



HOUSE OF LORDS

Select Committee on the Constitution

21st Report of Session 2010–12

Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill

Ordered to be printed 16 November 2011 and published 17 November 2011

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 222

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:

To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

Current Membership

Lord Crickhowell
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Baroness Jay of Paddington (Chairman)
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Rennard
Lord Renton of Mount Harry
Lord Rodgers of Quarry Bank
Lord Shaw of Northstead

Declaration of Interests

Declaration of interests are listed in the Appendix.

A full list of Members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

Professor Adam Tomkins, Legal Adviser, is a Member of and unpaid Ad Hoc Legal Adviser to Republic.

Publications

All publications of the Committee are available on the internet at:

<http://www.parliament.uk/hlconstitution>

Parliament Live

Live coverage of debates and public sessions of the Committee's meetings are available at

<http://www.parliamentlive.tv>

General Information

General Information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at:

<http://www.parliament.uk/business/lords>

Committee Staff

The current staff of the Committee are Emily Baldock (Clerk), Stuart Stoner (Policy Analyst) and Nicola Barker (Committee Assistant).

Contact Details

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.

The telephone number for general enquiries is 020 7219 1228/5960

The Committee's email address is: constitution@parliament.uk

Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill

Introduction

1. The Constitution Committee is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. In carrying out the former function, we endeavour to identify questions of principle that arise from proposed legislation and which affect a principal part of the constitution.
2. This report draws to the attention of the House Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill. Part 1 of the Bill constitutes a major overhaul of the system of legal aid for England and Wales. It builds on the Government’s Green Paper, *Proposals for the Reform of Legal Aid in England and Wales*.¹ The House of Commons Justice Committee published a report on the proposals in March 2011.² The Government published a response to this report in June,³ when the Bill was introduced into the House of Commons.
3. It is accepted by all parties that the goal of the reforms is to cut costs. The annual legal aid budget in England and Wales is £2.1 billion. The Government’s proposals are designed to make £350 million of savings (cutting about 16%, or nearly one-sixth, of the budget). The Ministry of Justice has a target of reducing its overall budget by 23% (approximately £2 billion) by 2014–15.⁴
4. On one level, the party political and broader⁵ argument about the cuts to the legal aid budget is just one facet of the ongoing political debate about cuts to public spending. On another level, however, cutting legal aid in the manner and to the extent proposed in Part 1 of the Bill raises discrete issues of constitutional principle, and it is these issues which the Committee draws to the attention of the House.

Access to justice and constitutional principle

5. There is no doubt that access to justice is a constitutional principle. In *R v Secretary of State for the Home Department, ex parte Leech*,⁶ Steyn LJ ruled in the Court of Appeal that the “principle of our law that every citizen has a right of unimpeded access to a court ... even in our unwritten constitution ... must rank as a constitutional right”. Applying this reasoning, the High Court subsequently ruled that setting court fees at an unaffordable rate may be unlawful.⁷
6. If access to justice is a constitutional right, then the courts will require that any impediment to access is made not only with lawful authority but is

¹ Cm 7967, December 2010.

² 3rd report of 2010–12, HC 681.

³ Cm 8111.

⁴ See House of Commons Justice Committee, 3rd report of 2010–12, HC 681, paras 11–12.

⁵ Both the Law Society and the Bar Council have intervened to argue against the Government’s reforms to legal aid.

⁶ [1994] QB 198.

⁷ *R v Lord Chancellor, ex parte Witham* [1998] QB 575.

proportionate. The leading case defines this to mean (among other matters) that “the means used to impair the right ... are not more than is necessary to accomplish the objective”.⁸

7. In his book, *The Rule of Law*, the late Lord Bingham forcefully argued that one of the ingredients of the rule of law itself was that “means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide disputes which the parties are unable themselves to resolve”.⁹ He went on to say that “denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law”.¹⁰
8. **These are the constitutional principles which, in our view, should inform the House’s scrutiny of this Bill.**

The scheme of Part 1 in outline

9. The Bill abolishes the Legal Services Commission (which, under the Access to Justice Act 1999, is currently responsible for legal aid in England and Wales) and brings responsibility for legal aid within the Ministry of Justice directly (clause 1). A newly created Director of Legal Aid Casework will take over many of the functions of the Legal Services Commission (clause 4).
10. Those categories of civil justice which may fall within the scope of legal aid are listed in Schedule 1; most of the categories listed there are subject to exclusions, which are likewise listed in Schedule 1. A considerable number of categories of civil justice that currently fall within scope would be excluded (wholly or partially) under the Bill.
11. Criteria determining whether an individual qualifies for civil legal aid are to be set out in regulations to be made by the Lord Chancellor (clause 10). Further regulations may be made (under clause 20) concerning any financial contribution that an individual is to make.
12. Provision is also made in the Bill regarding criminal legal aid.

Constitutional issues arising

13. A series of issues of constitutional principle arise with regard to these provisions, as follows.
14. Clause 1 provides that “The Lord Chancellor must secure that legal aid is made available in accordance with this Part”. There is no reference in this provision to the overarching constitutional principles which, in our view, should frame decision-making about legal aid. The law currently provides that the Legal Services Commission is under a statutory duty “within the resources made available” to ensure that “individuals have access to services that effectively meet their needs”.¹¹ **Clause 1 should be amended to read: “The Lord Chancellor must secure that legal aid is made available in order to ensure effective access to justice”.**
15. Clause 4 concerns the Director of Legal Aid Casework. We note that clause 4 does not currently require that the person appointed to this office will have any

⁸ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, at para 27 (Lord Steyn). Lord Bingham in the same case ruled that the right of access to a court and the right of access to legal advice may be curtailed only by clear and express words and even then “only to the extent reasonably necessary to meet the ends which justify the curtailment” (para 5).

⁹ Tom Bingham, *The Rule of Law* (Allen Lane, 2010), p 85.

¹⁰ *Ibid*, p 88.

¹¹ Access to Justice Act 1999, section 4.

particular relevant experience. We further note that the Director must comply with directions and must have regard to guidance given by the Lord Chancellor (clause 4(3)) and that the Lord Chancellor is prohibited from giving directions or guidance “in relation to individual cases” (clause 4(4)). **The House may wish to consider whether these provisions are sufficient to secure that the Director of Legal Aid Casework will be independent of possible Government interference in the carrying out of his functions.**

16. It is a feature of Part 1 of the Bill that much of the detail as to the operation of civil legal aid is provided not in the Bill itself but is to be provided in regulations to be made under the Bill. While the Bill does contain some provision as to the content of these regulations, there are significant omissions. There is no requirement in clause 11, for example, that reasons should be given when legal aid is refused. Further, clause 11(6) provides that the regulations “may make provision for appeals to a court, tribunal or other person”. **The House may wish to consider whether clause 11(6) should provide that the regulations “must” make provision for appeals.**
17. Clause 12(1) concerns criminal legal aid in the context of advice and assistance for individuals in police custody. It provides that “Initial advice and initial assistance are to be available under this Part to an individual who is arrested and held in custody at a police station or other premises *if the Director has determined that the individual qualifies for such advice and assistance in accordance with this Part (and has not withdrawn the determination)*”.¹² Section 58(1) of the Police and Criminal Evidence Act 1984 provides that “A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time”. The Court of Appeal has described the right enshrined in section 58 as “one of the most important and fundamental rights of a citizen”.¹³
18. Section 58 has been most recently discussed by the UK Supreme Court in *Ambrose v Harris*, in which Lord Brown stated that “On arrival at the police station the detainee must be advised about his right to *free* legal advice, including a right to speak to a solicitor on the telephone, and he must be asked if he wishes to do so”.¹⁴
19. The House may wish to consider whether clause 12 of the Bill, as it is currently drafted, has the potential to undermine this right in practice, particularly given Lord Brown’s recent observation in the Supreme Court that the right is not merely to legal advice but to free legal advice. As such, **the House may wish to consider whether clause 12 should be amended so as to omit the words “if the Director has determined that the individual qualifies for such advice and assistance in accordance with this Part (and has not withdrawn the determination)”.**
20. Under the Bill the Lord Chancellor will have a power to modify Schedule 1 by omitting further services from the scope of civil legal aid (clause 8(2)). Orders made under clause 8(2) will be subject to the affirmative resolution procedure.¹⁵ **This provision should be amended to enable the Lord Chancellor not only to omit services from the scope of civil legal aid but also to add services to the scope of civil legal aid.**

¹² Emphasis added.

¹³ *R v Samuel* [1998] QB 615 (at p 630).

¹⁴ *Ambrose v Harris* [2011] UKSC 43, [2011] 1 WLR 2435, para 79 (emphasis added).

¹⁵ Clause 40.

APPENDIX: DECLARATION OF INTERESTS

The following interests were declared in relation to this report:

GOLDSMITH, Lord

Chairman of the Access to Justice Foundation

President of the Bar Pro Bono Unit

Partner in an international law firm and a practising barrister

HART OF CHILTON, Lord

Non-practising solicitor

IRVINE OF LAIRG, Lord

Non-practising barrister

PANNICK, Lord

Practising barrister

Professor Richard Rawlings, Legal Adviser, declared to following interest. He did not advise the Committee on this Bill:

RAWLINGS, Professor

Wife is a practising solicitor (including legal aid work) who gave evidence to the Public Bill Committee in the House of Commons on the medical negligence aspects of the Legal Aid, Sentencing and Punishment of Offenders Bill.

A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>