The *Legal Aid, Sentencing and Punishment of Offenders Bill*: Lords amendments

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Section Home Affairs Section

The Commons is due to consider Lords Amendments to the *Legal Aid, Sentencing and Punishment of Offenders Bill* on Tuesday 17 April 2012. This note draws attention to the principal changes, additions and deletions that were made in the Lords.

There were a number of Government defeats in the Lords on legal aid. These included defeats on children's and welfare benefit appellants' entitlement to legal aid and on funding for expert reports in clinical negligence cases. Other defeats covered the single telephone gateway; the independence of the director of legal aid casework; and the wording of the Lord Chancellor's duty to provide legal aid. There were Government amendments on legal aid in certain cases of clinical negligence and in certain judicial review cases. Another would provide the power to add to the Bill's list of legal aid services. Other Government amendments would remove the power to means test advice at the police station from the Bill. Several amendments covered legal aid in domestic abuse cases, including changes to the Bill's definition of domestic violence.

There were also Government defeats which would result in exceptions from the Bill's provisions on civil litigation funding for respiratory disease cases and for other industrial diseases cases resulting from an employer's breach of duty. Other amendments on civil litigation funding covered pro bono representation at the Supreme Court and changes to the scope of rules against referral fees.

A Government new clause would bring in aggravated sentences for transgender hate crime, and a higher starting point for murders motivated by a victim's disability or transgender status. A further Government new clause would give courts powers to impose a new alcohol abstinence and monitoring requirement on those convicted of alcohol-related offences. Other Government amendments would introduce new powers to deal with metal theft and would reduce the period of time for which ex-offenders would have to declare convictions.

The consolidated Lords amendments to the Bill are available as Bill 327 of 2010-12. The Ministry of Justice has published further Explanatory Notes.

Contents

1 The Bill's progress so far

Library Standard Note 5840, *Legal aid: controversy surrounding the Government's plans for reform,* discussed the content of, and reaction to, the consultation paper published by the Ministry of Justice in November 2010 which forms the basis of the Bill's provisions on legal aid. Commentary on the Bill as first introduced was provided in Library Research Paper 11/53, *Legal Aid, Sentencing and Punishment of Offenders Bill*. Major changes and areas of debate arising during the Bill's committee stage in the Commons were set out in Library Research Paper 11/70 Committee Stage Report. House of Lords Library Note LLN 2011/035, prepared for the Bill's second reading in the Lords on 21 November 2011, summarises the report stage and third reading debate in the House of Commons.

The Bill had its first reading in the House of Commons on 21 June 2011, as Bill 205 of 2010-12, and had its second reading on 29 June 2011. Commons committee stage took place over 16 sessions between 12 July and 11 October 2011. Report stage took place over three days between 31 October and 2 November 2011, followed by third reading on 2 November 2011 (amended text available as HL Bill 109).

In the Lords, first reading took place on 3 November 2011 and second reading on 21 November 2011. Committee stage took place over 10 sittings between 20 December 2011 and 15 February 2012 and report stage over 5 sittings between 5 and 20 March 2012. Third reading was on 27 March 2012. The Bill is due to return to the Commons on 17 April 2012 for consideration of the Lords amendments, with final stages in the Lords on 23 April 2012.

Clause numbers in this note relate to the Bill as introduced to the House of Lords, HL Bill 109 unless otherwise stated.

2 Legal aid

2.1 Duty on the Lord Chancellor to provide legal aid: Government defeat

The Bill as introduced in the Lords would have required the Lord Chancellor (at **clause 1**) to "secure that legal aid is available in accordance with this Part".

On the first day of report, 5 March 2012, the Government suffered a defeat on an amendment moved by the crossbencher Lord Pannick to amend **clause 1**, so as to state on the face of the Bill that the Lord Chancellor must ensure that "within the resources made available and in accordance with this Part ... individuals have access to legal services that effectively meet their needs."

Lord Pannick suggested that it was important that the Bill should contain a statement of this "uncontroversial and fundamental purpose of legal aid ... the promotion of access to justice", similar to that in section 4(1) of the *Access to Justice Act 1999*.[1] The Bishop of Exeter agreed, saying that access to justice was at the heart of any civilised society.[2] In reply, justice minister Lord McNally argued that tough decisions had to be made and, although he had reflected on what had been said in committee, he was not persuaded to support the amendment, which was unnecessary and inappropriate. Lines (he argued) had to be drawn and there could be no blank cheques.[3]

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1 HL Deb 5 March 2012 c1559
2 HL Deb 5 March 2012 c1562
3 HL Deb 5 March 2012 c1570

The amendment was agreed by 235 votes to 190. It is now listed as **Lords Amendment 1** in Bill 327 of 2010-12.

2.2 Power to omit, vary or add to services: Government amendment agreed

Another controversial aspect of the Bill had been the lack of any power in **clause 8** for the Lord Chancellor to add to the services set out in Part 1 of Schedule 1 as eligible for funding; critics of the Bill pointed out that the list of services could be shortened but it could not be lengthened. A Government amendment was agreed at third reading (now listed as **Lords Amendment 6** of Bill 327) which would enable the Lord Chancellor to omit, vary or add to the services in Part 1 of Schedule 1. This was, Lord McNally argued, the "correct and sensible approach".[4]

2.3 Freedom from political interference: Government defeat

The Bill would create the post of director of legal aid casework.

On 5 March 2012, the Government suffered another defeat on an amendment by Lord Hart of Chilton (Labour), inserting a sub-clause into **clause 4** requiring the Lord Chancellor to ensure the director of legal aid casework's independence from political interference.

Lord Hart remarked that the Constitution Committee[5] had expressed concern that the Bill did not provide sufficient guarantees of the director of legal aid casework's independence.[6] In resisting the amendment, Lord Wallace of Tankerness (the Advocate General for Scotland) argued that the Bill's existing provisions were enough to ensure that ministers could not interfere in decision-making in individual cases; inserting the words "independent" or "independence" into the clause could (he went on) upset the balance that would apply in other parts of the director's work.[7]

The amendment was agreed by 212 votes to 195. It is now listed as **Lords Amendment 3** of Bill 327.

2.4 Telephone gateway: Government defeat

The Bill would create a mandatory single gateway for applying for civil legal aid and receiving legally-aided advice by telephone or by other electronic means. The Government proposal was that the mandatory gateway would apply initially to the areas of debt (insofar as it remains in scope), special educational needs and discrimination. There would be exceptions to the requirement to contact the gateway in emergency cases; where the individual was a child; where the individual was in detention; or where the individual had previously been assessed by the gateway as requiring face-to-face advice. All callers would also be assessed on a case by case basis to check their suitability to receive advice by telephone.

On 14 March 2012, the fourth day of report, the Government sustained another defeat on an amendment by the crossbencher Baroness Grey-Thompson, imposing a duty on the Lord Chancellor to ensure that anyone eligible for legally-aided advice may access it in a range of forms, including initial face-to-face advice.

Baroness Grey-Thompson argued that the most vulnerable clients might struggle to explain complex problems over the telephone and the Government's own impact assessment had

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4 HL Deb 27 March 2012 c1253
5 In its report on the Bill's legal aid provisions, HL Paper 222, published on 17 November 2011
6 HL Deb 5 March 2012 c1598
7 HL Deb 5 March 2012 cc1606-7

acknowledged the difficulty. The Government's proposals here would (she went on) yield negligible savings and might even cost more.[8] In response, Lord McNally said that the Government was not forcing everybody through a telephone gateway; the proposal was a specific and narrowly-drawn test. The Government had explained that there would be exceptions to the gateway, and would be putting safeguards in place, but it was patronising to assume that people could not make use of new technology.[9]

The amendment was agreed by 234 votes to 206. It is now listed as **Lords Amendment 24** of Bill 327.

2.5 Legal aid for children: Government defeat

At third reading on 27 March 2012, Baroness Grey-Thompson moved an amendment which would make legal aid available to children in all current cases, including when they were victims of medical negligence. There should not, she argued, be any confusion or delay about whether a child under 18 was entitled to legal advice and representation in British civil justice and, particularly in cases where a child was seeking to hold the state to account, legal aid was needed to enable the child to assert their rights.[10] Baroness Howe of Idlicote, a crossbencher, remarked that young people in general were rarely equipped to resolve their problems without expert advice.[11]

Resisting the amendment, Lord McNally remarked that spending cuts were never welcome. The Government had sought to keep civil legal aid for the highest priority cases, such as where a child might be taken into care, and so the overwhelming majority of funding and cases involving children would be protected: 97 percent of current spending on cases involving children as claimants would (he said) continue.[12] Where a child was the claimant or respondent, the case would usually be conducted on their behalf by a "litigation friend" — for example, their parents — and only in exceptional circumstances would a court make an order permitting the child to conduct proceedings on their own behalf. Lord McNally also pointed out that the Government had amended the Bill to make funding available for clinical negligence cases concerning infants with neurological damage (discussed below).[13]

The amendment was agreed by 232 votes to 220. It is now listed as **Lords Amendment 171** of Bill 327.

2.6 Clinical negligence: Government defeat

On 7 March 2012, the Government sustained another defeat on the crossbencher Lord Lloyd of Berwick's amendment to provide funding for the cost of expert reports in clinical negligence cases.

Lord Lloyd argued that, unlike many of the other amendments debated in committee, his amendment would save money, as legal aid could provide expert reports at less cost than the Government's alternative, which was more complicated as well as more expensive.[14] Lord Wigley (Plaid Cymru) argued that the report by King's College London[15] had shown that,

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8 Amendment 119: HL Deb 14 March 2012 cc278-9
9 HL Deb 14 March 2012 c285
10 HL Deb 27 March 2012 cc1257-8
11 HL Deb 27 March 2012 c1260
12 HL Deb 27 March 2012 cc1271-2
13 HL Deb 27 March 2012 c1275
14 HL Deb 7 March 2012 cc1823-4
15 Dr Graham Cookson *Unintended Consequences: the cost of the Government's Legal Aid Reforms* King's College London, November 2011

rather than reduce costs, removing clinical negligence cases from scope would shift costs to the NHS.[16] Lord Faulks (Conservative), however, suggested that hard decisions had to be taken and so the aim in scrutinising the Bill must be to limit the damage rather than pretend that limitless funds were available.[17]

For the Government, in dealing with this amendment at report, Lord Wallace of Tankerness pointed out that the Government was allowing these reports to be funded through after the event insurance, the premiums for which would remain recoverable. The Government had made a concession in relation to litigation and expert costs for clinical negligence causing brain injury as a result of which a child was severely disabled, recognising that conditional fee agreements might not be available to them and that relying on the Bill's provisions for exceptional funding might create uncertainty. Nonetheless, a line had to be drawn. Lord Wallace said that 82 per cent of clinical negligence cases where the funding method was known were funded via the conditional fee agreement route. It would not (he went on) be fair to the taxpayer to open up legal aid to many clinical negligence cases that were currently funded by conditional fee agreements, where lawyers carried the no-win no-fee risk.[18]

The amendment was agreed by 178 votes to 172. It is now listed as **Lords Amendment 170** of Bill 327.

2.7 Clinical negligence – children suffering neurological damage at or near birth: Government amendment

In response to some intensive lobbying, the Government introduced an amendment which would provide legal aid in a claim for damages in respect of clinical negligence causing neurological injury and leading to severe disability where the clinical negligence had been suffered by a child during the mother's pregnancy and at or near the time of birth.

This amendment was debated on 7 March 2012 (see above), when Lord Lloyd of Berwick's amendment was agreed.[19] It is now listed as **Lords Amendment 216** of Bill 327.

2.8 Clinical negligence in cases concerning children: Government defeat

An amendment restoring legal aid for clinical negligence in the provision of clinical services to a child was tabled by Baroness Eaton (Conservative), Lord Crisp (crossbencher), the late Lord Newton of Braintree (Conservative) and Lord Cormack (Conservative), but it was not moved at report stage.[20] On the second day of report on 7 March 2012, Baroness Eaton argued that to include clinical negligence cases only where the baby had sustained a neurological injury and ─ as the Government had done ─ to exclude physical conditions such as Erb's palsy, and to set a time limit of 72 days from birth, was arbitrary and upsetting.[21]

An amendment moved by Lord Cormack at third reading would keep legal aid in cases where clinical negligence had taken place when the individual was a child. In responding, Lord McNally emphasised that the Government had listened to concerns on this issue and so had brought forward its amendment to bring back into scope legal aid for clinical negligence concerning infants with neurological damage, because these cases would not always secure

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16 HL Deb 7 March 2012 c1832
17 HL Deb 7 March 2012 c1835
18 HL Deb 7 March 2012 cc1841-3
19 HL Deb 7 March 2012 cc1823-48 and HL Deb 7 March 2012 cc1885-7
20 HL Deb 7 March 2012 c1876
21 HL Deb 7 March 2012 c1828

a conditional fee agreement. This ensured funding for the most serious clinical negligence cases involving children.[22]

The amendment was agreed by 228 votes to 215. It is now listed as **Lords Amendment 172** of Bill 327.

The Explanatory Notes summarise the Lords amendments to this part of the Bill.[23]

2.9 Definition and evidence of domestic violence

Although, under the terms of the Bill, private law family cases are to be taken out of scope for legal aid for most applicants, such cases would remain in scope where the applicant for legal aid was a victim of domestic violence. The controversy surrounding these provisions – and, in particular, the definition of domestic violence to be used and the evidence that would have to be adduced – is discussed in the Library standard note on legal aid for victims of domestic violence.[24] As the Explanatory Notes indicate, the definition of domestic violence has remained contentious throughout the Bill's passage through the Lords and various amendments were tabled.[25]

Government amendments agreed

The Government made two amendments (37 and 38) to the definition of domestic violence in Part 1 of Schedule 1. These were agreed without debate on 7 March 2012, the second day of report.[26]

Bill 129 of 2010-12 (the Bill as amended in committee) provided in Part 1 of Schedule 1 for legal aid services for:

> *Victims of domestic violence and family matters*
>
> 10 (1) Civil legal services provided to an adult ("A") in relation to a matter arising out of a family relationship between A and another individual ("B") *where A has been abused by B or is at risk of being abused by B*. [italics added]

Amendment 37 (now listed as **Lords Amendment 189** of Bill 327) replaced the italicised words with

> (a) there has been, or is a risk of, domestic violence between A and B, and
>
> (b) A was, or is at risk of being, the victim of that domestic violence."[27]

The same paragraph of Bill 129 of 2010-12 also excluded legal aid where the claim in respect of abuse was for tort:

> (6) The services described in sub-paragraph (1) do not include services provided in relation to a claim in tort in respect of the abuse of A by B.

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22 HL Deb 27 March 2012 cc1273-4
23 *Legal Aid, Sentencing and Punishment of Offenders Bill: Explanatory Notes on Lords Amendments*: paragraphs 136-7
24 SN/HA/5839, 16 December 2011
25 *Legal Aid, Sentencing and Punishment of Offenders Bill: Explanatory Notes on Lords Amendments*: paragraphs 6-8
26 HL Deb 7 March 2012 cc1880-1
27 Now amendment 189 of Bill 327 of 2010-12

Amendment 38 (now listed as **Lords Amendment 190** of Bill 327) changed the wording here too, by replacing "abuse of A by B" with "domestic violence".[28]

The Government's amended definition of abuse, set out in amendment 42, was also agreed on 7 March 2012. The definition here stated that:

> "domestic violence" means threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.[29]

The amendment is now listed as **Lords Amendment 193** of Bill 327

Government defeat

On the first day of report stage in the Lords, the Government suffered a further defeat. An amendment by Baroness Scotland of Asthal (amendment 2) to amend **clause 1** so as to require the Lord Chancellor to ensure that victims of domestic violence were able to access civil legal services in accordance with the financial eligibility criteria was agreed by 238 votes to 201.[30] The amendment is now listed as **Lords Amendment 2** of Bill 327

Amendments agreed

Amendment 192 of Bill 327**,** on the definition of abuse, was first introduced by Baroness Scotland of Asthal (Labour), Baroness Butler-Sloss (crossbencher), the Bishop of Leicester and Lord Blair of Boughton (crossbencher) at committee stage, although it was not moved.[31] It defined abuse thus:

> "abuse" means any incident or repeated incidents of threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional, and including acts of neglect, maltreatment, exploitation or acts of omission) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.[32]

At report stage, when it was considered as amendment 41, several members of the Lords argued that this definition – which seeks to bring onto the face of the Bill the definition of abuse used by the Association of Chief Police Officers (ACPO) and others (although in fact the amendment's wording departs somewhat from the ACPO definition)[33] – was to be preferred to the Government's own amended definition. The Liberal Democrat, Lord Thomas of Gresford, however, supported the Government's amendment.[34] Amendment 41 (the definition of abuse moved by Baroness Butler-Sloss) was agreed on the second day of report, 7 March 2012.[35]

Amendment 194 of Bill 327 (the list of evidence of abuse) was also first introduced by Baroness Scotland, Baroness Butler-Sloss, the Bishop of Leicester and Lord Blair at

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28 Now amendment 190 of Bill 327 of 2010-12

29 HL Deb 7 March 2012 c1881

30 HL Deb 5 March 2012 cc1576-94

31 Amendment 45: HL Deb 18 January 2012 c666

32 HL Deb 18 January 2012 c 606

33 ACPO's *Guidance on Investigating Domestic Abuse* defines domestic violence as: Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults, aged 18 and over, who are or have been intimate partners or family members, regardless of gender and sexuality. (Family members are defined as mother, father, son, daughter, brother, sister and grandparents, whether directly-related, in-laws or step-family). [2008: page 7]

34 HL Deb 5 March 2012 cc 1581-2

35 HL Deb 7 March 2012 c1881

committee stage, although it was not moved.[36] On the first day of report on 5 March 2012 (when it was considered as amendment 43), Baroness Scotland argued that the list of evidence which the amendment offered would ensure that all victims of domestic violence were protected; the Bill's narrow evidential gateway (she went on) appeared to

> fly in the face of the Government's commitment and, in the face of what I believe to have been a universally agreed understanding about the nature and extent of domestic violence in our country

and would exclude genuine victims from help.[37] This amendment too was agreed on 7 March 2012.[38]

Amendment 196 of Bill 327, which would remove from the Bill the 12 month time limit on the currency of evidence of abuse, was also first introduced by Baroness Scotland, Baroness Butler-Sloss, the Bishop of Leicester and Lord Blair at committee stage, although it too was not moved.[39] It was agreed on 7 March 2012, as amendment 44.[40]

2.10 Availability of legal aid for welfare benefit cases: two Government defeats

A further Government defeat occurred on 7 March 2012, the second day of report, when the Liberal Democrat, Lady Doocey moved amendment 11, to retain legal aid for advice on appeals against welfare benefit decisions at the first-tier tribunals.

Lady Doocey argued that the Bill's provisions would seriously inhibit claimants' access to justice, would not deliver the promised savings and would create very serious problems for some of the most vulnerable people in society. As evidence of the need to retain legal aid, she cited the fact that, in six out of every ten successful appeals against employment support allowance decisions, the claimants had originally been deemed not to have any factors affecting their ability to work.[41] Lord Newton remarked that the changes to legal aid were being made at a time of change and turbulence in the benefits system and so many people would want to seek advice on those changes.[42] In similar vein, the crossbencher, Lord Low of Dalston suggested that the proposals represented a "triple whammy" for disabled people, with the risk that the cumulative impact of the changes might force disabled people out of their homes and into residential care.[43]

In response, Lord McNally agreed with Lord Bach, the Opposition spokesman for Justice, that this was the most important amendment in the Bill because, with the other amendments with which it was grouped, it could "tear out the heart of the rationale of the Bill". Tribunals were especially designed to ensure that claimants did not require legal representation; it was general advice that appellants needed, rather than legal advice, and the Government was supporting the advice sector to provide that advice. The Ministry of Justice needed to find significant savings and (Lord McNally argued) tough decisions had to be made.[44]

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36 Amendment 46: HL Deb 18 January 2012 c666
37 HL Deb 5 March 2012 cc1577-8
38 HL Deb 7 March 2012 cc1881-2
39 Amendment 48: HL Deb 18 January 2012 c607
40 HL Deb 7 March 2012 cc1881-2
41 HL Deb 7 March 2012 c1782
42 HL Deb 7 March 2012 cc1783-4
43 HL Deb 7 March 2012 c1796
44 HL Deb 7 March 2012 c1810-1

The amendment was agreed by 237 votes to 198. It is now listed as **Lords Amendment 168** of Bill 327.

The Government then suffered a further defeat on an amendment by Lord Bach to retain legal aid for benefit appeals to higher tribunals. Lord Bach suggested that the amendment was a matter of common sense. Very few cases (he said) reached the upper-tier tribunal and he was not suggesting that there should be representation there (where only advice and assistance was currently available), although it should be available for the Court of Appeal and the Supreme Court.[45]

This amendment was agreed by 222 votes to 194. It is now listed as **Lords Amendment 169** of Bill 327.

2.11 Judicial review: Government amendment agreed

On 7 March 2012, the Government introduced an amendment (**amendment 48** - now listed as **Lords Amendment 197** of Bill 327) intended to put "beyond doubt that legal aid will be available for any judicial review concerning death, personal injury, damage to property and Criminal Injuries Compensation Authority payments".[46]

2.12 Criminal legal aid: Means-testing of advice at the police station

On 24 January (the fifth day of committee) Lord McNally announced that the Government intended to table an amendment to **clause 12**, removing the power to introduce means-testing for initial advice and assistance at the police station.[47]

These amendments (103 and 104) were agreed on 12 March 2012, the third day of report.[48] They are now listed as **Lords Amendments 9 and 10** of Bill 327.

3 Civil litigation funding

3.1 Exception in respiratory disease or illness cases: Government defeat

On 14 March 2012, the fourth day of report stage, the crossbencher, Lord Alton of Liverpool, moved an amendment intended to remove proceedings involving a claim for damages for respiratory disease or illness (whether or not resulting in death) arising from industrial exposure to a harmful substance from the Bill's provisions relating to civil litigation funding,. The effect of the amendment would be that, in these types of proceedings, the success fee and the after the event insurance premium would continue to be recoverable from the losing party. Lord Alton spoke of people suffering from mesothelioma, an issue he had previously raised at second reading and in committee. He argued that asbestos victims should not be required to pay up to 25% of their damages for pain and suffering to meet the legal costs associated with a conditional fee agreement (CFA). He further argued that these victims should not have to subsidise other claimants' access to justice and said that they could not afford to defend test cases run by rich insurers. Lord Alton said that the Bill's provisions would inhibit claims, thus adversely affecting access to justice, and that terminally ill people would not have the energy to look for a lawyer who might charge more competitive fees. Claims by terminally ill victims could not be frivolous or fraudulent.[49]

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45 HL Deb 7 March 2012 c1809
46 HL Deb 7 March 2012 c1885
47 HL Deb 24 January 2012 c1021
48 HL Deb 12 March 2012 cc137-40
49 HL Deb 14 March 2012 cc309-12

Lord McNally resisted the amendment and said that allowing the present regime of recoverability to continue to apply in certain cases only would introduce unfairness between different classes of claimant. He spoke of various measures which had already been introduced in relation to sufferers of respiratory diseases. Lord McNally said that the success fee would be a negotiated amount, and that he would expect solicitors to compete for business by offering lower fees. The proposed 10% increase in general damages for non-pecuniary loss would help claimants to pay any success fee that may be due.[50]

The amendment was agreed by 189 votes to 158. It is now listed as **Lords Amendment 31** of Bill 327.

3.2 Exception for industrial disease cases: Government defeat

On 14 March 2012, Lord Bach moved an amendment to exclude claims for damages for other serious industrial diseases resulting from any breach of duty owed by an employer to an employee from the Bill's provisions relating to civil litigation funding. He said that asbestosis was not the only problem that required separate treatment.[51] Lord McNally resisted the amendment at the same time as resisting Lord Alton of Liverpool's amendment.

The amendment was agreed by 168 votes to 163. It is now listed as **Lords Amendment 32** of Bill 327.

3.3 Collective CFAs: Government amendments agreed

On 14 March 2012, minor and technical Government amendments (**now Lords Amendments 33-36** of Bill 327) were agreed without vote. Lord McNally said that the amendments would ensure that the changes to the recoverability of success fees and after the event (ATE) insurance premiums, and the ATE equivalent for self-insured bodies, would apply equally to all CFAs including collective CFAs which pre-date April 2013 but where work is commenced under the collective CFA after that date.[52]

3.4 Pro bono representation: amendment agreed

On 20 March 2012, the fifth day of report, an amendment moved by the crossbencher, Lord Pannick, with Government support, was agreed without vote. The amendment would enable the Supreme Court to order the losing party to make a payment to a charity prescribed by the Lord Chancellor where the other party is represented pro bono (this power already applies to civil cases in the county court, High Court and Court of Appeal).[53] It is now listed as **Lords Amendment 39** of Bill 327.

3.5 Rules against referral fees: Government amendments agreed

On report on 14 March 2012, Lord McNally said that he would bring back amendments at third reading to address certain issues relating to referral fees (**Clause 57**) which had been raised by amendments tabled by Lord Hunt of Wirral (Conservative).

At third reading on 27 March 2012, Lord McNally moved amendments which he said would:

- include within the scope of the rules against referral fees legal services relating to any other claim or potential claim for damages arising out of circumstances involving personal

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50 HL Deb 14 March 2012 cc326-30
51 HL Deb 14 March 2012 cc325
52 HL Deb 14 March 2012 cc360-1
53 HL Deb 20 March 2012 cc762-4

injury or death; Lord McNally said that this would address the situation "where the referral fee for an ancillary claim, such as for damage to a motor vehicle involved in a road traffic accident, in addition to a personal injury claim, may be inflated to include a payment for a referral fee for the personal injury claim"

- clarify that the payment of referral fees to a third party, whether or not they are regulated, would not avoid the prohibition on the payment of referral fees.[54]

The amendments were agreed without vote. They are now listed as **Lords Amendments 37** and **38** of Bill 327.

4 Sentencing

4.1 Transgender and disability hate crime – Government new clause agreed

In committee on 7 February 2012, the Government introduced a new clause[55] to introduce aggravated sentences for transgender hate crimes and a 30 year starting point for murders motivated by a victim's disability or transgender status.[56] Opposition spokesman Lord Beecham congratulated the Government on the new clause, and it was agreed to without division. It is now listed as **Lords Amendment 41** of Bill 327.

4.2 Alcohol abstinence and monitoring requirement – Government new clause agreed

The Government introduced a new clause on the fifth day of the Lords report stage to give courts the power to impose a new alcohol abstinence and monitoring requirement on offenders who have committed alcohol-related offences.[57] The requirement could be imposed as part of a community order or suspended sentence order for such offences. A further new clause would allow for these to be piloted. The new clause followed amendments tabled in committee by the crossbench peer, Baroness Finlay of Llandaff,[58] and earlier attempts to introduce the requirement in the *Police Reform and Social Responsibility Bill.*[59] The Prime Minister, David Cameron, announced on 17 March 2012 that the powers would be piloted[60] and further details were given in the Government's consultation paper *Punishment and Reform: Effective Community Sentences* which was published on 27 March 2012.[61] The new clauses are now contained in **Lords Amendments 48** and **49** of Bill 327.

5 Other changes

5.1 Rehabilitation of offenders – Government new clauses agreed

The Government introduced amendments to change the rules which govern the length of time for which ex-offenders have to declare their previous convictions. Under the *Rehabilitation of Offenders Act 1974*, a person's criminal convictions may become "spent" after a certain period of time. This means they do not have to reveal their previous convictions. At the same time, certain sensitive occupations (such as work with children and vulnerable adults) are exempted from the provisions, and employers in those fields are entitled to see the full criminal record history of the applicant.

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54 HL Deb 27 March 2012 cc1335-6
55 Now amendment 41 of Bill 327 of 2010-12
56 HL Deb 7 February 2012 cc152-4
57 HL Deb 20 March 2012 cc800-815
58 HL Deb 7 February 2012 cc 186-201
59 See for example HL Deb 9 June 2011 cc438-40
60 "'Sobriety orders' to be piloted by government", *BBC News*, 17 March 2012
61 Ministry of Justice, *Punishment and Reform: Effective Community Sentences*, Cm 8334, March 2012, pp43-5

In the case of offenders who were adults at the time of their conviction, the so-called rehabilitation periods are as follows:

Sentence	Rehabilitation period for adults
Imprisonment for over 30 months (2 ½ years)	Never spent
Imprisonment over 6 months but not exceeding 30 months (2 ½ years)	10 years
Imprisonment up to 6 months	7 years

Full details of rehabilitation periods under the Act can be found in the Ministry of Justice Guidance.[62]

There have been criticisms of the way the Act works for many years. For example, the Cabinet Office's Social Exclusion Unit suggested reforms in 2002:

> Current legislation requires all ex-prisoners to disclose their previous offences for very lengthy periods in order to protect the public from the few that pose a serious risk of harm. A more targeted approach could free from potential discrimination those ex-prisoners who pose no real risk, reducing significantly a real barrier to employment and so reducing the risk of re-offending.[63]

The Labour government reviewed the system in 2002-2003.[64] The review document proposed a number of changes to the rehabilitation regime, including a reduction in the length of rehabilitation periods and the removal of the 30 month cut-off so that the scheme would apply to all offenders who have served their sentence. In its response, the previous government said it would publish a draft bill for pre-legislative scrutiny. [65] However, a written answer to a Parliamentary Question in April 2009 stated that, although the Government remained committed to reform, it had reviewed the position in the light of the Bichard report into the Soham murders[66] and the subsequent introduction of the *Safeguarding Vulnerable Groups Act 2006*. As a result, no timescale could be set for changing the law.[67]

The present Government invited comments on possible reforms to the system, including reducing the length of rehabilitation periods, in their 2010 consultation document, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*.[68]

The Government tabled amendments during the Lords committee stage[69] which would amend the 1974 Act in two main ways: first, by enabling custodial sentences of up to 48 months to become spent; and second, by reducing the rehabilitation periods for some of the

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62 Ministry of Justice, *What is the Rehabilitation of Offenders Act 1974?*

63 Social Exclusion Unit, *Reducing re-offending by ex-prisoners*, 2002, p60

64 See Home Office, *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act*, July 2002, pp II-III and Home Office, *Breaking the Circle: a summary of the views of consultees and the Government response to the report of the review of the Rehabilitation of Offenders Act 1974*, April 2003

65 Ibid, p10

66 *Bichard Inquiry Report*, HC 653 2003-04, 22 June 2004

67 HC Deb 2 April 2009 cc1465-66W

68 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders,* Cm 7972, December 2010, p34

69 HL Deb 15 February 2012 cc884-896

sentences already covered by the 1974 Act. They are now listed as **Lords Amendments 152-154** of Bill 327.

Amendment 152 contains a complete table of the new rehabilitation periods which would apply. For adult offenders, these would be:

Sentence	Rehabilitation
Imprisonment of between 30 and 48 months	7 years
Imprisonment of between 6 and 30 months	4 years
Imprisonment of 6 months or less	2 years

The amendments were agreed to without division.

The changes have reportedly been welcomed by the Confederation of British Industry.[70] NACRO[71] and the Prison Reform Trust[72] have also welcomed them but said the Government should go further.

5.2 New offences to deal with metal theft – Government new clauses agreed

Metal theft is becoming an increasingly high-profile problem, which has been estimated to cost the UK economy around £770 million per year.[73] The British Transport Police, which has lead policing responsibility for metal theft, experienced 2,000 incidents in 2010/11, up from around 1,500 in 2009/10. [74] It says that the prevalence of metal theft is closely tied to the price of metals on international markets, which is expected to rise until at least 2015.

Special regulations have applied to scrap metal dealers since at least the late 1800s in order to help tackle the theft of metal. The current legislation is set out in the *Scrap Metal Dealers Act 1964*, which places specific controls on scrap metal dealers such as a requirement to register with the local authority. There have been calls for the 1964 Act to be reformed to strengthen controls on scrap metal dealers, in particular by introducing a ban on cash payments for scrap metal to make it more difficult for people to dispose of scrap metal anonymously. However, the British Metal Recycling Association opposes this particular proposal, arguing that it will force currently legitimate cash transactions into illegal yards.

On 29 November 2011, the Chancellor George Osborne announced £5 million of Treasury funding to establish a new multi-agency national metal theft taskforce, to be led by the British Transport Police.[75] The Home Office has said that the taskforce will "develop intelligence, coordinate activity and target and disrupt criminal networks - both the thieves and also the criminal market, including rogue elements of the scrap metal industry".[76]

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70 Alan Travis and Owen Bowcott "Kenneth Clarke to 'wipe slate clean' for hundreds of thousands of ex-offenders", *Guardian*, 2 February 2012

71 Ibid

72 "Spent conviction time reductions proposed", *BBC News*, 2 February 2012

73 HC Deb 6 September 2011 c335

74 Transport Committee, *Written Evidence from the Association of Chief Police Officers (CTR 12)*, 8 November 2011

75 HM Treasury, *Autumn Statement 2011*, Cm 8231, November 2011, para A.48

76 Home Office news release, *Metal theft taskforce*, 29 November 2011

On 26 January 2012, the Home Secretary Theresa May announced that the Government would be legislating to prohibit cash payments to purchase scrap metal and to significantly increase the fines for all relevant offences under the existing *Scrap Metal Dealers Act 1964*.[77]

The new clauses were moved by Lord McNally during the Bill's fifth report stage sitting in the Lords.[78] They would make three key changes to the 1964 Act:

- a new section 3A would make it an offence for scrap metal dealers to pay cash for scrap metal, with an exemption for itinerant sellers in respect of whom an order had been made under section 3(1) of the 1964 Act;
- section 6 of the 1964 Act would be amended to give the police new powers (on production of a warrant issued by a justice of the peace) to enter scrap yards where there were reasonable grounds for believing that scrap metal paid for in cash contrary to new section 3A was being (or had been) received or kept there; and
- maximum fines for offences under the 1964 Act currently set at level 1 on the standard scale (£200) would be increased to level 3 (£1,000), and those currently set at level 3 (£1,000) would be increased to level 5 (£5,000).

The Secretary of State would be required to review the new section 3A cash payments offence within five years of the day on which it came into force, and to publish a report of the conclusions of that review (considering in particular the objectives of the offence, the extent to which those objectives had been achieved, and whether it was appropriate to retain the offence to achieve those objectives).

The new clauses are now set out in **Lords Amendments 156-158** of Bill 327.

Further details on the issues, the debate in the Lords and reactions to the changes are given in Library Standard Note 6150, *Metal Theft* (26 March 2012).

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77 HC Deb 26 January 2012 cc25-6WS
78 HL Deb 20 March 2012 cc900-903