PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL

Tenth Sitting

Thursday 8 September 2011

(Afternoon)

CONTENTS

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Monday 12 September 2011

STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY FACILITATE THE PROMPT PUBLICATION OF THE BOUND VOLUMES OF PROCEEDINGS IN GENERAL COMMITTEES

The Committee consisted of the following Members:

Chairs: †Mr Philip Hollobone, Jim Sheridan

† Blunt, Mr Crispin *(Parliamentary Under-Secretary of State for Justice)*
† Brake, Tom *(Carshalton and Wallington)* (LD)
† Buckland, Mr Robert *(South Swindon)* (Con)
† Crockart, Mike *(Edinburgh West)* (LD)
† Cunningham, Alex *(Stockton North)* (Lab)
† Djanogly, Mr Jonathan *(Parliamentary Under-Secretary of State for Justice)*
† Fovargue, Yvonne *(Makerfield)* (Lab)
† Goodman, Helen *(Bishop Auckland)* (Lab)
† Green, Kate *(Stretford and Urmston)* (Lab)
† Gummer, Ben *(Ipswich)* (Con)
† Hinds, Damian *(East Hampshire)* (Con)
† Lee, Jessica *(Erewash)* (Con)
† Llwyd, Mr Elfyn *(Dwyfor Meirionnydd)* (PC)
† Reynolds, Jonathan *(Stalybridge and Hyde)* (Lab/Co-op)
† Slaughter, Mr Andy *(Hammersmith)* (Lab)
† Soubry, Anna *(Broxtowe)* (Con)
† Truss, Elizabeth *(South West Norfolk)* (Con)
† Turner, Karl *(Kingston upon Hull East)* (Lab)
† Wallace, Mr Ben *(Wyre and Preston North)* (Con)
† Watts, Mr Dave *(St Helens North)* (Lab)
† Wright, Jeremy *(Lord Commissioner of Her Majesty's Treasury)*

Kate Emms, *Committee Clerk*

† attended the Committee

Public Bill Committee

Thursday 8 September 2011

(Afternoon)

[Mr Philip Hollobone *in the Chair*]

Legal Aid, Sentencing and Punishment of Offenders Bill

Written evidence to be reported to the House

LA 80 Thompsons Solicitors
LA 81 Legal Aid Practitioners Group
LA 82 Bar Council of England and Wales
LA 83 Young Legal Aid Lawyers
LA 84 WithyKing
LA 85 CORE

Clause 9

Exceptional cases

Amendment proposed (this day): 96, in clause 9, page 6, line 11, before 'any', insert

'the interests of justice, including'.—(*Mr Llwyd.*)

1 pm

Question again proposed, That the amendment be made.

The Chair: I remind the Committee that with this we are discussing the following: amendment 97, in clause 9, page 6, line 12, at end insert—

'(c) that there is significant wider public interest in the resolution of the case,

(d) that the case is of overwhelming importance to the individual, or

(e) that should the individual represent himself this would create obvious unfairness in all the circumstances of the case.

'(3A) For the purposes of subsection (3)(c), exceptional funding should be provided where, in the particular circumstances of the case, the provision of legal services under this Part is likely to produce significant benefits for a class of person, other than the individual and members of the individual's family.

(3B) For the purposes of subsection (3)(d), exceptional funding should be provided where a case has exceptional importance to the client, beyond the monetary value (if any) of the claim, because the case concerns the life, liberty or physical safety of the client or his or her family, or a roof over their heads or raises other significant human rights issues.'.

Amendment 226, in clause 9, page 6, line 12, at end add—

'(c) that the individual is a child, or is without mental capacity'.

Amendment 227, in clause 9, page 6, line 33, at end add—

'(7) Civil legal services are to be available to an individual on a means tested basis for advice and assistance to prepare an application for funding under subsection (2)(a).'.

Mr Andy Slaughter (Hammersmith) (Lab): It is a pleasure to see you in the Chair for our final sitting this week, Mr Hollobone. When we adjourned this morning, I was encouraging the Minister—by way of further encouragement, I will sit down shortly to give him a chance to respond—to explain in detail how clause 9 and the regime of exceptional circumstances will work. The Government have a duty to do so, having relied on that as they have.

I mentioned attending yesterday afternoon's meeting of the all-party group on legal aid, which is ably chaired by my hon. Friend the Member for Makerfield. Historically, hon. Members of all parties have attended—the right hon. Member for Carshalton and Wallington (Tom Brake) has done so, and the Minister has been invited to attend; it is a shame that yesterday only I and Lord Bach attended—and I hope that, notwithstanding the serious disputes, it will continue to function in that way. The message that I was asked to bring to the Minister specifically on clause 9 was that practitioners want to know how the regime will operate, and how they can use it effectively, not to get round Government powers but to ensure that meritorious and acceptable cases are heard.

Yvonne Fovargue (Makerfield) (Lab): My hon. Friend refers to yesterday's meeting of the all-party group. A specific query—I am sure he agrees that it is important that it is answered—is whether the telephone gateway operators will tell people about the exceptional cases funding. If so, where will they refer people to obtain advice on making their case, and will there be legal aid for that? If the court considers that someone needs an application, what will they have to do? The group raised a number of questions that I hope the Minister will answer.

Mr Slaughter: That is a good example of what I was talking about, and I am sure the Minister will take it and other points on board. I quite liked this morning's idea of attribution, and although it may extend our sitting, I will attribute everything from now on because that will show how many and varied are the organisations opposed to the Bill.

Citizens Advice made two specific points that are not covered in its general remarks. It said:

"It is perverse that the proposed new criteria for civil funding set out in schedule 1 are structured around crisis point situations such as immediate homelessness and domestic abuse".

It said that that also applies to clause 9, and it is absolutely right. The Government are setting up a system that works entirely in crisis situations—the exception rather than the rule. That is no basis for legal aid.

The Bar Council ventured the view that, even in their narrowly drafted clause, the Government may not achieve what they wish to achieve. It said:

"An oddity immediately arises from the prima facie exclusion of private family law from legal aid, given the apparent Strasbourg view that at least some non-domestic violence private family cases can be sufficiently important to require legal aid, given the importance of the issues to the lives of the parties, especially the children."

Mr Dave Watts (St Helens North) (Lab): Does my hon. Friend find it as strange as I do that both the Prime Minister and the Minister continue to praise Citizens Advice, then ignore any advice that it gives them?

Mr Slaughter: And it is free advice, at least at the moment.

I mentioned children, and because my hon. Friend the Member for Stretford and Urmston has dealt so comprehensively with that I shall not speak to her amendment save to say that there is a discrepancy between what the Government say today—unless they accept the amendment—and Lord McNally's statement:

"As far as possible, our intention is that, where children are involved, legal aid will still be provided."—[*Official Report, House of Lords,* 7 July 2011; Vol. 729, c. 343.]

What is in the Bill is not "as far as possible", but it will be if the amendment is accepted, as I hope it will be.

Finally, I ask the Government to take a serious look at amendment 227. Another feature of the Bill is the catch-22 or, to put it in less clichéd terms, the way the Government are using the processes and procedures that they are setting up as a rationing mechanism—whether a telephone gateway, fees for access to services or, as in the case in question, an application process so complex that it would be difficult for an unrepresented person to make a proper case for exceptional funding. I commend to the Minister the simple, and not expensive, proposal contained in the amendment.

The Parliamentary Under-Secretary of State for Justice (Mr Jonathan Djanogly): Amendment 96 to subsection (3)(b) and amendment 97, through which the right hon. Member for Dwyfor Meirionnydd would insert additional subsections after subsection (3), would essentially retain the existing exceptional funding criteria and enshrine them in primary legislation.

Subsection (3)(b) enables the director to make an exceptional case determination where he considers that the failure to provide legal services would not necessarily amount to a breach of an individual's right to legal aid, but it is nevertheless appropriate for funding to be made available, having regard to the risk of such a breach occurring. Amendment 96 would allow the director additionally to fund excluded cases where he or she determined that it would be appropriate to do so in the particular circumstances of the case, having regard to the interests of justice. The phrase "interests of justice" is capable in the context of wide interpretation, and I have no doubt that that is the right hon. Gentleman's intention. However, amendments 96 and 97 would together result in a power considerably broader than the one we propose in clause 9.

The existing exceptional funding criteria were created to complement the existing legal aid scheme. It is right that, as we refocus the legal aid scheme as a whole, we adjust the exceptional funding scheme accordingly. As the right hon. Gentleman will be aware, the new exceptional funding scheme will provide funding for excluded cases where, in the particular circumstances of a case, failure to do so would be likely to amount to a breach of the individual right to legal aid under the European convention on human rights, or any rights of the individual that are enforceable EU rights. Funding will also be available in inquests only where there is a significant wider public interest in the applicant's being represented.

The hon. Member for Hammersmith asked for information about when exceptional funding would be awarded. We will publish guidance on the determination test and process in due course, but for now I will say that exceptional funding determinations will be made in accordance with the factors that the domestic courts and the European Court of Human Rights have held to be relevant in determining whether publicly funded legal assistance must be provided in an individual case.

Mr Elfyn Llwyd (Dwyfor Meirionnydd) (PC): Will the Minister give way?

Mr Djanogly: I will finish my explanation, then give way.

For example, if a case involved the determination of civil rights or obligations, thereby engaging article 6 of the European convention on human rights, the director would go on to consider whether there was convincing evidence that, in the particular circumstances of the case, the absence of public funding would make the assertion of a civil claim practically impossible or lead to an obvious unfairness in the proceedings. It is a high threshold, but in considering whether legal aid should be provided in an individual case, the director of legal aid casework will need to take into account such things as the importance of the issues to the individual concerned and the nature of the rights at stake, the complexity of the case, the capacity of the individual to represent themselves efficiently and alternative means of securing access to justice.

Mr Llwyd: The Minister has answered part of my question. The other part was about what would happen if there was a point of law of general public interest. In other words, if a case could have wider implications, would that also be an exception to the rule?

Mr Djanogly: I will come on to the wider public interest point. Exceptional funding determinations will continue to take into account a significant number of factors that inform the existing scheme. I hope that allays some of the concerns expressed by hon. Members.

Yvonne Fovargue: Will the Minister give way?

Mr Djanogly: I will follow up on the right hon. Gentleman's second point and then the hon. Lady can intervene.

The amendment would have the further effect of retaining the significant wider public interest criteria for all excluded cases. We believe that that would not focus our limited resources effectively enough on those matters that we consider sufficiently important to justify the use of public funds.

Significant wider public interest currently means that the resolution of the case has the potential to benefit other people, and that legal aid will assist in delivering those benefits, but in the Government's view, the simple fact that a number of other people may stand to benefit from the resolution of a case does not necessarily mean that the case should be funded exceptionally. For example, the criteria can be used to fund business cases where the likely beneficiaries would be other business men. Again, our approach on that point is consistent with our overall approach in the Bill. We propose that public interest should be a feature of the merits test for individual in-scope cases and that it should no longer be used as a basis for bringing tranches of cases back into scope.

Yvonne Fovargue: The Minister mentioned funding for exceptional cases. Will there be a fixed budget for the maximum spend on exceptional cases? He talked about a number of cases of a particular type being brought back into scope. What mechanism will allow a review of whether to reduce spending should that type of case be brought back into scope?

Mr Djanogly: I will come back to the hon. Lady on that point, but let me continue for the moment.

The right hon. Gentleman will be aware that clause 94 allows funding to be provided for representation in inquest cases where the director makes a wider public interest determination. It is right to retain wider public interest criteria in such proceedings because by their nature, inquests are concerned with matters different from those involved in civil litigation more generally. Inquest proceedings may offer lessons to be learned about potentially life-threatening practices that could affect other lives. In the Government's view, providing exceptional funding for cases and inquests where there is a significant wider public interest may help to prevent deaths.

The wider public interest test is narrowly drawn for inquests in that it is the litigant's representation at the inquest that must provide wider benefits, not merely the holding of the inquest itself. In addition, the cases described in proposed subsection (3A) would not be likely to require exceptional funding as they are precisely the types of case for which legal aid would generally remain available. The new scope of civil legal aid targets funding on those who need it most and the most serious cases in which legal aid or representation is justified. The Bill therefore provides that funding will continue to be routinely available for cases where people's life or liberty is a stake, and where they are at risk of serious physical harm or the immediate loss of their home. Legal aid will continue to be provided for cases involving significant breaches of human rights.

Let me take the right hon. Gentleman back to the fundamental purpose of the reforms and the exceptional funding system. I remind the Committee that the changes included in the Bill will make civil legal aid more focused, effective and sustainable. Legal aid has expanded far beyond its original scope and many of the current areas of availability should not require any legal expertise to resolve. The changes will encourage people to seek early resolution of disputes and improve affordability. Access to legal aid will remain for those most in need and for the most serious cases in which legal advice or representation is justified. It is right to have an exceptional funding scheme to provide an essential safeguard for the protection of an individual's fundamental right to access to justice, and clause 9 achieves that important end, but expanding the criteria for exceptional funding in the way suggested by the amendment would undermine our approach on scope and our rationale for making changes to the legal aid system.

Mr Watts: The Minister makes the point that the scheme has been expanded over time. Has it been expanded because Parliament has accepted that without those criteria and that new provision, justice cannot prevail?

Mr Djanogly: We could spend a large part of today and probably tomorrow debating how and why legal aid has expanded over the past 40 or 50 years, but we are where we are. I am pleased to tell the hon. Member for Makerfield, who asked whether there will be a fixed budget for exceptional funding, that there will not be, and nor will it be capped.

Amendment 226, which the hon. Member for Stretford and Urmston explained in some detail, would ensure that children and those without mental capacity received exceptional funding in all circumstances. In effect, all matters of law would be brought into scope for children or those lacking mental capacity. Let me make it clear that children and those who lack mental capacity are among the most vulnerable members of society and are, as a consequence, likely to require the greatest protection. I do not think any Member here would have anything to say against that.

1.15 pm

As I stated, clause 9 will enable the director to provide funding in an individual case where the failure to do so would be likely to amount to a breach of an individual's rights under the ECHR. The individual's capacity to represent himself or herself will obviously be an important part of that assessment, but the question whether legal aid is required to protect fundamental rights of access to justice will always turn on the individual facts of each case. The right hon. Member for Dwyfor Meirionnydd made a point about that. Parents often bring cases on behalf of children, as their litigation friend. That would be taken into consideration in deciding whether they have the ability to present their own case, but the amendment would introduce a blanket rule that was not capable of taking into account all relevant circumstances.

In considering whether exceptional funding should be granted in an individual case, we will consider the client's ability to present their own case, the complexity of the issues, the importance of the issues at stake and all other relevant circumstances. Where a child brings an action without a litigation friend, that will be a relevant factor in deciding whether they have the ability to present their own case. However, in the vast majority of non-family civil cases involving children, their parents and guardians bring proceedings on their behalf. That means that children do not generally need to instruct a legal adviser themselves.

The hon. Member for Stretford and Urmston asked whether there would be legal aid for gathering evidence of abuse. Funding will continue to be available where there are allegations and civil claims of abuse of a child or vulnerable adult. People do not need to prove the abuse exists first. She also asked about retaining funding for children. I can tell her and the hon. Member for Stockton North, who spoke about funding and asked about costs, that we will continue to provide approximately £130 million of legal aid per annum for the representation of child parties. That represents about 95% of the current spend, so the percentage reduction in the spend on children will be about 5%.

Alex Cunningham (Stockton North) (Lab): I am grateful to the Minister for trying to address our concerns, but I sought his advice specifically about looked-after children. The question my hon. Friend the Member for Stretford and Urmston asked me, which I could not answer, was whether a local authority would be responsible for picking up legal costs in relation to looked-after children who needed to enter the justice system. What is the answer?

Mr Djanogly: The point the hon. Gentleman raises, which has been raised by many other hon. Members throughout the various stages of the Bill and indeed by many outside organisations, is whether one part of the Government should have to pay for another. Throughout deliberations on the Bill—in fact, ever since I have been a Minister—I have had regular meetings with various Ministers in other Departments to see how we can improve communication between Departments and procedures for taking action. Ultimately, however, the hon. Gentleman must realise that there will not necessarily be a saving to the taxpayer if one Department gets savings from another; it could be, in effect, robbing Peter to pay Paul. That is not to say that it is not important that we facilitate better arrangements between Departments, and work is being done to achieve that.

Alex Cunningham: I would be grateful if the Minister answered the specific question. If legal aid is not allowed under the law for a looked-after child who needs to go to law for whatever reason, will the local authority be responsible for picking up their legal costs?

Mr Djanogly: It is impossible to say without knowing the circumstances of the particular case.

Amendment 227 would ensure that civil legal services were provided for the purposes of making an exceptional funding application. I assure the Committee that the Government will implement appropriate procedures to ensure that those who require exceptional funding will, in practice, be able to access the scheme. To that end, we will of course engage with all interested parties, including key stakeholders, to discuss relevant procedural issues such as contracting and remuneration and the important practical questions surrounding applications to which her amendment alludes. On that basis, I hope that hon. Members will withdraw their amendments.

The Chair: Just to inform the Committee, should the present business in the main Chamber run its full course, we can expect a Division in the House at 8 minutes past 2, or at any time before then.

Mr Llwyd: Welcome back to the Chair, Mr Hollobone.

Although I am partly reassured by some of the things that the Minister said, I still have doubts. Some powerful and well argued speeches were made this morning, not least by the hon. Member for Stretford and Urmston. It would be better in the circumstances if the Minister took away the matter for further consideration, because my amendments were not meant to drive a coach and horses through the Bill. He said in response to an intervention that class actions are a thing of the past. Many citizens over the years have had redress through class actions funded by legal aid, and many landmark decisions and changes in the law have been made. All that will become a thing of the past, which is disappointing.

I am not one to press everything to a vote for the sake of doing so, but I believe that this part of the Bill is important, so I seek the Committee's leave to press both my amendments to a Division. I do so in the knowledge that despite the outcome of the Division, the matter will undoubtedly be revisited in the other place and when the Bill returns to the Floor of the House. I hope that in the ensuing weeks and months, the Minister will reflect further on my amendment and understand that neither it nor the others were intended to be wrecking amendments, but were intended to improve the Bill. If we are here to do anything, we are here to improve the Bill, whether we are helped by Liberty, the Bar Council or anybody else. If we decide to use their advice, that is a matter for our discretion, much as the Minister—with respect to him—read verbatim the brief that he was handed by civil servants.

Question put, That the amendment be made.

The Committee divided: Ayes 9, Noes 11.

Division No. 22]

AYES

Cunningham, Alex	Reynolds, Jonathan
Fovargue, Yvonne	Slaughter, Mr Andy
Goodman, Helen	Turner, Karl
Green, Kate	Watts, Mr Dave
Llwyd, rh Mr Elfyn	

NOES

Blunt, Mr Crispin	Hinds, Damian
Brake, rh Tom	Lee, Jessica
Buckland, Mr Robert	Soubry, Anna
Crockart, Mike	Wallace, Mr Ben
Djanogly, Mr Jonathan	Wright, Jeremy
Gummer, Ben	

Question accordingly negatived.

Amendment proposed: 226, in clause 9, page 6, line 12, at end add—

'(c) that the individual is a child, or is without mental capacity'.—*(Kate Green.)*

Question put, That the amendment be made.

The Committee divided: Ayes 9, Noes 11.

Division No. 23]

AYES

Cunningham, Alex	Reynolds, Jonathan
Fovargue, Yvonne	Slaughter, Mr Andy
Goodman, Helen	Turner, Karl
Green, Kate	Watts, Mr Dave
Llwyd, rh Mr Elfyn	

NOES

Blunt, Mr Crispin	Hinds, Damian
Brake, rh Tom	Lee, Jessica
Buckland, Mr Robert	Soubry, Anna
Crockart, Mike	Wallace, Mr Ben
Djanogly, Mr Jonathan	Wright, Jeremy
Gummer, Ben	

Question accordingly negatived.

Clause 9 ordered to stand part of the Bill.

Clause 10

Qualifying for civil legal aid

Mr Djanogly: I beg to move amendment 24, in clause 10, page 6, line 38, leave out 'section' and insert 'paragraph'.

The Chair: With this it will be convenient to discuss the following:

Amendment 98, in clause 10, page 6, line 42, leave out from 'particular' to 'reflect' in line 43 and insert 'ensure the criteria'.

Amendment 99, in clause 10, page 7, line 19, at end insert—

'(3A) In determining whether an individual qualifies for civil legal services under this Part, nothing in any regulations produced by the Lord Chancellor shall preclude the provision of services on the basis of the availability of alternative sources of funding save where the Director can show:

(a) an alternative source of funding is practicably accessible to the individual in all the circumstances of the case,

(b) it is reasonable to expect the individual to access this alternative source of funding, and

(c) funding by this alternative route does not substantially prevent the individual from being fairly compensated by an award of damages.'.

Mr Djanogly: The amendment is technical and would correct an incorrect reference to "section" in the clause. Amendments 98 and 99 propose changes to the clause that I hope to persuade members of the Committee are unnecessary.

Amendment 98 would build an assurance into statute that the Lord Chancellor will ensure the merits criteria that he sets for civil legal aid reflect the factors listed in subsection (3). I can confirm that the Lord Chancellor must consider the extent to which the factors ought to be reflected in the merits criteria and that is made clear in the wording of the clause. It is important that we retain some flexibility in setting the merits criteria so that we can take account of changing economic and policy circumstances. In addition, it would not make sense to force the Lord Chancellor to reflect all the criteria in the merits tests of all cases. That is not what currently happens. The formulation in the clause is based on section 8(2) of the Access to Justice Act 1999. Having a set of factors underpinning the merits criteria means that fundamental principles will remain enshrined in the tests of receiving civil legal aid—common-sense principles, such as cost versus benefit, prospects of success and the seriousness of the matter in hand.

Amendment 99 would put the onus on the director of legal aid casework to demonstrate a range of circumstances before being able to refuse an application for legal aid on the basis of alternative funding being available. In my view, the amendment would be technically unworkable. The clause as drafted already deals with the underlying concerns. The amendment would prevent the Lord Chancellor from making regulations that preclude the refusal of legal aid on the basis of alternative funding being available unless the director can show first that the funding is practically accessible; secondly, that it is reasonable to expect the individual to access it; and thirdly, that the funding would not prevent the individual from being awarded damages.

1.30 pm

It is not right that the emphasis should be on the director to demonstrate all those things to refuse a legal aid application. As with nearly all legal aid applications, the emphasis must remain on the applicant via their solicitor to show how they meet the criteria that will be set. In some cases, this will be very easy to demonstrate. The formulation proposed would create an inverse application system with all the additional resource implications that this would require on the part of the director. Subsection (3)(f) refers to

"the availability to the individual of services provided other than under this Part and the likelihood of the individual being able to make use of such services".

The Committee can be assured that the wording of that subsection shows that we are already taking into account the practical concerns that appear to have motivated the amendments. We have made a clear and explicit link to the likelihood of an individual being able to use alternative services. Our approach is practical rather than theoretical, so I hope that the right hon. Member for Dwyfor Meirionnydd will accept my reassurances on those points and withdraw his amendments.

Mr Llwyd: The Minister has put the case succinctly and fairly. If he is saying that under subsection (3)(f), the question of the accessibility of any alternative source of funding and whether there is a reasonable expectation that the individual will access such funding will be considered, I am partly reassured. If such considerations, which are two of the three main components of my amendment, will be taken into account in arriving at a decision, I will not delay the Committee any further. If that is what he is saying, I will rely on his assurances in Committee.

Mr Djanogly: I believe that that is the case. If it is otherwise, I will come back to the right hon. Gentleman.

Mr Llwyd: I am reassured. I had a splendid script—I was helped by Liberty—but I will not delay the Committee further by going through it this afternoon. I do not mean to denigrate the Minister, but if there were a misunderstanding, perhaps he will write to me about it and we might be able to revisit it.

Mr Djanogly: Indeed.

Mr Slaughter: I do not want to prolong the debate on the amendment or indeed the clause, because clearly the system that we have at present is a system in which funding for advice and help—legal and more general advice—is a moveable feast and comes in a variety of forms, which is quite right. Many of those different funding streams are being cut. On Tuesday, we discussed issues such as the financial inclusion fund, local government funding and matters of that kind.

New clause 2, which we will come to later, states:

"The Lord Chancellor may by regulations make provision for alternative sources of funding to support the provision of Legal Aid."

So again we envisage that there may be different methods. The important outcome is the result for the client rather than which pot of money it comes from. On that basis, I see the force of the proposal.

My one area of concern, on which the Minister may want to comment, is that this will again be used simply as a way of saving money through inadequate alternatives. The Minister has on many occasions pointed towards

pro bono advice of one kind or another—professional or non-professional. I am sure his words will come back to haunt him. He famously said:

"Pro bono can be a good filler for those lawyers out of work, or women who want to get back into the legal job market after having children."

That attitude to pro bono work is not one that will be recognised by the sector. The Minister has no doubt seen representations from the Free Representation Unit, which states that pro bono—even at its most professional, which is what the FRU is—cannot possibly replace legal aid funding in that way. My fear, which may or may not be put to rest, is that the door will be opened, when an assessment is made, to unsatisfactory alternatives, not because pro bono advice in context is not excellent in this country, but because it is being asked to do a job that it simply is not there to do.

Mr Djanogly: I stand by my remarks about pro bono; I was right to make them. I was upset when a journalist misrepresented me by changing "pro bono" to "legal aid," because to say that legal aid would be an alternative would be absolutely wrong and that is not what I said.

I hear what Members have said, and I ask the right hon. Gentleman to withdraw his amendments.

Mr Llwyd: I beg to ask leave to withdraw the amendments.

The Chair: They have not been moved.

Amendment 24 agreed to.

The Chair: We now come to amendment 100 standing in Mr Elfyn Llwyd's name, which was debated as part of a previous group. Does Mr Llwyd wish to move the amendment formally?

Mr Llwyd: Yes.

Amendment proposed: 100, in clause 10, page 7, line 25, at end insert—

'( ) But the Director must determine that an individual qualifies for civil legal services where the services relate to a matter falling within paragraph 10 of Schedule 1 and—

(a) the individual has been admitted to a refuge for persons suffering from domestic abuse,

(b) the individual has obtained medical or other professional services relating to the consequences of domestic abuse, or

(c) an assessment for the purpose of possible mediation of a family dispute has concluded that the parties need not engage in mediation as a result of domestic abuse, and in this subsection "domestic abuse" means abuse of the kind to which paragraph 10(1) of Schedule 1 relates.'.—*(Mr Llwyd.)*

Question put, That the amendment be made.

The Committee divided: Ayes 9, Noes 11.

Division No. 24]

AYES

Cunningham, Alex	Reynolds, Jonathan
Fovargue, Yvonne	Slaughter, Mr Andy
Goodman, Helen	Turner, Karl
Green, Kate	Watts, Mr Dave
Llwyd, rh Mr Elfyn	

NOES

Blunt, Mr Crispin	Hinds, Damian
Brake, rh Tom	Lee, Jessica
Buckland, Mr Robert	Soubry, Anna
Crockart, Mike	Wallace, Mr Ben
Djanogly, Mr Jonathan	Wright, Jeremy
Gummer, Ben	

Question accordingly negatived.

Clause 10, as amended, ordered to stand part of the Bill.

Clause 11

Determinations

Mr Llwyd: I beg to move amendment 101, in clause 11, page 7, line 32, at end insert—

'(1A) A determination that an individual does not qualify under this Part for civil legal services must be fully reasoned and communicated in writing to the individual or his representative.'.

The amendment is short and simple. If a civil aid certificate is not granted that determination should be communicated in writing to the individual or their representative. The amendment would ensure that when there is a refusal there would be a reasoned and written decision. When the interests at stake are so important—for example, deprivation of legal assistance—it is imperative that such decisions are rational and based on an accurate assessment of the information. The requirement that a written decision be given will help to secure an acceptable standard of decision making and ensure that individuals understand the reasoning behind a refusal.

The other day, I delved into history and referred to a time when legal aid boards were assisted by panels of solicitors. Whenever there was a refusal under that procedure, a reasoned written decision was given and it is basic fair play for all concerned that any refusal should be based on reasonable grounds. We were never slow to explain why a legal aid application had been refused. That is very important, but a provision for such a written decision does not appear to be in the Bill at all. If the Minister assures the Committee that it will be in the Bill that would be the end of this particular debate, but the provision is rather important. This is a simple amendment but a significant one none the less.

Mr Djanogly: Amendment 101 seeks to make a change to clause 11, which concerns determinations. It would make it a requirement for a written explanation to be provided to an individual as to why they do not qualify for civil legal aid in all cases.

The Access to Justice Act 1999 and associated material, in particular the Legal Services Commission's funding code procedures, do not compel face-to-face providers or the Community Legal Advice helpline to provide in writing the reasons for the assessment that they make. The helpline operator or face-to-face provider will explain the reasoning to the client directly. However, the LSC communicates reasons for refusal in writing where it is making the decision directly.

We envisage a similar set of circumstances operating under the Bill. Determinations made by face-to-face providers or by the CLA helpline are likely to be explained to the client directly. Determinations made by the director, or on his behalf by his delegates, are likely to be communicated in written form.

Mr Slaughter: I do not know if the Minister can be pressed on this point, but he just said "are likely". The director is a new post. We have raised considerable concerns about the director, including the issue of independence and the importance of the post holder being seen to be independent. The LSC is an established body now. Can the Minister give an assurance that decisions by the director will be made in writing?

Mr Djanogly: I will communicate with the director on that point, to tie down exactly what the procedure is, and I will write to the hon. Gentleman about that. He can then take a view.

As with the Access to Justice Act 1999, clause 11 of the Bill provides for regulations to be made about the making and withdrawal of determinations. It is under these regulations that the procedures for the determination process will be set out. It would not be appropriate for technical rules and procedures to be set out in primary legislation. Clause 11 includes the power to provide for individuals to be informed of the reasons for making or withdrawing a determination in relation to civil legal aid.

I hope that the right hon. Member for Dwyfor Meirionnydd accepts my reassurance on these points and withdraws his amendment.

Mr Llwyd: That raises a further point—when does the Minister anticipate that we will be able to see the regulations? I presume that they are being prepared as we speak. If they are, we could obviously have a look at them before we finish our deliberations.

This is an important issue. For example, there might be a refusal during a telephone conversation. Let us consider that scenario briefly. In one of those telephone interviews, the applicant may well be extremely anxious; these legal problems are very important and concern very personal matters. Consequently, the applicant may not take on board what is being said to them if their application is refused. It would only be reasonable for that conversation to be followed by a short note of explanation.

1.45 pm

Yvonne Fovargue: Does my right hon. Friend agree that as well as explaining why legal aid has been refused, the possibility of getting exceptional case funding should be put to the person concerned?

Mr Llwyd: Yes, that is another pertinent point. I see that the Minister is engaging the matter, and I hope that he will dwell on it for a while. With that in mind, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 11 ordered to stand part of the Bill.

Clause 12

ADVICE AND ASSISTANCE FOR INDIVIDUALS IN CUSTODY

Mr Llwyd: I beg to move amendment 102, in clause 12, page 8, line 23, leave out from 'premises' to end of line 11 on page 9.

The Chair: With this it will be convenient to discuss the following: amendment 103, in clause 12, page 8, line 23, leave out from 'premises' to 'determination' in line 25.

Amendment 15, in clause 12, page 8, line 27, at end insert 'and the need to secure that individuals involved in criminal investigations or criminal proceedings have access, regardless of their means, to such advice, assistance and representation as the interests of justice require'.

Amendment 104, in clause 12, page 8, line 28, leave out subsection (3) and insert—

'(2A) Regulations may require the Director to make a determination in a form and manner which complies with regulations save insofar as subsection (3) applies.

(3) The Director may not make a determination that an individual does not qualify for advice and assistance under this section by reference to—

(a) section 20 (financial eligibility) and regulations under that section, or

(b) the interests of justice.'.

Amendment 105, in clause 12, page 9, line 18, leave out subsection (9).

Mr Llwyd: In its present form, clause 12 will significantly undermine the fundamental right to legal advice when someone is arrested and held in custody in a police station. The provision was not consulted on by the Government—something that has been widely criticised. Given the importance of a situation where a person is deprived of their liberty and held in a police station, the provision should have been subject to consultation. I dare say that the Minister will say that all the usual suspects, to coin a phrase, will come back to say the same thing—the Bar Council, Liberty and the rest of them. That may well be the case.

We are dealing with the fundamental rights of people who are held in custody. The contention is that the introduction of means-testing is inappropriate at a police station, when individuals are at their most vulnerable and in need of professional assistance. The Bar Council has assisted me in tabling amendments 102 and 105. Our other friend, Liberty, has assisted in tabling amendments 103 and 104.

Amendment 103 would remove 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)",

from clause 12(1). It is an introductory amendment, as amendment 104 would insert the wording:

"Regulations may require the Director to make a determination in a form and manner which complies with regulations save insofar as subsection (3) applies…The Director may not make a determination that an individual does not qualify for advice and assistance under this section by reference to…section 20 (financial eligibility) and regulations under that section, or the interests of justice."

The two amendments would ensure that advice and assistance can be provided to individuals taken to police custody as a matter of course, and not subject to means or merits-testing. The Lord Chancellor would still be able to make prescriptions on the form and content of determinations, time limits and circumstances in which they must be withdrawn, but only in so far as regulations do not lead to an assessment based on the interests of justice or financial eligibility.

I pose one possibility to the Minister. In years gone by, I represented clients in police custody. On more than one occasion, they had far more means of wherewithal

than I could ever dream of. That may be questionable, but I want to make the following point in relation to the Lord Chancellor's savings. Surely the initial interview at the police station could proceed on the basis that the solicitor would be paid for the first couple of hours. The means test could then kick in at a later stage. If there is to be a contribution or if there is to be a refund, it could work in that way, providing a balance between the freedom of an individual facing custody and a means test.

I have to be fair and reasonable; sometimes I could not understand why people of substantial means were given free legal advice. On the other hand, by doing what the Government are now saying, people of no means will lose out. I am not concerned about those who able to finance the advice; we are not here to prop people up on public funds. Inevitably, however, the weak and vulnerable—the people who really need the free legal advice—will not get it.

Many have expressed concern, including our old friend Liberty, about the broad powers under clause 12. I believe, as Liberty does, that justice requires as a bare minimum that individuals taken into police custody have access to legal advice and representation when facing criminal allegations, with the potential loss of liberty and disruption and damage to reputation that that entails. As the Minister, who is a lawyer, well knows, the first couple of hours in custody can be make or break as to whether the case goes to interview. Most people, when facing a police interview, particularly for the first time, are anxious and are often unable to think clearly and respond in a manner appropriate to the facts of the case, and may not be cognisant of their best interests.

Anna Soubry (Broxtowe) (Con): Is the right hon. Gentleman suggesting that it would be a good idea if, by some means, someone who is in the police station could be given free legal advice for an hour or two? The solicitor would be paid of course. During that time, the solicitor would fill in the means-testing form, which would determine future legal aid for that person. If that procedure were followed, it would save money, because it would save time and enable the means-testing procedure to begin from the outset.

Mr Llwyd: Yes indeed. The hon. Lady is right. In making my case, I am not in any way trying to say that those who can afford legal advice and assistance should not pay for it. It is right that they should do so, as she recognises. On the other hand, we need to ensure that we are not throwing the baby out with the bathwater. There are many people in society who simply cannot afford legal advice and would not be able to preserve their right to a properly argued case on their behalf, which is a breach of article 6.

Amendment 102 is straightforward. I hope that the Minister will consider it. If he does not wish to make a decision today, there is enough time ahead of us for him to take it away and consider whether it is practical. If it appears to be utterly impractical, so be it. It is incumbent on Committee members, who are charged with examining the Bill and how it will work, to look at these things to see whether they are practical. I hope that the Minister will seriously consider what I have said. If no decision is forthcoming today, all well and good, but I hope that he will reflect on it in the hours and weeks to come.

Karl Turner (Kingston upon Hull East) (Lab): I rise to speak to amendment 15. For the benefit of the Minister and other members of the Committee, I have spoken about the clause to the world and his wife: to lawyers, non-lawyers, my wife—a criminal solicitor—and the chap at the bus stop in Clapham Common this morning, when I was about to catch the No. 88 bus. I have exhausted every possible opportunity to get the full facts. I am grateful for having been assisted—I am happy to confess—by Liberty, the Bar Council, the Law Society and many other societies.

The clause is a crucial part of the Bill. Speaking as a former criminal solicitor, which I was for some years, it will be really dangerous if the clause remains in the Bill. It currently states:

"The Director must make a determination under this section having regard, in particular, to the interests of justice."

Amendment 15 would insert—at page 8, line 27—that the director would also have to have regard to

"the need to secure that individuals involved in criminal investigations or criminal proceedings have access, regardless of their means"—

that is particularly important—

"to such advice, assistance and representation as the interests of justice require".

Clause 12 makes provision about initial advice and assistance for an individual who has been arrested and is held in custody at a police station or other premises. I raised that provision on the Floor of the House on Second Reading, and the Minister told me that the Government have no intention of using it if it becomes law. Frankly, with the greatest respect to the Minister, I simply do not believe the Government when they say that. I do not suggest for a second that the Minister misled me when he responded to my comments in the Chamber, but I think that Governments—including, I am sure, my own—occasionally say that they do not intend to use particular provisions in legislation, but of course they do so at some later point. I respectfully submit that it is absolutely dangerous for the Government to say, flippantly, that although the provision is in the Bill they have no intention of using it.

Mr Watts: Is my hon. Friend's point that although the Minister may give that assurance, he will not be there for ever?

Karl Turner: I agree entirely. I make no criticism personally about the Minister or, indeed, the Lord Chancellor. It is, however, very—I stress, very—dangerous to have that provision in the Bill, and it worries me a good deal.

It is essential for the interests of justice that absolutely everyone has access to legal aid in a police station, regardless of their means. I fully accept that the Government need carefully to consider the allocation of what—let us face it—are scarce resources, but I have great concerns about the introduction of means-testing in a police station, or the possibility that at some point the Lord Chancellor, through the director of legal aid casework, might allow that to happen.

Mr Llwyd: I acknowledge the hon. Gentleman's expertise. Has he considered other problems that will arise owing to the fact that under the Police and Criminal Evidence Act 1984 the defendant is entitled to representation at several points during the procedure, and that it is impressed on him that he should be represented?

2 pm

Karl Turner: Absolutely. The right hon. Gentleman is a member of the Bar and has worked as a criminal solicitor, and he makes a valid point, one that I, too, intend to make shortly. He is right, because section 58(1) of the 1984 Act provides for just that—free and independent advice in private from a solicitor of a defendant's own choosing. I do not know whether that is the provision's exact wording, but that is certainly its sentiment. I ought also to expand on another point regarding inferences from silence, about which there is a definite danger relating to European Court case law.

Clients held in police custody who are suspected of criminal offences are at their most vulnerable. Of course, not all detainees are guilty; some—shock, horror!—are innocent. It does happen. The evidence suggests, in fact, that the vast majority of people who are arrested, taken to a police station, and held and questioned, often for many hours, are released without charge or further action. It is the most vulnerable who are in that police station situation, and we must remember that the important presumption in this country is that suspects of criminal offences are innocent until proven guilty.

Speaking from a practitioner's point of view, any attempt to introduce means-testing in a police station—make no mistake about this—is completely unworkable. Means-testing requires documentary verification of financial resources, which may not be available to the individual in custody. When I was in practice, I experienced numerous cases of clients attending the magistrates court for the first time. I would start to fill out the CDS14 and eventually it would become apparent that there was not enough information to put on the form to submit the application properly. I would therefore ask the magistrate for an adjournment of the case to allow me to make further inquiries about the means of the defendant, but it is impossible to make such inquiries in a police station scenario. The defendant might be arrested for a serious criminal offence, so the representative, whether a solicitor or an accredited police station representative—

2.3 pm

Sitting suspended for a Division in the House.

2.25 pm

On resuming—

Karl Turner: Before the Division, I was saying that I thought the provision for means-testing clients in a police station was completely unworkable. It is not hard to imagine situations in which legal representation might be denied due to difficulties in assessing means. That is serious. I give the Committee an example involving a client I represented. I was on call one weekend a couple of years ago. At about 3 o'clock on Sunday evening, or rather Monday morning, my pager sounded. I answered it and contacted the police station, to be told that the client wanting to speak to me was a chap who had been arrested in London and brought to Hull on suspicion of murder. They wanted me to give him advice over the phone, but I thought that it was best to see him face to face, for obvious reasons.

Members can imagine the situation: a client taken from the capital to Hull by armed police officers finds himself speaking on the phone to a solicitor who asks him about his means—not about the procedure of the detention in the police station, the offence for which he has been arrested or the seriousness of the case, but about how much cash he has. It is absolutely unworkable, and it beggars belief, I respectfully submit, that the Government would even suggest such a provision in the Bill. I do not think that they have considered the provision.

The right hon. Member for Dwyfor Meirionnydd made a point about section 58 of the Police and Criminal Evidence Act 1984. He is dead right. Section 58 provides:

> "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."

It is an important right that the Bill seeks seriously to undermine.

Mr Robert Buckland (South Swindon) (Con): The hon. Gentleman, with his customary force, makes important practical objections that reinforce the substance of the Government's concession on Second Reading about the implementation of the clause. His practical points about the sheer difficulty of obtaining financial information at that stage and the conflict with PACE were, I am sure, considerations that the Government were bearing in mind as the basis for their concession on Second Reading.

Karl Turner: I do not know whether that is right, but I am always grateful for interventions from the hon. Gentleman, a barrister of many years' experience and a Crown court recorder. I take his point, but if the Government have no intention of implementing the provision, let us take it off the face of the Bill, get rid of it and put it in the bin now. I invite the Minister to do so.

There are other, important legal reasons why the provision should be scrapped. Section 34 of the Criminal Justice and Public Order Act 1994 provides that a trial court can draw an adverse inference from a defendant's decision not to speak to the police or at trial. That point is significant because there is case law on the subject; I was researching it yesterday evening.

2.30 pm

The 1996 case of John Murray *v.* the United Kingdom makes the position clear. I bothered, somehow, to read the entire judgment, which makes it clear that inferences from silence may be drawn only if a defendant has had the opportunity to take legal advice. It is important for the criminal justice system to have a provision that makes it possible for a trial judge to invite a jury to draw an inference from someone's silence when they have been given a good opportunity to speak to the police. Such a provision allows the members of the jury to put their minds to the fact that the defendant, for whatever reason, has chosen not to speak when they have had every opportunity to do so. From my experience as an advocate, I know that the device tends to assist the jury in coming to their conclusion and their findings in the case.

It worries me—I mean this sincerely; I do not mean to be disrespectful to the Ministers—that the Government have failed to listen to the consultation responses they have received, and to the submissions from the Bar Council and the Law Society. The Judges' Council for England and Wales has, I think, also made representations. I am concerned that the Government have failed to

consider not just the practicalities of means-testing clients in police stations, but the wider and more costly effects of the provision. From the expression that I have just noticed on his face, I appear to be boring the Minister. I ask him to forgive me if I am terribly boring, but I have to continue to reiterate the importance of my points.

The Government chose just yesterday evening not to opt in to the EU directive on the defence rights road map. That is perhaps significant as well, and I wonder what the Minister might say about it in his response. I think that I have said as much as I possibly can without boring not only the Minister but the entire Committee, so I will leave it at that.

Mr Slaughter: I am sure that I will not bore the Committee. *[Interruption.]* The Minister's time will come, next week. He will have his own opportunity to bore the Committee then.

When it was published, the clause was the cause of great consternation and controversy. In fact, a lot of the Bill is the subject of controversy, but this clause particularly so, not simply due to its contents but as a result of the surrounding circumstances. As the right hon. Member for Dwyfor Meirionnydd said, there was no consultation; the provision came out of the blue. The Minister might wish to clear up all the confusion, and to explain why that happened in that way with this clause. I accept that it was an honest misrepresentation, but when on Second Reading it was understandably put to the Lord Chancellor that the provision was an outrageous step to take, he claimed that its provenance came from the previous Government. I am pleased to say that he has put the record straight on that—saying that that was never the case. I wonder, however, why the matter even arose, other than that it was due to the Government's own embarrassment.

We then had the issue of not implementing the clause, with which I know the Minister will deal. My hon. Friend the Member for Kingston upon Hull East has just referred to the debate in the Chamber last night. The Minister said again to me then,

"I can confirm to the hon. Gentleman that we currently intend to retain free legal advice at police stations, as I have said publicly in the past, and he will hear more on that in Committee tomorrow."—[*Official Report*, 7 September 2011; Vol. 532, c. 515.]

So I wait expectantly to hear not only that assertion again for the third or fourth time, but why, given that that seems to be the clear opinion of the Government now—if not when the Bill was published—the clause is going ahead.

The objections to the clause are many and from many sources. We will, of course, attribute them as has now become customary. However, the clause should not be in the Bill even if there is no intention to implement it, because it is simply not acceptable that a matter of such importance should be dealt with on a subsequent occasion perhaps many years into the future without being considered as a part of primary legislation at the time when the Government intend to implement it. For that reason, we will be pressing our amendment to a Division and will be voting against clause stand part unless the Minister says that he intends to withdraw it.

The Bar Council states in its submission:

"Clause 12 significantly undermines this fundamental right. Furthermore, the criteria required in order to qualify for assistance are unacceptably vague at present, and are to be administered by the holder of a new and as yet untested office: the Director of Legal Aid Casework."

That is a good point. It also states that

"the introduction of means testing is inappropriate at the police station, when individuals are at their most vulnerable and in need of professional assistance."

Government Members often say that lawyers are advocates in their own cause, when it comes to maintaining funding or legal services, but barristers have no role in the preliminary attendance at police stations. It is not in their self-interest; it is in the interests of justice that the Bar Council makes those points.

Liberty, which we have heard much about today, is

"extremely concerned about the broad powers outlined at Clause 12 of the Bill which would allow the Lord Chancellor to introduce means testing into new areas of the criminal law. Justice requires that, as a bare minimum, all individuals taken into police custody have access to legal advice and representation when facing criminal allegations with the potential loss of liberty, disruption and damage to reputation they entail. Further it should be noted that any attempt to introduce means testing at this stage in the criminal justice process is likely to be practically unworkable."

Justice says that such a provision should not be introduced at any stage under secondary legislation.

The Law Society argues perhaps the most powerfully:

"The right to speak to a solicitor when detained in the police station is an important bulwark against abuses of power against individuals who are entirely under the control of individual police officers. In addition, it serves as a protection for the police against false allegations of such abuses. It has been a cornerstone of our justice system for the past 25 years, having been introduced in the light of the abuses by the West Midlands and Metropolitan Police in the 1970s and early 1980s.

The proposal also presents enormous practical difficulties. Primarily, no consideration appears to have been given to how these tests would be conducted within the timescales that the police are required to operate, or how an arrested person would be able to prove their means once detained."

I hope that the Minister has been listening to all my comments. I have made points of practicality and set out important matters of principle, such as how means-testing will be administered in reality. How will an arrested detained person produce evidence of means? How will they even focus on that at the time of the arrest? My hon. Friend the Member for Kingston upon Hull East referred to the relevant sections of PACE to give the history of the matter. It was an outstanding piece of legislation introduced by a Conservative Government to deal with what was clearly a serious defect in the criminal justice system at that time, and one that has been followed and copied elsewhere.

I mentioned the debate last night. It is relevant to the clause. I was shocked to find that all Members of the Committee did not stay after the Whip ended at 7 pm to listen to the debate. *[Interruption.]* The hon. Gentleman did stay, and I apologise for suggesting that he did not. He set a very good example that I am sure all other members of the Committee will follow in future when the Minister and I are speaking on such important matters in the Chamber. Fortunately, a large number of Conservative Members of the Eurosceptic persuasion stayed to keep the Minister company and therefore I had quite an enjoyable ringside seat for that exchange.

Last night's debate is relevant to the clause, but I do not want to spend much time discussing it. The directive on access to a lawyer is important to the UK; that is not

[Mr Slaughter]

a point that the Government and the Opposition disagree on. It is important because it will give something like the same rights that we now take for granted under PACE to other jurisdictions throughout the EU among the other 26 countries who have—let us say—a variable record on the detention and treatment of suspects on arrest. Indeed, *Hansard* refers to some of the notorious cases of British citizens who have been detained in the most appalling conditions by European countries and treated appallingly in ways that we would find very peculiar here. Therefore there was a disagreement about whether to support the opt-in at the moment. However, I do not think that there is any disagreement now that supporting the opt-in is the objective.

I did not quite follow the Minister's argument when he said why the Government did not support the opt-in. He said:

"We are not making this recommendation because we fear that our law does not meet the minimum standards required by the European convention on human rights".

He continued:

"Standards of procedural rights are high in the UK. The right of access to a lawyer, both before and during police interview, has been provided in England and Wales and Northern Ireland since the mid 1980s."—[*Official Report*, 7 September 2011; Vol. 532, c. 502-503.]

We know why that is.

My fear is that, whether it is intentional or not, the enactment of clause 12 will leave the door open to a weakening of the position that we have carefully crafted and established in the light of evidence and bad practice in this country. That is something that I would regret. That fear—whether it is grounded or not—could be easily assuaged, simply by withdrawing the clause. The Minister says that he has no intention of implementing it, but there cannot be any basis for weakening rights, even if it is—as has been said in the submissions—to protect the police. We now have video in custody suites, which we did not have before, and we have clear codes of practice and clear guidance. In that respect, policing has improved immeasurably in the last 25 years. Whether it is to protect the rights of the suspect—the arrested or detained person—or simply because it is an important constitutional principle, the clause has no part in any justice Bill. I ask the Minister to withdraw the clause, or to explain why the clause, which he says he has no plans—I think that was his phrase—to action if enacted, remains in the Bill. It appears to have nothing to do with the other provisions in the Bill and nothing to do with the intention of the Government in introducing these proposals.

2.45 pm

Mr Djanogly: This group of amendments, starting with amendment 102, seeks to amend clause 12, which deals with legal aid determinations where an individual is arrested and held in custody at a police station or other premises. The broad effect of the group of amendments would be that people held in custody at a police station would qualify automatically for initial advice and initial assistance under clause 12, where the interests of justice require it. As the hon. Member for Kingston upon Hull East said, advice and assistance in a police station is not currently means-tested, and I can confirm that there are no immediate plans to change that. Clause 12 does not require means-testing. Rather it provides for flexibility to make regulations to apply means-testing if it were considered appropriate to do so in future. The hon. Gentleman and others had concerns about both the principle and the practicality of means-testing in relation to advice and assistance to those in custody and the interaction with the codes of practice issued under the Police and Criminal Evidence Act 1984.

On the point of principle, the hon. Gentleman and the right hon. Member for Dwyfor Meirionnydd discussed the effect of PACE. Under section 58

"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."

It does not, however, say that advice must be free. PACE code C on the detention, treatment and questioning of persons by police officers currently says that a person must be informed

"that free independent legal advice is available",

so the code would need amending if we were to decide to introduce a means test.

Mr Watts: Can I clarify what the Minister is asking the Committee to do? It seems that he is asking the Committee to approve the possibility that means-testing will be implemented without being prepared first to justify it or to draft the legislation that would give the Committee an idea of whether the proposals were sensible or likely to lead to problems. He seems to be asking for a blank cheque.

Mr Djanogly: I am not asking the Committee's permission to implement means-testing. I am asking for permission to introduce flexibility into the Bill, so that at a later stage it could be considered, subject to full consultation.

Karl Turner: I am confused. The Minister has said on previous occasions that the Government have absolutely no intention of implementing means testing for clients in police stations. If that is the position, why is it necessary to have this in the Bill? It is simply not necessary.

Mr Djanogly: Because, as in many other instances, legislation can provide for what could possibly happen in future if a future Government or Parliament were determined to take it in that direction. However, there is currently no such decision.

Mr Slaughter: Will the Minister give way?

Mr Djanogly: No. I am going to move on.

The hon. Member for Kingston upon Hull East also asked about the requirement in section 34 of the Criminal Justice and Public Order Act 1994. He said that an adverse inference could be drawn from silence and he cited the case of John Murray *v*. United Kingdom. He said that access to a lawyer was necessary in that instance. It is clear that in cases in which the European Court of Human Rights requires the provision of legal aid it is permissible for legal aid to be subject to means-testing. Article 6(3)(c) states that the right to free legal aid is for persons who do not have sufficient means to

pay for legal assistance. He also questioned the value of early advice to the later prosecution process. Of course, that is often helpful and the right thing. However, we cannot force people to accept legal advice. In fact, only about 56% of people held in custody ask for advice from a lawyer.

Mr Slaughter: It really is turning things on their head if we say that because some people do not ask for legal advice, we should use our own discretion as to whether to give legal advice. We were lectured by the Government for more than a decade about unnecessary legislation, so I am afraid it rings rather hollow to say that we are putting clauses in for a rainy day in case we need them. Will the Minister simply answer this point? Will he justify the purpose—let us leave aside the timing—and explain why the Government think it is the right thing to do?

Mr Djanogly: I was going to come to that, but first I must point out that the hon. Member for Hammersmith made reference to the opt-in to the directive, which I think reinforces the high standards of access to legal advice that exist in this country. I am pleased that he brought up that point.

To answer the hon. Gentleman's substantive question, yes, our general starting point is that those who can afford to pay for or contribute towards the cost of their case should do so. Presumably, that is, or was, the policy of the Opposition when they introduced means-testing for magistrates courts and the Crown court. Likewise, it seems counter-intuitive that the state should pick up the bill for police station advice for those who can readily afford to pay. We also start from the position that criminal legal aid will be available where required by the interest of justice.

I accept that any financial eligibility assessment would have to be much simpler than the current means test representation in the magistrates court or the means test applicable to the contribution orders in the Crown court—a point that was made by the hon. Member for Kingston upon Hull East. Any means test may have to be carried out after the provision of advice and assistance.

Karl Turner: I find that extremely frustrating. Could the Minister give me an example to show how that would be workable? How, practically speaking, would it be possible for a solicitor attending a police station to go through the means-testing procedure so that they are able to satisfy an application for legal aid? Give us a clue.

Mr Djanogly: My opinion is that as things stand, the practicalities are the greatest stumbling block, and costs could be significant. The right hon. Member for Dwyfor Meirionnydd weighed up the benefits of free advice in a police station with the other side of paying for that and my hon. Friend the Member for Broxtowe looked at some of the practicalities.

England and Wales will not be the first jurisdiction to restrict legal advice in police stations on financial eligibility grounds or to require the payment of a contribution. At the moment, in Ireland, the Garda station legal advice scheme is available only to persons who are in receipt of social welfare payments or persons whose earnings are less than €20,316 per annum. In Scotland, police station advice is available to all, but those who can afford to do so have to make a financial contribution of between £7 and £135, depending on their disposable income level. However, as I have already indicated, we do not have any immediate plans to introduce means-testing in England and Wales for those in custody.

The amendments would also prevent the Lord Chancellor from setting out in regulation the procedures that the director must follow in making determinations as currently provided for in subsection (6). They would also mean that initial advice and assistance would not be defined. The Access to Justice Act 1999 does not define what is meant by advice and assistance, whereas the Legal Aid Act 1988 did. We considered that a definition of initial advice and assistance would be helpful, and that is provided in subsection (8). The definition is relatively wide, so we felt that it would be wise to enable the Lord Chancellor to specify in regulation that certain things are not to be considered as initial advice and assistance under clause 12. The 1988 Act contained a similar power. I stress that the intention is not to use the power to exclude the sort of advice and assistance currently provided as part of the criminal defence service.

The amendments are not necessary. It is appropriate that the Government are able to define and establish appropriate qualifying criteria and procedures for a service that is paid for by the public. The Bill already reflects the important principle that criminal legal aid determinations made by the director should take into account the interest of justice. I therefore invite right hon. and hon. Members to withdraw their amendments.

Mr Llwyd: I am intrigued that the Minister has said that there is no intention to introduce the provision, and if there were, it would be subject to detailed consultation. We did not have any consultation when it was included in the Bill, so I am wondering why suddenly there is a need for it. The matter should have been consulted on at the beginning, bearing in mind the fundamental issue that we are dealing with in this part of the Bill.

Mr Watts: The very essence of our system is that if a Minister wants to introduce legislation, first he has to justify why it is needed, and secondly, he must be prepared to explain its details. It seems that the Government have no idea how they will introduce the legislation nor any ability to explain it. They are looking for a blank cheque. Does it seem like that to the right hon. Gentleman?

Mr Llwyd: That appears to be the case, and it is an uncomfortable situation, because we are, after all is said and done, scrutinising the Bill. If we are left without a clue about several of its aspects after scrutiny, we must call into question the purpose of convening the Committee.

I understand that the hon. Member for Kingston upon Hull East will move his amendment 15, so I shall not press amendments 102 to 105 to a vote. I reiterate that this part of the Bill is fundamentally important, but the thrust of my proposals is more than adequately dealt with in the hon. Gentleman's amendment. I am certain that this matter needs to be sorted out and, once again, that will be done by the other place. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

[Mr Llwyd]

Amendment proposed: 15, in clause 12, page 8, line 27, at end insert

'and the need to secure that individuals involved in criminal investigations or criminal proceedings have access, regardless of their means, to such advice, assistance and representation as the interests of justice require'.—*(Mr Turner.)*

Question put, That the amendment be made.

The Committee divided: Ayes 9, Noes 12.

Division No. 25]

AYES

Cunningham, Alex	Reynolds, Jonathan
Fovargue, Yvonne	Slaughter, Mr Andy
Goodman, Helen	Turner, Karl
Green, Kate	Watts, Mr Dave
Llwyd, rh Mr Elfyn	

NOES

Blunt, Mr Crispin	Hinds, Damian
Brake, rh Tom	Lee, Jessica
Buckland, Mr Robert	Soubry, Anna
Crockart, Mike	Truss, Elizabeth
Djanogly, Mr Jonathan	Wallace, Mr Ben
Gummer, Ben	Wright, Jeremy

Question accordingly negatived.

Question proposed, That the clause stand part of the Bill.

Mr Slaughter: I shall be brief, because we have had a lengthy discussion about the clause. I hope that Government Members note that we have not pressed for stand part debates, because we have had adequate discussions about clauses that we regard as controversial and that we oppose. We will continue in that manner during proceedings.

However, clause 12 should not be in the Bill. The right hon. Member for Dwyfor Meirionnydd and my hon. Friend the Member for Kingston upon Hull East have argued in great detail and with authority. The Minister's response confirmed my view. He seemed to say that not even the Government regard the measure as practicable, that there are barriers to its being put into effect and that they share our enthusiasm for the current statutory framework and the security that it provides. There can therefore be no basis for the clause.

3 pm

This is a fundamental matter of civil liberties. I will not do this often during our debates in Committee, because there is frankly not much point, but I look briefly to the Liberal Democrat members of the Committee. They have represented themselves, certainly during my time in the House, as the party of civil liberties. They have raised concerns about the liberty of the subject many times, and this matter could not be a clearer instance of that.

We can see other instances in the cases that were cited last night, although I am pleased to say that we will not now have a regime with such a tie in this country. There have been causes célèbres concerning British citizens abroad because of the failure to obtain clear advice—the advice is sometimes straightforward, although it might not be clear to a lay person—about their rights on arrest, and their rights to demand to see evidence or to have a stay so that they can gather evidence to prove their innocence and deal with their case at an early stage.

That is not the same, as the Minister implied, as looking at the case when it comes to the magistrates or the Crown court, where there is more independent scrutiny and there has been more time to assess the situation than for someone in extremis, who has been arrested and detained and who urgently needs to have advice. It is difficult to think of any circumstances in which those people should not be entitled to that advice. For those reasons, and because of the paucity of the Government's explanation, we oppose the clause.

Mr Llwyd: I associate myself fully with what the hon. Gentleman has said. I will not repeat the arguments, but I feel equally strongly about the matter. As well as the question of liberty and civil rights, the point is that we are being asked to make bad law—to legislate an unworkable part of the law. In my 20 years' experience in this place, this is the first time I have heard a Minister say in Committee, "You know, it isn't workable, but we'll have it anyway for some time in the future, but who knows?" Either it is workable, subject to regulations being approved, or it is not. Clearly, it is not, and we are being asked to pass bad legislation, which is not why we are here.

Mr Djanogly: We have spoken about the issue at length, so I shall be brief. From the Government's point of view, the issue is not about fundamental rights to civil liberties. We have civil liberties and due process in this country, and in no way are we proposing to delete them. The question of charging is not for the ECHR; other countries currently charge. I have been into the various legal aspects that hon. Members have mentioned.

I agree that there are questions about practicalities, and we are not currently consulting on the measure because we are not proposing to put it into effect. At some time in the future, it might be seen as something to bring forward, and at that point we would have to look carefully at the practicalities—how it is conducted in other countries and how it might be done cost-effectively—and there would then be a full consultation. But we are not at that point now.

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 12, Noes 9.

Division No. 26]

AYES

Blunt, Mr Crispin	Hinds, Damian
Brake, rh Tom	Lee, Jessica
Buckland, Mr Robert	Soubry, Anna
Crockart, Mike	Truss, Elizabeth
Djanogly, Mr Jonathan	Wallace, Mr Ben
Gummer, Ben	Wright, Jeremy

NOES

Cunningham, Alex	Reynolds, Jonathan
Fovargue, Yvonne	Slaughter, Mr Andy
Goodman, Helen	Turner, Karl
Green, Kate	Watts, Mr Dave
Llwyd, rh Mr Elfyn	

Question accordingly agreed to.

Clause 12 ordered to stand part of the Bill.

Clause 13

CRIMINAL PROCEEDINGS

Amendment made: 25, in clause 13, page 9, line 40, leave out 'body' and insert ', person'.—*(Mr Djanogly.)*

Clause 13, as amended, ordered to stand part of the Bill.

Clause 14

ADVICE AND ASSISTANCE FOR CRIMINAL PROCEEDINGS

Mr Llwyd: I beg to move amendment 106, in clause 14, page 9, line 43, leave out 'may' and insert 'must'.

The Chair: With this it will be convenient to discuss amendment 107, in clause 14, page 10, line 42, leave out 'may' and insert 'must'.

Mr Llwyd: These amendments are short, in that they would change only two words, but their effect would be far-reaching. They would ensure that the Lord Chancellor made provision for criminal legal services to be available for those within the criminal justice system in specified circumstances, having regard to the all-important interests of justice. That would reflect the current regime under the Access to Justice Act 1999. The amendments would further oblige the Lord Chancellor to provide the right of appeal against a decision not to provide legal services, which I referred to on the first day of our deliberations. In the past, that has always worked well. I hope that the Government will reflect on it and bring it in. It is only right that that should be so.

With the abolition of the Legal Services Commission and the transfer of its functions to the Ministry of Justice, there are grave and reasonable concerns about the independence of decision making, which will be exacerbated by provision in the Bill for the Lord Chancellor to reform the criminal legal aid system, without the parliamentary scrutiny that accompanies primary legislation.

That is the cause and effect of these amendments. They are short, but they are none the less important and would improve the Bill.

Mr Djanogly: Amendment 106 would require the Lord Chancellor to make regulations about when individuals who are involved in investigations that may lead to criminal proceedings, who are before a court or other body in criminal proceedings, or who have been the subject of criminal proceedings, should be able to receive advice and assistance.

Clause 14 creates a power to make regulations to prescribe what advice and assistance must be made if the director has determined that a person qualifies for advice and assistance. Clause 14 is intended to replace section 13(1)(b) of the Access to Justice Act 1999. We have conferred a power to make regulations in clause 14 for consistency with that section, which provides that the Legal Services Commission's duty to provide advice and assistance to the individuals mentioned there only arises in prescribed circumstances. "Prescribed" means prescribed in regulations made by the Lord Chancellor.

Mr Slaughter: I accept that some parts of the rest of part 1 of the Bill will be a matter for regulations when they are brought forward. A great deal of part 1 is delegated to regulations. When will we see these regulations? Frankly, the issue is difficult. I associate myself with the amendments tabled by the right hon. Member for Dwyfor Meirionnydd; they seem reasonable. On the other hand, it is difficult to take a clear view on some of these matters without the regulations before us. What is the timetable?

Mr Djanogly: As the hon. Gentleman knows, regulations to an Act normally follow the Act. I cannot give him a timetable, but I see no reason why the regulations should be delayed.

Although clause 14 of the Bill and section 13(1)(b) of the Access to Justice Act 1999 are framed differently, their overall effect is essentially the same. Advice and assistance for criminal proceedings is distinct from that provided for in clause 12 for individuals in custody. The services covered by the clause include those provided by a duty solicitor in court or to a prisoner preparing for his appearance before the parole board. In making a decision on regulations under clause 14, the Lord Chancellor will take into account any legal obligations, including the requirements of article 6 of ECHR, and clause 14(3) requires the Lord Chancellor, when making regulations under the clause, to have regard in particular to the interests of justice.

We consider that maintaining the status quo is to be preferred to moving towards a duty on the Lord Chancellor, which would remove his discretion to consider a range of factors in deciding what and where advice and assistance is most appropriate for individuals subject to criminal proceedings. Amendment 107 would require regulations made by the Lord Chancellor under clause 14(1) to provide for reviews or appeals in relation to determinations on legal aid set out in clause 14(9).

We think it more appropriate to allow the Lord Chancellor to make regulations if he considers it appropriate than to require him to do so. It is our intention to retain the existing arrangements, whereby advice and assistance have a sufficient benefits test conducted by the litigator. There is no appeal to a court or LSC based on the test, and there are no plans to introduce appeals provisions immediately, although clause 14(9) will allow us to introduce provisions for reviews and appeals in future if that is considered appropriate.

However, to return to the amendment's effect, procedures for review and appeal might not be necessary or proportionate, in any event, in establishing whether all criteria specified in regulations under subsection (5) were met. For example, if the criterion were that the provider must hold a contract to provide such services, an appeal would not be necessary to establish whether the provider held a contract. We therefore believe that a duty to secure such arrangements would be unnecessarily heavy-handed. I invite the right hon. Gentleman to withdraw his amendments.

Mr Llwyd: I thank the Minister for that fairly full response. At this stage, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Amendments made: 26, in clause 14, page 10, line 8, leave out 'or other body' and insert ', tribunal or other person'.

[Mr Llwyd]

Amendment 27, in clause 14, page 10, line 42, after 'court', insert ', tribunal'.—*(Mr Djanogly.)*

Clause 14, as amended, ordered to stand part of the Bill.

Clause 15

REPRESENTATION FOR CRIMINAL PROCEEDINGS

Mr Djanogly: I beg to move amendment 28, in clause 15, page 11, line 8, after 'determined' insert '(provisionally or otherwise)'.

The Chair: With this it will be convenient to discuss Government amendments 29, 31, 32, 34 to 41 and 47 to 52.

3.15 pm

Mr Djanogly: In brief, the amendments clarify how the measures about provisional representation orders work. They make it clearer which parts of clauses about determinations also apply to provisional determinations. Similar amendments are made in relation to schedule 3 that provide for legal aid for legal persons.

A provisional grant of representation under the Access to Justice Act 1999 is currently allowed at an early stage in investigations where the prosecutor has initiated plea discussions under the Attorney-General's guidelines on plea discussions in cases of serious or complex fraud. The availability of provisional representation is targeted at trying to resolve issues at an earlier stage and reduce the cost of complex fraud cases. The circumstances in which a provisional grant of representation is to be available may be expanded in the future if it is considered appropriate. We want to be able to have a distinct framework for provisional determinations that can allow for different considerations from those that apply to full determinations.

Amendment 28 agreed to.

Amendment made: 29, in clause 15, page 11, line 15, after 'determined' insert '(provisionally or otherwise)'.—*(Mr Djanogly.)*

Clause 15, as amended, ordered to stand part of the Bill.

Clause 16

QUALIFYING FOR REPRESENTATION

Mr Llwyd: I beg to move amendment 119, in clause 16, page 12, line 8, leave out from 'determination' to end and insert

'the relevant authority must take into account all the circumstances; but it must treat the interests of justice as requiring representation to be made available where'.

The Chair: With this it will be convenient to discuss the following: amendment 120, in clause 16, page 12, line 9, leave out 'whether'.

Amendment 121, in clause 16, page 12, line 12, leave out 'whether'.

Amendment 122, in clause 16, page 12, line 14, leave out 'whether'.

Amendment 123, in clause 16, page 12, line 16, leave out 'whether'.

Amendment 124, in clause 16, page 12, line 17, leave out 'and' and insert 'or'.

Amendment 125, in clause 16, page 12, line 18, leave out 'whether'.

Amendment 126, in clause 16, page 12, line 20, leave out subsection (3).

Mr Llwyd: Although the amendments appear to be bulky, they are straightforward and simple. Amendment 119 would delete the words,

"the following factors must be taken into account"

from line 8 and insert the following words,

"the relevant authority must take into account all the circumstances; but it must treat the interests of justice as requiring representation to be made available where".

Amendments 120 to 123 and 125 would merely delete the word "whether" from paragraphs (a) to (e). Amendment 126 would delete subsection (3).

I will explain the purpose and effect of the amendments. Section 12 of the Access to Justice Act 1999 enshrined the right to legal advice for individuals involved in criminal investigations or proceedings. That right would be withdrawn under schedule 5 of the Bill, and it has not been replaced by an equivalent provision. The amendments would ensure that an individual qualifies for representation in the interests of justice when any of the five factors in subsection 2(a) to (e) apply.

Amendment 126 is designed to limit broad Executive powers to set the agenda for provision of criminal aid. It would remove the Lord Chancellor's power to add to or vary the factors to be considered in determining whether an individual qualifies for representation in criminal matters, except in primary legislation. There is no objection to the matter coming fully before the House in a proper manner, in the form of a short Bill. However, it should not happen otherwise.

Karl Turner: I rise to speak about amendment 126. The clause provides for the way in which the director or court must make determinations about whether an individual qualifies for representation in criminal proceedings. Subsection (1) requires the director or a court to determine whether an individual qualifies on the grounds of means and in the interests of justice. Subsection (2) lists the factors that must be taken into account when deciding whether a person qualifies for such representation.

It is important briefly to discuss those factors. Under subsection (2)(a), the director or court must consider whether

"if any matter arising in the proceedings is decided against the individual, the individual would be likely to lose his or her liberty or livelihood or to suffer serious damage to his or her reputation";

under paragraph (b),

"whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law";

under paragraph (c),

"whether the individual may be unable to understand the proceedings or to state his or her own case";

under paragraph (d),

"whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual";

and under paragraph (e),

"whether it is in the interests of another person that the individual be represented."

Those factors mirror the provisions in paragraph 5 of schedule 3 to the Access to Justice Act 1999, which, for the criminal practitioners in the Committee, are effectively the Widgery criteria.

Clause 16(3) gives the Lord Chancellor a power to add or to vary those factors. Amendment 126 would remove subsection (3), so that the Lord Chancellor could add or vary the factors through primary legislation only. My major worry is that subsection (3) is yet another attempt in the Bill to allow the scope of qualification for representation to be restricted in future, which is a genuine and justifiable concern. The measure provides too much wriggle room for the Lord Chancellor to move the goalposts and add or vary factors to exclude yet more people from legal representation.

I listened carefully to the Minister in the previous debate in which I, too, spoke. The Government's intention seems to be for lawyers to represent clients for free, perhaps in a police station setting, given that they are intent on keeping clause 12 in its entirety. Perhaps the hope is that the client whom the lawyer represents may be charged, and eventually the solicitor may be paid for the services. That is absolutely appalling, to put it mildly. The Government should consider the position and support the amendment. I respectfully say that the criminal practitioners in Committee ought to think very carefully about supporting the Government on such crucial provisions.

Mr Slaughter: This is another example of the Bill taking matters away from scrutiny. That is why I support the right hon. Member for Dwyfor Meirionnydd and what was said by my hon. Friend the Member for Kingston upon Hull East, particularly in relation to his amendment. At least the Lord Chancellor may by order add or vary a factor, and not simply take them away as seems to be the practice throughout the Bill.

If we look at the criteria under subsection (2), which my hon. Friend has just run through—matters to do with the loss of liberty; a substantial question of law; individuals' inability to understand proceedings, and complex matters of tracing witnesses, expert cross-examination and the interests of another person—I invite the Minister to say under what circumstances he can envisage that that should not be the case. Even if he can envisage that, why should that not be a matter for primary legislation and full consultation and debate rather than being done by order? He could have included in subsection (3), "may amend the order by adding a factor", and it might not have attracted so much attention. The idea that such fundamental aspects can be deleted by order is very worrying. It adds to matters such as the dormant clause 12 and what I referred to a few moments ago: the excess of delegation to regulation. That is not proper scrutiny. These are fundamental changes to the system of law and nonsense is being made of the Committee by our having to defer decision after decision to the whim of the Lord Chancellor and secondary legislation.

Mr Djanogly: Amendments 119 to 125 would remove any discretion in determining whether the interests of justice test was met. It would mean that the director would have to treat the interests of justice test as requiring representation to be made available in a case where any one of the factors listed in subsection (2)(a) to (e) were present. The factors in the interests of justice test were originally known as the Widgery criteria, taken from the report of the departmental Committee on Legal Aid in Criminal Proceedings under the chairmanship of Mr Justice Widgery in 1966. They were incorporated into legal aid legislation under both the Legal Aid Act 1988 and the Access to Justice Act 1999. They broadly reflect the requirements of the ECHR. Article 6(3)(c) of the ECHR provides expressly for the right for a person to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

In considering the interests of justice aspect of this test, the European Court of Human Rights has considered the following factors: the seriousness of the alleged offence and the severity of the potential sentence; the complexity of the proceedings and the personal circumstances of the individual and their ability to make a useful contribution to their legal analysis without legal assistance and to put their case in a concrete and effective way. A decision on the interests of justice test is based on the facts of each and every case, and takes into account the circumstances of the individual. It is, with respect, too simplistic to say that the test is automatically passed if any one of the factors is present.

I will give an example to illustrate my point. In some cases, it may be enough for only one factor to be met—for example, because the risk of imprisonment is so high if the person is convicted or because the person's ability to represent themselves is so impaired. In other cases, the cumulative effect of the factors may be needed for the interests of justice to require legal aid. For example, if the risk of imprisonment is very remote due to established case law, other factors may need to be present for the interests of justice to be met.

The interests of justice test has served us well for 45 years and I can see no justification for such a radical departure, which would serve only to provide legal aid to individuals when it is not really in the interests of justice to do so.

3.30 pm

Amendment 126 would omit subsection (3) from clause 16, which is the power for the Lord Chancellor to use secondary legislation, subject to the affirmative procedure, to add or vary the list of factors in subsection (2). I should point out to the hon. Members for Kingston upon Hull East and for Hammersmith that such a power is included at paragraph 5 of schedule 3 to the 1999 Act. Although that power has not been used to date, it continues to be appropriate to have a power to add or to vary the factors, to allow for legal developments on the requirements of the interests of justice. Given my explanations, I urge the right hon. Gentleman to withdraw his amendment.

Mr Llwyd: I am not persuaded, but I will not press the amendment to a vote either. That is for two main reasons. First, these provisions will be carefully examined in the other place, which is bound to place great emphasis on them. Secondly, this area will undoubtedly be returned to when the Bill returns to the Floor of the House. I am not underplaying the importance of my amendments; in the interests of today's procedure, I do not intend to press the amendments to a division. We will have to revisit them in the other place or on the Floor of the House. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 16 ordered to stand part of the Bill.

Clause 17

DETERMINATIONS BY DIRECTOR

Amendments made: 30, in clause 17, page 13, line 19, after 'court' insert ', tribunal'.

Amendment 31, in clause 17, page 13, line 23, leave out 'and section 19(3)'.—*(Mr Djanogly.)*

Mr Llwyd: I beg to move amendment 127, in clause 17, page 13, line 24, leave out subsection (7).

The amendment is simple. Subsection (7) states:

"Regulations may provide for exemptions from subsection (6)."

The amendment would remove the power of the Lord Chancellor to create exceptions by regulation to the right to appeal a decision by the director that an individual is not eligible for representation within the legal aid system. In effect, the amendment would add an extra layer of protection for individuals refused legal aid in criminal matters. That is particularly important in a context where the executive is seeking to reserve to itself extensive powers to regulate criminal legal aid provision by means of secondary legislation. Having been here a while, I understand that secondary legislation is an important part of the way we do things in this place, but the Bill is beginning to read like a charter for someone to introduce whatever they like under secondary legislation. That leaves me feeling rather uncomfortable. I hope that the Minister will consider the amendment in the light of what I have said.

Mr Djanogly: As the right hon. Gentleman has just said, amendment 127 would remove the Lord Chancellor's ability to make exceptions from subsection (6) of clause 17. That subsection provides that in appeals against a determination by the director, the interests of justice do not require representation to be made available for the purposes of criminal proceedings or do not require such representation to continue and may be made to a prescribed court, tribunal or other body. The current position is that an appeal to a court is allowed in relation to proceedings in magistrates courts when the court staff have determined that the interests of justice do not require representation. Our intention is to maintain the current system and to make regulations that provide an appeal route for those who fail the interests of justice test if the test was carried out administratively rather than by a court or tribunal.

Appeals are not necessary in the Crown court as all cases on indictment are deemed to have passed the interests of justice test. It is appropriate to allow for exceptions from any right to appeal so as to exclude Crown court cases and any cases where the interests of justice test was conducted by a court or tribunal rather than administratively.

The purpose of allowing an appeal is to enable an independent court, tribunal or other body to reconsider the interests of justice test afresh. There will still be some circumstances in which a court may grant an initial representation order. In those cases, the court will effectively have conducted the interests of justice test. It is therefore inappropriate to give an individual another avenue of appeal if the initial decision was made by a court or tribunal. I therefore urge the right hon. Gentleman to withdraw his amendment.

Mr Llwyd: That was a straightforward and lucid explanation, which I accept. In the light of what the Minister has said, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Amendment made: 32, in clause 17, page 13, line 24, at end insert—

'( ) This section does not authorise the Director to make a provisional determination and accordingly—

(a) references in this section to a determination do not include a provisional determination, and

(b) references in this section to a decision do not include a decision made as part of such a determination.'—*(Mr Djanogly.)*

Clause 17, as amended, ordered to stand part of the Bill.

Clause 18

DETERMINATIONS BY COURT

Amendments made: 33, in clause 18, page 14, line 5, after 'court' insert ', tribunal'.

Amendment 34, in clause 18, page 14, line 10, at end insert—

'( ) Regulations under this section may not authorise a court to make a provisional determination and accordingly—

(a) references in this section to a determination do not include a provisional determination, and

(b) references in this section to a decision do not include a decision made as part of such a determination.'—*(Mr Djanogly.)*

Clause 18, as amended, ordered to stand part of the Bill.

Clause 19

PROVISIONAL DETERMINATIONS

Amendments made: 35, in clause 19, page 14, line 23, after 'of' insert 'provisional'.

Amendment 36, in clause 19, page 14, line 24, after 'provision' insert 'equivalent to that'.

Amendment 37, in clause 19, page 14, line 24, leave out '(h)' and insert '(i)'.

Amendment 38, in clause 19, page 14, line 28, after second 'determination' insert 'made'.

Amendment 39, in clause 19, page 14, line 29, leave out 'under section 15' and insert

'in reliance on section17 or18'.

Amendment 40, in clause 19, page 14, line 30, leave out subsection (3).

Amendment 41, in clause 19, page 14, line 33, leave out 'the regulations' and insert 'regulations under this section'.—*(Mr Djanogly.)*

Clause 19, as amended, ordered to stand part of the Bill.

Clause 20

FINANCIAL RESOURCES

Mr Llwyd: I beg to move amendment 129, in clause 20, page 15, line 2, at beginning insert 'subject to section 22(11A)'.

The Chair: With this it will be convenient to discuss the following:

Amendment 130, in clause 20, page 15, line 5, at beginning insert 'Subject to section 22(11A)'.

Amendment 132, in clause 22, page 18, line 18, at end insert—

'(11A) The Lord Chancellor may not, in regulations under this Part, make prescriptions which would require—

(a) an individual with £3,000 or less to make any capital based contribution to the cost of legal services,

(b) capital, whether real or nominal, in a primary dwelling, to be taken into account when assessing capital eligibility under this section,

(c) an individual with monthly disposable income of less than £316 to make any income based contribution towards the cost of legal services,

(d) an individual with monthly disposable income of between £316 and £733, to make a contribution which exceeds 30 per cent of disposable monthly income.

(11B) The Lord Chancellor may, by regulations, amend the capital and income eligibility thresholds provided for in paragraphs (b)(i), (iii) and (iv) to take account of variations in the value of sterling.'.

Mr Llwyd: The amendments are fairly self-explanatory and I think that their effect is plain. Amendments 129 and 130 place a certain restriction on the Lord Chancellor's freedom to make prescriptions about financial eligibility for legal aid, in accordance with clause 22, as I propose amending it. Amendment 132 is a probing amendment to initiate debate on provisions of the Bill that allow the Lord Chancellor to make cuts to the remuneration of legal aid professionals that are additional to the cuts alluded to in the Government's consultation response.

Read together, my amendments would limit the extent to which the Lord Chancellor could change the thresholds for eligibility for legal aid, the extent of contributions, and the level at which they are set. They recognise the importance of maintaining a system in which not only the poorest of the poor but those on low or average incomes are not effectively discouraged from vindicating their rights by the considerable costs that might be involved.

Provisions on eligibility in the Bill are largely skeletal, but clause 20 provides for the Lord Chancellor to make regulations setting eligibility thresholds. At present, the only indication of the level and nature of reviewed eligibility requirements is set out in the Government's response to the consultation on reform to the legal aid system. The Government intend to continue with plans to increase the level of income-based contributions to a maximum of 30% of monthly disposable income.

Liberty believes that higher thresholds for financial eligibility and further changes to the level of financial contribution will place even more people with low disposable incomes in the unenviable position of choosing between financial hardship and a lack of advice and assistance in upholding their fundamental rights. There is a belief that that will have a chilling effect, significantly undermining the effective protection of human rights in the United Kingdom.

3.45 pm

Mr Slaughter: It is understandable that regulations need to be made with respect to eligibility, and I do not want to make a point on that, but it means that we do not have clear guidance on where the Government are going, other than what was in the consultation documents and the amendments to one or two of the more outlandish proposals on contributions. Those suggested—I think the phrase that the Government used was "skin in the game"—a wilful desire for people, whatever their income or hardship levels, to make some investment as a principle more than as a financial contribution. That certainly was a departure. I hope that the Government will not persist with that attitude, as it brings a completely new element into the purpose of legal aid.

We do not have a clear Government strategy; we have only what was in the consultation paper and what the right hon. Member for Dwyfor Meirionnydd has referred to. However, we know that the Government are looking everywhere for money and take a cavalier attitude to the provision of legal aid, whether through scope or eligibility. For that reason, it would be appropriate to have some restraint on the powers of the Lord Chancellor. To anticipate the Minister's point, that might not have been appropriate in previous Acts. I take what the right hon. Member for Dwyfor Meirionnydd says: the amendments are probing in nature, and they have been designed to show the sorts of levels that may be acceptable at the moment. However, they would at least give the Minister an opportunity to indicate where the Government are going on eligibility and how they intend to deal with those matters in the future.

Mr Djanogly: Amendments 129, 130 and 132, which I take as probing amendments in line with what right hon. and hon. Members have said, would make the Lord Chancellor's powers to set financial eligibility limits for legal aid and require contributions subject to certain limitations and qualifications specified in primary legislation.

Financial limits and thresholds for legal aid eligibility have always been set out in regulations without the qualifications and limitations proposed by the amendments. Our approach in the Bill is fully consistent with the approach in the 1999 Act and its predecessor, the Legal Aid Act 1988, in which the Lord Chancellor had a general power to make regulations about financial eligibility, and the detailed rules were to be set out in the regulations. We are being clear about how we intend to exercise that power. To give the clear guidance requested by the hon. Member for Hammersmith, we intend to replicate the position under the existing regulations, subject to the three specific changes in relation to civil legal aid that we confirmed in our consultation response.

The first is abolishing capital passporting, so that all applicants for civil legal aid will be subject to the same assessment of disposable capital. The second is imposing a limit of £100,000 on the disputed assets that can be disregarded when assessing eligibility for civil legal aid

[Mr Djanogly]

at all levels of service, to ensure that legal advice is not provided to wealthy people contesting ownership of substantial properties. The third is imposing a modest increase to the monthly income contributions that civil legal aid recipients with higher incomes are required to make.

Clauses 20 and 22 provide the framework within which regulations on financial eligibility and payments by people in receipt of legal aid can operate for civil and criminal legal aid. There are different financial eligibility tests for civil and criminal legal aid. However, given that the amendments appear to be directed specifically at civil legal aid, I shall approach them on that basis. First, I should observe that the amendments apply to both criminal and civil legal aid, which would not be appropriate, given the differing systems in respect of means-testing and contributions.

Part of the amendments aims to ensure that legal aid applicants with disposable capital of £3,000 or less are not required to make any capital contribution. We originally consulted on a proposal to require a £100 capital contribution to civil legal aid from persons with disposable capital of £1,000 or more. However, having considered the responses to the consultation, we decided against that proposal. We recognise that individuals with low levels of capital may have assets that are highly variable, and which may represent a contingency fund. We also recognise the importance of individuals being able to save to pay for necessities. In addition, the collection of the fee would deliver only modest savings, which would be offset to an extent by the administration costs of collecting them. We therefore have no intention to seek capital contributions to civil legal aid from those who have disposable capital of £3,000 or less. The amendments are therefore unnecessary.

Furthermore, the amendments aim to exclude capital in a primary dwelling from being taken into account when assessing disposable capital. If they were agreed, that might have the unfortunate effect of rendering wealthy home owners, with high value properties, financially eligible for legal aid, thereby diverting limited public legal aid funding from those most in need.

The Government originally consulted on proposals that would have tightened the rules regarding capital held in a person's dwelling. However, we listened to respondents' views about the equity in their properties and announced that we will retain the current system of capital disregards in relation to disposable capital. The present system already allows for significant sums of capital to be disregarded when assessing disposable capital. For example, £100,000 of equity in the main dwelling house may be disregarded, and a further £100,000 may be disregarded in respect of a mortgage for the person's property. The current system therefore ensures that legal aid is targeted on those most in need, while it also recognises the difficulties that there may be in releasing capital held in property.

The amendments also propose to set in primary legislation a threshold of £316 for the monthly disposable income below which people would receive free legal aid. That threshold is the current one for income contributions for civil legal aid. Below that threshold, civil legal aid does not require income contributions to be paid. The threshold broadly reflects the level of subsistence benefits payments that are intended to cover basic elements, such as food and utilities. Our consultation proposals therefore focused on increasing the monthly contributions for people receiving legal aid whose disposable income exceeded the threshold.

We do not therefore intend to lower the threshold from that level. All the thresholds will continue to be reviewed annually, in keeping with the current regulatory system. The annual review will not necessarily result in a change to the threshold, but enables the thresholds and limits to be altered to allow for economic or legislative changes.

The amendments would also preclude monthly income contributions that exceed 30% of disposable incomes between £316 and £733, which presumably relates to the Government's announcement that we will increase monthly income contributions to no more than 30% of disposable income for people who are eligible for civil legal aid and who have a disposable monthly income of £316 or more. We have therefore made it clear that we have no plans to raise contributions above 30% of disposable monthly income. The amendments are therefore unnecessary, and the possibility that those figures may be revised to reflect economic or legislative changes means that the amendments are inappropriate.

More generally, it is not appropriate to seek to set out detailed qualifications and limitations on financial eligibility in primary legislation. Those are matters of considerable technical detail, which is why the thresholds have always been set out in regulations and should continue to be so. Concepts such as disposable income are meaningless without the sort of highly detailed and technical rules that appear in the regulations and which do not sensibly belong in the Bill. Indeed, it is most undesirable for such matters to be in the Bill, because that would remove our ability to make the sorts of technical changes to the detailed rules that are required from time to time to ensure the effective operation of the scheme.

The amendments also seek to restrict the Lord Chancellor's power to alter the financial eligibility limits set out in the amendments to alterations catering for variations in the value of sterling. The financial limits that are set out in regulations are normally reviewed annually and, following such reviews, the financial limits have remained unchanged for the past two years. As with the current regulations, changes will not be automatic. Any future change to the income limits will be set out in regulations made under the Bill, subject to parliamentary scrutiny, but the amendments propose automatically to peg the thresholds to the value of sterling. If they are intended to capture instances where applicants hold assets or receive income in foreign currencies, that is already taken into account when assessing legal aid eligibility and monthly income contributions. If they are intended to allow for the limits to be increased in line with inflation, that is already allowed for under the current system of annual review. Again, the amendments are therefore unnecessary.

To operate the legal aid scheme effectively and efficiently, we need to continue to set out the details of the financial eligibility rules in regulations rather than in primary legislation, and to retain the current system of review. That will allow decisions on limits to be taken in the light of economic and legislative changes, and for Parliament to scrutinise those decisions and their likely impact on

the legal aid fund. I therefore hope that the right hon. Gentleman is reassured by what I have said, and that he will withdraw his amendment.

Mr Llwyd: They were probing amendments, and I am grateful to the Minister for the fullness of his response. In those circumstances, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 20 ordered to stand part of the Bill.

Clause 21 ordered to stand part of the Bill.

Clause 22

PAYMENT FOR SERVICES

The Chair: I call Mr Llwyd to move amendment 131.

Mr Llwyd: Amendment 131 was consequential to the debate on clause 20. Under those circumstances, I do not wish to move it.

Question proposed, That the clause stand part of the Bill.

Mr Slaughter: Clause 22(3) states:

"The regulations may, in particular, provide that where…civil legal services are provided to an individual under this Part in relation to a dispute, and…prescribed conditions are met, the individual must pay a prescribed amount which may exceed the cost of the civil legal services provided."

Why does the Minister pursue that provision and under what circumstances does he envisage it being used?

Mr Djanogly: We intend to use the power in subsection (3) to establish a supplementary legal aid scheme that will provide an additional source of funding to supplement the legal aid fund. As indicated in our response to the consultation, under the scheme, 25% of damages received by successful legal aid claimants, other than damages for future care and loss, will be recovered by the legal aid fund. Those recovered funds will supplement the legal aid fund and therefore the funding of other civil legal aid cases. The supplementary legal aid scheme will apply to successful damages cases where the claimant is legally aided, including any out-of-scope cases that are funded through the exceptional funding scheme. I hope that explains the provision.

Question put and agreed to.

Clause 22 accordingly ordered to stand part of the Bill.

Clause 23 ordered to stand part of the Bill.

Schedule 2

CRIMINAL LEGAL AID: MOTOR VEHICLE ORDERS

Mr Djanogly: I beg to move amendment 42, page 121, line 15, leave out 'payable' and insert 'due'.

The Chair: With this it will be convenient to discuss Government amendment 43.

Mr Djanogly: The amendments relate to motor vehicle orders. Schedule 2 enables regulations to authorise the court to make a motor vehicle order as a form of enforcement action in relation to sums payable for criminal legal aid that have not been paid. Amendment 42 makes the language in paragraph 4 of schedule 2 consistent with paragraph 2(1) of the same schedule by referring to the person to whom an amount is due for the provision of criminal legal aid services, rather than the person to whom the amount is payable. Amendment 43 clarifies paragraph 5 of schedule 2. Charges in relation to motor vehicles will arise only in connection with legal aid under motor vehicle order regulations. We propose to amend paragraph 5 of schedule 2 for the first of those regulations, rather than regulations generally under clause 23.

Amendment 42 agreed to.

Amendment made: 43, in schedule 2, page 121, line 27, leave out 'section 23' and insert 'MVO regulations'.—*(Mr Djanogly.)*

Schedule 2, as amended, agreed to.

Clause 24 ordered to stand part of the Bill.

Clause 25

COSTS IN CIVIL PROCEEDINGS

4 pm

Mr Llwyd: I beg to move amendment 117, in clause 25, page 20, line 3, leave out subsection (3).

The Chair: With this it will be convenient to discuss amendment 114, in clause 38, page 27, line 38, leave out from '25' to '(6)'.

Mr Llwyd: Amendment 117 is a probing amendment. It would remove the Lord Chancellor's power to create exceptions to the rule that individuals may be required to pay any amount in costs that is reasonable in accordance with an individual's financial means, bearing in mind his or her conduct during the proceedings. I would like a response on that from the Minister. Amendment 114 is merely a brief consequential amendment.

Mr Djanogly: Probing amendment 117 would, as the right hon. Gentleman said, have the effect of removing the power to make regulations to make exceptions to the principle of cost protection. That principle, which is set out in clause 25(1), provides that the amount of costs that may be awarded against a legally aided person in certain civil proceedings

"must not exceed the amount…which it is reasonable for"

that person

"to pay having regard to all the circumstances, including…the financial resources of all of the parties"

and their conduct during the case.

I must make it clear that the Bill does not alter the current position under the Access to Justice Act 1999. The principle of cost protection, and the power to make exceptions to the rule by regulations are taken directly from section 11 of that Act. The Bill does not alter the principles in respect of cost protection, and we intend to use the power to make exceptions to re-enact those

[Mr Djanogly]

that exist under current regulations. As under the current Act, the exceptions will be set out in regulations, which will replace those currently in use.

Mr Llwyd: I am grateful for the Minister's explanation, and I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 25 ordered to stand part of the Bill.

Clause 26

CHOICE OF PROVIDER OF SERVICES ETC

The Chair: Does Mr Llwyd wish to press amendments 108 and 109 to a Division? They have previously been debated.

Mr Llwyd: No, Mr Hollobone.

Question proposed, That the clause stand part of the Bill.

Mr Slaughter: In the spirit of timing and understanding, I will not make a speech. The right hon. Gentleman did not press his amendment, and the matter was debated at length at our sitting on Tuesday, which is another reason for not debating it again, but I want to put on record the serious concern that Opposition Members have about the single telephone gateway and the way it is being rolled out. It has been ill thought out and has not been properly consulted on, and is opposed by almost all providers at all levels as a way of accessing legal aid. It is one of the key concerns about the Bill, because it is a way of strangling access to justice through technical measures at an early stage. Ironically, it will particularly affect those who are in most need of that help. Those views have been clearly expressed by several colleagues at greater length and with more eloquence, so my comments are simply for the record.

Mr Djanogly: The views of Opposition Members on that point were certainly made clear in previous debates. I reiterate that the needs of all callers will be assessed case by case and, where appropriate, callers will be referred to a face-to-face advice service. The key consideration will be whether the client is able to give instructions and act on the advice given. That is all I need to say at this stage.

Question put and agreed to.

Clause 26 accordingly ordered to stand part of the Bill.

Clause 27

POSITION OF PROVIDERS OF SERVICES

Mr Llwyd: I beg to move amendment 110, in clause 27, page 21, leave out line 39.

The Chair: With this it will be convenient to discuss amendment 111, in clause 27, page 21, leave out lines 44 and 45 and insert—

'(3) The withdrawal of a right to representation previously granted to an individual shall not affect the'.

Mr Llwyd: The effect of the proposals would be to reinstate the system established by the Access to Justice Act 1999, whereby provision is made in primary legislation for representatives to receive payment for work that they have done and undertaken, notwithstanding a subsequent determination that the individual is ineligible for legal aid. The amendments would also remove the Lord Chancellor's power to redefine by regulation the relationship between service provider and service recipient. The situation that I have described arises in a few cases each year, and it can be financially burdensome to providers. I am sure that the Minister will respond in detail to the amendments, which raise an important matter, and I should be grateful to hear his views.

Mr Djanogly: Clause 27 makes important provisions about the providers of services. As the right hon. Gentleman said, amendment 110 would remove the Lord Chancellor's power to make exceptions to the general rules set out in subsection (1), but we believe that it is important to be able to make such exceptions in specific areas. For example, the Legal Services Commission relies on similar provision in the Access to Justice Act 1999 to waive the rules of privilege and confidentiality regarding disclosure of information relating to the cases of clients, or former clients, funded by the commission. Such information is used for audit and assessment, and other relevant functions of the LSC, such as investigating the statutory charge. We envisage making similar regulations in future, because such provisions are necessary to ensure that public money is properly spent and that we receive value for money from providers.

On amendment 111, subsection (3) allows regulations to specify when a provider can be paid for work undertaken if the right to legal aid is subsequently withdrawn. The amendment would allow providers to be paid where legal aid is withdrawn for any reason. It is both fair and appropriate that providers are paid for the work that they undertake in some, but not all, cases where legal aid is subsequently withdrawn. It is appropriate that the detail, including what payments are made, is set out in secondary legislation. The Criminal Defence Service (Funding) Order 2007, for example, includes detailed provisions about payments to litigators depending on the timing of the withdrawal or transfer of legal aid.

With regard to civil legal aid, the LSC will remunerate solicitors for the work that they have carried out prior to the discharge or revocation of the civil legal aid certificate. Where the certificate is revoked—for example, owing to the client giving false information on the application form—the client is liable for all costs paid or payable by the LSC for work carried out under that certificate.

The LSC would not pay solicitors for work done prior to the discharge or revocation of the legal aid certificate where, first, this work was not permitted by the terms of the legal aid certificate, or secondly, where the solicitor had breached the duties set out within the funding code and the civil contract made between the LSC and the solicitor, resulting in a loss to the legal aid fund. The civil contract standard terms allow for sums owing to the solicitor to be set against sums that the solicitor owes the LSC.

The Government intend that the arrangements regarding remuneration of solicitors for civil legal aid work should continue. I urge the right hon. Gentleman to withdraw the amendment.

Mr Llwyd: I am grateful for the response. It appears that the point is covered so I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 27 ordered to stand part of the Bill.

Clause 28

CODE OF CONDUCT

Mr Llwyd: I beg to move amendment 112, in clause 28, page 22, line 8, after 'body', insert

'exercising functions of the Lord Chancellor or the Director pursuant to section 5 or regulations made under that section, including a body'.

While clause 5 enables the Lord Chancellor or the director to transfer services to a person or employees of that person authorised by the Lord Chancellor or the director for that purpose, the code of conduct provisions in clause 28 only extend the code to civil servants and employees of a body established and maintained by the Lord Chancellor. The effect would be that employees of a body or person to whom functions of the Lord Chancellor or the director have been transferred, but who are not civil servants or employees of a body established and maintained by the Lord Chancellor, will not be subject to the Lord Chancellor's code of conduct. That code will include duties of confidentiality and the avoidance of discrimination and conflicts of interest.

The Bar Council has assisted me in proposing the amendment. It believes that the amendment would extend the code of conduct to cover all individuals exercising functions of the Lord Chancellor or the director. It is an important amendment and deserves careful consideration, and I look forward to hearing what the Minister has to say.

Mr Djanogly: Amendment 112 would subject a body exercising a function of the Lord Chancellor or the director under the delegation provisions in clause 5 to the code of conduct in clause 28 when providing services to an individual. The code of conduct under clause 28 must be observed in relation to the provision of legal services to an individual by civil servants and by those employed by a body established by the Lord Chancellor under clause 2. Clause 2 enables the Lord Chancellor to establish a body to provide services under part 1 of the Bill.

At the moment, the body established by the LSC to provide legal aid is the public defender service. Public defenders are employees of the LSC. The Bill will transfer responsibility for the public defender service to the Lord Chancellor under clause 2 of the Bill. Those employed in the PDS must currently comply with a statutory code of conduct. The code is important to public defenders and provides them with some distinct protections relating to their unique status as public servants and legal professionals. The safeguards include a number of duties around their conduct, including most importantly an overriding duty to protect the interests of the client, and other matters, including how to handle and report an excessive caseload.

4.15 pm

The Government believe that the code is an important safeguard for public defenders, and that is why we have replicated it in clause 28, which adds to those existing safeguards and ensures that civil servants and the employees of a body established and maintained by the Lord Chancellor shall, when providing legal aid services to an individual, not be subject to the direction of the Lord Chancellor. Amendment 112 would make the code not apply to the public defender service. The Government do not support that position.

The right hon. Gentleman may wish the code at clause 28 to apply only to civil servants and to a person, or employees of a person, to whom functions have been delegated by the Lord Chancellor. The rationale behind the delegation provisions is primarily practical. In practice, neither the Lord Chancellor nor the director is going to be in a position to personally carry out all the functions laid out in part 1. The amendment is therefore not necessary. The code is specifically designed to safeguard the professional status of public defenders and was developed to complement existing professional codes of conduct rather than to override them. We do not believe that the code needs to extend beyond civil servants and the employees of this unique service. In the light of what I have said I invite the right hon. Gentleman to withdraw his amendment.

Mr Llwyd: I am encouraged by what the Minister said. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 28 ordered to stand part of the Bill.

Clauses 29 and 30 ordered to stand part of the Bill.

Schedule 3

LEGAL AID FOR LEGAL PERSONS

Amendments made: 44, in schedule 3, page 122, line 26, leave out 'the person's rights' and insert

'any rights of the person'.

Amendment 45, in schedule 3, page 122, line 26, leave out 'under European Union law' and insert

'that are enforceable EU rights'.

Amendment 46, in schedule 3, page 123, line 22, leave out 'or other body' and insert ', tribunal or other person'.

Amendment 47, in schedule 3, page 123, line 43, after 'determined' insert '(provisionally or otherwise)'.

Amendment 48, in schedule 3, page 124, line 18, at end insert—

'( ) The Director may not make a provisional determination under sub-paragraph (2)(b) unless authorised to do so by regulations under sub-paragraph (8).'.

Amendment 49, in schedule 3, page 124, line 31, leave out sub-paragraph (10).

Amendment 50, in schedule 3, page 124, line 38, after 'determination' insert 'made'.

Amendment 51, in schedule 3, page 124, line 39, leave out 'under section 15' and insert

'in reliance on section 17 or18'.

Amendment 52, in schedule 3, page 124, line 40, after 'under' insert

'sub-paragraph (2)(b) made otherwise than in reliance on'.—*(Mr Djanogly.)*

Mr Djanogly: I beg to move amendment 53, in schedule 3, page 125, line 11, at end insert—

'7A In Schedule 2, references to criminal legal aid include advice, assistance and representation required to be made available under paragraph 4 or 5 of this Schedule.'.

The amendment ensures that the provisions on enforcement of overdue moneys in respect of criminal legal aid by way of motor vehicle orders equally apply where legal aid is made available to a legal person. That is achieved by modifying the meaning of criminal legal aid in schedule 2 for the specific purposes of schedule 3. It is plainly right that the same enforcement powers are available where legal aid is given to a legal person as well as to a natural person.

Amendment 53 agreed to.

Schedule 3, as amended, agreed to.

Clause 31

Foreign law

Amendments made: 54, page 23, line 23, leave out 'an individual's rights' and insert 'any rights of an individual'.

Amendment 55, in clause 31, page 23, line 23, leave out 'under European Union law' and insert 'that are enforceable EU rights'.—*(Mr Djanogly.)*

Clause 31, as amended, ordered to stand part of the Bill.

The Chair: It would be helpful at this point if members of the Committee would indicate which, if any, of clauses 32 to 36, schedule 4 and clause 37 they wish to debate separately. With the leave of the Committee, I can put a composite question where no separate debate is required.

Clauses 32 to 36 ordered to stand part of the Bill.

Schedule 4 agreed to.

Clause 37 ordered to stand part of the Bill.

Schedule 5

Consequential amendments

Mr Djanogly: I beg to move amendment 173, page 130, line 32, at end insert—

'Children and Young Persons Act 1969 (c. 54)

3A (1) Section 23(5A) of the Children and Young Persons Act 1969 (restrictions on imposing security requirement on child or young person who is not legally represented) is amended as follows.

(2) In paragraph (a)—

(a) for the words from the beginning to "but the right" substitute "representation was provided to the child or young person under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2011 for the purposes of the proceedings but", and

(b) for "to be granted such a right" substitute "for such representation".

(3) In paragraph (aa) for "to be granted a right to it" substitute "for such representation".

3B (1) In section 23 of that Act as it has effect pursuant to section 98 of the Crime and Disorder Act 1998 (restrictions on remand of boy who is not legally represented), subsection (4A) is amended as follows.

(2) In paragraph (a)—

(a) for the words from the beginning to "but the right" substitute "representation was provided to the person under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2011 for the purposes of the proceedings but", and

(b) for "to be granted such a right" substitute "for such representation".

(3) In paragraph (aa) for "to be granted a right to it" substitute "for such representation".'.

The Chair: With this it will be convenient to discuss Government amendments 174 to 187.

Mr Djanogly: Schedule 5 will make various necessary amendments and repeals that are consequential on the changes to legal aid made by part 1 of the Bill. They will make minor corrections and clarifications to various paragraphs in schedule 5, as well as some further consequential amendments and repeals to the schedule. For example, amendment 174 will remove the consequential amendment made to the Race Relations Act 1976, as that Act has since been repealed by the Equality Act 2010.

Amendment 173 agreed to.

Amendments made: 174, in schedule 5, page 131, leave out lines 34 to 37.

Amendment 175, in schedule 5, page 132, line 43, leave out 'relating to'.

Amendment 176, in schedule 5, page 133, line 21, leave out 'the end' and insert '"Service"'.

Amendment 177, in schedule 5, page 134, line 1, after 'for', insert 'by him'.

Amendment 178, in schedule 5, page 134, line 2, after 'substitute', insert 'by the barrister'.

Amendment 179, in schedule 5, page 138, line 3, after 'for', insert 'under'.

Amendment 180, in schedule 5, page 138, line 20, leave out 'Section 33' and insert 'Sections33(2) and 34'.

Amendment 181, in schedule 5, page 140, line 5, at end insert—

'Equality Act 2010 (c. 15)

68 In Part 1 of Schedule 19 to the Equality Act 2010 (public authorities) omit "The Legal Services Commission."

Terrorist Asset-Freezing etc Act 2010 (c. 38)

69 In section 23(1)(d) (general power to disclose information) omit "the Legal Services Commission,".'.

Amendment 182, in schedule 5, page 140, line 10, in column 2, at end insert—

'(one) paragraph 1;'.

Amendment 183, in schedule 5, page 140, line 12, in column 2, leave out 'and 11' and insert 'to 12'.

Amendment 184, in schedule 5, page 140, line 13, in column 2, leave out '16' and insert '15'.

Amendment 185, in schedule 5, page 140, line 17, in column 2, at end insert—

'(one) paragraph 45;'.

Amendment 186, in schedule 5, page 140, line 42, in column 2, at beginning insert 'In Schedule 16, paragraphs 51(4) and 108(c).'.

Amendment 187, in schedule 5, page 141, line 9, in column 2, leave out 'paragraph' and insert 'paragraphs 65 and'.—*(Mr Djanogly.)*

Schedule 5, as amended, agreed to.

Clause 38

ORDERS, REGULATIONS AND DIRECTIONS

Amendment made: 56, in page 27, line 12, leave out 'body' and insert 'person'.—*(Mr Djanogly.)*

The Chair: I call Mr Llwyd to move amendment 113.

Mr Llwyd: Amendment 113 is consequential to an earlier debate so I shall not move it.

Clause 38, as amended, ordered to stand part of the Bill.

Clause 39

INTERPRETATION

Amendments made: 57, in page 28, line 4, leave out 'body' and insert 'person'.

Amendment 58, in clause 39, page 28, line 29, leave out from '19(4)' to end of line 31.—*(Mr Djanogly.)*

Clause 39, as amended, ordered to stand part of the Bill.

Clause 40 ordered to stand part of the Bill.

New Clause 2

ALTERNATIVE FUNDING ARRANGEMENTS FOR LEGAL AID

'The Lord Chancellor may by regulations make provision for alternative sources of funding to support the provision of Legal Aid.'.—*(Mr Slaughter.)*

Brought up, and read the First time.

Mr Slaughter: I beg to move, That the clause be read a Second time.

This new clause is short and clear. I referred to it earlier in the debate and I hope that it will be uncontroversial. Funding for legal services is made up from a variety of ways. Certainly under the previous Government, it was obtained in an increasing variety of ingenious ways and formed a composite whole. There is no objection as far as we are concerned to legal aid funding coming from a variety of sources. It may—who knows?—relieve some of the Government's current problems regarding their inadequate funding thereof. I urge the Government to accept the new clause. It is unpretentious, and I would be happy with a yes or no from the Minister.

Mr Djanogly: I will be brief. The proposed new clause would provide that:

"The Lord Chancellor may by regulations make provision for alternative sources of funding to support the provision of Legal Aid.".

We gave careful consideration to alternative sources of funding to support the legal aid fund when drawing up our consultation proposals. Hon. Members will be aware that we consulted on two alternative sources of funding that have had some success in other jurisdictions. The consultation paper sought views on establishing a scheme under which the interest accruing on sums held by lawyers on behalf of clients would be used to offset the cost of legal aid. However, many respondents raised concerns about both the principle and the practical arrangements of operating such a scheme, including concerns that the scheme would not provide a certain income, would be easily avoided, might reduce the level of pro bono work or competitiveness in the sector, and might cause significant harm to some small businesses. Having considered the responses, we recognise that the estimated financial benefits of the proposal are uncertain, and the impact on providers unclear. We therefore decided not to pursue the proposals at this stage. We have, however, decided to proceed with our other proposal for an alternative source of funding, namely the establishment of a supplementary legal aid scheme. I briefly described that earlier. This approach will also ensure that, so far as is possible, legal aid is no more attractive than conditional fee agreements, as revised in accordance with the proposals in part 2 of the Bill.

4.30 pm

In conclusion, we have already given careful consideration to possible alternative sources of funding to support the legal aid fund in drawing up our proposals for reform. I therefore urge the hon. Member for Hammersmith to withdraw the motion.

Mr Slaughter: I thank the Minister for that considered response. We want to keep these matters under review, as funding will clearly be a crucial issue in years to come, but I have no wish to pursue the new clause today. I beg to ask leave to withdraw the motion.

Clause, by leave, withdrawn.

New Clause 3

WASTED COST ORDERS IN CIVIL PROCEEDINGS

'(1) Where a case is funded in accordance with section 8, the costs of and incidental to proceedings in any Courts or Tribunals listed at Schedule 1, Part 3 shall be in the discretion of the Tribunal or Court in which the proceedings take place save insofar as subsection (2) has effect.

(2) A Tribunal must make a wasted costs order against a public authority where the court or the Ministry of Justice has incurred costs as a result of any improper, unreasonable or negligent act or omission on the part of the local authority or any of its representatives including—

(a) an administrative failure which could have been prevented by due diligence at individual or organisational level,

(b) a failure to make out an arguable case against the individual on the basis of the facts and the law,

(c) a failure to concede a case at any stage where due to any new development, whether evidential or legal, there is no longer an arguable case against an individual,

(d) a fundamental misunderstanding or ignorance of the facts or the law in a case which could have been prevented by the exercise of due diligence, or

(e) a delay in providing or failure to provide relevant information or evidence, which could not be obtained otherwise than from the public authority, without reasonable justification.

(3) A costs award under section 2 may reimburse the legal aid fund in the sum of any amount of any costs which the Court or Tribunal assesses as flowing from the act or omission.

(4) Where the Court or Tribunal concludes that proceedings before it would not have been required, or would have been shorter or otherwise less expensive were it not for the act or omission, it may order that costs be paid to the Tribunal.

(5) Wasted costs awarded in accordance with subsections (3) and (4) above must not exceed the amount of the actual wasted expenditure resulting from the act or omission.

(6) For the purposes of this section "public authority" has the same meaning as in section 6 of the Human Rights Act 1998.'.—*(Mr Llwyd.)*

Brought up, and read the First time.

Mr Llwyd: I beg to move, That the clause be read a Second time.

Although this is a rather substantial new clause and the hour is late, I am not going to leave it unmoved. It would be inserted at page 20. It is in the nature of a probing amendment, but it would oblige courts and tribunals that deal with cases funded by legal aid to make these orders against public authorities where acts of the latter have led to wasted expenditure, whether that be costs relating to the legal aid fund or costs incurred by courts or the tribunals system.

It appears to me that the financial objectives being pursued by the Government will not be well served by the scheme as currently set out in the Bill. Many of the cost-cutting claims made by the Ministry of Justice are inadequately reasoned and pay very little regard to the wider savings that an effective system of early legal help can provide. Findings by Citizens Advice indicate that for every £1 spent on legal aid, £10 will be saved in costs to the welfare system.

Without early interventions, manageable problems can become expensive and complex to resolve. In the context of social welfare law or debt advice, for example, what begins as a small issue, which could have been resolved with the early assistance of a lawyer, can become extremely costly further down the line. The court's time and resources and the legal fees involved in a possession hearing far outstrip the small sum necessary to secure legal help from a debt caseworker. Further expenditure may include the significant cost of re-housing a homeless family in bed-and-breakfast accommodation. The risk of resorting to crime for those in financial crisis will contribute to a great social ill and will frequently mean that the state must incur all the costs involved in bringing a defendant to trial, not to mention the wider financial and grave social implications.

The Government's case for the financial eligibility of reforms to the legal aid system is based on flawed assumptions. As a starting point, the Ministry of Justice claims that the legal aid system in this country is far more expensive than systems in the EU. That is not the case. Other outside bodies have said that that is an over-simplification and that it does not account for the increased litigation costs in an adversarial system of justice. Further, while litigation costs in England and Wales are higher than those in some European countries, our spending on sustaining and managing the court system is lower than that in other EU jurisdictions. Those assertions are borne out by research commissioned by the Ministry of Justice and render the claim that our legal aid system is significantly more expensive than those operating in comparable democracies somewhat misleading. In that context, it is easy to see the folly of creating a system in which many more people will be forced to represent themselves, thus consuming more of the court's resources and shifting costs to another area of the MOJ's budget.

In giving evidence to the Justice Committee, the Minister expressed his view on that. However, with respect to him, several senior judges from the very top gave evidence, and they are convinced that litigants in person will be flocking into the courts. We may well have a very short-term saving but, in the medium term, it will be anything but that. The measure may turn out to be a huge false economy, not only in terms of the costs involved in court staff time and clogging up the judges list, but in terms of those people who have not been accorded a fair trial, whether it is a civil issue or whatever. That is concerning.

Mr Slaughter: Lord Judge, the head of the judiciary, has said that the Government's proposals:

"would lead to a huge increase in the incidence of unrepresented litigants, with serious implications for the quality of justice… at a time when courts are having to cope in any event with closures, budgetary cut-backs and reductions in staff numbers…There is a real question whether the cost savings arising from the proposed cutbacks in the scope of civil and family legal aid would be offset by the additional costs imposed on the system by dealing with the increase in litigants in person."

Mr Llwyd: The hon. Gentleman is right and I am grateful for that quotation from Lord Chief Justice Judge. The measure is, I am afraid, short-termism in extremis.

Limiting legal advice in the manner proposed in the Bill will undoubtedly cost the UK more in the long term. In addition to ensuring that costly litigation is a measure of last resort, legal aid helps to ensure that public services operate effectively and that errors are corrected. Without the checks currently provided by legal interventions, public services will not be called to account and standards may well diminish, resulting in poorer services and greater expenditure in the medium and longer term.

The Government's proposals also perpetuate the myth that the legal aid budget has reached its current size as a result of unnecessary litigation instigated by unscrupulous lawyers. That is not the evidence that we have seen. In the Green Paper that preceded the Bill, the Government pointed to a culture in which individuals sought legal remedies unnecessarily and before exploring less expensive and combative ways of resolving their issues. Again, that is not accepted by a breadth of individuals and organisations. None of those trends are recognisable to those who know what is going on in the field.

The implication that there is widespread profiteering among legal aid professionals is an insult to those who work hard—indeed, tirelessly—for an extremely modest income to support those who cannot afford to pay for legal help.

Similarly, for the vast majority of individuals embroiled in litigation, participation in court proceedings provokes great anxiety and is a significant disruption to their lives. For them, as for many people, litigation is very much a last resort, only reached after protracted attempts to resolve a dispute by other means, including both formal and informal complaints.

Among the other organisations in this sector, Liberty believes that the most effective and just way of curtailing legal aid expenditure is to encourage a better quality of decision making by public bodies. It is to be hoped that imposing costs orders on the wasteful activities of those public bodies would encourage a better quality of decision making, which in turn would reduce the number of cases that are unreasonably pursued by public authorities.

Although that might initially seem like a simple shifting of costs from one area of the public sector to another, the belief is that the increased cost liability in this context will undoubtedly help to combat a culture of poor-quality decision making and an overt willingness on the part of some Government agencies to make decisions that are liable to be overturned by the judiciary.

I am sorry that I have spoken at length, but it was important that I did so. This new clause is important and I look forward to hearing what the Minister has to say about it.

Ben Gummer (Ipswich) (Con): I rise to comment briefly on the new clause that the right hon. Gentleman has tabled and also to set a challenge to the shadow Minister, the hon. Member for Hammersmith, who says that all of my interventions are spurious. I agree with the principle that the Law Society is proposing. The reason is that, as we agreed with the hon. Gentleman and with other Conservative colleagues in the Justice Committee, the principle of cross-charging within government is a sensible one, because it encourages better practice. The idea that robbing Peter to pay Paul is a false economy is not necessarily right if one can put together a scheme that properly encourages good practice while at the same time ensuring that claims and litigation are not put off when they need to be brought forward.

Having said that, I am afraid that I must say to the right hon. Gentleman that the new clause is not only poorly drafted but rather contradictory in parts and needs considerable improvement. I hope that the Minister will follow up on the evidence that he gave to the Justice Committee, when he seemed very open to the next stage of reform of legal aid, by looking at cross-charging, insurance systems and a series of other mechanisms for improving the funding of the legal system. I hope that at some point in the future the Government will be able to come back to this idea as a general idea.

Mr Slaughter: When the hon. Gentleman began to speak, I thought that we were all going to end the day in perfect harmony, like in a Mozart opera, but he strays slightly to criticise the new clause. It might not be perfect. It is, as the right hon. Member for Dwyfor Meirionnydd said, a probing measure, but it raises an important point, and one that underlies a great deal of this Bill. It is that blame is being attached to legally-aided litigants. That will become relevant as a useful introduction perhaps to part 2 of the Bill, which we will debate next Tuesday, when we will discuss claimants using conditional fee agreements. They are held up as the villains and the wasters of public money in both cases, but often the fault might lie with defendants, or tort visas, or others who, through their poor decision making or obstinacy in legal process, are the principal causes of additional costs to the public purse. Before the Minister responds, I only say that to show that, without wanting to go into the details of the clause or delay the Committee further, an important principle is established here. We should identify the villains and, even if we do not punish them, we should at least give them incentives to ensure that the public purse is not unduly dug into.

4.45 pm

Mr Buckland: I rise to echo some of the points that have been made by Members on both sides of the Committee. My hon. Friend the Member for Ipswich and the right hon. Member for Dwyfor Meirionnydd have quite rightly reminded the Committee of the work that has been done by the Justice Committee on the polluter pays principle, and on encouraging and incentivising Departments to get the decision making right in the first place rather than shifting the cost on to the Ministry of Justice and the administration of justice. Not to do so seems unfair to the Department and to the Ministers who represent it.

The principle of wasted costs is well known to the law. The Prosecution of Offences Act 1985 contains provisions that are fairly similar to those set out in the subsection (2) of new clause 3, in particular the phrase: "improper, unreasonable or negligent act or omission". Such provisions empower courts to impose orders against a prosecuting authority, particularly the Crown Prosecution Service, if there has been misconduct that falls short, in the court's opinion, of the high standards that are expected. Wasted costs orders are administered on a regular, if not a daily, basis by Crown court judges up and down the land. I note that my hon. Friend the Member for Broxtowe nods assent. I hope that she has not been on the receiving end of a wasted costs order in her capacity as prosecuting counsel, in which I believe she worked less often than in her capacity as defence counsel. As somebody who prosecuted about as many times as he defended, I encountered mercifully few wasted costs orders.

The point remains that that sword of Damocles could be exercised or threatened by the court if they thought that the conduct of the Crown Prosecution Service was falling below the standard that we should reasonably expect. Often, the threat of a wasted costs order would be enough to get the authority to do its job correctly.

Before I sit down, I want to make the point that in the context of the Department for Work and Pensions, the scenario could be somewhat different. I imagine that the decision makers in the Department for Work and Pensions might be subject to a different budget from those who were responsible for conducting appeals in the tribunal. There may well be an element of distance between those two parts of the Department that possibly would not create as much of an incentive to carry out its decision making in a proper way, as for example within the Crown Prosecution Service. I am more familiar with the culture of the Crown Prosecution Service from my work with it.

None the less, the principle as adumbrated by the right hon. Member for Dwyfor Meirionnydd is important, and I know that the Government will give it anxious consideration. For the purposes of today's debate, the probing new clause is welcome and it has allowed Members to look again at what some of us consider to be an important principle, namely that the polluter should start paying for their mistakes.

Mr Djanogly: New clause 3 is probing, and it is intended to oblige courts and tribunals dealing with cases that are funded by legal aid to make wasted costs orders against public authorities where those public authorities' acts have led to waste and expenditure, whether the costs relate to the legal aid fund or to costs incurred by the courts and tribunal system. We have had some debate about the extension of the so-called polluter pays principle. I was interested to hear the remarks of my colleagues who described their experience

[Mr Djanogly]

on the Justice Select Committee on this matter and its report, to which I contributed. Under the polluter pays principle, public bodies that are party to a case and that are responsible for legal aid costs being incurred should bear that cost rather than the legal aid fund. That was suggested by a number of respondents to our consultation on legal aid reform as a possible alternative to our reform proposals. We analysed that carefully in our response to the consultation, setting out in detail our conclusion that there is no realistic scope to extend that principle further.

First, there would be no additional savings to Government overall if the legal aid fund was simply financed by a different part of Government. Secondly, we are also concerned that a stricter application of the polluter pays principle in cases involving legal aid funding may have unintended and undesirable consequences, as pointed out by my hon. Friend the Member for Ipswich. For example, public authorities could be discouraged from intervening in cases of suspected child abuse by concerns about costs.

Instead, our focus is to work with other Departments and public bodies to ensure better decision making at the outset and throughout the conduct of cases. For example, in the context of social security, the Government are working to deliver improvements in decision making and review processes, and to simplify appeal processes. My Department is also taking forward similar work jointly with other Departments. We are working, for example, with the UK Border Agency on the handling of asylum cases to improve customer service and ensure that resources are focused on the right cases.

Furthermore, different courts and tribunals have different costs regimes, which have been designed specifically for the forum in question. If the proposed new clause were accepted, it would affect legislative provisions beyond legal aid which determine the costs regimes in courts and tribunals.

Wasted costs orders ordinarily have a narrower application than the new clause proposes, relating to the conduct of legal representatives rather than the administrative errors which give rise to the proceedings. In many civil courts, however, judges already have the power to award costs in the circumstances set out in the proposed new clause, should they deem it appropriate to do so in the circumstances of the case and with regard to the behaviour of the parties. That currently results in costs from public authorities being paid to the legal aid fund in some cases where a costs order is made in favour of the legally aided client.

Finally, the proposals suggested would make it mandatory for the court to make a wasted costs order in the circumstances described in subsection (2) of the proposed new clause. It is therefore likely to encourage a significantly higher level of satellite litigation over wasted costs orders, while it is unlikely to result in a significant increase in orders for costs, compared with the existing systems of costs and wasted costs orders. That is likely to create a disproportionate burden on court and tribunal resources for little overall return.

The Government do not consider it appropriate for the Bill to alter radically or impose costs regimes on courts and tribunals, which are provided for elsewhere. I urge the right hon. Gentleman to withdraw the new clause.

Mr Llwyd: This has been a short but good debate. We have heard some useful views on both sides of the Committee. I take issue on a single point made by the Minister. He said that if the proposed new clause were to succeed, it would be a matter of shifting the legal aid budget on to another Department. That is really not the point. At the end of the day, there would be better decision making at first instance, and thereby, there would be fewer applications to courts and tribunals, which is the underlining ethos of the proposed new clause.

I will not press the new clause—that would be silly. We have had a useful debate, and there are different views on both sides of the Committee.

Mr Buckland: I think another point made by the Minister might be the Government's strongest argument. There is perhaps a difference between the CPS being the subject of a wasted costs order, because of an error in its decision making and procedures relating to prosecuting a case, and an error made by a decision maker in the Department for Work and Pensions, which is then a different stage from the conduct of a case by the DWP before a court. A wasted costs order made against the CPS would be for misconduct with regard to the case before the court, as opposed to any original decision, or relating to the subject matter of the case. It is analogous, for example, to a wasted costs order being made against the CPS for something that the police did—if the police messed up their investigation. That might be the Government's strongest point, and perhaps we should look at it again when we reconsider the whole issue.

Mr Llwyd: I take the hon. Gentleman's views on board, but where does this brief example take him? Three or four months ago, I did a disability living allowance appeal before a panel, as I frequently do. I must have done 200 or 300 of them—obviously, as a Member of Parliament, not as a lawyer. We arrived at the hearing centre in Colwyn Bay, and we soon realised that no one on the panel spoke Welsh. The applicant wanted the matter dealt with in Welsh, and the hearing had to be scrapped. The chair of the tribunal said, "It's a shame, but I can't award you costs"—to avoid that nonsense happening again. Very fairly, he said, "If it does happen again, I will write to the Government, because I am desperately unhappy about it." He was right to say that. I will turn up at the next—I do not want any costs for going to it—but the individual, who was appealing for a DLA payment, had to find his way 50 miles back home and then come back again. We are looking at that kind of bad or negligent decision, maladministration or whatever else we might call it.

Mr Watts: My experience of the DWP is that most or all appeal cases are won by the applicants. There have been about four reviews—the present Government are just completing a review, and they are starting another—and we are still finding that decision makers are regularly making the wrong decision. I am convinced that, if the scheme were introduced, the DWP would start to get its act together and there would not be decisions that bear down on some of the poorest families and the poorest people in our community.

Mr Llwyd: And we would need fewer tribunal hearings. We would spend less, and there would be far less heartache for the individuals concerned. In my opinion, cases are regularly won because medical officers are always finding against the applicant. They are paid £140 for every form that they fill in, and I wonder how many applicants they will find in favour of before they stop getting that work. When I mentioned that in Parliament, I expected an avalanche of doctors to write to me calling me everything, but I received a dozen letters from doctors saying that I was right.

We might consider that, but I do not want to digress too far from the subject. We have had a useful debate, and I hope that we will return to it to see whether there is the gist of something that could be introduced in line with what is practicable. It is not a matter of tabling an amendment that is without any substance. As the hon. Member for St Helens North said, we daily find bad decisions by some, although clearly not all, Departments. That is not the Government's fault; it is the culture. I am sure that if a similar provision were introduced, there would be better initial decisions, thereby avoiding all the heartache and costs, and creating fewer tribunal hearings and a saving to the Government.

This is a probing amendment, and I beg to ask leave to withdraw the motion.

Clause, by leave, withdrawn.

Ordered, That further consideration be now adjourned. —(*Jeremy Wright.*)

4.59 pm

Adjourned till Tuesday 13 September at half-past Ten o'clock.