MINISTRY OF JUSTICE

HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION'S TWENTY FIRST REPORT OF SESSION 2011-12:

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL

GOVERNMENT RESPONSE TO THE REPORT

December 2011

LORDS SELECT COMMITTEE ON THE CONSTITUTION'S REPORT ON THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL

Ministry of Justice Memorandum

Introduction

i. The House of Lords Select Committee on the Constitution published a report on 17 November 2011 into the *Legal Aid, Sentencing and Punishment of Offenders Bill* (Twenty First Report of Session 2011-12).

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

Issue 1: Effective Access to Justice

The Committee makes the following point in its report:

"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"

1.1 It is central to our proposals for reform that the reforms establish an affordable system, while ensuring that no one is denied their fundamental rights of access to justice. Legal aid will be a key element in ensuring access to justice in some cases, but in many cases justice can and should be afforded without the assistance of a lawyer funded by the tax payer.

1.2 Fundamental rights to access to justice are the subject of international protections such as the European Convention on Human Rights and certain enforceable EU rights, and are protected by this Bill in relation to legal aid, through both the areas retained in scope in Schedule 1 to the Bill and through the exceptional funding provision at clause 9 of the Bill. The exceptional funding scheme will ensure the protection of an individual's rights to legal aid under the European Convention on Human Rights as well as those rights to legal aid that are directly enforceable under European Union law.

1.3 These rights are of fundamental importance, and the Government considers that the Bill adequately protects them. It does not consider however that any more extensive right to tax payer assistance by way of legal aid to access the courts should be established. To the extent the proposed amendment seeks to establish a more extensive right to legal aid, the government does not accept that this is either desirable or necessary. To

the extent it does not add to the existing provisions in the Bill, the Government considers it unnecessary.

Issue 2: Independence of the Director of Legal Aid Casework

The Committee makes the following point in its report:

"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".

2.1 The Director will be a civil servant, appointed on merit through a fair and open competition process, and will hold an independent statutory office. The Legal Aid, Sentencing and Punishment of Offenders Bill puts in place a number of measures to guarantee the independence of the Director in relation to individual funding decisions, in particular clause 4(4).

2.2 In particular, the Director must make determinations in legal aid cases in accordance with the provisions of Part 1 of the Bill. While the Lord Chancellor can issue directions and guidance to the Director, the Lord Chancellor is specifically prevented under clause 4(4) from issuing such directions or guidance about the carrying out of the Director's functions in relation to individual cases. This prohibition extends to anyone, including civil servants, to whom the Director may delegate his or her decision making functions in accordance with clause 5 of the Bill. Any guidance or directions issued by the Lord Chancellor are required to be published, which ensures transparency in respect of its content.

2.3 The purpose behind the creation of this statutory office is to ensure that there is no Ministerial involvement in the making of individual legal aid funding decisions whilst enabling the Lord Chancellor, rather than a non – departmental public body, to be accountable for the overall administration of the legal aid scheme. The Lord Chancellor will set the overarching guidance, procedures and criteria for legal aid, which the Director will apply in taking individual funding decisions.

2.4 The Government is satisfied that an appropriate and proper balance has been struck between the importance of independent decision making on individual cases, and ministerial accountability for the administration of the scheme.

2.5 There will be a published "framework document" which will set out the governance and reporting arrangements between the Director and the Ministry of Justice. One of the things it will do is to reflect the importance of the independence of decision making in individual.

Issue 3: Provision for appeals

The Committee makes the following point in its report:

"The House may wish to consider whether clause 11(6) should provide that the regulations "must" make provision for appeals".

3.1 Clause 11(5) provides that regulations made under clause 11(2) must make provision establishing procedures for the review of determinations under clause 8 and clause 9 and of the withdrawal of such determinations. Clause 11(6) provides that those regulations may make provision for appeals to a court, tribunal or other person against such determinations and against the withdrawal of such determinations.

3.2 The Government currently intends to continue with the Legal Services Commission's existing appeal and review procedures for cases determined under clause 8 (that is, those within the general scope of the civil legal aid scheme), including the use of independent funding adjudicators (IFA), which are well established and understood[1]. The intention is that these procedures will include provision for internal review of decisions by the Director (on means and merits grounds), and where a client is dissatisfied with the conclusion of a review on merits grounds, will also include a right of appeal to an IFA. As at present, there would be no appeal against refusal on means grounds.

3.3 Reflecting the current review arrangements, there will also be a right of internal review for exceptional case determinations (under clause 9 of the Bill), although IFAs will have no role in review of exceptional funding decisions. This is because of the particular nature of the assessment at the heart of such cases, which will focus on an interpretation of the relevant obligations under the European Convention on Human Rights to provide legal aid. Exceptional case determinations (along with all other decisions by the Director) would be subject to judicial review.

3.4 The Government therefore considers that in this instance no amendment is necessary.

Issue 4: Clause 12

The Committee makes the following point in its report:

"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)".

4.1 Clause 12 makes provision for initial advice and assistance for those in custody at a police station or other premises.

[1] See Legal Services Commission, *Funding Code Procedures* (2010), available at http://www.legalservices.gov.uk/docs/cls_main/FundingCodeProcedures-April2010.pdf.

4.2 Article 6(3)(c) of the European Convention on Human Rights provides two qualifications on the requirement to provide free legal representation to those charged with a criminal offence: (i) the financial means of the defendant ("if he has not sufficient means to pay for it"), and (ii) the interests of justice. Section 58 of the Police and Criminal Evidence Act 1984 (PACE) provides that any person under arrest and held in custody in a police station or other premises is entitled, upon request, 'to consult a solicitor privately at any time'. The Codes made under PACE, rather than the Act itself, say that an individual has a 'right to **free** legal advice'.

4.3 The position under the Bill is consistent with the obligations under Article 6 of the European Convention on Human Rights.

4.4 The provisions of the Bill are based on the starting point that advice and assistance at the police station should only be made available where the interests of justice require it to be made available. Therefore, we believe it is appropriate to allow the Director to determine whether or not an individual qualifies for initial advice and assistance. Our view however is that it will generally be in the interests of justice for those held in custody at the police station to receive advice and assistance in some form, whether over the telephone or in person, as at present. There are no current plans to change the system that operates in practice for police station advice and it is currently intended that initial advice and assistance will continue to be available to all those to whom it is available at the moment.

4.5 Clause 12(3) introduces the power for regulations to be made so that advice and assistance for those in custody would be subject to an assessment of an individual's means, so that those who could afford to pay for legal advice would do so. We have listened very carefully to the points that have been raised, in debate on the Bill, in connection with clause 12(3) and are continuing to consider the position carefully. We have also noted the views of the Committee in its Report. We will update the Committee on the outcome of our further consideration as soon as possible and apologise that we are not able do at the time of this response.

Issue 5: Adding and omitting services from the scope of civil legal aid

The Committee makes the following point in its report:

"This provision (clause 8(2)) 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".

5.1 The intention is that clause 8(2) will be a focussed power to omit services where, for example, funding may no longer be necessary and it will allow whole or parts of paragraphs to be omitted. Our intentions have been set out

in our programme of reform in the response to the consultation paper[2] and are reflected in the Bill. Part 1 of Schedule 1 to the Bill sets out the areas for which we will continue to make funding available. Civil legal aid has been limited to these areas following a thorough review based on the importance of the issue, the litigant's ability to present their own case (including their vulnerability), the availability of alternative sources of funding and the availability of alternative routes to resolution. We have used these factors to prioritise funding on the highest priority cases, for example, where people's life or liberty is at stake, where they are at risk of serious physical harm or immediate loss of their home, or where children may be taken into care.

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

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