

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

EXPLANATORY NOTES

SUMMARY

16. A summary of the Act is set out below:

Part 1: Legal Aid

17. **Part 1** of the Act abolishes the LSC and places a duty on the Lord Chancellor, subject to the provisions of Part 1, to secure the availability of civil and criminal legal aid. The intention is that an executive agency within the Ministry of Justice will administer the delivery of legal aid services in England and Wales. However, in relation to decision-making in individual cases, the Act requires the Lord Chancellor to designate a civil servant to be the Director of Legal Aid Casework (“the Director”). The Director will have statutory responsibility for taking decisions on legal aid in individual cases. The Act prevents the Lord Chancellor from giving directions or guidance to the Director in relation to individual cases.
18. Provisions in Part 1 ensure that, together with the powers the Lord Chancellor has as a Minister of the Crown, the Lord Chancellor has power to enter into appropriate arrangements with others for them to provide legal aid. The Lord Chancellor will have power to set quality standards for those providing legal aid services and to make arrangements for accreditation and monitoring of such providers. (the LSC currently have accreditation schemes such as the Specialist Quality Mark, responsibility for which will fall to the Lord Chancellor once the LSC is abolished). The Lord Chancellor will have power to make provision in regulations about the payment of remuneration to those providing legal aid services.

Civil legal aid

19. **Part 1** of the Act defines civil legal services as encompassing advice, assistance and representation by legal professionals and also the services of non-legal professionals, including for example mediation and other forms of dispute resolution.
20. Part 1 of Schedule 1 describes the civil legal services that can generally be made available under the arrangements for civil legal aid.
21. The Act also provides the Director with the power to require civil legal services not mentioned in Schedule 1 to be made available, *either* where the Director considers that it is necessary to make the services available because the failure to provide legal services to an individual would be a breach of the individual’s Convention rights (within the meaning of the Human Rights Act 1998), or any rights of the individual to the provision of legal services that are enforceable EU rights, *or* where the Director considers that it is appropriate to make services available, in the particular circumstances of the case, having regard to any risk that failure to do so would result in a breach of such rights.

22. The Act requires the Director to determine whether an individual qualifies for civil legal services by reference to their financial resources and the criteria set out in regulations prepared by the Lord Chancellor. The Act lists the factors which the Lord Chancellor must consider in setting those criteria. They are similar to the factors that the LSC is currently required to consider when setting the Funding Code criteria (see section 8(2) of the Access to Justice Act 1999).
23. The Act also provides the Lord Chancellor with a power to make regulations about the making and withdrawal of determinations by the Director about civil legal aid, including regulations about the means by which an application for legal aid must be made. The regulations must make provision about the review of determinations and may make provision about appeals against determinations.

Criminal legal aid

24. **Part 1** of the Act makes provision for individuals in custody at a police station or facing criminal investigation to be able to secure the provision of advice and assistance, including advocacy (usually by a duty solicitor). Determinations about whether individuals qualify for such services must be made having regard, in particular, to the interests of justice.
25. The Act also provides for individuals to be provided with representation for criminal proceedings. Whether such services should be provided is to be determined having regard to the interests of justice and, where provided for in regulations, following an assessment of the individual's financial resources. Determinations about whether an individual qualifies for criminal legal aid will be made by the Director or by a court. Provisional determinations may be made in favour of individuals involved in a criminal investigation. Such a determination may be made, for example, where plea negotiations are initiated by a prosecutor under the guidelines issued by the Attorney General.

Contributions and costs

26. **Part 1** of the Act makes provision about determining the financial eligibility of individuals for civil and criminal legal aid. It also makes provision about when individuals can be required to make payments in connection with the provision of civil or criminal legal aid and about the enforcement of such requirements. The Act provides for a statutory charge over property that a legally aided person recovers or preserves, or over costs payable to them, in civil proceedings and the settlement of civil disputes. It also makes provision about costs in civil proceedings, including limiting the costs that can be awarded against a person receiving civil legal aid to the amount (if any) that is reasonable, given the financial resources of both parties and their conduct during the case.

Providers of services

27. **Part 1** of the Act enables the Lord Chancellor to restrict the choice of provider in certain conditions, for example to providers who hold a contract with the Lord Chancellor to provide such services. In publicly funded cases the professional relationship between provider and client is unaffected. The Act restricts payments to providers of legal aid from other sources and enables regulations to provide that, where legal aid is withdrawn, the provider is still to be paid for work undertaken.
28. The Act provides for a code of conduct for any civil servants, or employees of a body established by the Lord Chancellor, who provide legal aid services. The code is to be published and laid before Parliament.

Part 2: Litigation funding and costs

29. **Part 2** of the Act contains provisions to implement reforms to the existing arrangements for civil litigation funding and costs as recommended by Lord Justice Jackson, a judge of the Court of Appeal, in his *Review of Civil Litigation Costs: Final Report*.¹
30. This Part of the Act also amends the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 to give the court powers to make orders in divorce proceedings, and corresponding civil partnership proceedings, for payments to be made by one party to another for the purposes of paying for legal services.
31. **Part 2** of the Act provides for the prohibition in personal injury cases both of the payment of referral fees (for access to potential claimants) by regulated persons, such as solicitors, to third parties, such as claims management companies and insurers, and of the receipt of such fees. Provision is also made for a power to extend the prohibition to other types of claim and legal services. It will be for the appropriate regulators, for example the Law Society, the Claims Management Regulator and the Financial Services Authority, to enforce the prohibition.
32. In Part 2 of the Act, section 61 amends the Legal Services Act 2007 to enable the Supreme Court to make costs orders in civil proceedings where a successful party is represented pro bono, with the monies recovered going to a prescribed charity.
33. **Part 2** of the Act also amends the Prosecution of Offences Act 1985 (“POA 1985”) by restricting the powers of the courts in England and Wales to order the payment out of central funds of amounts in respect of costs incurred by defendants, witnesses and appellants in criminal proceedings, particularly amounts in respect of legal costs (that is, lawyers’ fees, charges and disbursements including expert witness costs). Similar restrictions are to be applied to amounts awarded by courts in respect of costs incurred by persons who make representations to a court in England and Wales in the course of references made by the Attorney General, persons who are discharged following extradition proceedings in England and Wales and persons involved in proceedings before the Court Martial Appeals Court. The restrictions will not apply in relation to costs incurred in proceedings in the Supreme Court.

Part 3: Sentencing and punishment of offenders

Chapter 1: Sentencing

34. **Chapter 1** sets out changes to some general sentencing provisions contained in the 1991 Act and other legislation. In particular it does the following:
 - It imposes a duty on courts to consider the imposition of compensation orders for certain types of offence;
 - It simplifies the provision setting out the court’s duty to give reasons for and to explain the effect of a sentence imposed by the court;
 - It adds transgender identity to the personal characteristics which will be statutory aggravating factors in sentencing where any offence is motivated by hostility to the victim on this basis. It also provides for a starting point of 30 years for the minimum term for a life sentence for murder aggravated on the grounds of the victim’s disability or transgender identity;
 - It makes a number of changes in relation to community orders for adults. These are non-custodial sentences with specific treatment or behaviour requirements attached. It clarifies when community orders come to an end and enables a court to impose a fine for breach of a community order. It makes amendments

¹ Ministry of Justice (2010) “*Review of Civil Litigation Costs: Final Report*”, available at <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports>

to certain requirements that may be imposed as part of community orders and suspended sentence orders, in particular curfew requirements and mental health, drug rehabilitation and alcohol treatment requirements. It also creates new powers to prohibit foreign travel and to impose alcohol abstinence and monitoring requirements as part of an order.

- It amends the court's power to suspend a prison sentence by increasing the length of sentences that can be suspended, giving the court discretion not to impose community requirements as part of the sentence and enabling it to impose a fine for breach of a suspended sentence order.
 - It provides for offences currently punishable by the magistrates' court on summary conviction with a maximum fine of £5,000 to be punishable by an unlimited fine instead and gives the Secretary of State power to increase the maximum sentences of certain other fines and the sums specified as levels 1- 4 on the standard scale of fines.
35. **Chapter 1** amends the sentencing provisions of the Powers of Criminal Courts (Sentencing) Act 2000 that apply to youths. These will enable a court to impose a penalty for breach of a detention and training order even where the order has finished its term. The Chapter amends provisions about referral orders to provide more flexibility and discretion for their repeated use. It also applies a number of the changes made in relation to community orders to youth rehabilitation orders.
36. **Chapter 1** repeals an unimplemented provision in the 1991 Act relating to "custody plus", which was a new type of sentence for offenders sentenced to less than 12 months imprisonment, and intermittent custody, which would have enabled offenders to spend part of their sentence in prison and part in the community.

Chapter 2: Bail

37. **Chapter 2** makes a number of changes (contained in Schedule 11) to restrict the court's powers to remand adult unconvicted defendants in custody where it is apparent that there is no real prospect that the defendant would receive a custodial sentence if convicted. A court would still be able to remand in custody for the defendant's own protection, or where there was a risk of further offending involving domestic violence.
38. A similar restriction on the remand to youth detention accommodation of defendants under 18 is made by Chapter 3 of Part 3 of the Act.
39. The definition of 'young person' in the Bail Act 1976 is amended to include 17 year olds. This amendment is made as a consequence of changes to the provisions about remands for youths, the provisions for which are set out in Chapter 3 of Part 3 of the Act.
40. In addition, the Bail (Amendment) Act 1993 is amended so that the prosecution may appeal to the High Court against the decision of the judge of a Crown Court to grant bail to a person charged with or convicted of an imprisonable offence.

Chapter 3: Remand of children otherwise than on bail

41. **Chapter 3** creates new custodial remand provisions for under 18s who are charged with or convicted of a criminal offence or concerned in extradition proceedings. It repeals the existing framework set out in the Children and Young Persons Act 1969 and removes provisions under which 17 year olds are currently remanded in prison.
42. This Chapter makes provision for all under 18s who have been refused bail to be remanded in custody according to the same tests. It removes the existing distinctions based on age and gender and imposes a more rigorous test before under 18s can be remanded to youth detention accommodation.

Chapter 4: Release on licence etc.

43. **Chapter 4** makes amendments to the 1991 Act provisions about the release and recall of prisoners. As amended by this Chapter, the 1991 Act will apply to all sentences to be imposed for offences whenever they were committed and whenever the sentence was passed. Schedules 16 and 17 insert Schedules 20A and 20B into the 1991 Act and save the release and licence provisions for offences committed before 4 April 2005 where such provisions differ from those in Chapter 6 of Part 12 of the 1991 Act. Further amendments to the 1991 Act will:
- make the crediting of remand time an administrative function (rather than dependent on a direction of the court);
 - simplify the calculation of crediting periods of remand on bail;
 - provide for the unconditional release of prisoners serving sentences of less than 12 months at the half-way point of sentence;
 - provide for additional restrictions for early release on Home Detention Curfew (“HDC”);
 - make provision for a revocation of a licence to be cancelled where a mistake was made;
 - remove some of the restrictions on the use of recalls subject to automatic release;
 - allow for the executive release of recalled extended sentence prisoners (subject to a risk test);
 - make it clear that, where a prisoner is released on HDC before their automatic release date, a recall under section 254 during the HDC period will override automatic release when that date arrives, so that prisoners who have been recalled for misbehaviour may be detained beyond that date;
 - prevent prisoners recalled during their HDC period being re-released prior to their automatic release date unless satisfactory arrangements for further HDC electronic monitoring can be put in place;
 - provide for supervision of young adult prisoners on release from sentences of less than 12 months; and
 - allow for foreign national prisoners serving indeterminate sentences to be removed from the United Kingdom when the tariff set by the court expires.

Chapter 5: Dangerous offenders

44. **Chapter 5** repeals provisions in the 1991 Act creating indeterminate sentences for public protection and extended sentences and replaces them with provisions for life sentences to be imposed on conviction for a second serious offence and new provision for extended sentences. Equivalent provision is made for service law. The Chapter also creates a new power for the Secretary of State to amend the Parole Board release test for prisoners serving Indeterminate Sentences for Public Protection (“IPP”), extended sentence prisoners and determinate sentence prisoners subject to transitional provisions.

Chapter 6: Prisoners etc

45. **Chapter 6** gives the Secretary of State the power to make rules in respect of the employment and payment of prisoners and persons in young offender institutions aged 18 or over, including in respect of reductions in, deductions from or levies upon such payments.
46. **Chapter 6** also includes amendments to the Repatriation of Prisoners Act 1984, which governs the transfer of prisoners to and from the United Kingdom. The amendments

provide for transit through Great Britain of prisoners serving sentences of imprisonment and statutory protection from prosecution of prisoners transferred to Great Britain under international prisoner transfer arrangements.

Chapter 7: Out of court disposals

47. **Chapter 7** contains amendments to the legislation under which police constables may issue a penalty notice for disorder (“PND”) and authorised persons may give conditional cautions. This includes the introduction of a PND with an education option and provision for conditional cautions to be given without the need to refer the case to the relevant prosecutor. The amendments also allow new types of conditions to be attached to a conditional caution given to a foreign offender without leave to enter or remain in the United Kingdom. The Chapter creates a new kind of youth caution. It also makes amendments to youth conditional cautions, intended to make them more flexible.

Chapter 8: Rehabilitation of offenders

48. **Chapter 8** contains a package of changes to the Rehabilitation of Offenders Act 1974 (“the ROA”) to amend the scope of the Act and its rehabilitation periods. The amendments extend the scope of the ROA so that custodial sentences of up to and including 4 years in length can become ‘spent’. The times at which different convictions become ‘spent’ are also amended, and in most cases the rehabilitation periods are reduced. Where a caution or conviction has become spent, the offender is treated as rehabilitated in respect of that offence and is not obliged to declare it for most purposes, for example, when applying for employment or insurance.

Chapter 9: Offences

49. **Chapter 9** creates new offences of threatening with an offensive weapon or an article with a blade or point thereby creating an immediate risk of serious physical harm with a maximum penalty of 4 years imprisonment. There will be a minimum sentence of 6 months imprisonment for persons aged 18 or over found guilty of this new offence (unless this would be unjust in all the circumstances) and a minimum sentence for persons aged 16 and 17 years old of a 4 month detention and training order (again, unless it would be unjust in the circumstances).
50. It creates a new offence of causing serious injury by dangerous driving and a criminal offence of squatting in a residential building.
51. It amends the Scrap Metal Dealers Act 1964, including by creating a new offence of buying scrap metal for cash. The new offence prohibits scrap metal dealers paying for scrap metal other than by cheque or by electronic transfer.
52. It contains provision amending section 76 of the Criminal Justice and Immigration Act 2008 (“the 2008 Act”) (reasonable force for the purposes of self-defence etc).