respondents) [2010] UKSC 30 (On appeal from the Court of Appeal [2008] EWCA Civ 1097),* 30 June 2010

The court commented that the saving provision in the commencement order in question[204] had been unclearly drafted. Lord Philips, the president of the Supreme Court, described the situation as follows in his opening remarks:

> The road to hell is paved with good intentions. In this case the good intentions were to introduce mandatory rehabilitation for very short term prisoners by coupling time spent in custody with a release period under licence. This was known as "custody plus". Hell is a fair description of the problem of statutory interpretation caused by transitional provisions introduced when custody plus had to be put on hold because the resources needed to implement the scheme did not exist.[205]

The effect of **clause 93** and **schedule 12** is to replicate the position which existed under the *Criminal Justice Act 1991* by inserting a new section 243A into the 2003 Act. This new section sets out that where a person is imprisoned for less than twelve months for an offence committed on or after 4 April 2005, they will be released unconditionally after the "requisite custodial period". This is normally one half of the sentence. Schedule 12 makes consequential amendments, including revoking the problematic transitional and saving provisions. So, rather than having less than 12 month sentences continuing to be governed by the 1991 Act, and the inherent problem that created with 'mixed Act sentences', the new provision will bring the release arrangements for this category into the 2003 Act (along with all the other release provisions for offences committed after 4 April 2005). But this will make no change to the position that has existed for many years that a prisoner who is serving a sentence of less than 12 months will be released unconditionally at the half-way point.

9.3 Restrictions on early release subject to curfew

Clause 94 makes changes to the rules on Home Detention Curfew (HDC). This is a scheme which allows fixed term prisoners to be released with an electronic tag up to 135 days *before* the half way point of the sentence. The provisions allowing HDC were originally introduced into the *Criminal Justice Act 1991* by the *Crime and Disorder Act 1998* with effect from January 1999. Some groups are statutorily barred from HDC, whilst others will be presumed unsuitable and will only be able to apply in exceptional circumstances.

A new HDC scheme was introduced by the *Criminal Justice Act 2003*. This Act removed the statutory bar to HDC for people sentenced to fixed terms of more than four years in prison, although it listed a number of groups who would still be statutorily excluded from the scheme.[206] However, just before the provisions came into effect, the Government decided that prisoners serving sentences of more than four years would be presumed unsuitable for HDC unless there are exceptional circumstances. That policy has remained in place.[207]

As a result, the new scheme is identical to the old one, except for the fact that three of the statutory restrictions of the 1991 Act scheme operate as policy restrictions with a presumption against release under the 2003 Act scheme. The restrictions are for prisoners who:

i. are sentenced to fixed terms of four years or more; or

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[204] *Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions) Order 2005/950* schedule 2, paragraph 14,

[205] The judgement goes on to explain in some detail just why the wording of the savings provisions caused problems for the concurrent sentence provisions set out in sections 263 and 264 of the 2003 Act.

[206] Section 246

[207] See Prison Service Instruction 2003/31, Prison Service Instruction 31/2006 and Prison Service Instruction 55/2010

ii. had previously been recalled to prison for breach of curfew; or

iii had previously been returned to custody by a court for committing an offence during the licence or "at risk" period of a previous sentence

The *Criminal Justice Act 1991* provisions apply to prisoners whose offences were committed before 4 April 2005 and also to anyone sentenced to less than 12 months, regardless of the date of offence. Prisoners sentenced to 12 months or more for offences committed on or after 4 April 2005 are covered by the new provisions introduced by the *Criminal Justice Act 2003*.

In *Breaking the Cycle* the Government said it intended "to maintain the basic structure of the determinate custodial sentence, including the Home Detention Curfew scheme, because it can enable effective resettlement and public protection." They would, however, "take steps to ensure it is better understood and explained."[208]

Clause 94 amends section 246 of the *Criminal Justice Act 2003* to bring the HDC scheme under that Act in line with the one which exists under the 1991 Act. The Explanatory Notes state that this will mean that the "statutory provisions for HDC will be the same for all prisoners".

Clause 96 makes changes to the rules on further release after a person has been recalled to prison. The *Criminal Justice and Immigration Act 2008* introduced a fixed recall period of 28 days for prisoners judged not to be dangerous. They would automatically be released after that 28 day period, rather than having their release decided by the Parole Board.[209] The provisions, which are now contained in sections 255A to 255D of the *Criminal Justice Act 2003* are complex. They allow for two recall schemes – one applying to those suitable for automatic release and one for those who are not.

The Government's response to the consultation made it clear that the Government would "remove some of the current statutory restrictions to allow greater professional discretion to decide when lower risk prisoners who have been recalled to prison may be re-released on licence."[210]

The changes include:

- The executive release of prisoners who had been released from extended sentences (which are for certain violent and sexual offences)

- The removal of restrictions on automatic release for certain categories of prisoner

The Regulatory Impact Assessment on the Government's consultation response estimates will save £10 million and between 200 and 300 prison places.[211]

The Explanatory Notes explain the changes as follows:

Clause 96: Further release after recall

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208 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010,p53

209 Sections 255A to 255D of the *Criminal Justice Act 2003* as inserted by section 29 of the *Criminal Justice and Immigration Act 2008*

210 Ministry of Justice, *Breaking the Cycle: Government Response*, Cm 8070, June 2011, p12

211 Ministry of Justice, *'Breaking the cycle' – Government response impact assessment*, 21 June 2011, p14

442. Clause 96 replaces section 255A to 255D of the 2003 Act, which provide for the release of prisoners after recall, with new sections 255A to 255C. There are two different recall schemes under these provisions. Under section 255B prisoners, if not released executively or by the Parole Board within 28 days, are released at the completion of 28 days detention. Under section 255C prisoners are subject to detention to the end of their sentence unless released executively or by the Parole Board. Section 255A identifies which scheme will apply to a prisoner and sets out the criteria for suitability for automatic release. Recalled prisoners serving extended sentences and those not suitable for automatic release will be dealt with under section 255C.

443. The changes made by the substituted provisions are as follows:

• The combination of the previous section 255C and 255D allows for the executive release of recalled extended sentence prisoners.

• The re-writing of section 255B removes previous restrictions on automatic release for certain categories of prisoner so that such prisoners may be considered for automatic release if they are assessed as sufficiently low risk and suitable.

• New sections 255B(6) and (7) and 255C(6) and (7) prevent prisoners recalled during their HDC period from being re-released prior to their automatic release date unless satisfactory arrangements for further HDC electronic monitoring can be put in place. These are prisoners who have been released on HDC under section 246 and recalled under section 254.

• New section 255B(8) and (9) allows for the Secretary of State, on receipt of new information, to alter the basis of the recall, so that an offender originally intended for automatic release will be dealt with under the standard release provision (section 255C).

444. The amendment to section 244(1) of the 2003 Act by *subsection (2)* of clause 96 makes it clear that for those serving a sentence of 12 months or more a recall under section 254 can override the automatic release date at the half-way point of the sentence. This means where the 28-day automatic recall period ends after the duty to release at the half-way point under section 244, the full 28 days can be served before release. Similarly, the duty to release at the half-way point will not apply if the Parole Board has not directed release under section 255C.

Clause 97 provides for the supervision of young adult prisoners on release from sentences of less than 12 months. The change applies to those with a sentence of Detention in a Young Offenders' Institution (DYOI), which is available for 18 to 20 year olds. Those released from a DYOI sentence of less than 12 months will receive 3 months' supervision. The Explanatory Notes state that this provision recasts a similar provision in section 65 of the *Criminal Justice Act 1991*, which was repealed by the 2003 Act.[212]

[212] Paragraph 445

10 Prisoners' pay and employment

10.1 What work is available for prisoners?

The HM Prison Service website provides information about prison industries and has an article about a National Offender Management Service[213] project to enable prisoners to gain work on their release.

For many years, it has been widely accepted that having a job, both in prison and on release, can help an offender to resettle into the community and avoid further re-offending. The history of employment for prisoners, though, is chequered. A report by the Home Affairs Committee in 2005 argued that it was "indefensible" that there was not enough work for prisoners:

> 154. Whilst the Home Office claim that the key recommendations of the Prison Industries Review are being implemented, it is clear that prison industries remain peripheral to the Prison Service's strategy for rehabilitation. Prison industries continue to be run in isolation from other activities rather than as a complement to other rehabilitation measures. There has been no substantial increase in the number of hours workshops operate. Hardly anywhere in the prison estate does the work regime yet reflect the structured working week found in outside work. (...)[214]

In its response to that report, the previous Government argued that the changes which had fairly recently been made with the passing of the *Criminal Justice Act 2003* and the creation of the National Offender Management Service would lead to the necessary improvements, although finding employment for prisoners was only one aspect of reducing reoffending.[215] The Government later published a Green Paper promising to equip offenders with the skills to enable them to become productive members of society.[216]

In September 2009, the then Justice Secretary, Jack Straw, offered a snapshot of employment rates for male and female prisoners:

> [Over] the period April to July 2009 male **prisoners** were engaged in 11.9 hours of work (**paid** and unpaid) per week on average. For female **prisoners** the average was 12.7 hours per week. The data are taken from the Regimes Monitoring (Regmon) database by means of a query which only picks out the types of purposeful activity which fall under the activity group of "Works". This does not tell us whether or not this is **paid** work. [217]

A list of private contractors providing training and employment in prisons was provided in February last year:

> There are a number of employer partnerships with private sector companies that provide employment and training activities within prisons with some offering employment on release. Some of these operate at an individual prison level and unless they wish to expand their work to other prisons details would not necessarily be kept centrally. Those private sector organisations involved in work for prisoners include Cisco Systems, DHL, Timpson's, Travis Perkins, Trackworks, Pertemps People Group, A4e Ltd., SERCO, and Speedy Hire.

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213 The National Offender Management Service is an executive agency of the Ministry of Justice bringing together HM Prison Service and the Probation Service

214 Home Affairs Committee, *Rehabilitation of Prisoners*, 7 January 2005, HC 193-I 2004-05: chapter 6

215 Government Reply to Home Affairs Committee's report on Rehabilitation of Prisoners Cm 6486, March 2005

216 Home Office, Department for Education and Skills, Department for Work and Pensions *Reducing Reoffending Through Skills and Employment*, Cm 6702, December 2005: Foreword

217 HC Deb 14 September 2009 cc 2146-7W

> In addition, a number of registered charities and public bodies help to provide education and training in prisons and many others provide work for prisoners in the form of contract services. There are also a number of companies that provide paid employment for selected low risk prisoners in the community. There is also a Corporate alliance network of over 100 employers committed to supporting the offender employment agenda in training and recruiting (ex) offenders.
>
> The Learning and Skills Council has let contracts to A4e Ltd., CfBT, JHP Group, Kensington and Chelsea college, Lincoln college, the Manchester college, Milton Keynes college, Norton Radstock college, Prospects, Strode college, Tribal and Working Links to deliver education, skills training and careers information and advice services in public sector prisons and young offender institutions across England.[218]

According to NOMS' annual report for 2009-10, in that year 67,700 offenders completed over 8.9m hours of unpaid work and 35% of offenders were in employment at the end of their sentence.[219]

10.2 The working prison

In his speech to the Conservative party conference on 5 October 2010, Kenneth Clarke said that prisoners should be expected to work hard, in readiness for life outside prison. Private sector organisations could play a part in this, by running businesses within prisons, and could be paid by results.[220]

The Green Paper *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* envisaged that prisons would become "places of hard work and industry" through three main changes. The Ministry of Justice proposed to

- ensure that more prisoners are subject to a structured and disciplined environment where they are expected to work a full working week;
- use the expertise and innovation of the private, voluntary and community sectors to help develop the working prison; and
- implement the Prisoners' Earnings Act in respect of payments to victims funds, and explore other ways to make deductions from prisoners' wages for uses including reparation to victims and communities.

Prisoners should not, the Green Paper went on, mark time in prison but should have challenging and meaningful work:

> 52. Some adult prisoners do work. In public sector prisons, for example, 9,000 prisoners are employed in prison workshops, with many more doing essential jobs to help prisons run smoothly. However, we want to see more prisons using the discipline and routine of regular working hours to instil an ethos of hard work into prisoners. Prison should be a place where work itself is central to the regime, where offenders learn vocational skills in environments organised to replicate, as far as practical and appropriate, real working conditions.
>
> 53. To achieve this transformation we are developing a new type of prison – the working prison. We anticipate that in a working prison:
>
> - prisoners will work a full working week of up to 40 hours;

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[218] HC Deb 1 February 2010 c118W
[219] NOMS *Annual Report and Accounts for 2009-10*: page 7
[220] Conservatives *Speech: Ken Clarke: Making prisoners pay to support victims* 5 October 2010

- the regime and core day will be focused around enabling work, within the requirements of ensuring a safe, decent and secure regime; and

- education will be geared primarily to providing skills to perform work effectively and as far as possible giving prisoners skills which will increase their ability to get a job on release.[221]

In his written ministerial statement at the publication of the Bill, Kenneth Clarke outlined how he intended to create a culture of work instead of idleness in prisons, with prisons making reparations to victims.[222]

10.3 Prisoners' pay

The last Conservative government enacted the *Prisoners' Earnings Act 1996* (the 1996 Act) which would have allowed for deductions to be made to higher rate prisoners' earnings for a number of purposes, including to the consolidated fund, to pay for upkeep, and to voluntary organisations dealing with victim support or crime prevention. The Act was never brought into force.

Both coalition partners had manifesto commitments to allow deductions from prisoners' earnings to be paid towards a victims' fund and the Coalition agreement duly committed the Government to implementing the 1996 Act. This commitment was (as quoted earlier) repeated in *Breaking the Cycle*. The Government aims to generate around £1 million per year from these prisoners to go towards services which support victims.

10.4 The Bill's provisions

Clause 103 deals with prisoners' employment and deductions from their pay, amending the *Prison Act 1952*. The Secretary of State would have new powers to make prison rules (which are secondary legislation to which the negative resolution procedure applies) about prisoners' employment, pay and deductions from their pay. The Explanatory Notes survey the ground those rules might cover:

- about the employment of prisoners and the making of payments to prisoners in respect of work or other activities undertaken by them (or in respect of their unemployment)

- about the making, by the governor, of reductions in such payments to a prisoner

- about the ways in which a governor may use the amounts generated by way of reductions – which can be for the benefit of victims or communities, for the purposes of the rehabilitation of offenders, or for other purposes prescribed in rules

- enabling amounts generated by way of reductions for making payments into an account of a kind to be prescribed. (It is envisaged that such accounts will be for the benefit of the prisoner. The accounts are to be of a kind prescribed in rules, and the rules may also make provision for making payments out of the account to the prisoner before or after the prisoner's release on fulfilment by the prisoner of conditions which are prescribed in rules

- to allow for payments of amounts generated by way of reductions to be made after the deduction of amounts of a prescribed description. This is to enable running and administration costs to be taken into account

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[221] Cm 7972: pages 14-5
[222] HC Deb 21 June 2001 c11WS

- to allow for the making deductions from, or imposing levies on, payments to a prisoner for work, other activities, or in respect of unemployment, where those payments are not made by or on behalf of the governor. It is envisaged that this power will apply in respect of a prisoner's earnings etc. from a range of sources other than the governor

- to provide for either the governor or the Secretary of State to make deductions or impose levies but that, where the governor does so, the governor must pay amounts generated to the Secretary of State.[223]

11 Transfer and transit of prisoners

11.1 Foreign national prisoners in England and Wales

In the Green Paper *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, the Ministry of Justice set out its strategy for reducing the number of foreign nationals in prison in England and Wales. Bolstering arrangements for the transfer of sentenced prisoners was one part of that strategy:

> **Reduce the number of foreign national offenders**
>
> 224. The population of foreign national offenders in our system has doubled over the last decade. In September 2010, the foreign national prisoner population was 11,100; approximately 13% of the total prison population.
>
> 225. Our objective is that foreign national offenders – unless they have a legal right to remain here – should be deported or administratively removed at the end of their sentence. The use of criminal justice and immigration resources will follow this principle.
>
> (...)
>
> 228. In addition, we will build on existing prisoner transfer agreements, which enable some foreign national prisoners to serve their sentence in their country of origin. The EU framework decision on prisoner transfer is due to enter into force in December next year, which will ensure that most EU nationals sentenced here after its implementation will also serve their sentences in their country of origin. [224]

In its response to the Breaking the Cycle consultation, the Government reiterated its aim of reducing the number of foreign national offenders.[225] In June, junior minister Crispin Blunt set out the steps the Ministry of Justice was taking, including the expansion of prisoner transfer agreements:

> In addition we are building on existing Prisoner Transfer Agreements which enable some foreign national prisoners to serve their sentence in the country of origin. The EU framework decision on prisoner transfer is due to enter into force in December of this year and this should provide for a steady increase in the number of EU nationals transferred to their own country.[226]

11.2 Prisoner transfer arrangements

Foreign national prisoners may be repatriated (transferred) to their own country, to serve the rest of their sentence there. Repatriation can, however, only take place where there is an

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[223] Para 461
[224] Ministry of Justice, Cm 7972, December 2010
[225] Ministry of Justice *Breaking the Cycle: Government Response* Cm 8070, June 2011
[226] HC Deb 10 June 2011 c513W

international agreement in place, whether bilateral or multilateral. The transfer of prisoners to and from England and Wales can be done with or (in some cases) without the prisoner's consent.[227]

11.3 The Bill's provisions

The Bill makes some additions to the *Repatriation of Prisoners Act 1984* (the 1984 Act), to fill some gaps in the provisions for prisoner transfers.

Clause 104 of the Bill amends the 1984 Act, inserting a new section 3A. In accordance with international prisoner transfer arrangements (and except in specified circumstances set out in **clause 104(3)),** it protects prisoners transferred to England and Wales or Northern Ireland against prosecution for offences committed prior to the transfer. This fulfils an obligation under the *Additional Protocol to the Council of Europe convention on the transfer of sentenced persons* (article 4(3)).

Clause 105 also amends the 1984 Act, inserting three new sections. These new provisions will (the Explanatory Notes say) permit countries with whom the UK has prisoner transfer arrangements to transfer (via an airport or port in England, Wales or Northern Ireland) a prisoner serving a sentence of imprisonment to or from a third country, to serve that sentence. New **sections 6A and 6B** enable the Minister responsible for the transit to hold a prisoner who is in transit through England, Wales or Northern Ireland as part of prisoner transfer arrangements for as long as is reasonable and necessary for the transit to take place. (The Minister may also grant the powers of a constable for executing a transit order and grant the power to arrest the prisoner without a warrant if the prisoner should escape or be unlawfully at large). New **Section 6C** creates a power of detention where a prisoner makes an unscheduled stop in England, Wales or Northern Ireland while being transferred between two other countries for no more than 72 hours or until a transit order is issued, provided the UK has prisoner transfer arrangements with one of those two countries. This fulfils an obligation under the *Council of Europe Convention on the Transfer of Sentenced Persons* (article 16).

12 Cautions and penalty notices

12.1 What is an "out of court disposal"?

When someone commits a minor crime, the police or CPS can decide to give them an out of court disposal instead of taking the case to court. The disposal can be a "caution" or a "penalty notice". Both constitute official warnings of unacceptable behaviour.[228]

12.2 When is a penalty notice for disorder used?

Under sections 1 to 7 of the *Criminal Justice and Police Act 2001,* a police officer, who has reason to believe that a person has committed a relevant offence, may give that person a penalty notice, which can be £50 or £80 depending on the seriousness of the offence.

The Directgov website sets out general information about when the police use penalty notices:

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[227] The United Kingdom is a party to two multi-party agreements – the *Council of Europe Convention on the Transfer of Sentenced Persons* and the *Commonwealth Scheme for the Transfer of Convicted Offenders*. Both of these normally require the consent of the prisoner. The Council of Europe Convention was incorporated into law by the *Repatriation of Prisoners Act 1984*; under that Act, prisoners can be repatriated to continue serving their sentences in accordance with international arrangements to which the United Kingdom is a party. The UK has also ratified the *Additional Protocol to the Council of Europe convention on the transfer of sentenced persons*, which came into force in the UK on 1 November 2009.

[228] Directgov, *Police warnings for minor crimes: when you might get a warning and what it means,* at 24 June 2011

> Penalty notices are used for smaller offences that would usually get a fine in court. For example:
>
> - theft from a shop
> - cannabis possession
> - being drunk and disorderly in public
>
> You cannot choose whether or not to accept a penalty notice. If is for the police to decide if you should be given one. If you pay the penalty then you cannot get a criminal conviction for the offence listed on your penalty notice ticket. A penalty notice isn't part of your criminal record, but it may be disclosed on a Criminal Records Bureau enhanced disclosure if it's considered relevant.[229]

Payment of a penalty involves neither a finding nor an acceptance of guilt and removes the possibility of being proceeded against or gaining a record of criminal conviction for the offence for which the notice was issued.[230]

Recipients have 21 days to pay the penalty or to request a hearing, otherwise a fine of one and a half times the value of the original penalty is enforced by the courts in the normal way. However, in exceptional circumstances, the police may seek to bring a prosecution for the original offence.[231]

Further information about penalty notices is available on the Home Office police website.[232]

12.3 The Government's proposals for change

Breaking the Cycle set out the Government's proposal to amend the penalty notice for disorder scheme to allow suspects to pay to attend appropriate educational courses as an alternative to paying a financial penalty: "This will help individuals to understand the harm caused by their conduct and reduce the likelihood of further offending".[233]

12.4 What changes would the Bill make to penalty notices for disorderly behaviour?

Clause 106 and **Schedule 14** would enable Chief Officers of Police to set up within their area a scheme which would allow police officers, where appropriate, to issue penalty notices with an education option. A similar power would be given to the Chief Constable of the British Transport Police Force to establish an educational course scheme in relation to penalty offences committed on a railway and other places where that force has jurisdiction.

This would allow recipients to discharge their liability to be convicted of the penalty offence by paying for and completing an educational course related to the offence for which the notice was given. The Explanatory Notes state that an educational course might seek to make individuals aware of the social and health implications of their conduct and would be designed to reduce the likelihood of further offending.[234] They give as an example, that a person suspected of being drunk and disorderly might be offered a penalty notice with an

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229 At 23 June 2011
230 Home Office, *Penalty Notices Frequently Asked Questions,* at 24 June 2011
231 Home Office, *Penalty Notices Frequently Asked Questions,* at 24 June 2011
232 At 24 June 2011
233 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010, p64
234 Paragraph 471

option of paying for and completing an alcohol awareness course instead of paying the penalty amount or asking to be tried.[235]

Schedule 14 would also:

- ensure that a penalty notice for disorder (PND) could not be given to a person under the age of 18
- remove the requirement that a police officer issuing a PND to an individual other than at a police station must be in uniform; and
- remove the requirement that police officers in a police station may not give a PND unless they are "authorised constables".

A fine of one and a half times the value of the original penalty would be registered for enforcement against a recipient of a PND with an education option where the recipient:

- fails within a period of 21 days beginning with the date on which the notice was given either to ask to attend an educational course, or to pay the penalty, or ask to be tried for the offence to which the notice relates; or
- asks within that 21 day period to attend a course, but then fails to pay the course fee or pays the fee but fails to attend or complete the course in accordance with regulations.

12.5 When do the police use cautions?

The Directgov website sets out information about when the police use cautions:

> Cautions are meant to be used for less serious crimes, for example low level criminal damage.
>
> Cautions are given to adults 18 and over for less serious crimes. Young people, aged 10-17, can get cautions but they are called reprimands and warnings.
>
> You have to agree that the police can caution you.
>
> **Committing further crimes after a caution**
>
> If you commit another crime after getting a caution, you're likely to go to court. You may avoid court if:
>
> - the second offence is also a minor one and not related to the first
> - two years have passed since your first caution
>
> **Cautions and criminal records**
>
> A caution is not a criminal conviction, but it does go on your criminal record.
>
> The police will record your caution on their databases. This means that your caution may in some circumstances be told to an employer or used in court as evidence of bad character. The police will also keep a record of photographs, fingerprints and any evidence taken in your case.

[235] Paragraph 473

If you are cautioned for a sexual offence, you could be placed on the sex offenders register.

The police may give your name and address to any victims of your crime if they ask for it. This means you might be sued for damages by a victim.

Types of cautions the police can give

There are different kinds of cautions that the police use, depending on the crime committed.

Simple cautions for less serious crimes

A simple caution is a warning for a minor crime. Police can give a simple caution if:

- there is enough evidence that you are guilty
- you are 18 years or older
- you admit that you committed the crime
- you agree to be given a caution

If you don't admit to the crime or accept the caution, the police might charge you instead and the case could go to court.

Conditional cautions for minor crimes

These are a caution with certain conditions attached. You have to agree to accept the caution and the conditions.

These will only be given for certain offences, such as spraying graffiti. Conditional cautions are available for adults aged 18 or over and in some areas someone aged 16-17 may be offered a youth conditional caution.

Examples of conditions might be:

- rehabilitation – you must start a treatment programme, eg for drug misuse, gambling, alcohol or personal problems
- reparation, eg you may have to apologise to the victim or physically repair damaged goods

The police and CPS decide when they use a conditional caution. Sometimes they may take into account the views of the victims when deciding what conditions to offer.

If you don't admit to the crime or accept the caution, the police might charge you and your case could go to court.

If you don't follow the conditions of your caution, you may be charged and your case will go to court.[236]

A Library standard note, *Conditional Cautions,* includes further information.[237]

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[236] At 23 June 2011
[237] SN/HA/3008, 30 April 2004

12.6 How would the Bill affect conditional cautions?

Clause 107 would amend the *Criminal Justice Act 2003* to enable an "authorised person" to make a decision to offer a conditional caution or to vary the conditions attached. Generally speaking, this would be a police officer.[238] At present, a relevant prosecutor must decide that there is sufficient evidence to charge the offender and that a conditional caution should be given, and must also decide on variations. This would usually be the Crown Prosecution Service (CPS).[239] Some matters would still be referred to the CPS; the Explanatory Notes provide information about how it is intended that the new provision will operate:

> The intention is that the Code of Practice issued under section 25 of the 2003 Act or guidance will specify those matters that should still be referred to the relevant prosecutor for a decision about whether a conditional caution should be given or to vary conditions.[240]

The offender would still have to admit that they committed the offence and consent to being given the conditional caution.

Clause 108 would amend section 22 of the *Criminal Justice Act 2003* so as to make available new types of conditions that could be attached to a conditional caution given to an offender who is a foreign national and who does not have leave to enter or stay in the United Kingdom. The object would be to bring about the departure of the foreign national offender from the UK and to ensure that they do not return to the UK for a period.

Liberty has expressed concerns about this proposal:

> The Human Rights Act places the Government and authorities such as the parole board and the police under a positive obligation to safeguard the right to life and the right to freedom from inhuman and degrading treatment. This obligation entails not only a duty to protect the public from attack by dangerous individuals, but also the right of the victim to have her perpetrator brought to justice. ...The objective of this proposal is apparently for Government to unburden itself of the cost of dealing with suspected offenders. Liberty urges the Government not to place a cost-cutting agenda above public protection. Victims of crime understandably and rightly want to see suspected offenders prosecuted and - if found guilty - punished for their crimes. This is the case whether the suspected offender is a British citizen or a foreign national.[241]

12.7 Out of court disposals for young people

General information about what can happen if a young person commits an offence but is not charged with a crime is set out on the Directgov website including:

> **If you're given a reprimand**
>
> If it's the first time you have been in trouble the police could tell you off. This is known as a 'reprimand'. They must give you the reprimand in front of your parents or another adult, and this often happens at a police station.
>
> The police will keep a record of the reprimand, and you will only get told off once. If you get into trouble with the police again you could get a final warning or be charged with a crime.

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238 Explanatory Notes paragraph 488
239 Explanatory Notes paragraph 488
240 Paragraph 490
241 *Liberty's Response to the Ministry of Justice's Proposals on the Effective Punishment, Rehabilitation and Sentencing of Offenders,* March 2011, pp9-10

> You may get referred to the local youth offending team, who can help you with school, health or housing problems. This is to help you stay out of trouble, and deal with problems that made you get into trouble in the first place.
>
> **If you're given a final warning**
>
> If you get into trouble for a more serious crime, or you have already had a reprimand, the police may give you a final warning. This is usually given to you at the police station.
>
> If you get caught doing anything wrong again you could be charged with a crime and will have to go to court.
>
> When you get the warning, someone from the local youth offending team will contact you and your family.
>
> The team will try and help you stay out of trouble. If you refuse to work with the team, it can count against you if you later go to court.[242]

Reprimands and warnings

The practice of cautioning juvenile offenders was developed by the police and encouraged by a series of Home Office police circulars published from 1978 onwards. A statutory scheme of reprimands and final warnings, known as the Final Warning Scheme, was included in the *Crime and Disorder Act 1998*.

A reprimand is a formal verbal warning given by a police officer to a young person who admits they are guilty of a minor first offence. Sometimes the young person can be referred to the youth offending team (YOT) to take part in a voluntary programme to help them address their offending behaviour.

A final warning is a formal verbal warning given by a police officer to a young person who admits their guilt for a first or second offence. Unlike a reprimand, however, the young person is also assessed to determine the causes of their offending behaviour and a programme of activities is identified to address them.

Guidance on the Final Warning Scheme can be found in Home Office Circular 2006/14.

Youth conditional cautions

The *Criminal Justice and Immigration Act 2008*, section 48, extended the use of conditional cautions to young people aged 10 to 17. However, as part of a phased approach to the implementation, the Youth Conditional Caution applies, at present, solely to 16 and 17-year-olds and is being piloted in five areas. The *Code of Practice for Youth Conditional Cautions for 16 & 17 Year Olds* is available online. Information about the Youth Conditional Caution pilot scheme is set out on the Youth Justice Board website.[243]

Consultation

Breaking the Cycle consulted on preventing offending by young people, describing this as "one of the most cost effective ways to provide long term benefit for communities":

> 234. Young people often commit low-level offences. This means that the disposals given out-of-court are particularly important and account for over 40% of responses to youth offending. Under the current system of out of court disposals, young offenders

[242] At 24 June 2011
[243] At 24 June 2011

> are automatically escalated to a more intensive disposal, regardless of the circumstances or severity of their offence.
>
> 235. We believe that this rigid approach can needlessly draw young people into the criminal justice system, when an informal intervention could be more effective in making the young person face up to the consequences of their crime, provide reparation for victims and prevent further offending.
>
> 236. To remedy this we propose to simplify the current framework and allow police and prosecutors greater discretion in dealing with youth crime before it reaches court. We propose to end the current system of automatic escalation and instead put our trust in the professionals who are working with young people on the ground.
>
> 237. The police, working in partnership with other local agencies, will have more freedom to determine the most appropriate response, depending on the severity of the offence and the circumstances of the young offender. This could involve reparation or interventions such as a referral to mental health provision to tackle offending behaviour. We will also look at the future use of juvenile penalty notice for disorder, in conjunction with the Home Office review of Anti Social Behaviour tools and powers.[244]

In its response to *Breaking the Cycle,* the membership body, Standing Committee for Youth Justice (SCYJ), supported proposals to simplify and widen the use of out of court disposals for children, and said that it was vital that the police had a proper range of alternative options to prosecution at their disposal, in order to reduce the number of children being criminalised for low level offending:

> 15. The current system of reprimands and final warnings, which escalates children into the court system through the 'two strikes and you're out concept', should be abolished and replaced by a simpler system of cautioning, similar to that in use with adults. SCYJ would support a far more flexible system, with no limit to the maximum number of cautions that can be given to any one offender, and with no bar on children with criminal records receiving cautions if they later commit a cautionable offence.
>
> 16. The decision as to whether to caution or prosecute should be taken in line with published guidelines. The current system, which differs from the adult system, results in children being brought before the courts for offences they would have received a caution for had they been adults; SCYJ believes that children should be less likely to be prosecuted than adults rather than vice versa, and it is therefore important that encouragement is given in all cases to divert rather than prosecute.
>
> 17. SCYJ would therefore support a system where the decision following an arrest for a criminal offence would be one of three options: to take no further action; to caution; or to prosecute.
>
> 18. SCYJ recognises the need for early intervention with children who offend, but would emphasise that this can be done informally rather than as part of a court order. SCYJ would advocate a nationwide approach, where multiple agencies participate in the decision making process, and feed-back suggestions to the police and CPS, where the ultimate decision can be taken as to appropriate action. Engagement in certain programmes or activities or even reparation or restorative justice can be made a precondition of receiving a caution or the police taking no further action (within the

[244] Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972, December 2010, pp67-9

> context of appropriate accountability) where appropriate for that young person, similar to the current system of conditional cautions.[245]

12.8 The Bill: youth cautions

The Bill would repeal the Final Warning Scheme and establish instead a new "youth caution". It would also make amendments to youth conditional cautions. Some of the features of the new scheme would be similar to existing provisions but there would also be significant changes.

Clause 109 would insert new section 66ZA and 66ZB into the *Crime and Disorder Act 1998* to create the youth caution and to set out its effect, which would be similar in a number of respects to reprimands and warnings. **Schedule 15** would make consequential amendments. Full details of the new provisions are included in the Explanatory Notes. New features include:

- it would be possible to offer a youth caution to a young person even if (s)he has previously been convicted of an offence or given a youth conditional caution (unlike reprimands and warnings)
- the police would have to refer a young person who has received a youth caution to the appropriate youth offending team as soon as is practicable. This was previously required for warnings but not reprimands. The Explanatory Notes state that the purpose of this is:

  > to ensure that the youth offending team has complete records of the young person's involvement with the police and so that they can be considered for assessment, both upon receiving a first or subsequent youth caution[246]

- a reprimand or warning given to a person prior to the commencement of the new provisions would subsequently be considered a youth caution for the purposes of the Bill

Clauses 110 to **112** would make amendments to youth conditional cautions including:

- it would be possible to give a youth conditional caution to a young person when they have admitted to committing an offence for which such a disposal is appropriate, even if they have been convicted of other more serious offences in the past
- as with youth cautions, an authorised person who gives a young person a youth conditional caution would have to refer that young person to the youth offending team as soon as is practicable. The Explanatory Notes state that the referral under this provision would enable the youth offending team to apply for a "parenting order" if voluntary parenting support is not engaged with[247]
- a number of matters which at present must be referred to a relevant prosecutor (usually the CPS) for a decision could be dealt with by an authorised person (usually a police officer) who offers the caution including:
  - specifying the conditions to be attached to a youth conditional caution

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[245] Standing Committee for Youth Justice, *Consultation response to Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders, 4* March 2011

[246] Paragraph 502

[247] Paragraph 511; parenting orders are created by section 25 of the Anti-Social Behaviour Act 2003

- deciding whether there is sufficient evidence to charge the offender and whether a youth conditional caution should be given; the Explanatory Notes state: "The decision taken here is not a charging decision. It is an assessment of the evidence for the purposes of deciding whether to caution only"[248]

- specifying, if payment of a financial penalty is a condition, the amount of the penalty, to whom it must be paid and how it may be paid

- varying conditions

The Explanatory Notes state that it is intended that the Code of Practice introduced under section 66G of the 1998 Act or guidance will specify those matters that should be referred to the relevant prosecutor for a decision about whether a conditional caution should be given or to vary conditions.[249]

12.9 Concerns about out of court disposals

A number of the published responses to *Breaking the Cycle* included concerns about out of court disposals, including the following:

Criminal Sub Committee of the Council of HM Circuit Judges

> We have expressed our concerns about the ever increasing use of out of court disposals for what is, in reality, criminal activity for some years. We remain very concerned. Out of Court disposals have, increasingly, been used as a response to truly criminal activity and the general public may have no idea how the situation has developed and the range of matters that may now be dealt with by extra judicial processes.
>
> (...)
>
> 65 Until recent years, in our view appropriately, the use of fixed financial penalties has been in relation to offences that might be loosely termed as regulatory in nature, many for matters such as road traffic violations. What has taken place recently has been a greater extension of the use of fixed penalties, in which term we include penalty notices for disorder, beyond regulation to encompass what may be regarded as truly criminal activities. On many recent occasions we have expressed our concerns about this as we do not believe that fixed penalties should be used to punish those who commit truly criminal acts.
>
> 66 The use of fixed penalties as a response to truly criminal offending is to create the impression that truly criminal offending is not to be treated as significant. We are concerned that this is likely to encourage the belief that crime may not result in retribution and introduce a perception that some criminal activity does not merit proper process or consequences whilst other matters which might be deemed regulatory breach rather than truly criminal activity, result in equivalent or more serious consequences. In the long term such a policy carries substantial risk. Perceived removal of genuine criminal activity from the Courts or perceived downgrading of the consequences of such activity has the long term consequence of increasing its occurrence and escalation. If less serious but nonetheless criminal activity is to result in similar sanctions to regulatory breach it is likely to come to be regarded as no more serious. So at risk of stating the obvious if, for example, theft from a shop attracts the same consequence as unlawful parking it may come to be regarded as equivalent in

[248] Paragraph 514
[249] Paragraph 518

> seriousness. That must have an impact upon the numbers who may be tempted to engage in truly criminal activity but for whom the threat of Court process and public humiliation is a deterrent.
>
> (...)
>
> 70 It should not be thought that we are opposed to any extension of the use of fixed penalties. As we indicated above we favour the proportionate use of such sanctions in the case of offences that are regulatory in nature rather than truly criminal. We agree there is a case for considering fixed penalties in relation, for example, to drunkenness, alcohol consumption, alcohol sales, some firework offences and dropping litter. What we could not support, for example, would be the treatment of the throwing of stones at trains as equivalent to dropping litter and parking offences.[250]

Liberty

> Liberty is extremely concerned about proposals aimed at increasing the use of out-of-court disposals such as conditional cautions, notices for disorder and cannabis warnings, which by-pass fair trial protections and judicial due process. Out-of-court disposals are presented as a softer alternative for low-level offending, but these measures are prone to use as a short-cut to punishment, and the Government's plans would see them implemented in large numbers of cases. Liberty believes it is contrary to fundamental principles of justice for prosecutors and police to be able to impose on-the spot punishment without the involvement of the judiciary. By-passing normal judicial and fair trial safeguards can leave individuals open to bias and irrationality in sentencing decisions. An out-of-court disposal, whilst undoubtedly sparing an individual the disruption of court proceedings, can have a significant and long-lasting impact on life chances. An individual who receives a conditional caution, for example, in addition to having to comply with a specified condition, will have a criminal record which may well affect his or her employment prospects. The consequences for the individual render it critical that sentencing remains firmly in the hands of the judiciary. Liberty is concerned that out-of-court disposals are part of a wider trend of legal short cuts; punitive measures dressed-up as "preventative" to escape the fair trial safeguards that civilised societies normally abide by before punishing their citizens.[251]

Lord Justice Thomas and Lord Justice Goldring

> We would make these very preliminary observations about this section: the officer may be exercising his discretion on an incomplete basis. He/she may not know whether there are unpaid fixed penalty notices, or an out of court disposal in another police area for a similar offence. There are cases where the courts have been told that an offender is of good character only to find out by chance that he has a string of unpaid Fixed Penalty Notices which, whilst not criminal convictions in themselves, suggest that the offender should potentially have been brought before the court at an earlier date. There is a general question-mark over the recording of out of court disposals. Further, it is sometimes difficult properly to assess the seriousness of a case. The offence that an offender is charged with often changes as it progresses through the court process due to the fact that, on an objective analysis, the offence is different (and possibly less serious) than that reported by the victim.[252]

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250 *Breaking the Cycle Observations of Criminal Sub Committee Council of HM Circuit Judges*, 3rd March 2011

251 *Liberty's Response to the Ministry of Justice's Proposals on the Effective Punishment, Rehabilitation and Sentencing of Offenders,* March 2011, p9

252 Lord Justice Thomas and Lord Justice Goldring, *Response to Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders, 2011*, p5

13 Knives and offensive weapons

In the *Breaking the Cycle* consultation paper, the Government declared:

> Knife crime is wholly unacceptable. It causes misery for victims and is often connected to the kind of gang violence than can wreck whole communities. The Government's position is clear. Any adult who commits a crime using a knife can expect to be sent to prison and serious offenders can expect a long sentence. For juveniles, imprisonment is always available and will also be appropriate for serious offences.
>
> We must do better at intervening before offending reaches this stage. We are developing a new community based intervention that is specifically designed to prevent this kind of violence. This will help to ensure that offenders who are caught in possession of a knife will face consequences and a response intended to prevent their behaviour from escalating.[253]

Chapter 7 of the Bill creates new offences of threatening someone with an offensive weapon or an article with a blade or point where this creates an immediate risk of serious physical harm. The offences will carry a minimum sentence of six months' imprisonment. The Government justifies the change to the law in these terms:

> 55. The benefits associated with the knife crime proposals are that the level of public protection, and hence public confidence, could be increased as a result of the introduction of a mandatory prison sentence for any adult found guilty of possession of a knife to threaten and endanger.[254]

13.1 Background

Knife crime is a persistent and worrying concern, especially as it impacts particularly upon young people and the disadvantaged, and various remedies have been tried over the years.[255] The Equality Impact Assessment accompanying the Bill discusses the potential race, gender and age impacts of minimum sentencing with illustrative statistics.[256]

In June 2008, the Home Office announced that new guidance was being issued under which over 16s caught in possession of a knife could expect to be prosecuted on the first offence rather than cautioned. Details were set out in a Home Office press release.[257]

The Sentencing Guidelines Council subsequently published the following advice, in cases where the offender pleaded not guilty:

> • Level 1 (knife possession for a first time adult offender where the knife is not used to threaten or cause fear) would attract a sentencing starting point of 12 weeks' custody;
>
> • Level 2 (possession in a "dangerous circumstance" but where a knife is not used to cause or threaten fear) would attract a custodial sentence in excess of six months; and
>
> • Level 3 (where a weapon is used in dangerous circumstances to threaten or cause fear) would attract a custodial sentence in excess of six months.[258]

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253 Ministry of Justice, *Breaking the Cycle...*, December 2010, p54
254 Ministry of Justice, *'Breaking the cycle' – Government response impact assessment*, 21 June 2011, p12
255 For an overview of the issue, see, for example, Centre for Crime and Justice Studies, *'Knife crime': a review of evidence and policy*, 2nd edn, 2007
256 Ministry of Justice, *Breaking the cycle – Government response – full equality impact assessment*, paras 107 to 116;
257 *Tough new sanctions to tackle knife crime*, 5 June 2008
258 Sentencing for possession of a weapon – knife crime

The Home Affairs Select Committee in the last Parliament published a report in June 2009 entitled *Knife Crime*. This investigated levels and causes of knife crime, profiles and attitudes of offenders, and assessed effective solutions.[259] The Committee was sceptical of the deterrent value of prison sentences:

> 123. While it may be an appropriate punishment for knife-carriers, evidence suggests that the prospect of a custodial sentence may not deter young people from carrying knives. Many young people do not think about the consequences of their actions, and for a small minority who feel at risk of violence, the prospect of jail seems preferable to the dangers of being caught without a weapon for protection. Evidence suggests that the fear of getting caught acts as a stronger deterrent for young people. This strengthens our support for strong police action against knives, including the use of stop and search.

In November 2009, the Ministry of Justice announced that the minimum prison term for those who commit murder using a knife would be increased from 15 years to 25 years.[260] This change was implemented by way of the *Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010*, which came into force on 2 March 2010. The Explanatory Memorandum to the 2010 Order provides further background.

In June 2008 the Home Office launched the Tackling Knives Action Programme (TKAP) in 10 police force areas in response to a record number of fatal stabbings involving teenage victims. The increased focus in ten police force areas on tackling knife crime included:

- stepping up enforcement operations
- targeting the most dangerous young people in each area
- carrying out home visits and sending letters to parents if their children are known to carry weapons
- working with A&E departments on information sharing
- setting up or expanding youth forums to enable young people to have a say in local issues
- clamping down on retailers who continue to sell knives to young people

In a second phase, launched in April 2009, the campaign was extended to 16 police force areas. TKAP ran until March 2010 and was targeted at 13- to 24-year-olds.[261]

Home Office research published in May 2011 concluded that, while there were reductions in serious violence involving teenagers and young adults across the country between 2007 and 2010, there was little discernible difference between those areas targeted by the TKAP programme and those that were not.[262]

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[259] HC 112-I 2008-09, 2 June 2009

[260] Ministry of Justice press release, *Jack Straw: tougher sentences for those who kill with a knife*, 10 November 2009

[261] A factsheet provides further details of the programme and the latest bulletin was published in February 2010.

[262] Home Office Research Report 53, *An assessment of the Tackling Knives and Serious Youth Violence Action Programme (TKAP) – Phase II*, 2011

On 2 February 2011 the Home Office published the outcomes of a review by Brooke Kinsella into local anti-knife crime projects[263] and announced that the Coalition Government will provide £18 million of funding between 2011 and 2013, to prevent gang and knife-related violence and youth crime. At least £14 million of that funding will be provided to voluntary organisations working with young people to stop their involvement in knife, gang and gun violence and other youth crime.[264]

A Library Standard Note provides statistics on knife crime.

13.2 The present law

It is an offence under section 1 of the *Prevention of Crime Act 1953* for a person to have with him in any public place any offensive weapon without "lawful authority or reasonable excuse" (the proof of which lies on him). The offence is punishable by up to six months' imprisonment and a £5,000 fine following conviction in the magistrates' court, or up to four years' imprisonment and an unlimited fine following conviction in the Crown court. Section 1(4) of the 1953 Act provides that "offensive weapon" means:

> any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him or by some other person.

Under section 139 of the *Criminal Justice Act 1988* it is an offence, punishable by up to four years' imprisonment and a fine,[265] for a person to have with him in a public place any article which has a blade or is sharply pointed, except a folding pocket knife with a cutting edge of three inches or less. It is a defence for a person charged with such an offence to prove that he had "good reason or lawful authority" for having the article with him in a public place. (Note that the wording here is slightly different from that used in the 1953 Act, which requires "reasonable excuse" rather than "good reason".) It is also a defence for a person charged with such an offence to prove that he had the article with him for use at work, for religious reasons, or as part of a national costume. "Public place" includes any place to which at the material time members of the public have or are permitted access, whether on payment or otherwise.

Section 139A of the *Criminal Justice Act 1988*, which was inserted by the *Offensive Weapons Act 1996*, created two new offences which may be committed by any person who has with him on school premises:

a) an article to which section 139 of the 1988 Act applies (i.e. an article with a blade or sharp point other than a small folding pocketknife); or

b) an offensive weapon within the meaning of section 1 of the *Prevention of Crime Act 1953*.

The offence of being in possession, on school premises, of a bladed or pointed article to which section 139 applies, is punishable by up to two years' imprisonment and a fine. Possession of an offensive weapon on school premises is punishable by up to four years' imprisonment and a fine. Once again, it is a defence for a person to prove that he had "good reason or lawful authority" for having the article or weapon with him in a public place, or that he had the article or weapon with him for use at work, for religious reasons, or as part of a national costume.

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263 Brooke Kinsella, *Tackling knife crime together – a review of local anti-crime knife projects*, 2011. Brooke Kinsella is an actress whose brother was killed in a knife attack.

264 HC Deb 2 February 2011 c46WS

265 Raised from two years to a maximum of four years' imprisonment by the *Violent Crime Reduction Act 2006*.

13.3 The Bill

Clause 113 creates new offences of aggravated use of an offensive weapon. The offence is committed by someone who commits the relevant possession offence (as defined by the 1953 Act) while at the same time unlawfully and intentionally threatening another person with the weapon in such a way that there is immediate risk of serious physical harm to the other person. "Serious physical harm" is defined as harm which would be viewed as "grievous bodily harm" for the purposes of the *Offences against the Person Act 1861*.

The offences under this clause can be tried in either the magistrates' court or the Crown court. In the magistrates' court the maximum penalty is six months' imprisonment, in the Crown court four years. However, where the offender is aged 18 or over, the court must impose a minimum custodial sentence of six months (with or without a fine), unless there are circumstances relating to the offence or the offender which would make it unjust to do so.

The new offences are created by way of amendments to the 1953 and 1988 Acts. The defences available to someone charged with the new offences are the same as those for the relevant possession offence. In the case of an offensive weapon in a public place, the defendant must prove that he has "lawful authority or reasonable excuse". In the case of an offensive weapon on school premises, or a bladed article in a public place or on school premises, the defendant must prove "lawful authority or good reason".

Clause 113(3) gives effect to Schedule 16 of the Bill. The effect of this will be to amend section 144 of the *Criminal Justice Act 2003* ("Reduction in sentences for guilty pleas"). As a result, where a person pleads guilty to the new offences created by clause 113 of the Bill, the court will be able to reduce the sentence of imprisonment it would otherwise have passed, but it may not reduce it to below 80% of the minimum term referred to in the new sections inserted into the earlier Acts by clause 113.

In considering the Bill's compatibility with the European Convention on Human Rights, the Government recognises that the imposition of a minimum sentence potentially engages Article 5 (right to liberty and security of the person). However:

> 561. It is the Government's view that this provision is compatible with Article 5, since the proviso [in clause 113] allows for a proper consideration by the court of the particular circumstances of the offender and is therefore lawful within the meaning of Article 5(1)(a) as interpreted by the courts.[266]

The Government estimates that the proposal to introduce a mandatory minimum prison sentence in these circumstances will lead to additional costs of £5m per year from 2013/14, due to an increased demand for prison places of around 100.[267]

13.4 Reaction to the Bill

In his press conference on sentencing reforms on 21 June, the Prime Minister highlighted this measure in what he called "a tough package to fight crime, putting the system on the side of the victim":

> So, first, tough action on knife crime, which has been the cause of so many tragedies in our communities. Even after all these tragedies far too many people still think they can go out armed with a knife. We need to send the clearest possible message that

[266] Explanatory Notes, p94
[267] Ministry of Justice, *'Breaking the cycle' – Government response impact assessment*, 21 June 2011, p11

> this simply has to change. So we will introduce, for the first time in legislation, a compulsory jail term for anyone threatening someone with a knife.[268]

In a letter to the London *Evening Standard* on the following day, Prof John Howson, a magistrate and president of the Liberal Democrat Education Association, suggested that the clause is a move towards "mandatory sentencing" which threatens to "alter the balance between Parliament and the judiciary":

> The proposed legislation might look and sound good, but given that individuals using a knife to threaten can already be charged with harassment, intent to cause GBH or aggravated burglary, it may be a law that ends up being used only in a small number of cases. When they debate the bill, MPs will have to consider the balance between sending out a salutary warning to young people not to carry knives and the dangers of over-legislation.[269]

[268] Prime Minister's Office, *PM's press conference on sentencing reforms (transcript)*, 21 June 2011
[269] Letters, *Evening Standard*, 22 June 2011, p47

Appendix 1 – A selection of responses to the Government's consultation document, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*

- **Victim Support,** *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders – A response by Victim Support*, March 2011
- **Justice,** *Response to Sentencing Green Paper Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, March 2011
- **Criminal Bar Association,** *Breaking the Cycle Consultation: Response on behalf of the Criminal Bar Association*, March 2011
- **Sentencing Council,** *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders - Response from the Sentencing Council*, 2011
- **Lord Justice Thomas and Lord Justice Goldring,** *Response to Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, 2011,
- **The Criminal Sub-Committee of the Council of HM Circuit Judges,** *Breaking the Cycle – Observations of the Criminal Sub Committee of the Council of HM Circuit Judges*, March 2011
- **Commissioner for Victims and Witnesses**, *Green Paper Response – Commissioner for Victims and Witnesses*, 4 March 2011
- **Corston Coalition**, *Response to Breaking the Cycle*, 2 March 2011
- **Prison Reform Trust**, *Prison Reform Trust submission to the Ministry of Justice: Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, March 2011
- **Howard League**, *Howard League calls for courageous action on sentencing*, 14 March 2011
- **Judiciary of England and Wales**, *Breaking the cycle: Effective punishment, rehabilitation and sentencing of offenders*, 2011
- **Probation Association**, *Probation Association response to the Green Paper Breaking The Cycle*, March 2011
- **Liberty**, *Liberty's Response to the Ministry of Justice's Proposals on the Effective Punishment, Rehabilitation and Sentencing of Offenders*, March 2011
- **Citizens Advice**, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders: Response by Citizens Advice to the Ministry of Justice*, March 2011
- **Restorative Justice Council**, *A new way of Doing Justice - Restorative Justice Council response to Breaking the Cycle Green Paper*, 4 March 2011
- **Women in Prison**, *Breaking the Cycle for Women: Women in Prison Response to Breaking the Cycle*, March 2011

- **UNLOCK**, UNLOCK response to Ministry of Justice Green Paper: Breaking the Cycle: Effective Punishment, Rehabilitation & Sentencing of Offenders, March 2011