



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**First Report
of Session 2014-15**

Drawing special attention to:

Certification of Enforcement Agents Regulations 2014 (S.I. 2014/421)

Teachers' Pensions (Amendment) Regulations 2014 (S.I. 2014/424)

Teachers' Pension Scheme Regulations 2014 (S.I. 2014/512)

Government Resources and Accounts Act 2000 (Estimates and Accounts) Order 2014 (S.I. 2014/531)

Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 (Draft S.I.)

Openness of Local Government Bodies Regulations 2014 (Draft S.I.)

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Joint Committee on Statutory Instruments

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Lord Lyell (*Conservative*)
Baroness Mallalieu (*Labour*)
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Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74, available on the Internet via www.parliament.uk/jcsi.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

- i. that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- ii. that its parent legislation says that it cannot be challenged in the courts;
- iii. that it appears to have retrospective effect without the express authority of the parent legislation;
- iv. that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
- v. that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- vi. that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- vii. that its form or meaning needs to be explained;
- viii. that its drafting appears to be defective;
- ix. any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

The reports of the Committee are published by The Stationery Office by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

Committee staff

The current staff of the Committee are Simon Patrick (*Acting Commons Clerk*), Jane White (*Lords Clerk*) and Liz Booth (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons*); Nicholas Beach, Peter Milledge and John Crane (*Lords*).

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Contents

Report	<i>Page</i>
Instruments reported	2
1 S.I. 2014/421: Reported for requiring elucidation and defective drafting	2
2 S.I. 2014/424 and 512: Reported for defective drafting	3
3 S.I. 2014/531: Reported for doubtful <i>vires</i>	4
4 Draft S.I.: Reported for doubtful <i>vires</i> and unexpected use of the enabling power	5
5 Draft S.I.: Reported for unusual use of enabling power	9
Instruments not reported	12
Annex	12
Appendix 1	17
S.I. 2014/421: memorandum from the Ministry of Justice	17
Appendix 2	18
S.I. 2014/424 and 512: memorandum from the Department for Education	18
Appendix 3	19
S.I. 2014/531: memorandum from HM Treasury	19
Appendix 4	21
Draft S.I. 2014: memorandum from the Ministry of Justice	21
1. Clause 8 as introduced the House of Commons on 21 June 2011	25
2. Excerpt from Delegated Powers Memorandum – June 2011	25
3. Delegated Powers and Regulatory Reform Committee, 21st Report of Session 2010-12 – November 2011	26
4. Government response to the Delegated Powers and Regulatory Reform Committee Report – December 2011	27
5. Select Committee on the Constitution, 21st Report of Session 2010–12 on Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill – 17 November 2011	27
6. Government’s response to the Select Committee on the Constitution’s Report on Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill – 15 December 2011	28
7. Hansard – House of Commons Committee – clause 8	28
8. Hansard – House of Lords Committee – clause 8	32
9. Hansard – House of Lords Report – clause 8	45
10. Hansard – House of Lords Report – clause 8	46
11. Hansard – House of Lords Third Reading – Amendment of clause 8	48
Appendix 5	50
S.I. 2014: memorandum from the Department for Communities and Local Government	50

Instruments reported

At its meeting on 11 June 2014 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to six of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 S.I. 2014/421: Reported for requiring elucidation and defective drafting

<p><i>Certification of Enforcement Agents Regulations 2014 (S.I. 2014/421)</i></p>
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1.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they require elucidation in one respect and that they are defectively drafted in one respect.**

1.2 The Regulations make provision about certificates for enforcement agents under sections 63 and 64 of the Tribunals, Courts and Enforcement Act 2007.

1.3 Regulation 2 defines the “court” as “the County Court”. Since section 17(1) of the Crime and Courts Act 2013, which introduces section A1 of the County Courts Act 1984 establishing the single County Court, was not commenced when the Regulations came into force, the Committee asked the Ministry of Justice to explain the intended operation of the definition of “court” and, in particular, whether it is intended that each county court should maintain a separate list of certificated persons under regulation 4 pending the commencement of the single County Court. In a memorandum printed at Appendix 1, the Department explains that the intention was to maintain a single list, both before and after the establishment of the single County Court; and that the intention of having a single list was achieved by requiring applications for certificates to be made to the County Court Business Centre; that requirement is contained in rule 84.18 of the Civil Procedure Rules 1998 as inserted by the Civil Procedure (Amendment No. 2) Rules 2014 (S.I. 2014/482). The Department adds that the definition (which it now considers unnecessary) could have been made clearer by adding something transitional to it, and agrees that the Explanatory Note could have made the position clearer. The Committee is not convinced that the definition was necessarily superfluous, the term defined not being identical with the language of the enabling provision, but agrees with the Department about the effect of S.I. 2014/482. **Accordingly the Committee reports regulations 2 and 4 as requiring the elucidation provided by the Department’s memorandum as amplified above.**

1.4 Regulation 4 makes provision for applications to the court for the issue of certificates. Paragraph (5)(c) requires notices of any application to state “the date on which the application will be heard, which must be at least eight days after [a specified time limit for providing reasons opposing the issue of the certificate to the applicant] ...”. Regulation 5 provides: “No application for a certificate to be issued will be heard before the date in regulation 4(5)(c)”. The Committee asked the Department whether regulation 5 is intended to have legislative effect, and if so what. In its memorandum the Department explains that “regulation 5 was included to reinforce the requirement in regulation 5(4)(c) (presumably a misprint for 4(5)(c)) that there be at least eight days between the end of the

period in which reasons may be submitted why the applicant may not be a fit and proper person to be granted a certificate and the date of the hearing of the application itself”; it acknowledges, however, “that the legislative effect of requiring the eight-day interval is achieved by regulation 4(5)(c) itself, and that regulation 5 ... does not add any legislative effect and may be seen as “inert” (to use the description in the Committee’s First Special Report of 2013-14).” For the reasons given in that Report, to which the Department correctly refers, the Committee considers it undesirable to include provisions which while appearing to contain legislative propositions are in fact designed merely for emphasis. **Accordingly the Committee reports regulation 5 for defective drafting, acknowledged in principle by the Department.**

2 S.I. 2014/424 and 512: Reported for defective drafting

Teachers’ Pensions (Amendment) Regulations 2014 (S.I. 2014/424)

Teachers’ Pension Scheme Regulations 2014 (S.I. 2014/512)

2.1 The Committee draws the special attention of both Houses to these Regulations on the ground that each is defectively drafted in one identical respect; and the Committee draws the special attention of both Houses to S.I. 2014/512 on the ground that it is also defectively drafted in one other respect.

2.2 The Teachers’ Pensions (Amendment) Regulations 2014 (S.I. 2014/424) amend the Teachers’ Pensions Regulations 2010 to give effect to the new “Fair Deal” issued by HM Treasury in October 2013 and to extend access to the teachers’ pension scheme for teachers, on the same terms as other members, who have moved from the public sector to an independent contractor by way of a compulsory transfer.

2.3 The Teachers’ Pension Scheme Regulations 2014 (S.I. 2014/512) establish a career average re-valued earnings scheme for the payment of pensions and other benefits to and in respect of teachers in England and Wales.

2.4 Regulation 5 of S.I. 2014/424 inserts a new regulation 14A into the 2010 Regulations setting the test for a person (“P”) to become an “accepted member”; paragraph 5 of Schedule 1 to S.I. 2014/512 sets a test in similar terms. In each case P becomes one “if the conditions in [tests] (2) to (4) are met?”. Each provision ends with the proposition that “P ceases to be an accepted member from the date P ceases to satisfy” the tests set out earlier in the provision. Since those tests appeared to relate to historic features of the employee’s employment, the Committee asked the Department for Education how a person can be said to cease to satisfy them. In a memorandum printed at Appendix 2, the Department acknowledges that this amounts to a drafting error, and explains that the policy intention is that a person ceases to be an accepted member from the date that the person no longer undertakes employment referred to in one of those tests. The Department thanks the Committee for pointing out the error and undertakes to amend the relevant provisions at the earliest convenient opportunity, expected to be in the autumn of 2014. **The Committee accordingly reports regulation 5 of S.I. 2014/424 and paragraph 5 of Schedule 1 to S.I. 2014/512 for defective drafting, acknowledged by the Department.**

2.5 Regulation 220 of S.I. 2014/512 deals with the provision of information to scheme managers. The Regulation is said to apply to “(a) a person (P) who is or was in pensionable service; and (b) P’s personal representatives” (para.(1)). Paragraph (2), however, imposes

the disclosure obligation on P alone. The Committee asked the Department why the obligation in paragraph (2) does not include express reference to personal representatives, as does paragraph (1). In its memorandum the Department acknowledges that the absence of a reference to P's personal representatives in paragraph (2) is an unintentional omission, thanks the Committee for pointing it out and undertakes to amend the provision at the earliest convenient opportunity, expected to be in the autumn of 2014. **The Committee accordingly reports regulation 220 of S.I. 2014/512 for defective drafting, acknowledged by the Department.**

3 S.I. 2014/531: Reported for doubtful vires

Government Resources and Accounts Act 2000 (Estimates and Accounts) Order 2014 (S.I. 2014/531)

3.1 The Committee draws the special attention of both Houses to this Order on the ground that there is doubt as to whether it is *intra vires* in one respect.

3.2 The Government Resources and Accounts Act 2000 empowers the Treasury to make orders to designate identified bodies in relation to named government departments, and this Order has effect for the current financial year, which ends on 31 March 2015. Designation of any specific body in relation to a department has the effect that the estimate for the department for approval by the House of Commons in respect of the current financial year must, if the Treasury so directs, include information relating to resources expected to be used by that body, and that the department's accounts have to cover the resources used by that body in the year. The Committee observed that a number of the entities designated by the Order did not appear to be bodies, despite the fact that Article 2 provides for the designation of specified "bodies" (that being the scope of the enabling power – section 4A(3) and (4) of the 2000 Act). The Committee asked HM Treasury to explain how the Certification Officer, the Director of Fair Access to Higher Education and the Prisons and Probation Ombudsman, each of which appear to be individuals and none of which is a corporation sole, can count as 'a body' for the purposes of designation – as opposed to the organisation that each of them heads.

3.3 In a memorandum printed at Appendix 3, the Department explains the nature of the appointment of each of these three officials and identifies, in particular, the powers under which they appoint staff. The Department agrees that none of these officials is a corporation sole but asserts that "it is clear that the description of each denotes an office and that persons appointed to one of the offices are officeholders. Further, in each case the functions in question are conferred on and exercised by or on behalf of the officeholder, the expenditure in question is incurred by or on behalf of the officeholder, and (as appropriate to the scope and nature of its activities) each officeholder is required to account for its exercise of and expenditure on its functions". The Department further argues that "there is power ... to designate the offices in question, where the reference to the office is, in effect, a reference to the organisation that carries out the relevant functions (and hence a "body" in the relevant sense)" and that "it would be artificial to frame such designations by reference to some description of a wider organisation when that organisation is a means of delivering the functions conferred on the office". Its view is that "a designation in those terms would in substance be no different from designating the office by name."

3.4 The Committee agrees with the Department’s statement that “the description of each denotes an office and that persons appointed to one of the offices are officeholders”. But the Committee does not accept that this necessarily makes the officeholders “bodies”, and the fact that they have power to appoint staff does not alone turn the officeholder and his or her staff into a “body” for statutory purposes. The ability to designate the officeholders by name would of course have been beyond doubt had the enabling power used the common term “person”, which by virtue of the Interpretation Act 1978 would have been capable of referring either to the officeholder alone or to the officeholder together with his or her staff (as an unincorporated body of persons). However, while the power survives in its present form, secure compliance calls for designation of entities that clearly count as “bodies” – a course that, in the case of the three designations queried, could have been achieved without significant difficulty. While the Committee accepts that enabling powers can at times be respected securely without identical terminology, the difficulty here is that the difference lies not just in terminology but also in concept.

3.5 The regime under consideration relates to the material that departments must prepare for Parliament rather than transactions, and accordingly the Committee cannot envisage any transaction that could be invalidated by the flaws identified by it. Furthermore, it cannot see anything in the 2000 Act that prevents the Department’s intention being achieved as a voluntary arrangement, given suitable co-operation. At the same time, given the need for legality and regularity in the provision of such material, the Committee sees no reason to depart in this case from its practice of drawing attention to delegated legislation that does not clearly confine itself to what the enabling power authorises.

3.6 Accordingly the Committee reports the Order on the ground that there appears to be doubt whether it is *intra vires* in respect of the designations specified above.

4 Draft S.I.: Reported for doubtful *vires* and unexpected use of the enabling power

Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 (Draft S.I.)

4.1 The Committee draws the special attention of both Houses to this draft Order on the grounds that, if it is approved and made, there will be a doubt whether it is *intra vires*, and that it would in any event make an unexpected use of the power conferred by the enabling Act.

4.2 Article 2 of the draft Order would insert a new paragraph 19 in Part 2 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the 2012 Act”) so as to introduce a new residence test for individuals applying for legal aid. In general terms, the new test would require an individual to be lawfully resident in the United Kingdom at the time of applying for civil legal services, and to have been lawfully resident in the United Kingdom for at least 12 months in the past. Certain categories of person would be exempt from the test, for example asylum seekers and members of the armed forces. Article 3 provides that the test would not apply in relation to certain types of legal services, for example those concerning the care, supervision and protection of children.

4.3 The enabling provisions relied on by the Lord Chancellor for the proposed new paragraph 19 are sections 9(2)(b) and 41(2)(b) of the 2012 Act. These provide:

Section 9

- (1) Civil legal services are to be available to an individual under this Part if—
 - (a) they are civil legal services described in Part 1 of Schedule 1, and
 - (b) the Director [of Legal Aid Casework] has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination).
- (2) The Lord Chancellor may by order—
 - (a) add services to Part 1 of Schedule 1, or
 - (b) vary or omit services described in that Part,
 (whether by modifying that Part or Part 2, 3 or 4 of the Schedule).

Section 41

- (2) [Orders under this Part] may, in particular, make provision by reference to—
 - (a)...
 - (b) services provided for a particular class of individual ...

4.4 The Committee asked the Ministry of Justice to explain—

- (a) why it is considered that sections 9(2) and 41(2) authorise the proposed paragraph 19, having regard in particular to the absence of explicit provision for the imposition of a residence condition which would arguably impede the right of access to court, and to the principle that a power to vary an Act of Parliament by delegated legislation is given a narrow and strict construction and any doubts about the power's scope are resolved by a restrictive approach (see *R v Secretary of State for the Environment ex parte Spath Holme Ltd* [2001] 2 AC 349);
- (b) in what way the Order is considered to vary or omit a “service”; and
- (c) what indication was given to Parliament that the power conferred by section 9(2) would be exercised in the way now being contemplated.

4.5 In a memorandum printed at Appendix 4, the Ministry of Justice asserts that the statutory language of the 2012 Act clearly permits the introduction of a residence test, even on a narrow and strict construction. This is particularly because section 41(2)(b) allows for orders under Part 1 of the Act to make provision by reference to services provided for a particular class of individual. While the Ministry of Justice acknowledges that there is no express reference in section 9 or 41 to make provision which applies generally to a range of services described in Part 1 of Schedule 1, it does not consider that the absence of such a reference detracts from what it describes as “this clear interpretation”; its view is that the power exists by necessary implication. The memorandum also emphasises that the proposed residence test would not impede access to justice, and points out that access to justice and access to taxpayer-funded legal aid are distinct concepts.

4.6 The Committee does not find these arguments persuasive. It is also aware that judicial review proceedings have been brought in relation to the proposed residence test which were heard in the Administrative Court on 3-4 April 2014, and that judgment is awaited.

4.7 The effect of the draft Order is succinctly described in the explanatory note as “a new general exclusion for civil legal services provided to individuals who do not satisfy the residence test”. In the Committee’s view, it is far from clear that an order-making power enabling the Lord Chancellor to vary or omit services described in Part 1 of Schedule 1 permits him to create a new general exclusion of the type proposed. If Parliament had intended that the Lord Chancellor could introduce such an exclusion by secondary legislation, the Committee considers it likely that it would have conferred an express power enabling him to do so, analogous to that contained in section 175 of the National Health Service Act 2006 (which allows the Secretary of State to provide by regulations for persons not ordinarily resident in Great Britain to be charged for NHS services).

4.8 The Committee accepts that the order-making power in section 9(2) of the 2012 Act has to be read with section 41(2)(b), and would enable the Lord Chancellor to expand or contract existing classes of individuals who are eligible for civil legal services under Part 1 of Schedule 1 by reference to the kind of service they are seeking. For example, paragraph 7 of the Schedule makes legal aid available in relation to grants under Part 1 of the Housing Grants, Construction and Regeneration Act 1996 for the provision of facilities to “disabled persons” within the meaning of section 100 of that Act. This is a service provided for a class of individuals, namely disabled persons as defined in section 100; and there is a close nexus between that class and the service which individuals in that class may wish to seek, i.e. legal advice in relation to claims for housing grants to improve the accessibility of their home. While section 9(2) of the 2012 Act, read with section 41(2)(b), may allow the Lord Chancellor to narrow that class by, for example, redefining the term “disabled person”, the Committee considers there to be real doubt whether those powers permit him to narrow the class by reference to a wholly extraneous factor, namely the disabled person’s immigration status.

4.9 In considering the extent of the Lord Chancellor’s power to amend Part 2 of Schedule 1 to the 2012 Act, the Committee would expect a Court to apply the principle of construction by which words having a literally wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context. In the case of this draft Order, the context is the current paragraphs of Part 2. These set out a number of civil legal services that fall outside Part 1 by reference to descriptions of types of claim that a person might wish to bring, for example civil legal services provided in relation to personal injury or death (paragraph 1), civil legal services provided in relation to the making of wills (paragraph 10), and civil legal services provided in relation to judicial review of an enactment, decision, act or omission (paragraph 18). The proposed new paragraph 19 is significantly different in character to any existing provision in Part 2 in that it would exclude individuals from access to the types of services listed in Part 1 by reference to a condition of general application rather than one linked to a type of claim that they may wish to bring. The Committee doubts whether sections 9(2) and 41(2)(b) of the 2012 Act enable the Lord Chancellor to insert in Part 2 a provision such as paragraph 19 which is wholly unlike the existing contents of that Part.

4.10 The Committee therefore reports article 2 of the draft Order on the ground that there appears to be doubt as to whether it would be *intra vires*.

4.11 In paragraph 9 of its memorandum, the Ministry of Justice accepts that (so far as it is aware) no indication was given to Parliament during the passage of the Bill which became the 2012 Act that the power conferred by section 9(2) could be used to introduce a residence test for civil legal aid. However the Ministry considers that the draft Order is nonetheless consistent with Parliament's intention and not contrary to any indication given to Parliament as to how the power would be used. The annex to its memorandum sets out the relevant material identified by the Ministry of Justice in the legislative history of what is now section 9(2) of the 2012 Act.

4.12 In the Committee's view, the key material is as follows:

- (a) The House of Lords Delegated Powers and Regulatory Reform Committee's 21st Report of the 2010-12 session. This drew clause 8(2) (which became section 9(2) of the Act) to the attention of the House on the ground that the power was not limited to routine updating and may legitimately be used to make substantial omissions from Schedule 1.
- (b) The Government's response in December 2011 (published as Appendix 2 to that Committee's 22nd Report) stating that clause 8(2) would be "a focussed power to omit services where, for example, funding may no longer be necessary and it will allow whole or parts of paragraphs to be omitted".
- (c) The statement by the Minister (Jonathan Djanogly M.P.) at Commons Committee stage on 6 September 2011 (Public Bill Committee, Bill 205, col 326) that the power "allows the removal of civil legal services where it is no longer appropriate to fund them. An example of where that might be necessary is where the governing legislation behind an area of law is repealed or otherwise altered, and we need to alter civil legal aid provision accordingly".
- (d) The statement by the Minister (Lord McNally) at Lords Report stage on 5 March 2012 (Official Report, vol. 735, col. 1157) that "the principles underpinning this Bill include the need to establish very clearly the scope of civil legal aid services".
- (e) The following statements by Lord McNally at Lords Third Reading on 27 March 2012 (Official Report, vol. 736, col. 1253) when moving an amendment to clause 9(2):

"The power to vary a service allows us to amend the existing services within the schedule where they need to be altered, but without the need to omit a service and then add a new service. For example, if the Immigration (European Economic Area) Regulations 2006 were amended in the future, any such amendment might not mean that services need to be added to the schedule, but it might be necessary to vary the provisions in paragraph 31 of Part 1 in order to reflect any such changes to those regulations.

The provisions of Amendment 1 mean that the power in clause 9(2) would be similar to that which exists in Section 6(7) of the Access to Justice Act 1999. We consider that this is the correct and sensible approach to take...

Amendment 2, tabled by the noble Lord, Lord Bach, would allow services to be added but not to be omitted. As I have said, the government amendment provides for balance to the existing clause 9. Amendment 2 seeks to go further and actually removes the ability to omit. I firmly believe that that power to omit is necessary and gives the Bill a welcome flexibility. An example of where this may be necessary is where the governing legislation behind an area of law is repealed or otherwise altered and we need to alter civil legal aid provision accordingly. Another example would be where particular court proceedings are moved to a tribunal. It may cease to be appropriate to provide funding for advocacy for those proceedings, so an amendment to Part 3 of Schedule 1 would be needed...”

4.13 While there is a recognition that the power to omit or vary services in what is now section 9(2) of the 2012 Act is a wide one, there is no indication at all in these passages or in any of the other Parliamentary materials identified by the Ministry of Justice that the Government proposed to exercise the power to create a general exception of the type now contemplated under which individuals who do not meet a residence test would be excluded from access to many of the types of civil legal services listed in Part 1 of Schedule 1. On the contrary, it appears to the Committee that the Government consistently presented the power as a focussed one needed to make consequential amendments to Schedule in light of changes to other legislation.

4.14 The Committee therefore reports article 2 of the draft Order on the ground that it would make an unexpected use of the power conferred by sections 9(2) and 41 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

5 Draft S.I.: Reported for unusual use of enabling power

Openness of Local Government Bodies Regulations 2014 (Draft S.I.)

5.1 The Committee draws the special attention of both House to these draft Regulations on the grounds that they appear to contain an unusual use of the power to make them.

5.2 The draft Regulations would be made under section 40 of the Local Audit and Accountability Act 2014. Part 2 would require local government bodies in England, including town and parish councils to allow: members of the public to film, photograph or make sound recordings of proceedings of meetings; those not present at meetings to see and hear proceedings; and reporting of and commentating on the proceedings. Part 3 would require officers of local government bodies in England, again including town and parish councils, to make a written record of certain decisions and to make the record available for inspection by members of the public on request. An officer with custody of the record who without reasonable excuse either intentionally obstructs a person exercising the right to inspect, or refuses a request to provide a written record or background papers, is guilty of a criminal offence and is liable on summary conviction to a fine not exceeding level 1 on the standard scale.

5.3 Given that the draft Regulations appear to impose significant new obligations on local government bodies, and create new criminal offences, the Committee asked the Department for Communities and Local Government to explain the justification for regulation 1 which would bring the whole of the Regulations into force on the day after the day on which they are made.

5.4 In a memorandum printed at Appendix 5, the Department explains why it considers there is a pressing need to bring the Regulations into force at the earliest opportunity, in particular so as to put an end to incidents where persons are prevented from reporting on local government meetings using social media. The Department denies that the Regulations would impose any significant new administrative or organisational burdens, and asserts that no significant preparation time is needed. All that is required is that “once the Regulations are in force, particular behaviours by officers and members need to be adopted”. The new criminal offence (the Department says) closely mirrors an existing offence in Regulations about access to information in Council executives, and can only be committed where the person concerned adopts an intentional and proactive course of action.

5.5 The Department considers that all local government bodies would be in a position now to comply with the Regulations’ requirements, given that the Government’s proposals for the Regulations are widely known in the local government sector. The Department says it will ensure that any Parliamentary approval of the draft Regulations “is widely and rapidly communicated across the local government sector, as well as likewise communicating any subsequent coming into force date”.

5.6 In the view of the Committee it is fundamentally objectionable, in the absence of a compelling reason, for a new law which requires persons affected to adopt different patterns of behaviour to be brought into force before they have sufficient time to familiarise themselves with its provisions, and to make any necessary changes to their practices and procedures.

5.7 This explains the convention (which started in 1982) that, except in cases of particular need, primary legislation does not come into force less than two months after the date on which it is enacted. It is also the rationale for the convention that an instrument subject to the negative procedure should not be made so as to come into force less than 21 days after laying. The Committee may draw an instrument to the special attention of each House where it is not satisfied with the explanation proffered for that instrument’s non-compliance with this convention.

5.8 Neither convention applies to instruments subject to the affirmative procedure. However, the Committee considers that the rationale for the conventions applies with equal force to an affirmative instrument which significantly diminishes the legal rights of persons affected, or imposes new duties on such persons which are significantly more onerous than before, and requires them to adopt different patterns of behaviour accordingly. In the absence of a strong policy justification, it is in the view of the Committee unreasonable for the legislator to provide for changes of the law of this type to be brought into force on the day after the instrument is made (which is entirely within the choosing of the legislator), or indeed on a date earlier than appears to give those affected a reasonable chance to adapt to the changes required. As a starting assumption, the

Committee considers that a date earlier than 21 days after an instrument of this type is made is unlikely to be reasonable.

5.9 These considerations apply *a fortiori* where a draft instrument such as this creates criminal sanctions for a failure to comply with an obligation. It would in theory be possible for an offence under regulation 10 of these draft Regulations to be committed on or shortly after the day the instrument comes into force which, if it is the day after it is made, is likely to be before the instrument has even been printed and published^a.

5.10 Respondents to the consultation carried out by the Department, including the National Association of Local Councils, appear not to share the Department's view that the Regulations will require no new significant administrative or organisational burdens. Indeed section 8.4 of the Explanatory Memorandum refers to concerns that provisions in the draft Regulations, such as filming or recording a meeting, and recording and publishing decisions taken by officers, would have significant detrimental, costly and disproportionate effects on local councils.

5.11 While the Committee notes the Department's intention rapidly to communicate Parliament's approval of the draft Regulations and the subsequent coming into force date, it is quite plausible that the Department's communication would not reach all persons affected (for example officers in small parish councils) until after they were supposed to have put the new law into effect.

5.12 The Committee also remains unconvinced by the argument that the Government's intentions are widely known in the local government sector. Although the length of the legislative process generally means that those affected by a proposed new law are on notice of the intention to make it, there will remain uncertainties about whether it will be enacted, and the precise form it will take, with the result that persons potentially affected will delay making practical arrangements for compliance until its enactment and precise terms are beyond doubt. So, in the case of these draft Regulations, it is possible that either House of Parliament may not approve them, or that the Secretary of State may ultimately decide not to make them in their present form.

5.13 It follows that the Committee does not find compelling the justification that the Department has offered for the provision which would bring the Regulations into force on the day after that on which they are made. There is nothing in the Department's memorandum to indicate that the urgency for the changes in the law made by the draft Regulations is so great that they have to be brought into force immediately, denying those affected any time to prepare for their implementation.

5.14 The Committee therefore reports regulation 1 of the draft Regulations on the ground that it appears to make an unusual use of the power conferred by section 40 of the Local Audit and Accountability Act 2014.

^a Section 3(2) of the Statutory Instruments Act 1946 confers a defence on a person who proves that the instrument had not been issued "by or under the authority of His Majesty's Stationery Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged".

Instruments not reported

At its meeting on 11 June 2014 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Paragraph 3.7 of the Explanatory Memorandum to the Family Procedure (Amendment No. 2) Rules 2014 (S.I. 2014/667), which were made and allowed (by the Secretary of State) before the publication of the Committee's 24th Report of Session 2013-14, draws attention to a usage parallel to the one commented on in paragraphs 1.1 to 1.15 of that Report.

Annex

Draft Instruments requiring affirmative approval

Draft S.I.	Health Care and Associated Professions (Indemnity Arrangements) Order 2014
Draft S.I.	Representation of the People (Supply of Information) Regulations 2014
Draft S.I.	Public Bodies (Abolition of Food from Britain) Order 2014
Draft S.I.	Public Bodies (Marine Management Organisation) (Fees) Order 2014
Draft S.I.	Armed Forces Act (Continuation) Order 2014
Draft S.I.	Transfer of Tribunal Functions (Mobile Homes Act 2013 and Miscellaneous Amendments) Order 2014
Draft S.I.	Co-operative and Community Benefit Societies and Credit Unions Act 2010 (Consequential Amendments) Regulations 2014

Instruments subject to annulment

S.I. 2014/479	Non-Domestic Rating (Collection and Enforcement) (Amendment) (England) Regulations 2014
S.I. 2014/506	Financial Services and Markets Act 2000 (Consumer Credit) (Miscellaneous Provisions) (No. 2) Order 2014
S.I. 2014/507	Ukraine (European Union Financial Sanctions) Regulations 2014
S.I. 2014/513	Social Care (Self-directed Support) (Scotland) Act 2013 (Consequential Modifications and Savings) Order 2014
S.I. 2014/525	Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014

S.I. 2014/533	Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014
S.I. 2014/534	Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014
S.I. 2014/538	Wildlife and Countryside Act 1981 (Prohibition on Sale etc. of Invasive Non-native Plants) (England) Order 2014
S.I. 2014/545	National Health Service (Charges, Payments and Remission of Charges) (Upgrading, Miscellaneous Amendments and Transitional Provision) Regulations 2014
S.I. 2014/549	Enterprise and Regulatory Reform Act 2013 (Competition) (Consequential, Transitional and Saving Provisions) (No. 2) Order 2014
S.I. 2014/559	Competition and Markets Authority (Penalties) Order 2014
S.I. 2014/570	National Health Service Pension Scheme (Amendment) Regulations 2014
S.I. 2014/573	Co-ordination of Regulatory Enforcement (Enforcement Action) (Amendment) Order 2014
S.I. 2014/577	Port Security (Port of London) Designation Order 2014
S.I. 2014/597	Universal Credit and Miscellaneous Amendments Regulations 2014
S.I. 2014/604	Port Security (Port of Bramble Island Dock, Felixstowe, Harwich, Harwich International, Ipswich and Mistley Quay) Designation Order 2014
S.I. 2014/608	Social Security (Contributions) (Amendment) Regulations 2014
S.I. 2014/635	Social Security (Categorisation of Earners) (Amendment) Regulations 2014
S.I. 2014/656	Waste (England and Wales) (Amendment) Regulations 2014
S.I. 2014/658	Tax Credits (Miscellaneous Amendments) Regulations 2014
S.I. 2014/667	Family Procedure (Amendment No. 2) Rules 2014
S.I. 2014/683	Town and Country Planning (Revocations) Order 2014
S.I. 2014/692	Town and Country Planning (Revocations) Regulations 2014
S.I. 2014/693	Ukraine (European Union Financial Sanctions) (No.2) Regulations 2014
S.I. 2014/702	Export Control (Amendment) Order 2014

S.I. 2014/771	Housing Benefit and Universal Credit (Supported Accommodation) (Amendment) Regulations 2014
S.I. 2014/784	National Health Service Trusts (Membership and Procedure) Amendment Regulations 2014
S.I. 2014/798	School Staffing (England) (Amendment) Regulations 2014
S.I. 2014/818	London Insolvency District (County Court at Central London) Order 2014
S.I. 2014/847	Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2014
S.I. 2014/853	Enterprise and Regulatory Reform Act 2013 (Consequential Amendments) (Employment) (No. 2) Order 2014
S.I. 2014/861	Transfrontier Shipment of Waste (Amendment) Regulations 2014
S.I. 2014/876	Non-Contentious Probate Fees (Amendment) Order 2014
S.I. 2014/878	Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees (Amendment) Order 2014
S.I. 2014/879	Crime and Courts Act 2013 (Family Court: Consequential Provision) (No.2) Order 2014
S.I. 2014/881	Guardian's Allowance Up-rating Regulations 2014
S.I. 2014/882	Financial Services (Banking Reform) Act 2013 (Disclosure of Confidential Information) Regulations 2014
S.I. 2014/883	Financial Services and Markets Act 2000 (Disclosure of Confidential Information) (Amendment) Regulations 2014
S.I. 2014/887	Cycle Racing on Highways (Tour de France 2014) Regulations 2014
S.I. 2014/888	Coal Industry Act 1994 (Commencement No. 8 and Transitional Provision) Order 2014
S.I. 2014/904	Social Security (Invalid Care Allowance) (Amendment) Regulations 2014
S.I. 2014/907	Customs (Inspections by Her Majesty's Inspectors of Constabulary and the Scottish Inspectors) (Amendment) Regulations 2014
S.I. 2014/917	Diffuse Mesothelioma Payment Scheme (Amendment) Regulations 2014
S.I. 2014/1107	Civil Partnership (Registration Abroad and Certificates) (Amendment) Order 2014

- S.I. 2014/1129** European Parliamentary Election Petition (Amendment) Rules 2014
- S.I. 2014/1130** Aerosol Dispensers (Amendment) Regulations 2014
- S.I. 2014/1180** West Midlands Integrated Transport Authority (Decrease in Number of Members) Order 2014
- S.I. 2014/1184** Television Broadcasting Regulations 2014
- S.I. 2014/1195** Financial Services Act 2012 (Relevant Functions in relation to Complaints Scheme) Order 2014

Instruments not subject to Parliamentary proceedings laid before Parliament

- S.I. 2014/704** European Parliamentary Elections (Welsh Forms) Order 2014
- S.I. 2014/1182** Premium Savings Bonds (Maximum Holdings) (Amendment) Regulations 2014

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2014/714** Tuberculosis (England) (Amendment) Order 2014
- S.I. 2014/794** European Parliamentary Elections (Returning Officer's Charges) (Northern Ireland) Order 2014
- S.I. 2014/816** Mobile Homes Act 2013 (Commencement and Saving Provision) (England) Order 2014
- S.I. 2014/830** Crime and Courts Act 2013 (Commencement No. 9) Order 2014
- S.I. 2014/831** Protection of Freedoms Act 2012 (Commencement No. 3) (Amendment) Order 2014
- S.I. 2014/857** West Northamptonshire Development Corporation (Dissolution) Order 2014
- S.I. 2014/929** Legislative and Regulatory Reform Code of Practice (Appointed Day) Order 2014
- S.I. 2014/954** Crime and Courts Act 2013 (Commencement No. 10 and Transitional Provision) Order 2014
- S.I. 2014/956** Crime and Courts Act 2013 (Family Court: Transitional and Saving Provision) Order 2014
- S.I. 2014/1103** Inspectors of Education, Children's Services and Skills (No. 3) Order 2014
- S.I. 2014/1120** Taxation of Chargeable Gains (Gilt-edged Securities) Order 2014

S.I. 2014/1134 Children and Families Act 2014 (Commencement No. 2) (Amendment) Order 2014

Appendix 1

S.I. 2014/421: memorandum from the Ministry of Justice

Certification of Enforcement Agents Regulations 2014 (S.I. 2014/421)

1. By a letter dated 7th May 2014, the Committee sought a memorandum on the following points:

“(1) Given that section 17(1) of the Crime and Courts Act 2013, which introduces section A1 of the County Courts Act 1984 establishing the county court as a concept, appears not to have been commenced at the time these regulations came into force, explain—

- (a) why the definition of “court” was included in regulation 2; and*
- (b) whether it was intended that—*

- (i) each county court should maintain its own list under regulation 4, or*
- (ii) there should be a single list pending the coming into force of that section,*

and, in either event, how the intention has been achieved.

(2) Explain whether regulation 5 is intended to have legislative effect, in which case identify its effect.”

2. On the Committee’s first point, we would acknowledge, on reviewing the instrument, that it was not necessary to include a definition of “court”, since it appears sufficiently clear from section 64(1) of the Tribunals, Courts and Enforcement Act, both in its original form and as amended by paragraph 46 of Schedule 9 to the Crime and Courts Act 2013, that applications for a certificate to act as an enforcement agent are county court business.
3. We consider that the definition itself would not have the effect that “the court” could only mean the court established under section A1 of the County Courts Act 1984, and that it would, during the period between 6 April 2014 and 22 April 2014 (when section A1 of the 1984 Act came into force), not rule out each individual county court to which an application might be made. We would, however, acknowledge that this would have been clearer had the definition explicitly referred to that transitional period (for example, by defining the court as the single county court established under section A1 of the County Courts Act 1984 or, until commencement of that section, a county court). In either event, the intention was that a single list should be maintained (the list is accessible

via <http://www.justice.gov.uk/courts/enforcement-officers> as part of the Certificated Enforcement Agent (Bailiff) Register).

4. The mechanism for achieving this was by requiring applications for certificates to be made to the County Court Business Centre, with the Business Centre undertaking by administrative arrangement the entering of the relevant details on the website (five such applications were made, and the details entered, between 6 and 22 April, and one application was made for the grant of a replacement certificate which by virtue of regulation 14(1)(b) fell to be dealt with under the Distress for Rent Rules 1988). The requirement to make the application to the Business Centre is contained in rule 84.18 of the Civil Procedure Rules 1998 as inserted by the Civil Procedure (Amendment No. 2) Rules 2014 (S.I. 2014/482). We would acknowledge that the Explanatory Memorandum to the Certification Regulations, while it referred to the Regulations being part of a package to include provision in Part 84 of the Civil Procedure Rules, did not provide sufficient elucidation on this aspect.
5. On the Committee's second point, regulation 5 was included to reinforce the requirement in regulation 5(4)(c) that there be at least eight days between the end of the period in which reasons may be submitted why the applicant may not be a fit and proper person to be granted a certificate and the date of the hearing of the application itself. We would, however, acknowledge that the legislative effect of requiring the eight-day interval is achieved by regulation 4(5)(c) itself, and that regulation 5 (even were it cast as a requirement that the hearing must not be heard before the date mentioned in 4(5)(c)) does not add any legislative effect and may be seen as "inert" (to use the description in the Committee's First Special Report of 2013-14).

Ministry of Justice

9 May 2014

Appendix 2

S.I. 2014/424 and 512: memorandum from the Department for Education

Teachers' Pensions (Amendment) Regulations 2014 (S.I. 2014/424)

Teachers' Pension Scheme Regulations 2014 (S.I. 2014/512)

1. The Committee requested a memorandum on the following points:

- (1) *Explain in relation to—*
 (a) *regulation 14A of the Teachers’ Pensions Regulations 2010 inserted by regulation 5 of S.I.2014/424, and*
 (b) *paragraph 5 of Schedule 1 to S.I.2014/512,*

how a person who becomes an “accepted member” when 3 conditions are met at given times can be said to cease to satisfy them after those times have passed.

2. This is a drafting error and the Department is grateful to the Committee for drawing it to our attention. The policy intention is that a person ceases to be an accepted member from the date that the person no longer undertakes employment described in a Participation Agreement (which is the condition in sub-paragraph (4)).
3. The Department will amend these provisions to correct these errors at the earliest convenient opportunity, expected to be in the autumn of 2014.
- (2) *Explain why regulation 220(2) of SI 2014/512 does not include express reference to personal representatives, unlike regulation 220(1).*
4. The absence of a reference to P’s personal representatives in paragraph (2) is an unintentional omission and the Department is grateful to the Committee for drawing it to our attention. The Department will amend this provision at the earliest convenient opportunity, expected to be in the autumn of 2014.

Department for Education
13 May 2014

Appendix 3

S.I. 2014/531: memorandum from HM Treasury

<p><i>Government Resources and Accounts Act 2000 (Estimates and Accounts) Order 2014 (S.I. 2014/531)</i></p>

1. The Committee has asked HM Treasury for a memorandum on the following point—

Explain how the Certification Officer and the Director of Fair Access to Higher Education (see Schedule, Table 6) and the Prisons and Probation Ombudsman (see Schedule, Table 9), as opposed to the organisation that each of them heads, can count as ‘a body’ for the purposes of article 2 and section 4A(3) and (4) of the Government Resources and Accounts Act 2000, given that—

- (a) *each of them appears to be an individual, and*
 (b) *it does not appear that any of them is a corporation sole.*

2. Bodies which are designated under section 4A(3) of the Government Resources and Accounts 2000 ('section 4A(3)') in relation to a department and in respect of a financial year must be included in the department's Estimates and resource accounts for that year.

3. Designation in this manner is central to the implementation of the 'Clear Line of Sight' reforms agreed between HM Treasury and Parliament, which (in essence) are intended to align departmental Budgets, Estimates and resource accounts. The Certification Officer, the Director of Fair Access to Higher Education, and the Prisons and Probation Ombudsman have all been designated in accordance with Clear Line of Sight.

4. Taking each in turn, the position is as follows.

- Section 254 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('the 1992 Act') provides that there shall continue to be an officer called the Certification Officer ('the Officer'). The Officer is appointed by the Secretary of State and has the functions conferred by the 1992 Act. The Officer's staff is provided by ACAS (section 254(5)) and the Officer's functions are funded by ACAS and the Secretary of State (section 254(5A) and (6)). The Officer must prepare annual reports and the accounts prepared by ACAS (under section 265 of the 1992 Act) must show separately sums disbursed to or on behalf of the Officer (section 258).
- Section 31 of, and Schedule 5 to, the Higher Education Act 2004 ('the 2004 Act') make provision for the Director of Fair Access to Higher Education ('the Director'), who has such functions relating to plans as are conferred by Part 3 of the 2004 Act. The Director is appointed by the Secretary of State and may appoint staff (paragraph 4 of Schedule 5). The Director is funded by the Secretary of State, required to prepare annual reports and required to prepare annual statements of account which are audited by the Comptroller and Auditor General (paragraphs 6 to 8 of Schedule 5).
- The 'Framework Document between the Ministry of Justice and the Prisons and Probation Ombudsman' (November 2009)^b ('the Framework') and the 'PPO Terms of Reference' (September 2013)^c ('the TOR') explain the status and functions of the Prisons and Probation Ombudsman ('the Ombudsman'). The Ombudsman is an administrative office appointed by the Secretary of State for Justice (paragraph 2.6 of the Framework). The Ombudsman's functions are

^b <http://www.ppo.gov.uk/docs/ppo-framework-document.pdf>.

^c [http://www.ppo.gov.uk/docs/Terms_of_Reference_September_2013_\(updated_to_inc._STC_comps\).pdf](http://www.ppo.gov.uk/docs/Terms_of_Reference_September_2013_(updated_to_inc._STC_comps).pdf).

described in the Framework (paragraph 2.1) and set out in more detail in the TOR. The Ombudsman appoints such staff as he thinks necessary to discharge his functions (paragraph 6.1 of the Framework) and the Ministry of Justice provides the resources necessary for the Ombudsman's office (paragraph 3.1 of the Framework). The Ombudsman prepares annual reports which include a summary of the costs of the office (paragraph 4 of the TOR).

5. Whilst neither the Officer, the Director nor the Ombudsman would appear to be a corporation sole, it is clear that the description of each denotes an office and that persons appointed to one of the offices are officeholders. Further, in each case the functions in question are conferred on and exercised by or on behalf of the officeholder, the expenditure in question is incurred by or on behalf of the officeholder, and (as appropriate to the scope and nature of its activities) each officeholder is required to account for its exercise of and expenditure on its functions.

6. Given these circumstances and the purpose of the powers in section 4A(3), we consider there is power under that section to designate the offices in question, where the reference to the office is, in effect, a reference to the organisation that carries out the relevant functions (and hence a "body" in the relevant sense). We also consider it would be artificial to frame such designations by reference to some description of a wider organisation when that organisation is a means of delivering the functions conferred on the office. In our view a designation in those terms would in substance be no different from designating the office by name.

HM Treasury
13 May 2014

Appendix 4

Draft S.I. 2014: memorandum from the Ministry of Justice

<p><i>Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 (Draft S.I.)</i></p>

1. By a letter dated 7th May 2014, the Committee sought a memorandum on the following points:

Explain why it is thought that sections 9(2) and 41 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 authorise the provision inserted by article 2(3) of this draft Order, having regard in particular to–

- *the absence of explicit provision in either section for the imposition of a residence condition which would arguably impede the right of access to court, and*

- *the principle that powers conferred by delegated legislation to vary Acts of Parliament are given a narrow and strict construction (see R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd [2001] 2 AC 349). [the first point]*

Explain in what way the provision inserted by article 2(3) is considered to vary or omit a “service” within the meaning of section 9(2) of that Act. [the second point]

Explain what indication was given to Parliament, during the passage of the Bill which became that Act, that the power conferred by section 9(2) would be exercised in the way now being contemplated in this draft Order. [the third point]

The first point – legislative authority

2. As Lord Bingham stated in *ex parte Spath*, in construing enactments “*the overriding aim of the court must always be to give effect to the intention of Parliament as expressed in the words used.*” Further, he said that the principle of giving a strict construction to powers to amend primary legislation will apply only “*where there is a genuine doubt about the effect of the statutory provision in question*”. The Department considers that the statutory language of LASPO clearly permits the introduction of a residence test for legal aid. That is so even on a narrow and strict construction, and whether or not the principle of strict construction applies in this case.
3. Section 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”), taken with section 41 of that Act, provides the Lord Chancellor with the power to make an Order which omits services from Schedule 1 to LASPO (“the Schedule”) for a particular class of individual (in this case, those who do not satisfy the residence test). Section 41(2)(b) of LASPO provides that orders under Part 1 of that Act may make provision by reference to services provided for a particular class of individual. The Department considers that this provides clear and specific authority for the introduction of the residence test. The effect of the draft Order would be to make provision by reference to services provided for a particular class of individual (those who satisfy the residence test).
4. The Department does not consider that the absence of an express reference in section 9 or section 41 to a power to introduce a residence test detracts from this clear interpretation. The provisions set out in broad terms the sort of amendments that the Secretary of State is empowered to make, in a way which on their face encompasses the introduction of a residence test. In the context of section 9 and the scheme of LASPO, the power conferred by section 9(2) is clearly designed in part to enable the Lord Chancellor to provide that legal aid is not available in relation to the provision of certain legal services, which is the effect of

the proposed residence test. The Department does not consider that a power to introduce a residence test is the sort of power that, by its nature, would need to be expressly set out.

5. The Department acknowledges that there is no express reference in section 9 to make provision which applies generally to a range of services described in Part 1 of the Schedule, which is a feature of the proposed residence test. However the Department considers that this power exists by necessary implication. First, the natural reading of the power in section 9 is sufficiently broad to allow for such a provision. Secondly, section 9 expressly envisages that provision may be made by modifying Part 2 or 3 of the Schedule. A number of the provisions in those Parts have general application to all, or a wide range of, services described in Part 1 of the Schedule. This demonstrates that Parliament intended that provision could be made under section 9 which applies generally to a range of services described in Part 1. For example, an amendment to paragraph 1 of Part 3 of the Schedule (which in effect provides that the services described in Part 1 of the Schedule include advocacy in proceedings in the Supreme Court) would have general application across a range of services. The Department notes that there is no express restriction on the (express) power to modify Parts 2 and 3.

6. The Department does not consider that the proposed residence test would, if enacted, impede access to justice. Access to justice and access to taxpayer-funded legal aid are distinct concepts. Successive Governments have recognised the need to put limits on the availability of legal aid. The Department also notes that the Divisional Court confirmed in its permission decision in *The Howard League for Penal Reform and the Prisoners' Advice Service –v- Lord Chancellor*, that “There is no corollary to the common law right of access to a court of a right to legal aid: *R v Lord Chancellor ex parte Witham* [1998] QB 575. The Strasbourg article 6 ECHR jurisprudence is clear that the provision of legal aid of this character is not mandatory, except in exceptional cases: *Airey v Ireland* (1979-80) 2 EHRR 305; *Hooper v United Kingdom* [2005] 41 EHRR 1.” Against this background, the Government considers it is appropriate to introduce a residence test to ensure that, in general (and with provision being made for exceptional cases), those who benefit from the receipt of public money for legal aid are people who have a strong connection with the UK. This is expected to lead to a saving in public funds, and thereby increase public confidence in the legal aid system.

The second point – “service”

7. New paragraph 19 of Part 2 of the Schedule, to be inserted by article 2(3) of the draft Order, must be read with the opening words of Part 2 of the Schedule. These provide that the services described in Part 1 of the Schedule do not include the services listed in Part 2 of that Schedule (except to the extent that Part 1

provides otherwise). Thus the effect of the provision to be inserted by article 2(3) of the draft Order is to omit services described in Part 1 of the Schedule – those services to which the residence test applies and which are provided to an individual who does not satisfy the residence test.

8. The Department notes that section 9(2) of LASPO expressly envisages that services described in Part 1 of the Schedule would be omitted by modifying Part 2 of that Schedule. This is the approach the draft Order takes.

The third point – Parliamentary history

9. The Department confirms that, so far as the Department is aware, no indication was given to Parliament during the passage of the Bill which became LASPO that the power conferred by section 9(2) could be used to introduce a residence test for civil legal aid. The Department considers that the draft Order is nonetheless entirely consistent with Parliament’s intention and not contrary to any indication given to Parliament as to how the power would be used.
10. The Annex to this memorandum contains all relevant material identified by the Department on the legislative history of what is now section 9(2) of LASPO. The Department can provide a short summary of these materials if that would assist the Committee.
11. This legislative history demonstrates that Parliament clearly envisaged that what became section 9 was broad enough to allow for substantial changes to be made to the scope of civil legal aid. The Department considers that it is clear that section 9 gives power to bring whole categories of civil legal aid into scope, as well as allowing for taking out whole categories of civil legal aid from scope. The House of Lords Delegated Powers and Regulatory Reform Committee acknowledged that this would be the effect of the power (see item 3 in the Annex).

Ministry of Justice

13 May 2014

Annex – Legislative history of the section 9 power

1. Clause 8 as introduced the House of Commons on 21 June 2011	25
2. Excerpt from Delegated Powers Memorandum – June 2011	25
3. Delegated Powers and Regulatory Reform Committee, 21st Report of Session 2010-12 – November 2011	26
4. Government response to the Delegated Powers and Regulatory Reform Committee Report – December 2011	27

5. Select Committee on the Constitution, 21st Report of Session 2010–12 on Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill – 17 November 2011	27
6. Government’s response to the Select Committee on the Constitution’s Report on Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill – 15 December 2011	28
7. Hansard – House of Commons Committee – clause 8	28
8. Hansard – House of Lords Committee – clause 8	32
9. Hansard – House of Lords Report – clause 8	45
10. Hansard – House of Lords Report – clause 8	46
11. Hansard – House of Lords Third Reading – Amendment of clause 8	48

1. Clause 8 as introduced the House of Commons on 21 June 2011

“8 General cases

(1) Civil legal services are to be available to an individual under this Part if—

(a) they are civil legal services described in Part 1 of Schedule 1, and

(b) the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination).

(2) The Lord Chancellor may by order modify Schedule 1 by omitting services from Part 1 of the Schedule (whether by modifying that Part or Part 2, 3 or 4 of the Schedule).”

Available at: http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0205/cbill_2010-20120205_en_2.htm

2. Excerpt from Delegated Powers Memorandum – June 2011

Clause 8(2): General cases: Amendment of Schedule 1

Power conferred on: The Lord Chancellor

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Affirmative Resolution

Clause 8(2) confers power on the Lord Chancellor to amend Schedule 1 to the Bill. The services that can be provided as part of civil legal aid are defined in clause 7. Under the provisions of clause 8, those services can be provided to a person if they are described in

Part 1 of Schedule 1 to the Bill and the Director has determined that the person qualifies for civil legal aid in accordance with Part 1. Schedule 1, therefore provides the list of matters and proceedings that will be within the scope of civil legal aid and will be considered for funding.

Clause 8(2) provides that the Lord Chancellor may, by order, omit services from the list of civil legal services which may be made available under Part 1 of Schedule 1. The power extends to modifying any Part of Schedule 1. The power will allow for services to be omitted from Schedule 1 if they are no longer needed, or it is no longer appropriate for them to be listed. For example, if particular court proceedings are moved to a tribunal, it may cease to be appropriate to provide funding for advocacy for those proceedings and so an amendment to Part 3 of Schedule 1 would be needed. The power can also be used to add new exceptions to the matters listed in Part 1. It is appropriate for there to be a limited power to amend Schedule 1 to allow it to be kept up to date. As this is a power to amend primary legislation, it is drawn as narrowly as possible.

The power does not allow new areas of law to be added to Schedule 1. Any additions to scope will require primary legislation. In contrast, under section 6(8) of the 1999 Act the Lord Chancellor may by direction require the Legal Services Commission to fund the provision of any of the services set out in Schedule 2 i.e. areas otherwise excluded to be brought back into scope of legal aid funding. Such a direction must be published (see section 25 of the 1999 Act) but is not subject to any parliamentary procedure.

The power in clause 8(2) is subject to the affirmative resolution procedure as it is a power to amend primary legislation with secondary legislation.

Available at: <http://www.justice.gov.uk/downloads/legislation/bills-acts/legal-aid-sentencing/delegated-power-reg-reform-memo.pdf>

3. Delegated Powers and Regulatory Reform Committee, 21st Report of Session 2010-12 – November 2011

Clause 8 – Civil legal services

6. Clause 8(2) enables the Lord Chancellor, by regulations subject to affirmative procedure, to reduce the services (listed in Schedule 1) that may be provided under civil legal aid. We recognise that there is a precedent for a power of this kind; regulations under section 6(7) of the Access to Justice Act 1999 may amend the list (in Schedule 2 to that Act) of services that may not be provided as part of the Community Legal Service, whether by adding new services or omitting existing ones. The memorandum explains that “it is appropriate for there to be a limited power to amend Schedule 1 to allow it to be kept up to date”. In reality, the power is limited only by the inability to add to the list and may legitimately be used to curtail the scope of civil legal aid quite significantly. Whether the power should extend to adding to the list is not a matter for this Committee. **The Committee has concerns about clause 8(2), and those concerns were not allayed by the explanation in the memorandum that this was merely an updating provision. However, there is precedent for a power of this type to be delegated and subject to affirmative procedure (whether the power is to**

add or to remove from the Schedule), and on that basis, we do not find it inherently inappropriate. But we draw it to the attention of the House because it is not limited to routine updating and may legitimately be used to make substantial omissions from Schedule 1.

Available at:

<http://www.publications.parliament.uk/pa/ld201012/ldselect/lddelreg/225/225.pdf>

4. Government response to the Delegated Powers and Regulatory Reform Committee Report – December 2011

Issue 2: Clause 8 – Civil legal services

The Committee makes the following point in its report:

2.1 The intention is that clause 8(2) will be a focussed power to omit services where, for example, funding may no longer be necessary and it will allow whole or parts of paragraphs to be omitted. Our intentions have been set out in our programme of reform in the response to the consultation paper and are reflected in the Bill. Part 1 of Schedule 1 to the Bill sets out the areas for which we will continue to make funding available. Civil legal aid has been limited to these areas following a thorough review based on the importance of the issue, the litigant's ability to present their own case (including their vulnerability), the availability of alternative sources of funding and the availability of alternative routes to resolution. We have used these factors to prioritise funding on the highest priority cases, for example, where people's life or liberty is at stake, where they are at risk of serious physical harm or immediate loss of their home, or where children may be taken into care.

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

Available at: <http://www.justice.gov.uk/downloads/legislation/bills-acts/legal-aid-sentencing/gov-response-delegated-powers-reg-reform-committee.pdf>

5. Select Committee on the Constitution, 21st Report of Session 2010–12 on Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill – 17 November 2011

20. Under the Bill the Lord Chancellor will have a power to modify Schedule 1 by omitting further services from the scope of civil legal aid (clause 8(2)). Orders made under clause 8(2) will be subject to the affirmative resolution procedure. **This provision should be amended to enable the Lord Chancellor not only to omit services from the scope of civil legal aid but also to add services to the scope of civil legal aid.**

Available at:

<http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/222/222.pdf>

6. Government's response to the Select Committee on the Constitution's Report on Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill – 15 December 2011

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

The Committee makes the following point in its report:

“This provision (clause 8(2)) should be amended to enable the Lord Chancellor not only to omit services from the scope of civil legal aid but also to add services to the scope of civil legal aid”.

5.1 The intention is that clause 8(2) will be a focussed power to omit services where, for example, funding may no longer be necessary and it will allow whole or parts of paragraphs to be omitted. Our intentions have been set out in our programme of reform in the response to the consultation paper and are reflected in the Bill. Part 1 of Schedule 1 to the Bill sets out the areas for which we will continue to make funding available. Civil legal aid has been limited to these areas following a thorough review based on the importance of the issue, the litigant's ability to present their own case (including their vulnerability), the availability of alternative sources of funding and the availability of alternative routes to resolution. We have used these factors to prioritise funding on the highest priority cases, for example, where people's life or liberty is at stake, where they are at risk of serious physical harm or immediate loss of their home, or where children may be taken into care.

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

Available at: <http://www.parliament.uk/documents/lords-committees/constitution/GovernmentResponse/GovtResLegalAid.pdf>

7. Hansard – House of Commons Committee – clause 8

House of Commons, 6 September 2011: Column 324

Clause 8: General cases

Mr Slaughter: I beg to move amendment 75, in clause 8, page 5, line 27, leave out subsection (1).

The Chair: With this it will be convenient to discuss the following: amendment 78, in clause 8, page 5, line 32, leave out subsection (2).

Amendment 77, in clause 8, page 5, line 32, after ‘from’, insert ‘or adding services to’.

Amendment 159, in clause 8, page 5, line 33, after ‘Schedule’, insert ‘or by amending any description of services included in that Part.’.

Mr Slaughter: The amendments go to the heart of our opposition to the Government’s strategy of restricting legal aid. I do not need to say much about them because we will shortly debate schedule 1, when we can consider the related matters in more detail.

Legal aid was devised to allow those who are impecunious and cannot afford access to legal advice to get their cases into court to reach a fair resolution, to be put on a level peg with those who have such resources. Over time, the areas that are subject to dispute—which become more complex—and relevant to society, change significantly. We have seen such changes clearly over the past 40 or 50 years, and many of the areas that the Government propose to take out of scope have worked their way into scope over that time.

The Government’s approach here is not permissive. They are simply saying, “Unless we have put it down in black letters that we are going to allow legal aid in a restricted number of cases, it will not be allowed. We will have a list of matters that are not allowed and we will allow the Lord Chancellor by secondary legislation to continue to remove but not to add matters to that list.” That triple whammy, as it were, of proposals makes the Government’s intention very clear: to be as restrictive as they can possibly get away with being in the provision of social welfare legal aid and to allow exceptions only where they believe it is untenable not to, either for public relations reasons or for reasons of

Column number: 325

simple morality. Otherwise, they will do their level best to close down those options for legal aid that have grown over time.

By removing the wording in clause 8 that allows the Government to take this reductive approach, we are saying through these amendments that we wish to stay potentially with the status quo. That does not mean things should not be reviewed. On the contrary, the point I am making is that if we want to constantly review what is and is not appropriate, we should not set up a system so restrictive that it will give little justice to anybody who is seeking that in any of the areas currently in scope.

I mentioned amendment 77. I can anticipate what the Minister will say on amendments 75 and 78. I will conclude, so he can tell us what he wants to say on that. I do not know what he will say on amendment 77 because it is difficult for him to argue that schedule 1 should be capable of modification only to omit rather than to omit or add. As I say, I am keen to hear his explanation on that.

Mr Llwyd: I share the concern of the hon. Member for Hammersmith about the wording of the clause, particularly the fact that the Lord Chancellor will be given the power by order to delete further services from scope. We are having a full day’s debate on the absence of some

of these services from scope, yet in this subsection we are expected to give leave to the Lord Chancellor on a whim to delete any further services from scope. We often say that the devil is in the detail. There is quite a devil in this particular detail, and I am very concerned about it. That is not to cast any aspersions on the present holder of the office or, indeed, anybody on the Treasury Benches. However, it is absolutely unacceptable to leave it open to delete other areas from scope another day.

If there is an insistence on having that power, it is perfectly reasonable in my view, and in the opinion of the hon. Member for Hammersmith, that there should be an amendment to allow services to be added. For example, after the reference to schedule 1 in subsection (2), the amendment I have tabled could be inserted, which states:

“or by amending any description of services included in that Part.”

In other words, amendment 77 and my amendment 159 would allow the Lord Chancellor to include services at a future date. The reason for cutting back on services and taking them out of scope is largely, if not entirely, being justified by the current economic circumstances and, indeed, we all hope and pray that the outlook will improve. Therefore, it would be sensible and prudent to allow the Lord Chancellor to bring back services within the scope of legal aid in due course, particularly because I am afraid that we will revisit the Bill in the not too distant future. I was around when the Dangerous Dogs Act 1991 and the firearms—pistol—legislation were enacted, and they proved to be as useful as a chocolate teapot.

6.15 pm

I am beginning to feel uneasy about how every amendment is batted back by Ministers saying, “Well, it’s unnecessary. It’s not going to happen”. Perhaps, but

Column number: 326

there are concerns among the Opposition, and I believe that there are Members on the Government side who are concerned about several aspects of the changes as well. Amendments 77 and 159 are both designed to provide, reasonably enough, a power for the Lord Chancellor, in due course, to add services back to scope and not to prepare the way to add yet further services to the swathes already taken out of scope.

Mr Djanogly: The amendments all relate to clause 8 and concern changes to the way in which the scope of civil legal aid is set out or how it can be altered.

Amendment 75 would remove subsection (1), removing schedule 1 in its entirety. I assume that the intended effect of the amendment is to prevent civil legal aid from being limited to the matters listed in schedule 1. However, removing the operative part of it in that way would technically prevent the director from providing civil legal aid to any individual, which presumably is not the intention.

Clause 8 allows the Lord Chancellor to modify schedule 1 by omitting civil legal services from part 1 of the schedule, whether by modifying part 1 or other parts of the schedule. Amendment 78 would remove the Lord Chancellor’s power to modify schedule 1 by omitting types of civil legal services from part 1. We think the amendment is motivated by a

concern that the Lord Chancellor should not be able to further narrow the scope of the civil legal aid scheme without primary legislation. I think that has been reflected in Members' comments. However, the power allows the removal of civil legal services where it is no longer appropriate to fund them. An example of where that might be necessary is where the governing legislation behind an area of law is repealed or otherwise altered, and we need to alter civil legal aid provision accordingly. Another example is where particular court proceedings are moved to a tribunal, and it ceases to be appropriate to provide funding for advocacy for such proceedings, so an amendment to part 3 of schedule 1 would be needed. Any changes made to the scope of part 1, using the power in clause 8, would be subject to the affirmative resolution procedure.

The intention of amendment 77 appears to be to allow out of scope civil legal services to be added back in by secondary legislation. Amendment 159 would allow the descriptions of funded services to be changed, essentially allowing the schedule to be substantially revised. We have been clear. I hate to say this to the right hon. Member for Dwyfor Meirionnydd, but in the current fiscal climate we have to make these tough choices about which civil legal services should continue to be funded by the taxpayer.

Given the importance of the issue, we believe that the scope of civil legal aid should be set out in primary legislation, which the Bill places before Parliament for approval. Therefore, I urge the hon. Member for Hammersmith to withdraw the amendment.

Mr Slaughter: The Minister has correctly interpreted the intention of the amendment. I hear what he says, but in light of the way the clause is drafted there was little or no alternative but to draft the amendments in this way. There is no meeting of minds on these issues. The very real concerns we have about many of the scope

Column number: 327

changes and their practical effects will become clearer as the debate continues. We need to get on to that. We simply do not believe that parts 1 and 2 are an appropriate way to administer and apply legal aid. I do not intend to press all the amendments to a Division, although I want to make it clear that we do not believe it appropriate for areas to be removed from scope by secondary legislation. I do not intend to press amendments 75 or 78 to a vote, but I will ask for a vote on amendment 77.

I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Available at:

<http://www.publications.parliament.uk/pa/cm201011/cmpublic/legalaid/110906/pm/110906s01.htm>

8. Hansard – House of Lords Committee – clause 8

House of Lords, 16 January 2012: Column 350

Amendment 22

Moved by Lord Faulks

22: Clause 8, page 5, line 35, leave out subsection (2)

Lord Faulks: My Lords, the amendment is in my name and that of the noble Lord, Lord Pannick, and others. The noble Lord, Lord Pannick, asked me to give the House his apologies for his unavailability today. The amendment concerns Clause 8(2), which gives the Lord Chancellor the power to modify Part 1 of Schedule 1 so as to omit services from the scope of legal aid and assistance. I have considerable concerns about that power.

First, this allows for still further reductions in the scope of legal aid by means of delegated legislation. Your Lordships' House is currently debating the scope of legal aid. For example, we are shortly to consider the withdrawal of legal aid for clinical negligence. The power would allow the Lord Chancellor to remove areas from the scope of legal aid without proper debate on the Floor of the House. There should surely be the opportunity for such debate if the Lord Chancellor is inclined to restrict in future the scope of legal aid.

Furthermore, although the Lord Chancellor can remove legal aid from the scope in areas he thinks appropriate, he is not given the concomitant power to restore legal aid. There are two circumstances in which he or his successor might want to do that. The first is if there was an improvement in the economy. The cuts in legal aid are, as the Minister has repeatedly said, needed as a result of the Government's overall strategy. Should matters improve, there should be an opportunity for the Lord Chancellor to restore legal aid within the terms of the Bill.

There is another reason. However well planned the cuts are-I know that much criticism is made, particularly by the party opposite, of the lack of an impact assessment-it is difficult to be absolutely confident about the effect. For example, I do not think that the party opposite had any idea of the extent of the take-up of conditional fees when it introduced changes in the Access to Justice Act.

I suggest, further, that the uncertainty about the effect of legal aid was acknowledged by the Government themselves in last year's Community Legal Service (Funding) Amendment Order 2011. The Explanatory Memorandum stated that,

16 Jan 2012 : Column 351

"the LSC will monitor the situation to ensure that they are aware of any market shortfall and the Government will work closely with them so that that they are able to respond promptly, effectively and appropriately",

should this materialise. The Lord Chancellor should be able to respond in a like manner should there be some egregious examples of market shortfall or the establishment of legal aid deserts. Your Lordships' Constitution Committee said in paragraph 20 of its report that if the Lord Chancellor is to have the power to take away by delegated legislation, he must also have the power to provide.

The amendment is intended not to be destructive but to improve the Bill so that, within the constraints considered necessary by the Government, there should none the less be a proper reflection of the principles of access to justice. This amendment and others in the group should help to achieve this. I beg to move.

The Lord Speaker (Baroness D'Souza): My Lords, I should remind the Committee that, if this amendment is agreed to, I cannot call Amendments 23 to 27 for reasons of pre-emption.

Baroness Butler-Sloss: My Lords, I have put my name to Amendments 23 and 27, which are very much on the same lines as the amendment by the noble Lord, Lord Faulks. I find it absolutely astonishing that the Government should, in Clause 8, have an arrangement whereby they can delete legal aid but they cannot bring it back. It is particularly astonishing because a number of judges who know what they are talking about—two Supreme Court judges who have been judges in the Family Division and the present president of the Family Division—all say that this is a false economy. I very well understand that it is absolutely necessary to cut the legal aid bill. However, if the Government cut it in the wrong way, as I suggest they are doing and as I shall say in the debate on later amendments, they cannot put it back if it requires primary legislation.

As the noble Lord, Lord Faulks, has already said, the whole purpose of these amendments is not to destroy the Bill but to allow the Government, or indeed a subsequent Government, a degree of flexibility so that they do not have to use primary legislation to achieve their purpose. Therefore, I very much support all the amendments in this group.

Lord Goodhart: My Lords, I entirely agree with what has been said by the noble Lord, Lord Faulks, and the noble and learned Baroness, Lady Butler-Sloss. At present, as has already been pointed out, the Bill authorises the Lord Chancellor to omit the services under Schedule 1 but it does not permit him to extend his powers by adding to the services in Schedule 1. Any extension of the power would therefore require primary legislation. By contrast, the deletion of existing services would, under Clause 132(5), require only the affirmative procedure, which is quicker, simpler and cheaper than primary legislation.

From long service on the Delegated Powers Committee, I am satisfied that it would be acceptable to use the affirmative procedure to use Clause 8(2) to delete

16 Jan 2012 : Column 352

services that now exist under Schedule 1. We should recognise that as desirable. From that, it follows that we should make it as easy as possible to reconstruct the provisions that have been cut and that ought to be restored when the financial situation permits. That would be done most swiftly by including in the Bill the ability to introduce powers to add new services by the affirmative procedure, as well as a power to remove existing services. That will cost

nothing today but it will help to satisfy those of us who accept that some reduction is needed now but who do not want it to continue when the reduction is needed no longer. In some years to come, that will be the case.

Therefore, if we are to go ahead with the Government's proposal, it is essential to add to it the requirement that the Government accept that in the future, when it is possible on economic grounds to do so, existing provisions can be added and not just deleted by the affirmative procedure in both Houses.

3.30 pm

Baroness Mallalieu: My Lords, I wonder what on earth could, in fact, be a valid reason for objecting to the spirit of the amendments in this group, in particular the one proposed by the noble Lord, Lord Faulks. If, as I fear, some parts of the Bill remain unchanged by amendment and legal aid is withdrawn from some areas, it is almost certain that it will be shown in due course that legal aid was essential for the smooth running of our benefits systems, our legal system and our society. I suspect that there will be a public sense of unfairness when the extent of the proposed cuts is more widely known. I suspect that at that stage there may need to be, as others have already said, some rapid amendment to the existing system.

Who knows whether our economy may once again prosper? Further money may be available to spend, not just on more lavish opening ceremonies for the Olympics, royal yachts or high-speed railways but on the needs of people who are poor and disadvantaged. It is surely not beyond the bounds of possibility, as history has often shown, that a new field of law will develop rapidly and that legal aid will need to be extended to a different category that has not been anticipated to require it. Flexibility, as others have said, so that further primary legislation, which is costly and time consuming and inevitably involves considerable delay, can be avoided, ought surely to be embraced by the Minister with enthusiasm. I look forward to seeing it in a moment.

Lord Thomas of Gresford: My Lords, the problem for many lawyers is that we so often look into the past. Common lawyers in particular try to piece together what has happened before. Consequently, we tend always to look for evidence to support our interpretation of events. I certainly share that problem, but I have also had some experience of running an independent local radio company. During that time I realised the great difference between businesspeople and lawyers. Businesspeople have to take decisions about the future, and they can do that only on limited information.

In this instance, the Government have had to take a decision; it has been forced upon them. To adopt a phrase first used by the noble Lord, Lord Elystan-Morgan,

16 Jan 2012 : Column 353

50 years ago, "The Visigoths were at the gates". It was therefore necessary to decide how best we can cut the deficit and how, in this instance, legal aid should share that burden. This is an issue which I think I raised with Ministers before the Bill came here-I certainly referred to it in my Second Reading speech-and I have had further discussions since. When taking

decisions about the future, one has to have flexibility when the future happens. One has to be able to adopt what was decided at one moment in accordance with experience.

This is an instance of that. Some of the prognostications that we have heard from the lawyers around this place-and there have been a lot of "mays" and "what is likely to happen" and so on from lawyers-might happen in the future, in which case the provision of legal aid will have to change. The changes might be positive and legal aid granted more widely. It is therefore essential that the Lord Chancellor has the power to add back into the scope of legal aid matters that prove not to be profitable in the way that the Bill envisages. There are not the alternatives that the Minister speaks of for dealing with various legal issues and the very important question of access to justice. That is why I am speaking to Amendment 25 in my name. This is a very positive way in which the Minister can demonstrate that the Government will be flexible in this area, will listen to the concerns that are voiced in the Chamber and will adapt the Bill accordingly.

Lord Scott of Foscote: My Lords, I support strongly the amendment proposed by the noble Lord, Lord Faulks, and the other amendments in the same spirit. It is important in considering the merits of the amendments that we bear in mind the purpose of a civil justice system. I suggest that a country is not entitled to regard itself as civilised unless it has a proper, workable system for the administration and attainment of civil justice. I spent my professional life working in the civil justice system. Of course, the criminal justice system has its own imperatives, but a civil justice system whereby individuals can obtain remedies or resist attempts to obtain remedies against them is of critical importance if our country is to retain the status that it has earned over many years of being a civilised country in which it is a pleasure to live.

Baroness Kennedy of The Shaws: My Lords-

Lord Scott of Foscote: I beg your pardon. That might have sounded like a peroration but I am afraid it was only a beginning. Cutting down on legal aid might be very necessary for cutting the deficit, but it must not be allowed to get to a stage where it imperils the adequacy of the civil justice system.

A plethora of litigants in person is not an ornament to a civil justice system but a reproach. I was a judge for many years, and on many occasions litigants in person appeared before me, sometimes as plaintiffs and sometimes as defendants. It is never a satisfactory means of conducting a trial. Every judge wants to come to the correct conclusion if they can, and every judge must bear in mind that one party is going to lose and must leave the court feeling that he or she has had justice. Where there is a litigant in person, the judge cannot avoid appearing to be on the side of that party.

16 Jan 2012 : Column 354

The litigant in person usually does not know how to put their case or the best arguments for the propositions that they are advancing, so the judge will step in and examine them on behalf of the litigant in person. That is fine for the purpose of obtaining justice but does no good in persuading the party on the other side, who has listened to his or her lawyers attempting to argue against the judge, that this is an appropriate means of obtaining a just

result. That is the effect of producing a state of affairs in which one or other party cannot afford access to justice through the remedy of employing lawyers to appear in the case.

It is of very great importance, if the Minister is to have the power to remove areas of eligibility for legal aid or to add areas where there should be legal aid, that both those forms of executive law-making should be associated with the requirement for an affirmative resolution from each House, as the noble Lord, Lord Goodhart, suggested. Without that safeguard, these amendments are essential. If they are not agreed, that safeguard at least should be included.

Baroness Kennedy of The Shaws: My Lords, I apologise for interrupting the noble and learned Lord, Lord Scott. There is no greater crime than for a barrister to interrupt a judge mid-speech, so I am covered in a white shroud as I appear before him.

I, too, support the noble Lord, Lord Faulks, in this amendment, and in the other amendments. They tend to flush out a rather important question: is it the intention that this is a continuation of the erosion of legal aid, and that the idea of turning it back is never to be considered? Are we talking about the withering on the vine of legal aid? If so, you would not have in mind the opportunity of the Lord Chancellor to reinstate legal aid or to put it back in place as a result of evidence of shortcomings. If the intention is simply to reduce legal aid inexorably, of course you would not bother having that bit as part of the powers of the Lord Chancellor.

The piece of law to which I want to speak is that of unintended consequences. We know that it is only in the experience of the absence of legal aid that we will see its impact. I want to reinforce what others have said, that it will be in the sucking of the sweetie that one will be able to work out whether the consequences are so serious that the Lord Chancellor might want to reinstate legal aid or to put it into a place where it had not previously been. I strongly urge the Minister to look again at this and to have that reciprocal part of the power so that it will be possible to put legal aid in place, or to reinstate it where it has been removed.

Lord Carlile of Berriew: Like other noble Lords, I wish to support what has been said by all speakers so far in this short debate. We are talking not merely about reinstatement of legal aid but about adding to legal aid issues that have not yet been considered. In the first debate this afternoon, the noble Lord, Lord Beecham, referred to his experience, which I share. When I and many others in this House started practising the law, there were many things that we had not envisaged that we now take to be absolutely basic rights. For example, equalities legislation, the equality of women and the right to equal pay in the workplace

16 Jan 2012 : Column 355

for equal work had barely started when I was called to the Bar in 1970. We must, therefore, keep the door open for such issues to be added to legal aid.

The final point is a question to my noble friend the Minister. Why are the Government opposed to addition or reinstatement? The only informed speculation, if I can call it that, which I have heard on the reasons for this provision is that Ministers feel that they would avoid being lobbied by outside interest groups if this were a one-way-only provision. Surely

being lobbied is something that we expect and welcome in political life in this country, and Ministers of the Crown and their officials should be robust enough to resist if the lobbying lacks merit. If the Minister is to resist the spirit of the amendments this afternoon, the House would be grateful for a coherent set of reasons why.

Lord Elystan-Morgan: My Lords, I was exhilarated, enthralled and deeply flattered by the reference made by the noble Lord, Lord Thomas, to my existence 50 years ago. It is surprising that he should remember that I was there at all, let alone the hackneyed clichés that I was given to in those days.

I shall speak to this amendment, and to Amendment 23, if I may. Their effect would be to give the lie to the canard, which may well be suspected by many people, that the Government are a liquidator of legal aid. The first part of Schedule 1 is the remnant, remainder and rump of what was once a splendid system created in 1949. I make no apology for reminding the House that in 1949 the financial condition of Britain, having fought and won a dreadful war, at massive expense, was even more parlous than it is today. Yet the Government did exactly that. They sent John Maynard Keynes to the United States to negotiate, on very hard terms, a massive loan that had harsh conditions, the last instalments of which were repaid only some six or seven years ago. That was the situation and it would have been easy for the Government of the day to have said, "Justice is a magnificent thing-it is a noble ideal-but in our weakened condition we simply cannot afford it". They did not say that, to their eternal credit. The first point to be made is that the amendments give the lie to the idea that the present Government are trying to reduce legal aid and that they are a liquidator of everything that legal aid fundamentally represents. That is neither the attitude nor the intention of the Government.

3.45 pm

The effect of these amendments would be to give a more balanced view of the situation. It would be absurd-and even more absurd to allow it to be done by secondary legislation-to allow the authorities a power in Clause 8(1) and (2) to further restrict legal aid without considering any possibility on the other side of the balance sheet, as it were, of adding where necessary. That addition might be made if there was a massive change in economic circumstances, which is not likely to occur for some years, or if it were discovered that some of these changes, though proposed in good faith, were so costly to the principles of the administration of justice and access to justice that there had to be a rethink. That would be one condition.

16 Jan 2012 : Column 356

Another condition would be where it had been anticipated that a substantial net saving could be made under a certain heading but it was shown that the consequential costs to other departments were such that either a loss or no saving at all was created. These are real possibilities. I do not criticise the Government for not being able to point out exactly what will happen in any of these matters either in relation to access to justice or-perhaps less importantly, but nevertheless of immense importance-in relation to the savings for the public purse, as that is not possible.

If I may indulge in egotism again, in Committee on Tuesday I put it to the Deputy Leader of the House that the Government's intention was to save £350 million, that that was a gross figure and that from that gross figure there had to be deducted a figure of X. No one in this House or this world can say exactly what X may be-it is certainly not a miniscule figure; it may be massive; it may be no more than substantial, but it is an equation that everyone must bear in mind. The £350 million is a gross figure from which X has to be deducted.

The Deputy Leader of the House maintained that that was not the case. His reply can have validity only if there is no downstream additional cost to be regarded or that cost is miniscule. Neither of those propositions can be correct. It is for those reasons that I ask the Government to bear in mind the necessity of maintaining a balance and an equity in this situation and to agree to these amendments. No one imposes any condition upon the Government-the initiative will lie with them the whole time-but this will give a balance and an equity to the situation which does not exist in the Bill at the moment.

Lord Howarth of Newport: My Lords, should not the governing principle be that every single one of our citizens, regardless of their income or personal resources, should have available to them legal advice and representation should they find themselves in a situation of dispute and where they have a reasonable case to pursue through legal channels? Is that not a fundamental liberal principle? The noble and learned Lord, Lord Scott of Foscote, articulated it very finely and much better than I can, but this has to be our benchmark.

Of course, I recognise that this group of amendments is designed to salvage what can be salvaged and to limit damage. However, we ought to differentiate quite carefully between the purport of the amendments in this group, because they are not all saying the same thing. I support Amendment 24, tabled by my Front Bench, because the effect of it would be that no further areas could be taken out of scope other than by new primary legislation. The way that Parliament deals with secondary legislation does not provide adequate opportunity for debate about very important and contentious matters. Therefore, it would be a proper safeguard that there could be no further attrition of legal aid-we would not take any additional areas out of scope-without Parliament thinking deeply about it, taking care about it and being fully aware of what it is doing.

On the other hand, Amendment 24 would allow areas to be brought back into or added to the scope of legal aid by order. That is acceptable because you are

16 Jan 2012 : Column 357

not taking away people's legal rights, you are enhancing them, and there must be a presumption in favour of that as a matter of principle and that Parliament would therefore not be required to give such proposals the same intensive scrutiny as it ought to give to proposals to take areas out of scope. I agree with my noble friend Lady Mallalieu that there may very well be instances where Parliament would wish to act fast to bring an area back into scope. Therefore, Amendment 24 is preferable within the group.

Perhaps the Minister will again defend the Government's breach of liberal principle in taking whole areas out of scope of legal aid with the argument that it is imperative to save public expenditure. I noticed that the Lord Chancellor, in that very interesting article he wrote in the Guardian just before Christmas, said that:

"Legal aid in England and Wales costs vastly more than other common law variants-twice as much per head as New Zealand's system for example".

However, I understand that the cost of civil legal aid in New Zealand is not significantly higher per head. It is of the same order as it is in England and Wales, and it is in fact in the criminal legal aid area that the New Zealand system is so much more economical-they spend less per head on criminal legal aid but not on civil legal aid. However, although the Government justify what they are doing by reference to the comparison with New Zealand, they have not chosen to seek economies in criminal legal aid, but in civil legal aid. The Government need to examine these figures and, I hope, explain their economic rationale rather more fully than they have so far.

I am sure the Minister has had the opportunity to see the study entitled Unintended Consequences: the Cost of the Government's Legal Aid Reforms by Dr Cookson of King's College, London, in which he examines the possible knock-on effects-the higher spending that may be incurred for other government departments and indeed for the Ministry of Justice-as a result of the policies in this Bill. The Minister has been extremely helpful to the Committee in writing to us very fully to explain why the Government have adopted the policies that this Bill would enact. If the Minister would be kind enough to write to us with a detailed refutation of the arguments that Dr Cookson, a distinguished academic, has put forward in criticism of the Government's case that it will be making a net saving to public expenditure, I am sure that that would be very helpful.

I am very far from saying that the sky should be the limit in terms of what we spend on legal aid. I would entirely agree that where there is waste, it should be taken out. However, the assault should be on waste, not on scope. If the principle is that every citizen should have equal access to the law, then it is not proper for the Government to say, "But if the conflict or dispute that might be litigated is in one particular field, then the citizen is not to have access to the law for a dispute of that kind". It is fine to do all you can strenuously to reduce unnecessary costs, but do not breach the fundamental principle.

I would finally say that while it seems to be almost common ground around the House that it is necessary to reduce the legal aid bill, with respect, it is an absurd

16 Jan 2012 : Column 358

proposition to say that we cannot afford what we are spending. I repeat: we do not need to spend every penny of it, because there may well be waste in the system and it may be possible to reform it to make it more economic while maintaining access to justice. However, to say that a total of £2.2 billion spent on legal aid, which is only 1 per cent of the social security budget, is something that as a country we cannot afford-a country that prides itself on being a liberal society, and on the rule of law-seems to me to be wrong. This is a moral and a political choice, not a matter of economic exigency.

Lord Phillips of Sudbury: My Lords, I would very briefly reassert the fundamentalism of access to the law. Equality before the law is one of our basic claims. If in fact it does not exist, it damages not only the law and the rule of law but democracy itself.

This group of amendments is interesting. Amendment 22, moved by the noble Lord, Lord Faulks, which leads the group, simply removes subsection (2) of Clause 8, which will mean that any change in the scope of legal aid would have to be by primary legislation. Our amendment, spoken to by my noble friend Lord Thomas of Gresford and to which my name is added, seeks to even things up by saying that not only can the Government omit or change by deletion the scope of legal aid, but can add to it. The third position is that of the noble Lords, Lord Bach and Lord Beecham, who in their amendment reverse the tables, saying that you cannot remove from scope but you can add to it.

I must confess that I would, if the world were a perfect place, prefer the first amendment, Amendment 22, which would require all changes in scope to be by primary legislation. However, living on a pragmatic globe, I suspect that the best we may do is at least to have equality as between diminution of scope and addition to it. Hence Amendment 25, which incidentally is mirrored by Amendment 23, spoken to by the noble and learned Baroness, Lady Butler-Sloss.

I would just add this point, which has not been sufficiently clarified or emphasised. Whether something is in or out of scope is not, in my book, most significantly a question of finance. If we are the most legislated democracy on earth—do not forget that we pass about 14,000 pages of new statute law a year—it behoves us, in this Parliament above every parliament, to ensure that what we do has fairness of application in the real world. Above all, I put it to my noble friend Lord McNally that there has been a unanimity of view from those who have contributed to this debate that, as things stand, the exclusions from scope are going to cut so deep that the consequences will be social and political unless they are reversed speedily. For that reason alone, if I were sitting in the seat of my noble friend, I would want to be able to add back speedily. I promise him that if this Bill goes through as drafted, scandals will arise, which the Government will want to rectify swiftly. Therefore, I hope that the Government will move on this.

4 pm

Lord Clinton-Davis: As a former Member of the other place and as a Member of this House, I am deeply suspicious of secondary legislation. The onus

16 Jan 2012 : Column 359

of proof that secondary legislation is absolutely essential must rest on the Government. There are too many instances where people do not vote on the issues which arise because they happen perhaps late at night or in circumstances where it is not regarded as absolutely essential that Members should attend. Whether that is right or wrong does not matter. What is important is that the Government should resist the temptation to indulge in secondary legislation wherever possible.

The onus of proof rests fairly and squarely on the Government. In my view, they have not begun to do that. They disregard entirely the essential nature of that duty. In other words, they are saying that it is not important. I think that it is vital that Parliament conducts itself properly and scrutinises legislation where possible. I do not think that we should resort to secondary legislation, except where it is proven to be absolutely essential.

Lord Bach: My Lords, first, I thank my noble friend Lord Howarth in particular for supporting our Amendment 24. Of the alternatives set out so clearly by the noble Lord, Lord Phillips of Sudbury, Amendment 24 is the preferred amendment. But I want to make it absolutely clear from our Front Bench that our real quarrel is with the Bill as drafted. In the mild words of the noble and learned Baroness, Lady Butler-Sloss, it is astonishing to find Clause 8(2) in modern legislation. It goes without saying that we believe that this is a non-party issue. Right around the Committee, it has been suggested that on this the Government have got it seriously wrong. If I am a little harsher on the Government than noble Lords have been so far, it is because this is an essential and very important part of this Bill. It is crucial that the Government move on it, if not at this stage, then later. I very much hope that on this group, the Minister can help us by implying that the Government are thinking of changing their position.

The Bill represents an attack on a number of crucial areas of civil legal aid. If the Government get their way, the whole edifice of social welfare law will be severely damaged, perhaps to destruction. The restrictions on private family law are poorly thought through and the proposed taking out of scope of clinical negligence, which we are to debate shortly, seems more ridiculous as every day passes.

We all agree—we certainly do—that there must be some cuts to legal aid. But there should not be these cuts, and any cuts should not be so fast or so far. I pose again to the Minister a question to which I have had no response up till now: why on earth is all criminal law seemingly off limits? Is there no waste, nothing that could be rationalised, in that area of law which, I remind the Committee, takes well over 50 per cent of the whole legal aid budget? The answer is apparently not, because the Government have announced that there will be no moves on criminal legal aid until 2015 at the earliest. I pose the question again: why?

The present position, as I understand it, is that a government can, to a limited extent—I shall be frank in saying that I am not sure to what extent—alter by order what is in and out of scope; for example, by amending the funding code as felt appropriate. But what

16 Jan 2012 : Column 360

the Bill asks us to accept is a quite new proposition; namely, that the Government should have the power to omit services from Schedule 1 by order. However, there is no suggestion, of course, that they should have the power to add services by order. Again, the question that all noble Lords have been asking the Minister is: why not? Why this imbalance, this tilt, against legal aid? My own view is that the answer is a bit depressing. It is that, to put it mildly, the ministry has a rather small-minded, extraordinarily partial view of legal aid; it does not much like it and would rather be rid of it than defend it. It does not see it as central to access to justice, let alone the rule of law, and is rather looking forward to cutting more. What other impression can one possibly get from the way in which this clause is drafted?

It is often said, particularly in this House, that the real argument against allowing a provision like this is not for now but for a future government who may not be troubled by the same principles as are supposed to exist in all modern governments of whatever complexion. However—and I hope that this does not sound too harsh—my own reason for not allowing this crude power to omit legal aid to the Government is just as much to do with

what I fear is the present Government's careless attitude towards legal aid as with some rogue government in the future.

Right across this Bill, or right across Part 1 at any rate, the cavalier manner in which it is proposed to decimate social welfare law, to remove clinical negligence from scope and to restrict the definition of domestic violence on the one hand and have too wide evidential criteria for it on the other all tend to suggest that, on the importance in our society of the availability of civil legal aid for ordinary citizens to access justice, the Government really do not have the enthusiasm that they should have. I believe that this view is shared by many inside and outside this Committee. How then can it be right to entrust the Government with the new extensive powers that they propose? Legal aid could be further diminished by order, but nothing could be added to it except by primary legislation. Just to state that proposition shows how wrong it is.

No one apart from the noble Lord, Lord Goodhart, has referred to the two important reports that have been published for our benefit. One was from the Delegated Powers and Regulatory Reform Committee, which discussed this issue and came to the following conclusion:

"The Committee has concerns about clause 8(2), and those concerns were not allayed by the explanation in the memorandum that this was merely an updating provision. However, there is precedent for a power of this type to be delegated and subject to affirmative procedure (whether the power is to add or to remove from the Schedule), and on that basis, we do not find it inherently inappropriate. But we draw it to the attention of the House because it is not limited to routine updating and may legitimately be used to make substantial omissions from Schedule 1."

The Select Committee on the Constitution said this about Clause 8(2):

"Under the Bill the Lord Chancellor will have a power to modify Schedule 1 by omitting further services from the scope of civil legal aid (clause 8(2)). Orders made under clause 8(2) will be subject to the affirmative resolution procedure. This provision should be amended to enable the Lord Chancellor not only to omit services from the scope of civil legal aid but also to add services to the scope of civil legal aid."

16 Jan 2012 : Column 361

I do not want to quote from the Government's response to both those committees' reports. Perhaps the only advantage was that of consistency, because the two paragraphs were the same in each case. If noble Lords look at those paragraphs they do not make a convincing case, or indeed any case at all, against the amendments that have been raised in Committee today.

This is another part of the Bill where the Government must move. I very much hope that the Minister will show signs that the Government have listened to the unanimous view of these committees on this matter today.

Lord McNally: My Lords, I thank all noble Lords who have contributed to this debate, and particularly my noble friend Lord Faulks for introducing it. There is a little bit of the

political bruiser in me that always wants to take the noble Lord, Lord Bach, full on, particularly when he is in piety mode. He was part of a Government who carried out six reviews of legal aid in its last five years, brought in real cuts, and had an actual manifesto commitment to cut legal aid.

Lord Bach: Specifically not on social welfare law, however. Why are this Government doing differently?

Lord McNally: As I said at the very beginning, we were faced with circumstances where we had to make hard choices. The noble Lord sticks to the mantra, "Not these cuts, not this place, not now".

A number of telling points have been made by the contributions today. To clarify a point that my noble friend Lord Faulks asked for, the regulations under Clause 8(2) would be subject to the affirmative procedure in terms of parliamentary scrutiny. However I take full note of the point that the noble and learned Baroness, Lady Butler-Sloss, made, that strong and experienced legal opinion has advised against this one-way street which is built into the Bill. I also take on board-which is why I want to come back to this at the end-the question of primary legislation as against secondary legislation.

I also take note of the advice of the noble Baroness, Lady Mallalieu, about the need for flexibility and future-proofing, which my noble friend Lord Thomas also referred to. The importance, as the noble and learned Lord, Lord Scott, pointed out of the adequacy of the civil justice system, is something that is constantly in our minds in trying to determine our priority, and I take on board the warnings that we have had about the dangers of litigants in person.

The noble Baroness, Lady Kennedy, asked whether the aim was to see legal aid wither on the vine. That is certainly not our intention. Like previous speakers, the noble Baroness argued again the case for having some guard against what she termed the "law of unintended consequences", although the term "sucking on the sweetie" must be some aspect of Scottish law rather than English law. As a non-lawyer, I would not know. However I agree that "sucking on the sweetie" may well be the test of all legislation.

My noble friend Lord Carlile called for us to keep the door open. He was right to say that all Ministers must be ready to take lobbying; that is not in doubt.

16 Jan 2012 : Column 362

4.15 pm

The noble Lord, Lord Elystan-Morgan, cursed with the fluency of the Welsh, talks about the liquidation of legal aid. I remind colleagues, as I have in previous debates, that we are talking about a 17 per cent reduction of present expenditure over the lifetime of this spending review. This is not the liquidation of legal aid. Whatever debates there are about other countries and other systems, I have never seen it challenged that ours is a most generous system of legal aid.

I was pleased that the noble Lord, Lord Howarth, said that he did not believe that the sky was the limit regarding legal aid; it sometimes sounds as if that is what he is saying. Legal aid has never been available at the point of need in the way that was the great aspiration of the National Health Service. Those drawing up the rules of legal aid have had to do just that: draw lines and often make difficult decisions.

My noble friend Lord Phillips argued for what I should describe as the doom scenario. That may be a case that makes the argument for looking again at the clause, although Ministers do not believe that all the terrible things in reports, briefings or speeches in this House are going to take place.

The noble Lord, Lord Clinton-Davis, was suspicious of secondary legislation. Again, that would carry more weight if he had not been a strong supporter over 13 years of a Government who brought forward a whole tsunami of secondary legislation.

Lord Clinton-Davis: What I said was that secondary legislation should be introduced only where essential, and the onus of proof is on the Government.

Lord McNally: I did hear the noble Lord's speech. I was merely pointing out that as a parliamentarian I, too, have worried about the overreliance on secondary legislation, which is a point that I would concede to him.

There is no doubt that there is great strength of feeling about these amendments. I assure the Committee that the Lord Chancellor has noted the concerns; my noble friend Lord Thomas and others had a meeting with him earlier in the week when they put this case very strongly. With the leave of the House, and I think the noble Lord, Lord Bach, intimated this in his wind-up speech, in the full light of the points made in this debate and by the Delegated Powers Committee and the Select Committee on the Constitution, both of which have been referred to, may the Justice Secretary look at these matters again and give serious consideration to the amendments-not all of which mesh together-so that we can bring back proposals regarding this clause for further debate on Report? Given that assurance that we are taking this matter away in a constructive way, I hope that noble Lords will agree to not to press their amendments today.

Lord Faulks: My Lords, I am very grateful to all noble Lords who have spoken in this debate. It is a matter of happenstance that I am dealing with this amendment. The other amendments are in the same spirit, although to slightly different effect. I do not wish to intrude on the spat between the noble Lords, Lord McNally and Lord Bach. My concern, in this

16 Jan 2012 : Column 363

amendment, is not so much the detail, which we are going to develop in due course in argument, but more the question of principle, which I would suggest, and others all round the Committee have suggested, is at the moment embodied in this clause in a most unsatisfactory way.

I am, however, very grateful for the conciliatory noises made by the noble Lord, Lord McNally, and for his assurance that what has been said in this debate, and what has been

said in the various committees that have considered this clause, will be noted by the Lord Chancellor. I very much hope that, when this matter comes back on Report, those concerns can be reflected by the Minister. In that guise, I am happy to withdraw this amendment.

Amendment 22 withdrawn.

Amendments 23 to 27 not moved.

Clause 8 agreed.

Available at: <http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120116-0001.htm#12011620000381>

9. Hansard – House of Lords Report – clause 8

House of Lords, 5 March 2012: Column 1656

Clause 8: General cases

Amendment 8

Moved by Lord Bach

8: Clause 8, page 5, line 41, leave out "omitting" and insert "adding"

Lord Bach: My Lords, I am conscious of the time. I would sooner that this amendment is left to Wednesday.

Lord Thomas of Gresford: If the noble Lord does not move his amendment perhaps I may move my Amendment 10 in the same group.

Lord Bach: I was not sure whether the Government were minded to adjourn the House now, it being 10 o'clock. Clause 8 has always taken a considerable amount of attention from those inside and outside the legal profession. People are very struck by the fact that it was very much a one-way ticket; namely, that the Lord Chancellor would have the power to take extra matters out from legal aid by regulation but not have the power to put them back in. Many people felt that that was very unsatisfactory.

5 Mar 2012 : Column 1657

The solution was to do it the other way around; namely, that he could put things into legal aid but could not take them out by regulation. But we see the virtues of the amendments, which are not quite the same in wording but come to the same thing, in the names of the noble Lord, Lord Thomas, and my noble friend Lord Hart. Although I will move my amendment, I would be more than happy to accept either of their amendments. I very much hope that the Government will be happy to accept one of their amendments. I beg to move.

Lord McNally: My Lords, the principles underpinning this Bill include the need to establish very clearly the scope of civil legal aid services. We need to ensure that the funding of the scheme is sustainable in the light of the historic expansion of the scheme and the cost to the taxpayer. We have made difficult choices in order to focus legal aid in our priorities and therefore we will resist amendments that seek to expand the scope of the scheme. However, I accept that a case has been made by my noble friends Lord Thomas and Lord Phillips, and indeed by the noble Lord, Lord Bach. If they do not press their amendments this evening, I give a clear undertaking to the House to bring back our own amendment at Third Reading which I think will meet the concerns that have been expressed. I can reassure noble Lords that the Government accept the amendments in principle in so far as they would provide the Lord Chancellor with a power to add new

5 Mar 2012 : Column 1658

civil legal services to Part 1 of Schedule 1. I hope that will allow the noble Lord to withdraw his amendment and await the government amendment at Third Reading.

Lord Hart of Chilton: My Lords, I accept the undertaking from the Minister.

Lord Thomas of Gresford: My noble friend will know that I have been urging this course upon him since the Bill was first drafted and I am delighted with the undertaking he has given.

Lord Bach: It is only a question for me to decide whether to put my amendment to a vote, but I do not intend to do so. I can see one or two faces opposite looking anxious-or perhaps they look confident. It is only graceful from this side to thank the Minister for arranging this concession by the Government. It is much appreciated and we look forward to seeing the draft amendment when it comes forward. In the mean time, I seek the leave of the House to withdraw my amendment.

Available at: <http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120305-0001.htm#1203057001727>

10. Hansard – House of Lords Report – clause 8

House of Lords, 7 March 2012: Column 1811

Lord McNally: And I have heard a lot. The House has to move on. We want to get through Schedule 1.

This is not a debate about who cares most; it is about whether this House is willing to take the tough decisions that our economic situation requires, or whether it is simply going to push the problem down the corridor for the other place to take those decisions. That is it, because the other place will have to take those decisions whether we do so or not.

I believe that these amendments dismantle the central architecture of the Bill and our reform programme. As a result, as I have said many times, it will come as no surprise to

the House that we have had to make these difficult choices about legal aid, as we have done with every aspect of MoJ expenditure. I know that we are debating issues about which noble Lords care deeply; I do not think there is any monopoly on that. There will be noble Lords who will follow me into the Lobby tonight who have just the same-if I may use the words of the noble Lord, Lord Carlile-"determinations of principle and conscience" as those who will not.

7 Mar 2012 : Column 1812

I remind noble Lords that the reform programme is specifically aimed at protecting the most vulnerable. The noble Lord, Lord Bach, talked about the social welfare programme being "decimated". We will still be spending an estimated £120 million a year on funding for private family law; £50 million on categories of social welfare law; an extra £10 million a year on mediation; £6 million on clinical negligence; and £2 million on education.

We are keeping legal aid for child parties in family proceedings. We have retained legal aid for child protection cases, civil cases concerning the abuse of a child, and for cases concerning special educational needs assistance. We are keeping legal aid for people with mental health problems or who lack capacity for cases that determine their vital interests, and for advocacy in front of mental health tribunals. Legal aid will be retained for judicial review of welfare benefit decisions, and for claims about welfare benefits relating to contraventions of the Equality Act 2010. We will agree to extend funding to victims of human trafficking and domestic child abduction-something I know that the noble and learned Baroness, Lady Butler-Sloss, is interested in.

Our reforms have been deliberately designed with these cases in mind. Crucially, as I said in the House on Monday, we will amend the Bill to enable the Lord Chancellor to bring areas of law back into the scope of legal aid. When the noble Lord, Lord Phillips, rose, everyone groaned that there was nothing more that could be said. But I congratulate him on being the first to mention what was a very significant concession by the Government, in that what was a ratchet in the Bill is now a regulator. If some of the doom and gloom is proved to be true, the scope is there to respond to those facts.

While we are clear that our reforms are the right ones, we believe that this is an important amendment. As has also been said, the Treasury has announced that additional funding in this spending period will be available for the not-for-profit sector. As noble Lords know, we believe that in many social welfare cases it is not legal advice that people want; it is simply advice. We will support the advice sector to do just that. While we appreciate that many people rely on welfare benefits, these decisions are made in a tribunal, which is a court especially designed to ensure that claimants do not require legal representation. They are also primarily about financial entitlement and do not raise such fundamental issues as cases concerning liberty or safety.

Available at: <http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120307-0001.htm#12030760000452>

11. Hansard – House of Lords Third Reading – Amendment of clause 8

Clause 9: General cases

Amendment 1

Moved by Lord McNally

1: Clause 9, page 6, line 25, leave out from "order" to "(whether" in line 26 and insert "-

(a) add services to Part 1 of Schedule 1, or

(b) vary or omit services described in that Part,"

The Minister of State, Ministry of Justice (Lord McNally): My Lords, the Government have tabled government Amendments 1, 6, 7, 8, 13, 14 and 18 following the commitment I gave on Report. The Government have listened to the reasoned arguments

27 Mar 2012 : Column 1253

presented by my noble friend Lord Thomas of Gresford and other noble Lords, and we have brought forward these amendments accordingly.

Amendment 1 to Clause 9(2) would give the Lord Chancellor the power to omit, but in addition the power to add or vary the services in Part 1 of Schedule 1. He would be able to do so by modifying Parts 1, 2, 3 and 4 of Schedule 1. The power to vary a service allows us to amend the existing services within the schedule where they need to be altered, but without the need to omit a service and then add a new service. For example, if the Immigration (European Economic Area) Regulations 2006 were amended in the future, any such amendment might not mean that services need to be added to the schedule, but it might be necessary to vary the provisions in paragraph 31 of Part 1 in order to reflect any such changes to those regulations.

The provisions of Amendment 1 mean that the power in Clause 9(2) would be similar to that which exists in Section 6(7) of the Access to Justice Act 1999. We consider that this is the correct and sensible approach to take. The powers in Clause 9(2) would be exercisable by the Lord Chancellor when making an order. Clauses 41(6) and 41(7)(a) mean that such an order would be subject to the affirmative procedure and so subject to debate in and approval by each House of Parliament.

Amendment 2, tabled by the noble Lord, Lord Bach, would allow services to be added but not to be omitted. As I have said, the government amendment provides for balance to the existing Clause 9. Amendment 2 seeks to go further and actually removes the ability to omit. I firmly believe that that power to omit is necessary and gives the Bill a welcome flexibility. An example of where this may be necessary is where the governing legislation behind an area of law is repealed or otherwise altered and we need to alter civil legal aid provision accordingly. Another example would be where particular court proceedings are moved to a tribunal. It may cease to be appropriate to provide funding

for advocacy for those proceedings, so an amendment to Part 3 of Schedule 1 would be needed.

As a result of Amendment 1, we no longer consider that we need certain powers in Schedule 1 to make secondary legislation. The purpose of this is not to reduce the categories in which legal aid will be available but are more technical in nature. To ensure that this is clear, let me explain in detail the powers which will be removed. First, Amendments 6 and 7 relate to paragraph 4(1)(k) of Part 1 of Schedule 1, which concerns the care, supervision and protection of children and provides for further orders or procedures to be prescribed for the purposes of this paragraph. In the light of the power to add services proposed by Amendment 1, we consider that the power at paragraph 4(1)(k) of Part 1 of Schedule 1 is no longer necessary.

Secondly, Amendment 8 would omit paragraph 9(3)(n) of Part 1 of Schedule 1, which relates to community care. Paragraph 9(3) defines community care services as services, "which a relevant person may provide", under a number of listed enactments. Heading (n) of that definition allows other enactments to be prescribed for the purposes of that definition. With the power to add services under Clause 9, this is no longer necessary.

27 Mar 2012 : Column 1254

Thirdly, Amendment 13 relates to paragraph 15(1)(g) of Part 1 of Schedule 1, which concerns the protection of children. Paragraph 15 refers to civil legal services where a person is seeking in a private law family case to protect a child from abuse by applying for any of the list of orders or procedures set out in paragraph 1, and paragraph 1(g) provides for further orders or procedures to be added by being prescribed for this paragraph. Again, this is now unnecessary.

As a result of these amendments, we have made consequential amendments to paragraph 21 of Part 1 of Schedule 1, which concerns judicial review, and Part 3 of Schedule 1. Amendment 18 makes consequential changes by removing paragraph 23 from Part 3 of Schedule 1. Paragraph 23 of Part 3 ensures that advocacy is available in relation to prescribed legal proceedings relating to orders and procedures that might have been prescribed under the powers in Part 1 of Schedule 1 which, as I have explained, we no longer consider necessary. There is, therefore, no need for paragraph 23 of Part 3. As a result, the reference to paragraph 23 of Part 3 in paragraph 21(10)(b), which defines judicial review, is removed by Amendment 14.

Amendment 1 meets the concerns raised in Committee and I urge the noble Lord, Lord Bach, not to move Amendment 2. I beg to move.

Available at: <http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120327-0001.htm#12032757001721>

Appendix 5

S.I. 2014: memorandum from the Department for Communities and Local Government

Openness of Local Government Bodies Regulations 2014 (Draft S.I.)

1. The Joint Committee on Statutory Instruments has asked the Department for Communities and Local Government to submit a memorandum to explain the justification for the provision that would bring the Regulations into force on the day after the day on which they are made, having regard in particular to—
 - (a) the significant new obligations imposed on local government bodies (including parish and town councils) by the draft Regulations, and
 - (b) the fact that regulation 10 would create new criminal offences.
2. The Department's explanatory memorandum to the Regulations explained the circumstances of the Regulations and that given these circumstances the Government considers it would be appropriate for the Regulations to come into force on the day after the day on which they are made.
3. In short, in the Government's view, there is both a pressing need for the Regulations and the obligations imposed by the Regulations are neither unexpected nor would impose any significant new administrative or organisational burdens on the local government bodies concerned, including parish and town councils. It is already the case that meetings of council Executives (and their sub-committees) have to follow similar rules as a consequence of Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2012.
4. There is a pressing need because whilst the great majority of councils already allow persons attending an open meeting to use social and digital media for reporting the meeting, there are examples where attempts have been made to prevent such reporting to the detriment of effective local democracy and of ensuring full transparency and accountability in step with the digital world of today. For example, we understand that on the 24 April 2014 police officers were called to effect the removal from a Wigan council meeting of a councillor on the grounds that he was using social media during the meeting. It is reported that the leader of the council, Lord Peter Smith, stated that "this has been the most atrocious meeting I have seen". Another example is that, we understand, on 16 January 2014 the police were called to a Seaford town council meeting because a person was filming the meeting; they asked to speak to the person, who refused to leave the meeting, and the final upshot was that the meeting was abandoned.
5. Such situations are clearly indefensible and are deeply damaging to public confidence in our democratic processes. The Regulations, if approved by Parliament and made, will put beyond doubt the legality of using social and digital media,

including filming, to report any open meeting of a local government body. The Regulations can therefore be confidently expected to put an end to any incidents such as those described above arising in future. The need for the Regulations to be in force at the earliest opportunity is therefore, in the Government's view, unarguable.

6. The Government is also conscious that it would not be appropriate to bring Regulations into force so early that those to which they apply could not reasonably be expected to comply. In the case of these Regulations the Government is clear that compliance, whether by large councils with extensive administrative resources, or by small bodies such as parish or town councils with perhaps a single part-time officer, do not require any significant preparation. Council meetings are already public meetings and members of the press already attend to report meetings. All that is required is that once the Regulations are in force, particular behaviours by officers and members need to be adopted, if they have not already been adopted, as in fact they have in the great majority of cases. These behaviours are to allow the use of social and digital media for reporting meetings by those attending the meetings, and for officers to record in writing (the record then to be publicly available) certain decisions which they are taking, where these decisions have been delegated to them by the council or other local government body.

7. The criminal offence, which closely mirrors existing offences provided for in the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2012, is limited to making it an offence for a person having custody of the written record of decisions and background papers intentionally obstructing a member of the public from being able to inspect these records. It is not related to the issue of social and digital media. An offence therefore can be committed only by the person concerned adopting an intentional and proactive course of action, that course being to obstruct the inspection of the document concerned.

8. The Government therefore considers that all local government bodies would be in a position now to comply with the Regulations' requirements, were these to now be brought into force. Ministers have previously called for all councils to adopt these provisions and open up their meetings to digital media. Furthermore, it is not the case that these requirements, if and when they are brought into force on the day after the day on which Regulations were to be made, would be unexpected. The Government's proposals for these Regulations are widely known in the local government sector, and the Department will ensure that any Parliamentary approval of the draft Regulations is widely and rapidly communicated across the local government sector, as well as likewise communicating any subsequent coming into force date. The Government will be providing a plain English guide for councils and members of the public.

9. In conclusion therefore the Government considers that it is practicable for the Regulations to be brought into force on the day after the day on which they are made, and given, for the reasons described above, the need for the Regulations to

come into force at the earliest opportunity, it is thus the Government's view that the Regulations should come into force on that day.

10. We would note that the enabling power to issue these regulations was debated during the Local Audit and Accountability Bill, with cross-party support. The Shadow Secretary of State for Communities and Local Government, Rt Hon Hilary Benn MP, stated: *"We will therefore support... the proposal that councils in England should allow the recording and videoing of council and committee meetings. In this day and age, big changes in technology make recording and videoing readily possible, and I cannot see the difference between sitting in a meeting, listening and writing down what is being said, or—for those who have shorthand—taking a verbatim record, and making one's own recording"* (Hansard, 28 October 2013, Column 690)

11. The Local Government Minister, Brandon Lewis MP, recently explained to the Commons the rationale and public benefit from these new regulations. He said:

"Council meetings are public meetings which already can be reported by the press. We are merely reforming the access rules to allow the press and public to report such meetings through digital and social media. It will help bring greater awareness of the good work that councillors do for their local communities.

"I would observe that the cause of openness in council meetings was championed by Margaret Thatcher, in her maiden speech to this House. As a backbencher, she successfully introduced a Private Members' Bill—the Public Bodies (Admission to Meetings) Act 1960—to open up meetings to the press and public, spurred on by the practice of the print unions getting Labour councillors to kick out journalists from council meetings who had crossed picket lines.

"While that the 1960 Act did not expressly permit filming, I note from perusing the Bill Committee Hansard that Mrs Thatcher was firmly of the view that broadcast journalists should have the same rights as other members of the press and public (Official Report, Standing Committee C, 13 April 1960). We are updating those analogue rights for a digital age." (Hansard, 8 April 2014, Column 222W)

Department for Communities and Local Government
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