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PROTECTING CIVIL LIBERTIES
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Liberty's Second Reading Briefing on the Legal Aid, Sentencing and Punishment of Offenders Bill in the House of Lords

November 2011

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
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Introduction

1. If passed, the Legal Aid, Sentencing and Punishment of Offenders Bill would implement two starkly different Government policies. Parts 1 and 2 of the Bill advance short-sighted proposals announced in March this year to reform the system for funding legal advice, assistance and representation in this country. If implemented, they would decimate the legal aid system, placing justice beyond the reach of many and creating alarming gaps in protection. The ever-present prospect of legal intervention is the surest way of securing a society in which respect for human rights and values of equality and due process guide the behaviour of decision makers – if this Bill passes without substantial amendment, big business, government and other members of a rich and powerful elite will be able to act with impunity. By contrast, Liberty strongly supports some of the measures set out in Part 3 of the Bill, particularly those which will abolish the dishonest and counter-productive IPP regime and introduce welcome reform of our remand system.

2. In addressing Parts 1 and 2 of the Bill, this briefing will first set out the detail of proposed new measures and at paragraphs 16-58 provide an analysis of the far-reaching impact of this unprecedented assault on access to justice.

Part 1 – Legal Aid

3. Part 1 of the Bill, read together with Schedule 5, provides for the abolition of the Legal Services Commission ('the LSC'). It is proposed that the Lord Chancellor will take over governance of the legal aid system and be granted wide powers to make general prescriptions by secondary legislation.[1] A civil servant appointed to a new role of 'Director of Civil Legal Aid' ('the Director') will deal with the assessment of eligibility in individual cases.[2]

4. Financial eligibility for legal aid in the areas where it remains is not dealt with substantively in the Bill, rather the Lord Chancellor has the power to *'make provision about when an individual's financial resources are such that the individual is eligible…for services..*'.[3] Regulations can specify, amongst other things, the circumstances in which individuals are to be required to pay for all or part of the legal

[1] Clauses 1-3.
[2] Clause 4.
[3] Clause 20(2).

services they require, how payments are to be made, how payment is to be enforced and the extent of a costs order that can be made against an individual in receipt of legal aid.[4] The Bill provides for information relevant to the assessment of an individual's means to be shared between Government departments and creates an offence of providing misleading information.[5]

5. If implemented, the Bill would oblige individuals to accept assistance in the form prescribed in Regulations, including advice given by telephone or email.[6]

Civil Legal Aid

6. Clause 8, read together with Schedule 1, establishes the discreet areas in which civil legal aid will remain. Most of these areas are subject to a wide range of exceptions prohibiting the provision of legal aid in cases which involve, for example, personal injury, negligence, assault and battery, human rights violations by a public authority, welfare benefits and applications for compensation where an individual has been a victim of crime. The Bill limits the circumstances in which advocacy, as opposed to early assistance and advice, can be provided in any of the areas of law retained within scope. Other areas of law will be excluded entirely from the system including clinical negligence and the vast majority of immigration, family, employment, education and welfare benefits cases. The Bill also makes specific provision for the removal of assistance for victims of violent crime seeking to make applications for compensation to the Criminal Injuries Compensation Board. The Lord Chancellor is free to further narrow the scope of legal aid provision by means of secondary legislation.[7]

7. During the passage of the Bill through the House of Commons a small but welcome amendment to the Bill provides that civil legal services will continue to be available for a limited category of individuals, who have separated with a partner as a result of domestic abuse and are seeking to regularize their status in the UK. Provision will be limited to those originally granted leave to enter or remain in the UK as the partner of an individual already present and settled in this country. Abuse is

[4] Clause 20.
[5] Clause 21 and Clause 35 respectively.
[6] Clause 26, see subclause (2) in particular. Except where an individual qualifies for representation in criminal proceedings and he selects a representative who consents to represent – but restrictions can be placed on this choice, for example in cases meeting a particular description (Clause 26(4)).
[7] Clause 8(2).

defined as *'physical or mental abuse, including… sexual abuse, and… abuse in the form of violence, neglect, maltreatment and exploitation'*.[8]

8. Clause 9 provides for a new exceptional funding regime to be applied, in individual cases, by the Director. Legal services can be provided in excluded cases where he determines that a failure to provide legal aid would be a breach of Convention rights or EU law entitlements, or that *'it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that a failure to do so would be such a breach.*'[9] Public interest will no longer be a consideration in determining eligibility for funding, accept in relation to advocacy in proceedings at an inquest.[10]

9. Eligibility for legal aid will be determined by the Director in individual cases, but his decisions must be made in accordance with regulations of general application which the Lord Chancellor is empowered to make.[11] When assessing eligibility for legal aid, the Director is required to consider the availability of alternative funding sources: there is little detail about how this requirement will work in practice.[12] In making these regulations, the Lord Chancellor is required to have regard to various factors including an express requirement that criteria *'reflect the principle that, in many disputes, mediation and other forms of dispute resolution are more appropriate than legal proceedings'*.[13]

Criminal Legal Aid

10. The Bill makes few substantive prescriptions, rather giving the Lord Chancellor extensive powers to make regulations, which could introduce means testing into new areas of criminal law. The Bill lays the groundwork, in particular, for a new system of means testing for individuals seeking legal advice on being taken into police custody. [14] The Bill makes wide provision for secondary legislation to deal with eligibility for legal assistance, at any stage of the criminal justice process, by reference to financial resources and provides little in the way of restrictions, save for

[8] Schedule 1, Part 1, paragraph 25.
[9] Clause 9(3)(b).
[10] Clause 9(4).
[11] Clause 10(1)(a) read together with Clause 20(2).
[12] Clause 10(3)(f).
[13] Clause 10(5).
[14] Clause 12.

a requirement to *'have regard'* to the interests of justice.[15] Regulations *may* provide for a procedure for appealing decisions on eligibility for criminal legal aid.[16]

Part 2 – Litigation funding and costs

11. Part 2 of the Bill deals with areas of litigation funding outside of legal aid. It makes provision for maximum limits to be placed on success fees charged by representatives funded under conditional fee agreements (CFA) and provides that a loosing party can never be liable in costs for the success fee of his opponent's representative.[17] The Bill further significantly restricts the extent to which a loosing party can be held liable in costs for the insurance premiums of a successful party who insured himself against liability arising through legal proceedings; the exception to this rule is for claimants who insure themselves against liability for the cost of expert evidence in clinical negligence cases.[18] The Bill would make damages based agreements (DBA), where lawyers' fees are contingent on success and are paid from the damages of a successful client, enforceable in all areas of civil litigation.[19]

12. The Bill addresses the funding of divorce and related proceedings including the dissolution of a civil partnership.[20] Provision is made for interim payments to be made by one party in proceedings to another to cover some or all of the legal costs incurred. Such payments are only to be available to impecunious parties who would otherwise have no way of raising the funds to pay for legal services, including obtaining a loan. Courts will be required to consider the financial position of both parties and the interests at stake in proceedings when deciding whether to order a payment.[21]

13. The Bill also increases the costs liabilities for defendants where they fail to accept an offer of settlement made by a claimant and subsequently, the award made by a court equals or exceeds the sum offered in settlement.[22] Costs liability for failing

[15] Clause 14(3). Includes everything from early advice to representation before the court. The Lord Chancellor has the power, by secondary legislation, to vary the list of factors to be taken into account when accessing the interests of justice (Clause 16(3)).
[16] Clause 14(9).
[17] Clause 43.
[18] Clause 45(1). Subject to limits imposed by the Lord Chancellor in secondary legislation
[19] Clause 44.
[20] Clauses 47-51.
[21] There is provision for the Lord Chancellor, by regulations, to make further provisions.
[22] Clause 53.

to accept a reasonable offer is also to be extended to non-monetary cases, with the value of non-monetary benefits to be taken into consideration.

14. Amendments made to the Bill during Report Stage in the House of Commons introduced a rule banning the controversial referral fee system in personal injury cases.[23] The new rules will prevent the payment of sums to intermediaries by service providers in exchange for referring on potential clients. Service providers would also be prohibited from receiving sums where they refer business on to another provider. Clause 54(5) of the Bill currently confines the ban to personal injury cases, but there is provision for the Lord Chancellor to extend the provision into new areas of law by means of secondary legislation.[24] Clause 55(1) places a statutory duty on regulators such as the Bar Council and the Law Society to ensure appropriate arrangements are put in place for the monitoring and enforcement of restrictions imposed under clause 54, however a breach of the rules on referral fees will not lead to criminal prosecution.

15. The Bill imposes restrictions on cost orders made to defendants who are acquitted in criminal proceedings limiting, in particular, the extent to which lawyers costs can be accounted for in costs awarded to a defendant.[25]

Briefing on Parts 1 and 2

16. Liberty believes that reforms to the provision of legal services set out in the Bill are based on specific misunderstandings about the operation of service provision in practice and a more general undervaluation of the role it plays in our society. By excluding large areas of law from scope, the Bill fails to allow for the complexities of real life legal problems, which frequently arise in interconnected clusters. The Bill further fails to build adequate protections into the legal aid system to deal with particularly compelling or complex cases, or cases where legitimate disputes arise out of sudden and substantial shifts in Government policy. The substantive provisions of the Bill are supplemented by a raft of measures giving the Lord Chancellor wide powers, to make further changes to the legal aid system without even the protection of proper Parliamentary scrutiny. Liberty is particularly concerned by clause 8(2)

[23] Clauses 54 – 57. The prohibited activity is defined as providing information to another, where the information is necessary to facilitate the provision of legal services to a client and the information is provided by somebody other than the client
[24] Clause 54(4)(b)
[25] Clause 59 read together with Schedule 7

which would allow the Lord Chancellor, by order, to *'omit services'*, from the few areas where provision continues to be made under the Bill.

17. The Government accepts that the scheme set out in the Bill would lead to an increase in the number of litigants in person, but fails to acknowledge the human and financial costs of this shift.[26] The Government's intention to deliver legal services through a single telephone gateway and to further provide some casework by telephone and potentially by electronic means, reveals an insensitivity to the difficulties this will present to many of those attempting to access the system and particularly those with complex or distressing legal problems.[27] Liberty welcomes the Government's confirmation, during Report stage in the House of Commons, of a £20 million fund for advice charities and its indication that the Cabinet Office will review of the operation of advice centres. To the extent, however, that this commitment represents an expectation that gaps in advice provision can be filled by the voluntary sector, even with limited additional funding, the Government continues to demonstrate a lack of foresight about the impact of legal aid cuts on third sector advice providers, particularly when combined with cuts to local authority funding schemes. If the cuts go ahead as planned, many organisations will close or be forced to significantly downsize. The huge resource of expertise we currently rely on to provide legal assistance to some of the most vulnerable people in our communities will be lost.

18. The idea that restricting access to legal assistance will force people to resolve their problems by other, non-adversarial means, reveals serious misunderstandings about the role played by legal assistance in dispute resolution. In addition to the importance of sound advice in avoiding the unnecessary escalation of problems, it is frequently the prospect of legal intervention which produces compromises. If one party has no means of accessing the courts, what impetus is there for a spouse to make concessions, an inefficient government agency to improve its practices, or a large company at fault to accept a reasonable settlement? Access to legal services is a great equaliser, enfranchising the voiceless and ensuring that nobody in our country is above the law.

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[26] Reform of the Legal Aid System in England and Wales: Government Response: pg. 40. Accessed at http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf.

[27] The Government's ongoing intention to provide services through a single gateway in debt (insofar as it remains in scope); special educational needs, discrimination cases under the Equality Act 2010 and community care are set out in its consultation response at pg 42-43.

An uncertain future for criminal legal aid

19. The Bill contains very little in the way of concrete proposals for reform to the system of funding in criminal legal aid cases. The most worrying aspect of clauses 12-19 of the Bill is the freedom they give to the Lord Chancellor to introduce means testing into new areas of criminal law. Liberty is particularly concerned about proposals which could see means testing carried out before individuals in police custody are granted access to legal advice. We further have concerns about the potential for wider changes to the way advice is provided, for example increased reliance on telephone advice services. Notwithstanding these concerns, this briefing will focus on more substantive proposals to cut advice provision to those seeking legal assistance in areas falling outside of the criminal law.

Weakening rights protections

20. We cannot foster a meaningful human rights culture in the UK without accessible justice. Access to legal services to uphold rights does more than simply vindicate the individual in the particular circumstances of his or her case. Successful challenges set precedents, raise awareness and help to place human rights considerations at the heart of public sector decision making.

Exclusions from scope

21. The Bill provides for the ongoing availability of legal aid for those challenging the decisions of public authorities in judicial review claims, including claims based on fundamental freedoms. Whilst this is a welcome concession, judicial review will not always be available to claimants challenging administrative decisions: there will, for example, be cases in which the prescribed form of redress is an appeal before a court or tribunal for which no publically funded legal assistance will be available. As a legal remedy of last resort, even where judicial review is the appropriate legal avenue for challenging the decision of a public body, such action will ordinarily only become possible after initial legal interventions.[28] As such the removal of areas such as debt, family, employment and welfare law will effectively reduce access to public law remedies for those unable to pay.

[28] Such as the drafting of further submissions mitigating against removal in an immigration case or exhausting internal complaints procedures.

22. The Bill further includes within scope claims in tort (excluding negligence) or claims for damages brought against public authorities under the Human Rights Act. Whilst this might appear, at first glance, to be an important concession, many human rights cases do not involve tort law or a claim for damages. A large number of cases involving human rights are about ending illegitimate practices, forcing public authorities to do their duty and reversing unfair decisions; it is precisely this type of case which will be excluded from scope. Many individuals, and particularly those ill-equipped to navigate the court system, will be separated from family members abroad or lose access to their children as a result of these reforms. Even where cases reach the highest courts in the land, if they concern an 'excluded' area of law legal aid will not be routinely available, leaving all but the wealthiest litigants to present extremely complex legal arguments before the Court of Appeal and the Supreme Court.

Reforms to the exceptional funding regime

23. In excluding so many areas of law from the scope of legal aid, the Bill throws into sharp focus the need for a robust mechanism for providing exceptional funding on an individual basis. Clause 9 provides that the new Director can bring excluded cases back into scope where he is *'satisfied'* that a failure to make legal services available *'would be a breach of the individual's Convention rights (within the meaning of the Human Rights Act 1998)… or that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that a failure to do so would be such a breach'*.[29] This carefully worded provision limits exceptional funding to cases where it is the decision not to fund which would lead to a violation of human rights.[30]

24. The due process aspects of the right to a fair trial provide hugely important protection, but they do not extend to, for example, immigration cases and of course will have no impact on the range of early advice and assistance provided to people in

[29] Clause 9(3).
[30] The Government's intention to confine this exception to those fundamental rights with have a procedural element going to due process is set out in the explanatory memorandum: *It will be necessary to provide legal aid to an individual under Clause 9(3)(a) where the withholding of services would clearly amount to a breach of Article 6 of the ECHR ('right to a fair trial'), Article 2 of the ECHR ('right to life') or any other provision of the Convention giving rise to an obligation to provide such services*. The Government's consultation comments *'our new exceptional funding scheme will mean that no one will be deprived of their fundamental rights to access to justice.'* – Government's consultation response; pg 157.

many areas of law, undertaken with the aim of resolving matters before they reach the court doors.[31] It is at best uncertain that the exceptional funding regime will be of assistance to those seeking initial advice on for example, welfare benefits, debt or employment issues; this would appear to be the case whether or not an individual's case raises human rights issues.

25. We are further concerned about the mechanism by which cases are brought back within scope. The formal due process requirements of Articles 2, 3 and 6 are just as much a part of the rights regime as the substantive freedoms they help to safeguard. Liberty believes that disputes about the requirements of the Convention in a particular case should be determined by the judiciary, not a Government appointed civil servant.

Eligibility requirements

26. Liberty recognises the importance of maintaining a system in which not just the poorest of the poor, but also those on low or average incomes are not effectively discouraged from vindicating their rights by the considerable costs involved. Provisions relating to eligibility in the Bill are largely skeletal, but clause 20 provides for the Lord Chancellor to make regulations setting eligibility thresholds. At present the only indication of the level and nature of reviewed eligibility requirements is set out in the Government's response to the consultation on reform to the legal aid system. The Government intends to continue with plans to increase the level of income based contributions to a maximum of 30% of monthly disposable income. Financial eligibility levels have not, for several years, kept pace with inflation and these new proposals will place even more people with low disposable incomes in the unenviable position of choosing between financial hardship and a lack of advice and assistance in upholding their fundamental rights. Liberty believes this will have a chilling effect significantly undermining the effective protection of human rights in our country.

Private civil litigation funding

27. The Bill introduces a new consideration into the assessment of eligibility; namely the availability of other sources of funding. Little detail is provided as how this

[31] The right to a fair trial under Article 6 of the European Convention on Human Rights.

assessment will be carried out in practice, however, a key Government justification for the cuts to legal service provision is the availability of alternative funding arrangements such as conditional fee agreements, which allow solicitors to accept the risk of loosing, with fees made contingent on a successful outcome. Whilst conditional fee agreements are of no assistance to people seeking advice in many of the areas of law excluded from the scope of legal aid, (such as social welfare, immigration and debt, where there is little prospect of damages) and a significant proportion of legal aid spend is on non-litigious legal help, they are hugely valuable in other areas of the law, including many cases which would not attract legal aid funding under the current regime.

28. In the areas where CFAs prove an indispensable resource, clause 41 of the Bill will seriously limit their practical availability. At present, solicitors offset the risk taken in individual cases, by charging an uplift on their fees in case of success. This means that lawyers are willing to take on borderline cases, or difficult and time-consuming briefs, as overall they will be able to cover their costs. Any attempt to capitalize on the role of CFAs in civil litigation is contingent upon a recognition that a business will not operate at a loss simply in order to perform a useful social function. If the Bill is enacted in its current form, representatives will no longer be able to recover a success fee from a party found to be at fault. To the extent that success fees are recoverable, they will only be recoverable from the client. The Bill also provides that success fees must be capped at a percentage of damages; this percentage can be set by the Lord Chancellor in secondary legislation.[32] As with other areas of the Bill, reforms are blunt and broad, with no exception made for cases involving, for example, serious human rights violations.

29. Firms such as Leigh Day, who have taken numerous claims against massive conglomerates on behalf of ordinary people suffering the health consequences of corporate misconduct have said that they will no longer be able to continue with work of this sort under new proposals for civil litigation funding. Amongst their clients are the 30,000 Ivorians injured by the dumping of toxic waste by Trafigura and South African minors who suffered asbestos poisoning whilst mining for Anglo-American. Pursuing litigation like this is hugely expensive and can take whole teams of lawyers years to complete. Leigh Day have confirmed that the changes proposed in the Bill

[32] Clause 43(2).

threaten to make litigation of this kind impossible:

> *In particular, the abolition of 'success fees' payable by defendants, will mean that claimant firms like Leigh Day will simply not be able to run the risk of taking on these type of cases in the future…..*[33]

30. To the extent that CFAs remain a viable prospect, representatives will be disinclined to take on anything other than the most winnable cases, and important test-case litigation, which is inherently uncertain, will represent a prohibitive risk. Liberty strongly urges the Government to rethink these proposals which would effectively grant impunity against corporate misconduct.

31. Clauses 45 and 46 of the Bill will prevent individuals from recovering, from a loosing party, insurance premiums paid by those who have sought to shield themselves from costs of litigation. This is another in a barrage of measures which will prove a disincentive to ordinary people seeking to vindicate their rights, making justice the preserve of the super-rich. Whilst some concession is made to individuals seeking to ensure themselves against the costs involved in seeking expert evidence in clinical negligence cases, this provision is strictly limited and specifically prevents successful claimants from recovering insurance premiums relating to costs outside of disbursements for expert reports.

Inequality of arms

32. Legal aid is an essential safeguard against inequality of arms, both in cases brought between private parties and in situations where a claimant faces an arm of the state with all the resources it can bring in its defence. Although some claims against public authorities are to remain within scope, for example abuses of position, Liberty is concerned about proposals to narrow the circumstances in which legal aid funding can be secured for such actions. At present, in order to qualify for public funding, such claims must either involve (i) serious wrong-doing, (ii) abuse of a position of power, (iii) a significant breach of human rights, or (iv) they must be of significant wider public interest.[34] Under the Bill funding will only be available for

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[33] Martin Day, Partner in Leigh Day, taken from Press Release accessible at: http://www.leighday.co.uk/news/news-archive-2011/moj-bill-will-put-corporate-wrongdoers-beyond-the.

[34] *Proposals for the Reform of Legal Aid*; paragraph 4.44.

cases of deliberate and dishonest abuse resulting in foreseeable harm to person or property: no provision is made for cases falling within this category if, for example, they relate to welfare benefits law or clinical negligence. If the Bill is passed in its current form many will have no choice but to face a public authority and their legal team as a litigant-in-person. In addition to the tangible inequalities these proposals are likely to create in individual cases, there is a real risk that these restrictions will create a sense of impunity amongst decision makers, particularly when dealing with categories of people unlikely to have the financial resources to fund private representation.

33. Inequality of arms also frequently arises in cases between private parties, for example in divorce proceedings. Liberty acknowledges that the Bill makes some provision for impecunious spouses facing wealthy partners in the Court room and we welcome proposals which would allow an interim costs award to be made against a former partner who has the means to pay[35] where the other party would be unable to fund legal representation privately. However, this provision is narrowly drafted, and if a party to proceedings has any other means of funding representation, even the prospect of taking out a loan, an individual will be unable to avail himself of this benefit. Further as the process of seeking an interim costs award is complex and legalistic, it is likely that many seeking to access this remedy will struggle without access to advice and assistance.

Litigants-in-person

34. As the Government acknowledges in its literature review, the weight of the evidence demonstrates that litigants in person face a wide range of problems including understanding evidential requirements, difficulties with forms, problems identifying which facts are relevant to their case and even understanding the nature of proceedings. The evidence also supports the contention that litigants in person are frequently overwhelmed by the procedural and oral demands of the courtroom, and have difficulty explaining the details of their cases.[36] The Government's literature review also acknowledges the views of court staff, the judiciary and other parties' representatives, who have reported that they are effectively forced to compensate for

[35] Clauses 45-50. Costs would then be offset against eventual liability.
[36] http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/litigants-in-person-literature-review.pdf - pg 5.

the difficulties experienced by litigants-in-person. In addition to producing extra work, this also presents them with ethical challenges.[37]

35. The Government's only answer to these conspicuous difficulties is to point to the availability of assistance such as guides to court procedure, assistance from court staff and online help.[38] Liberty maintains that these alternatives are wholly inadequate. There will be many for whom an adverse decision will seem unfair, but very many fewer who will recognise that they may seek legal redress to uphold their entitlements; fewer still will be adequately aware of the processes for challenge and have the confidence to put forward arguments against formidable opponents in formal court proceedings. In this respect the Government is right to suggest that a reliance on self-representation will significantly reduce the expenditure of the Ministry of Justice, but this will be at the expense of access to justice for those ill-equipped to navigate the justice system alone. For those individuals who make it as far as the Court door without assistance, their cases are likely to last longer and consume more of the time of court staff and the judiciary, creating major and lasting financial burdens in other areas of the MOJ budget.

Means of advice provision

36. The Bill provides for the Lord Chancellor, to discharge his duty to provide services for those who are eligible in accordance with primary and secondary legislation, by any means he chooses, including explicit provision for services to be provided by telephone or electronic means.[39] The Government's response to the consultation exercise carried out earlier this year confirms its intention to press ahead with plans for a mandatory single telephone gateway to be used, with a few narrow exceptions, by those seeking to access the legal aid system in four key areas.[40] In addition the Government envisages the provision of at least some ongoing casework through a 'specialist advice service', including complex cases and cases involving extensive documentation.[41]

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[37] http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/litigants-in-person-literature-review.pdf, pg 5.
[38] Government's Consultation Response, pg 158.
[39] Clause 26(2).
[40] Government's consultation response, pg 166. Areas in which the new single telephone gateway will be rolled out are debt, insofar as it falls within scope, special educational needs, discrimination cases under the Equality Act 2010 and community care (pg 42-43).
[41] Government's consultation response, pg 175.

37. Whilst there is still little detail about how this system would work in practice, Liberty has serious ongoing concerns about the proposals. No information is given about the level of training or qualifications to be expected of those channeling requests for legal advice and assistance. Advisors with an incomplete understanding of the legal issues involved may well misdirect inquiries, which could compromise the interests of individuals who must bring claims within set limitation periods. Legal issues are often complex and an individual's concerns frequently span areas of law and require a combination of specialisms. There is real risk that telephone operatives will artificially demarcate areas of law and the specific needs of the individual will not be met. Liberty believes that face to face contact with clients is a critical component of good quality legal advice, facilitating a comprehensive understanding of issues and helping to build a relationship of trust and confidence.

38. Liberty is also concerned about the removal of choice from clients seeking legal representation. Under clause 26 of the Bill, the Lord Chancellor would be empowered to remove the individual's ability to choose her legal representative. Liberty believes it is fundamentally important that individuals have the freedom to choose a representative in whom they have confidence because, for example, he or she has built up a strong reputation through the provision of good quality representation and advice.

Remuneration of legal aid professionals

39. The Government maintains the view that sweeping cuts to civil, family and criminal fees will be sustainable and *'there will be a sufficient supply of providers of sufficient quality to provide an appropriate level of service'.*[42] Under the Bill the Lord Chancellor has the power to make provision for the payment of service providers by secondary legislation. Liberty is concerned that significant cuts in the fees paid to practitioners will create a climate in which legal aid work becomes the domain of inexperienced legal professionals, irrespective of the complexity of the issues involved or the importance of the interests at stake. A consistently good standard of representation, whether publically or privately funded, cannot be assured if junior lawyers are expected to do complex work beyond their experience and without adequate levels of supervision. Liberty believes that the continuing drive to achieve more for less is placing unsustainable pressure on legal aid professionals which will

[42] Government's consultation response, pg 203.

have the inevitable consequence of driving down the quality of legal representation. We further risk a rise in 'conveyer-belt' litigation, with solicitors only willing to take on a core of similar cases requiring less case specific research or initiative; as a result individuals whose cases are complex or unusual, and particularly those whose cases span different areas of law will find it increasingly difficult to obtain representation.

40. In addition to compromising the standard of advice provided and the caliber of professionals working in the legal aid system, the cuts are likely to significantly restrict the local availability of services effectively creating 'advice deserts'. Clients will have to travel further and wait longer to access the advice and representation they need and the choice of providers available will be curtailed. In rural areas there may be insufficient work to support more than one large firm which could lead to serious conflict issues. If a larger firm goes out of business there could be serious disruption to the level of supply in a given area, which could not easily be replaced. Liberty believes that clients' needs can only be effectively met and potential interruptions in supply limited if there exists a spread of large and small firms, specialist and generalist, in varied areas of the law and all areas of the country.

Failing the vulnerable and the marginalised

41. The Government has itself warned of the wider social cost of the proposed cuts including reduced social cohesion and increased criminality. [43] The impact assessment which accompanied the Green Paper published in March this year noted that legal aid recipients *'are amongst the most disadvantaged in society, reflecting both the nature of the problems they face as well as the eligibility rules for legal aid'*. [44] 44% of the cases granted funding for legal representation and 68% for legal help in 2008-2009 would not be funded under the new regime: between 80 and 85% of the people who will now miss out will be in the poorest 20% of the population.[45] Liberty recognises that difficult decisions need to be made in times of financial hardship, but is alarmed to see that the poorest and the most vulnerable will be expected to bear the brunt of this assault on access to justice.

Increasing social exclusion

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[43] *Legal Aid Reform: Scope Changes*: paragraph 35, pages 9-10: http://www.justice.gov.uk/consultations/docs/eia-scope.pdf.
[44] *Legal Aid Reform: Scope Changes*: paragraph 40 page 11: http://www.justice.gov.uk/consultations/docs/eia-scope.pdf.
[45] *Ibid.* paragraph 43 page 11

42. The Welfare Reform Bill, currently making its way through the House of Lords, is going to radically overhaul the benefits system, including introducing a 'Universal Credit' to replace existing means-tested benefits and tax credits, replacing Disability Living Allowance with Personal Independence Payments, restricting housing benefit allowance and capping the amount of money that can be claimed.[46] Whilst any consideration of the substance of these proposals is beyond the scope of this briefing, what is clear is that there is to be a massive upheaval which will create uncertainty and confusion amongst claimants and those responsible for administering the system. Yet just at the time when people will need assistance to navigate new rules and procedures, the vast majority of welfare benefits cases are to be removed from scope. An amendment tabled by Yvonne Fovargue MP, Chair of the All-Party Group on Legal Aid, and considered at Report Stage in the Commons, proposed continuing support in welfare benefits cases, for those with *'complex interconnected needs'*.[47] Despite receiving considerable Opposition support and backing from some senior Liberal Democrats, the amendment was defeated. According to statistics produced by the Citizen's Advice Bureau, proposals to exclude most social welfare law issues from scope will result in over half a million fewer people getting help every year.[48]

43. The Government's proposals will mean that the most vulnerable in our society will become increasingly ostracised, unable to access the advice and support they need to resolve their welfare issues. Whilst the Ministry of Justice is committed to encouraging alternatives to litigation and is apparently of the view that many claims are unnecessary or susceptible to alternative resolution, such assertions are not born out by the evidence. According to the Citizen's Advice Bureau, 80% of social welfare legal aid cases dealt with by its staff record positive outcomes for clients: this suggests that there exists a significant problem with the standard of decision making and certainly does not indicate that frivolous or unnecessary legal interventions are taking place.[49] A significant proportion of those embroiled in disputes over welfare entitlements may have poor levels of education and low standards of literacy: without outside assistance, their prospects of resolving valid complaints would be negligible.

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[46] Welfare Reform Bill: http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0075/lbill_2010-20120075_en_1.htm.
[47] Amendment NC17 on the House of Commons Order Paper dated 27th October 2011.
[48] http://www.citizensadvice.org.uk/press_20110111.
[49] Citizens' Advice Bureau, Evidence, Winter 2010, page 8: www.citizensadvice.org.uk/evidence_winter2010_2_.pdf.

Furthermore, public funding does not simply fuel litigation. Cuts in this area of law will have a far greater impact on access to legal help than access to representation in court: legal help at an early stage has a significant part to play in resolving issues before they reach the court steps.

44. In removing legal aid funding for advice about debt matters where the home is not immediately at risk, the proposals again hit out at the vulnerable. This proposal must be seen in the context of the wider cuts to the provision of advice services. The pending abolition of the Financial Inclusion Fund combined with significantly reduced local authority budgets means that agencies providing free advice about personal financial management will be forced to scale down their operations or close, with the Citizen's Advice Bureau estimating that cuts will lead to their capacity for debt casework being reduced by 75%.[50] This is in a context where, according to statistics published by Credit Action at the end of last year, the Citizen's Advice Bureau dealt with 9,389 new debt problems every working day.[51] The removal of legal help in relation to employment matters entirely from scope is likely to exacerbate these problems, leaving many who are unfairly dismissed unable to challenge decisions.

45. Liberty is relieved that the Government recognizes the life-shattering implications of homelessness and has therefore retained public funding for cases where the home is at immediate risk and some housing disrepair cases involving serious harm to health and safety. What is disappointing, however, is that the link between debt, welfare and employment matters and eventual homelessness is not acknowledged in the Bill. That the exclusion of legal aid in these areas is taking place at a time when many face unemployment and financial hardship, means that the effects will be widely felt.

Targeting the vulnerable

46. In retaining legal aid funding for areas such as community care and mental health law, the Government is acknowledging the vulnerability of those who are likely to need access to these legal services. Whilst these concessions are welcome, the Bill fails to apply the same reasoning in contexts where comparable issues of extreme vulnerability arise. To justify its decision to remove the majority of

[50] http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_20101111b.
[51] Debt Facts and Figures - Compiled January 2011, page 2: http://www.creditaction.org.uk/assets/PDF/statistics/2011/january-2011.pdf.

immigration cases from scope, the Government characterised them as *matters of choice* which should not attract public funds in straightened economic times. The Government is entirely right to keep asylum, claims for indefinite leave to remain for victims of domestic violence and cases involving the provision of support for destitute asylum seekers within scope. However the proposed immigration cuts will have a direct and profound impact on those seeking and those granted international protection in the UK, including many who have been traumatized by exposure to persecutory ill-treatment in their country of origin. The desire of a refugee and his family to be reunited in the UK cannot be written off as a mere matter of personal preference. This notwithstanding, if the Bill is passed in its current form, refugee family reunion matters will be excluded from the scope of legal aid. Those trafficked into the UK to work in the sex industry or as domestic slaves are forced into degrading and exploitative situations, yet they will also no longer be able entitled to legal aid in order to resolve their immigration status.

47. The Government contends that there are organisations which can assist these vulnerable groups, but without the availability of legal aid professionals to carry some of the load, not-for-profit organisations with limited resources will be overwhelmed by desperate people.[52] It is similarly fanciful to suggest that refugees, asylum seekers and victims of trafficking will be able to complete applications alone and represent themselves at tribunal hearings. Most such individuals arrive in the UK friendless and without a knowledge of the language, many have little formal education and are entirely unequipped to navigate a complex, legalistic and bureaucratic system.

48. In addition to vulnerable categories of immigrants, victims of crime will be directly hit by the Ministry of Justice's proposals. Those who may have been left severely physically injured or psychologically scarred by criminal attacks, will no longer have the benefit of legal help when making applications to the Criminal Injuries Compensation Authority. One of the rationales for this exclusion is that claims are of a primarily financial nature. The Bill, in its current form, fails to acknowledge the wider significance of claims for compensation for victims of crime. Compensation can help people to regain control of their lives and dispel feelings of victimisation; it can make a real practical difference to the recovery and quality of life of individuals who may be rendered temporarily or permanently unable to work.

[52] See Refugee Council Briefing: *The Impact of the spending cuts on refugee community organisations*, October 2010.

Whilst the Government maintains that these individuals will be able to act without assistance, Liberty understands that the process can be lengthy and complex raising technical issues such as time bars on recovery and the quantification of future losses. No provision whatever is made for those with physical and mental health problems which will effectively prevent them from applying without assistance.

49. In more general terms, those with disabilities will be disproportionately affected by the removal of welfare benefits from scope, representing, as they do, 63% of legally aided clients in the welfare system.[53] Liberty welcomes concessions which will see welfare benefits cases raising issues under the Equality Act bought within scope, but many welfare difficulties faced by disabled people will have nothing to do with discrimination, but will rather be problems relating to factual disputes or administrative errors. Liberty understands that, in the current fiscal climate, difficult choices have to be made, but the reality of our economic situation is no answer to the injustice of measures which target those who have an overwhelming need for legal support and are least able to bear the impact of the cuts.

Cutting the cost of justice

50. Liberty believes that the financial objectives pursued by the Government will not be well served by the scheme set out in the Bill. Proposed changes to civil litigation funding, relied on by the Government as an alternative to legal aid, will not provide a realistic alternative in the vast majority of cases and will be of no assistance to those seeking early advice in debt or welfare benefits cases. In those situations where conditional fee arrangements could provide a realistic alternative, proposals set out at clause 41 of the Bill will provide a disincentive to solicitors considering taking legal action on behalf of impecunious claimants. Liberty believes that there are avenues open to the Government which will avoid these pitfalls whilst significantly reducing public expenditure.

False economies

51. The Government's case for the financial eligibility of reforms to the legal aid system is based on flawed assumptions. As a starting point, the Ministry of Justice claims that the legal aid system in this country is far more expensive than those

[53] *Legal Aid Reform: Scope Changes*, paragraph 7.32: http://www.justice.gov.uk/consultations/docs/eia-scope.pdf.

across the EU. Liberty believes that this is an oversimplification and does not account for the increased litigation costs involved in an adversarial system of justice. Further, whilst litigation costs in England and Wales are higher than in other European countries, our spending on sustaining and managing the Court system is comparably lower than that in other EU jurisdictions. These assertions are born out by research commissioned by the Ministry of Justice and render the claim that our system of legal aid is significantly more expensive than those operating in comparable democracies somewhat misleading.[54] In this context it is easy to see the folly of creating a system in which many more people will be forced to represent themselves, thus consuming more of the Court's resources and shifting costs to another area of the MOJ's budget.

52. Many of the cost-cutting claims made by the Ministry of Justice are inadequately reasoned and pay little regard to the wider savings that an effective system of early legal help can provide. Findings by the Citizens Advice Bureau indicate that for every £1 spent on legal aid, £10 will be saved in costs to the welfare system.[55] Without early interventions manageable problems can become expensive and complex to resolve. In the context of social welfare law or debt advice, for example, what begins as a small issue which could have been resolved with the early assistance of a lawyer can become extremely costly further down the line. The court time, resources and legal fees involved in a possession hearing far outstrip the small sum necessary to secure legal help from a debt caseworker. Further expenditure may include the significant cost of re-housing a homeless family in bed and breakfast accommodation. A risk of possible resort to crime for those finding themselves in financial crisis will contribute to a great social ill and will frequently mean that the state must incur all the costs involved in bringing a defendant to trial, not to mention the wider financial and social implications.

53. Liberty believes that limiting legal advice in the manner proposed in the Bill will cost this country more in the long term. In addition to ensuring that costly litigation is a measure of last resort, legal aid helps to ensure that public services operate effectively and that errors are corrected. Without the checks currently provided by

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[54] *International Comparison of Publically Funded Legal Services and Justice Systems*, October 2009, summary of findings, page (ii): http://www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf.

[55] http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_20101112.

legal interventions, public services will not be called to account and standards may well diminish, resulting in poorer services and greater expenditure in the long term.

Inadequate alternatives

54. In addition to forcing representatives and claimants to bear greater risks in litigation, the Government has pointed to the voluntary sector and pro bono legal representation as means of plugging the gaping hole in legal protection for those who cannot afford to pay. Liberty believes that neither source can offer anything approaching the scale of advice and support provided by the legal aid system. Whilst we recognise the valuable contribution made by pro-bono lawyers, professionals cannot be expected to work for free on a large scale to ensure that individuals receive the legal protection they so often desperately need. The legal help and representation provided by the not-for-profit sector is frequently funded by legal aid. Without this resource, and with cuts to local authority budgets, there is likely to be a significant impact on services provided by organisations such as the Citizen's Advice Bureau. Alarmingly, the Under-Secretary of State for Justice has been reported as saying that he believes that pro bono work is *'a good filler'* for unemployed lawyers, or women attempting to re-enter the job market after time spent raising a family.[56] The interests currently defended by legal aid lawyers are amongst the most important and fundamental; it is critical that such support is provided by motivated and paid professionals committed to achieving just results for vulnerable clients. The Government should certainly not be attempting to rely on the labour that can be supplied by lawyers unlucky enough to find themselves out of work. Similarly it should not be seeking to take advantage of the notorious difficulties facing women seeking to re-enter the labour market following maternity leave.

Cutting public expenditure without compromising justice

55. The Government's proposals perpetuate the myth that the legal aid budget has reached its current size as a result of unnecessary litigation instigated by unscrupulous lawyers. In the Green Paper which preceded this Bill, the Government pointed to a culture in which individuals resort to legal remedies unnecessarily and before exploring less expensive and less combative ways of resolving their issues.

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[56] As reported by Afua Hirsch in *The Guardian* 13 October 2010 http://www.guardian.co.uk/commentisfree/2010/oct/13/legal-aid-justice-lawyers-vulnerable.

Liberty does not recognise either of these trends. The implication that there exists wide-spread profiteering amongst legal aid professionals is an insult to those who work tirelessly, for extremely modest recompense, to support those who cannot afford to pay for legal help. Similarly for the vast majority of individuals embroiled in litigation, participation in court proceedings provokes great anxiety and is a significant disruption to their lives. For them, as with many people, litigation is very much a last resort reached after protracted attempts to resolve their dispute by means including both formal and informal complaints.

56. Liberty believes that the most effective and just way of curtailing legal aid expenditure is to encourage a better quality of decision making by public bodies. The Citizens Advice Bureau records that 80% of the welfare benefits cases taken on by staff record positive outcomes for clients.[57] Research by Advice UK in Nottingham reveals that 42% of the demand at advice agencies in the city is attributable to failures in the system of public administration[58] and the Community Links advice service records that throughout 2010, 73% of the benefits related cases handled by their staff arose as a result of errors on the part of the Department of Work and Pensions.[59] The impact of this type of work on the public purse could be dramatically reduced by a better quality of administrative decision making.

57. In the same vein Liberty notes that the Law Society identifies a number of bodies which, through bad practice, are creating significant work for the legal aid system. Specific reference is made to public bodies who generate the need for legal assistance by a failure to comply with statutory duties, and in particular the CPS for bringing prosecutions doomed to failure in light of a paucity of evidence.[60] It is to be hoped that imposing cost orders on the wasteful activities of these bodies would encourage a better quality of decision making and in turn reduce the number of cases unreasonably pursued by public authorities and others. Liberty also supports calls for public authorities such as the UKBA, whose decisions are routinely overturned by the courts and tribunals, to be required to pay the cost of the claim to the legal aid fund. Whilst this might initially seem like a simple shifting of costs from one area of the public sector to another, Liberty believes that increased costs liability

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[57] Citizens' Advice Bureau, Evidence, Winter 2010, page 8: www.citizensadvice.org.uk/evidence_winter2010_2_.pdf.
[58] Advice UK, *Time well-spent: The importance of the one-to one relationship between advice workers and their clients*, page 3: http://www.adviceuk.org.uk/news-and-campaigns/sector-news/TimeWellSpent.
[59] http://www.community-links.org/linksuk/?tag=dwp.
[60] The Law Society, *Access to Justice Review: Final Report*, pages 20-21.

in this context will help to combat a culture of poor quality decision making and an overt willingness on the part of some Government agencies to make decisions liable to be overturned by the judiciary.

58. Successful long term savings to the MOJ's budget requires joined up thinking between Government departments. Over a decade of largely unfair and deliberately damaging political attacks on 'the gravy train of legal aid' have demoralized the system and tainted it in the eyes of the public. Governments of all colours inevitably under-value those tasked with holding them to account and as the most vulnerable people in society are inevitably highly dependent on government, law and lawyers are a vital counterweight in this unequal relationship. Liberty believes that the scheme for reform of legal aid and civil litigation funding set out in the Bill will lead to widespread social exclusion and unforeseen future costs which will place a much greater strain on the public purse. We urge the Government to think again.

Part 3 – Sentencing and punishment of offenders

A progressive approach to sentencing

59. Liberty shares the Government's expressed aim of reducing re-offending and facilitating rehabilitation, particularly by ensuring that sentencing measures aid rather than hinder reintegration into society. A number of proposals set out in Part 3 of the Bill acknowledge that prison is not always the solution, particularly in relation to petty offending, and provide judges with the flexibility to adapt sentences to the requirements of an individual case.

60. Clauses 62 - 63 provide for community orders to have a clearly specified end-date. Courts will further have more options when considering how to respond to a breach of a community order, including making no order or imposing a fine.[61] Liberty welcomes plans which would see wider use made of suspended sentences; the regime will be reformed to allow sentences of between 14 days and 2 years to be suspended, by contrast with current provisions which limit suspension to sentences of 12 months or less.[62] Courts will also be given a discretion as to whether or not to attach a community requirement to a suspended sentence and will be empowered to

[61] Clause 63(2).
[62] Clause 64.

impose a higher fine for breach of a suspended sentence order.[63] Provisions set out in Part 3 would further give Courts wider powers to include programme requirements in criminal sentences, for example requirements aimed at helping offenders to overcome drug and alcohol dependency problems.[64]

61. The Bill proposes welcome changes to the youth sentencing regime, giving judges additional powers to discharge young offenders conditionally, in addition to powers to give an absolute discharge or make a referral order.[65] Referral orders, which refer offenders to a youth offender panel who will meet with the young person and supervise rehabilitative activities, would be more widely available to judges under the provisions of the Bill, including in cases where there is a previous guilty plea or a referral order has already been made.[66] Courts are to have wider powers to sanction offenders for breach of Detention and Training Orders, including by imposing an additional period of supervision.[67] Clause 77 provides powers to extend the maximum duration of a youth rehabilitation order by 6 months and to impose an increased fine for breach of an order.

62. Chapter 4 of the Bill deals with release on license, including providing for unconditional release for individuals sentenced to 12 months or less and provides for prisoners serving over 4 years to be excluded from the scheme which provides for early release on home detention curfew.[68] Clauses 105-106 of the Bill would allow for an erroneous revocation of a license to be cancelled and would lift restrictions on automatic release after an individual has been recalled to prison for breach of a license. The Bill extends provision for the supervision of young adults released from a young offenders' institutes and provides for further supervision to be accompanied by electronic monitoring and drug testing.[69]

63. Liberty largely supports proposals set out at Chapter 1 of the Bill which will give Courts the flexibility to tailor sentences to the particular needs of the individual. We welcome, in particular, plans which would allow drug rehabilitation and alcohol treatment requirements to be used in a wider range of circumstances. Whilst

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[63] Clauses 64 and 65.
[64] Clause 66.
[65] Clause 73(1).
[66] Clause 73. In the later case, this can presently only happen with the recommendation of an appropriate officer – usually the local youth offending team.
[67] Clause 74(2).
[68] Clause 104.
[69] Clause 107.

offending behaviour must be addressed, Liberty believes that the Government's commitment to tackling the root causes of offending, such as drug and alcohol addiction and mental health issues, represents a progressive approach, likely to yield more favourable results in terms of reducing overall criminality than a system which relies heavily and inflexibly on custodial sentences. This notwithstanding, Liberty has concerns about the removal of some formal safeguards, we note in particular that the Bill removes the requirement that programmes be limited to a series of accredited options. Judges will also be able to impose programme requirements, without the approval of a programme officer, even where they place obligations on another individual who may not have provided express consent.[70] Further clause 69 allows judges to make a mental health treatment requirement without the need to obtain evidence from a medical practitioner. Liberty understands the objective underpinning this provision. From a practical perspective, mental health treatment requirements are an underused resource thanks, in no small part, to the difficulty of obtaining medical evidence from over-subscribed professionals within tight deadlines. We are concerned, however, that without medical opinion, these orders may be imposed inappropriately and place unhelpful burdens on the individual which fail to contribute towards effective rehabilitation.

Bail and remand

64. Chapter 2 of the Bill amends the bail regime to provide for exceptions to the presumption in favour of bail to be disapplied where there *is 'no real prospect of a custodial sentence'*.[71] However, a new exception to the presumption, which will not be subject to the *'no real prospect'* test, is proposed to deal with cases where, if released on bail, an individual is likely to engage in conduct amounting to domestic violence. [72] The Bill corrects an anomaly in the current remand system by bringing 17 year olds within provisions designed to deal with remand for children.[73]

65. Where children are not granted bail, the Bill provides that they must be remanded to local authority accommodation except where a series of conditions

[70] See clause 66(3) which would repeal the restrictions set out at s202(4)-(5) of the Criminal Justice Act 2003.
[71] Limited to adult defendants with no prior convictions and to non-extradition proceedings.
[72] For offences punishable with imprisonment – certain exceptions to the presumption in favour of bail do not apply. In relation to non-imprisonable offences some of exceptions to the presumption in favour of bail will only be applicable where a defendant is aged under 18 or has been convicted of the offence.
[73] Clause 84(6).

apply including where the alleged offence is sexual or violent in nature and only remand to a youth detention accommodation would be sufficient to protect the public from death or serious injury, or to prevent the young person from committing an imprisonable offence.[74] Under clauses 91-94 of the Bill, remand to youth detention accommodation would only be available in cases where it is rendered imperative by a combination of factors going to, amongst other things, the seriousness of the offence, the risk of absconding and any risk to public.

66. Liberty strongly supports measures which would remove the option of remand for many defendants unlikely to receive custodial sentences if convicted. The deprivation of liberty involved in imprisonment can lead to family breakdown, loss of employment and wider social stigmatisation. As a result, Liberty believes that prison should be reserved for those convicted of or awaiting trial for offences of a serious nature which are likely to justify the imposition of custody after proper consideration of the nature of the crime and any mitigating or aggravating factors. On this basis we welcome the Government's plans to introduce a new test which requires judges to recognise the presumption in favour of bail, even where certain exceptions apply, in cases where there in *'no real prospect that the person will be sentenced to a custodial sentence in the proceedings'.*[75]

67. We further welcome plans to create a single remand regime for all minors, recognising the unique position of children in the criminal justice system and addressing the injustice created by remand legislation which treats 17 year olds as adults. Liberty welcomes further welcomes plans to ensure that, where remand is appropriate in the case of minors, it is confined, wherever feasible, to remand in local authority custody as opposed to incarceration in youth detention accommodation.

Preventative Detention

68. Liberty strongly supports the Government's decision to abolish the discredited and counterproductive regime of indefinite detention for public protection (IPPs).[76] IPPs have proven to be a dishonest sentencing tool undermining public understanding of the sentencing regime and unnecessarily inflating prison numbers. The IPP regime effectively introduced life sentences via the backdoor for a huge

[74] Clause 84.
[75] Schedule 11, paragraph 5.
[76] Clause 113.

range of offence categories. Statistics produced by the Ministry of Justice reveal that at the end of March 2011 there were a total of 6,550 IPP prisoners – three quarters of whom had a tariff of less than four years, with almost a quarter attracting a tariff of less than two years. Over half of the current IPP prison population have passed their tariff date.

69. Through Liberty's experience of operating a public advice and information line, it has become apparent to us that the IPP scheme has been blighted by practical inefficiency, with many unable to access the courses which must be completed before a prisoner can be considered for release. Additionally, the indefinite legal limbo created by IPP sentences has worked to undermine rehabilitation, leaving prisoners and their families unable to prepare, psychologically or in practical terms, for release. Crucially, while these proposed reforms will deal with the problems identified above, they will not prevent lengthy custodial sentences being imposed on those convicted of serious criminality – in particular serious violent and sexual offences.

70. New clause114 provides that adults convicted of a second serious violent, sexual or terrorism related offence warranting a sentence of at least 10 years, will face a presumption that a life sentence should be imposed.[77] Provisions which unduly fetter judicial sentencing discretion are a cause for concern. The most appropriate authority to assess what penalty justice demands in the particular circumstances of a case is a judge seized of all the relevant facts. We note, however, that built into the new system is a provision which allows judges to impose a sentence reflecting the interests of justice and taking account of all relevant factors.

71. Clauses 115 and 116 would establish a new extended sentence regime for certain violent or sexual offences committed by adults. On conviction for a specified offence which warrants a custodial sentence of at least four years, individuals who have a prior conviction for one of a list of serious offences and who are deemed to represent an ongoing risk, will be required to serve two-thirds as opposed to the usual half of their custodial term and will further face an extended period on licence. This extra licence period may not exceed five years for a specified violent offence and eight years for a specified sexual offence and in any event the total sentence may not exceed the statutory maximum for the offence. Under the Government's

[77] Save where it would be unjust, in all the circumstances of the case, to impose a sentence of this gravity (Clause 114(1) and (2)).

proposals a sub-category of prisoners convicted of certain offences, or sentenced to a custodial term of more than 10 years will not be automatically released at the end of their custodial sentence, but will be referred to the parole board for an assessment of ongoing risk. Liberty has concerns about provisions which effectively reverse the presumption in favour of release on completion of a specified custodial term.[78] This notwithstanding, the regime represents a definite improvement on the IPP scheme as, save for life sentence prisoners, there will always be a finite limit on the period of time an individual can spend in custody.

72. Clause 117 makes provision for the Lord Chancellor to, by order, set a release test, or tests, that the Parole Board must apply when considering the release of prisoners serving indeterminate sentences under existing provisions, or prisoners serving extended sentences.

73. Notwithstanding these progressive measures we have ongoing concerns about other of the Government's sentencing proposals in particular plans to extend curfews and remove prosecutorial oversight of out-of-court disposals. Liberty is further concerned about some aspects of Chapter 8 and in particular the proposed offence of squatting in residential premises and presumptive sentences attaching to prescribed offending.

Wider use of curfews

74. The Bill proposes to extend the maximum period for curfews operating as part of a community sentence to 16 hours per day for a maximum of 12 months. Where a curfew is attached to a Youth Rehabilitation Order (YRO), the maximum limit will be extended in line with adult curfew requirements to a maximum of 16 hours per day for 12 months.[79] The current limit caps curfew at 12 hours per day for a 6 month duration.[80] In its Green Paper published in March this year, the Government envisaged the implementation of these new tougher measures in the place of custodial sentences. Whilst the deprivations of liberty involved in the imposition of a curfew will be far less than would be the case on receipt of a custodial sentence, Liberty is concerned that, once legislation is passed introducing new and extended powers to tag and curfew, there will be no way of ensuring that they are used as

[78] Clause 116(3) inserting new Clause 246A into the Criminal Justice Act 2003.
[79] Clause 75.
[80] Clause 67.

intended. In the past tougher community penalties have not always been used in practice as an alternative to custody, but rather as additional, harsh punishments which are available to courts in circumstances where a custodial sentence would not be appropriate. Curfews of the level and duration proposed will make it difficult for individuals to hold down regular work or perform other useful functions. This level of punishment in the community may also have a stigmatizing effect preventing successful reintegration which is such an important element of the rehabilitation process.

Magistrates' sentencing powers

75. On publication, what was originally clause 71 of the Bill repealed uncommenced provisions which provide for the extension of Magistrates' sentencing powers from 6 to 12 months. The Bill was amended during Committee Stage to remove this clause. The Minister for Prisons and Probation stated that the Government's case for removing clause 71 rested on the August riots which *"have rightly provoked further debate on this issue"*, he concluded *"we no longer think that it would be appropriate to repeal the existing power at this stage".*[81] Liberty regrets the Government's decision to remove old clause 71 from the Bill. Offending behaviour serious enough to warrant a sentence of 12 months imprisonment should properly be the preserve of the Crown Court – where an individual pleads not guilty, his guilt or otherwise should be determined by a jury of his peers. Liberty does not underestimate the gravity of the disorder which blighted our towns and cities during the August riots, however our Courts have shown themselves willing to impose lengthy custodial sentences in relation to large scale disorder. Indeed Magistrates Courts have been praised by the Government for their tough and efficient response to the riots. For more serious offending, defendants were quickly diverted to the Crown Court and lengthy custodial sentences were handed down in many cases.

76. Most commentary around the judicial response to the riots has highlighted the severity of the sentences imposed and indeed a number of sentences passed have been successfully appealed. Liberty does not believe that this Augusts' riots help to make the case for yet further increasing the sentencing powers of Magistrates' – in fact the response to the riots has demonstrated that appropriate custodial sentences

[81] Fifteenth Sitting of the Public Bill Committee, pg 674.

are already available in the Magistrates and the Crown Court and can be passed with relative speed in response to widespread offending.

77. New clauses 79 – 81 of the Bill, introduced during Report Stage in the House of Commons, extend Magistrates' powers to impose fines. New clause 79 provides that, where offences are punishable on summary conviction by fines of £5,000 or more, they will instead be punishable by a fine of any amount. The clause applies to fines prescribed by both primary and secondary legislation. The Lord Chancellor is further given wide powers, by way of secondary legislation, to create offences which are punishable on summary conviction by a fine with a limit of £5,000 or more, so that they are punishable by a fine of any amount. If passed in its current form, the Bill would allow the Secretary of State to disapply limits and to set alternative limits, subject to certain restrictions.

78. Clause 80 deals with fixed fines of less than £5,000. The Lord Chancellor is again given wide regulation-making powers to raise the level of fines for offences punishable by a fine on summary conviction. Regulations made under this clause may not increase the level of fines above whichever is the larger of the sum specified at level 4 on the standard scale, or a sum of £5,000. Provision under this section is restricted to adult offenders. Clause 81 provides for the Secretary of State to alter, by order, the sums specified at levels 1-4 of the standard scale.

79. Liberty has concerns about amendments made to the Bill during Report Stage which remove the £5,000 cap on fines issued by Magistrates and make provision for further changes to the sentencing regime by means of secondary legislation. We accept that fines are a useful part of the adult sentencing regime and further accepts that, in order to be a useful deterrent, sums must be sufficiently large as a proportion of an offender's assets or income. This notwithstanding, it is incumbent on Parliament to lay down proper sentencing guidelines to ensure consistency, fairness and proportionality in sentencing decision.

80. Liberty further has concerns about plans to increase fines to £2,500 for children breaching youth rehabilitation orders. This is a substantial increase from the current limits of £250 for offenders under 14 and £1000 for older children. The vast majority of minors and particularly those under 16 have no independent financial resources. Fines are therefore effectively a punishment for parents. Liberty believes

that increasing the financial hardship facing parents is unlikely to improve outcomes for struggling families and may, in any event, have little direct effect on the child.

Out of court disposals

81. Chapter 7 of the Bill is concerned with out of court disposals and would allow for chief officers of police to set up new schemes allowing officers to combine penalty notices for disorderly behaviour (PNBD) with education courses, paid for by the individual, which are designed to reduce the risk of reoffending. The Bill also removes limitations which currently restrict the issuing of penalty notices to authorised uniformed officers.[82] This section of the Bill also makes provision for the Secretary of State to issue guidance regarding education courses and regulations dealing with the revocation of PNBDs.[83]

82. Clauses 122 and 123 deal with cautions in adult cases, removing the requirement for prosecutorial authorisation before a conditional caution can be issued.[84] Where an offender is a foreign national and does not have leave to enter or remain in the UK, new conditions can be attached to a caution designed to facilitate departure from the UK or ensure that an individual does not return within a specified period of time.[85]

83. Clauses 124 -127 abolish the current system of out of court disposals for young people known as the 'final warning scheme', replacing it with a new youth caution. The circumstances in which the new cautions can be given broadly mirror provisions of the final warning scheme, but the new youth cautions will be available even if a young person has a previous conviction or has already been given a caution. Under the new scheme there will be no requirement that officers consult with the Crown Prosecution Service before a youth caution or a youth conditional caution is administered to determine whether there is enough evidence to charge. Other requirements incorporated into the final warning scheme still apply, for example the requirement that an adult must be in attendance. Where a young person is given a caution she must be referred to a youth offending team (YOT) as soon as practicable, and a rehabilitation scheme must be put in place where appropriate.

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[82] Clause 121 read together with Schedule 20.
[83] Schedule 20(4) inserting new subclause 2A (5) of the Criminal Justice and Police Act 2001.
[84] Clause 122.
[85] Clause 123.

84. Of all the proposals set out in Part 3 of the Bill, those sections providing for wider use of out-of-court disposal without even the protection of prosecutorial authorisation are the greatest cause for concern. Out-of-court disposals are presented as a softer alternative for low-level offending, but these measures are prone to use as a short-cut to punishment, and the Government's plans would see them implemented in large numbers of cases. On-the-spot police punishment without the involvement of the judiciary or even prosecutors undermines traditional due process standards. By-passing normal judicial and fair trial safeguards can leave individuals open to bias and irrationality in sentencing decisions. An out-of-court disposal, whilst undoubtedly sparing an individual the disruption of court proceedings, can have a significant and long-lasting impact on life chances. An individual who receives a conditional caution, for example, in addition to having to comply with a specified condition, will have a criminal record which may well affect his or her employment prospects. The consequences for the individual render it critical that sentencing remains firmly in the hands of the judiciary. Liberty is concerned that out-of-court disposals are part of a wider trend of legal short cuts; punitive measures dressed-up as "preventative" to escape the fair trial safeguards that civilised societies normally abide by before punishing their citizens.[86]

85. Liberty believes that the Government needs to urgently take stock of current use of out-of-court disposals. Since 2003, the total number of out-of-court disposals has increased significantly, by 135%.[87] In 2003, 241 000 alleged offences were dealt with out of court and in 2008, the figure was 567 000.[88] This means that the proportion of alleged offences dealt with outside court went from 23% in 2003 to just under 40% in 2008.[89] This represents a huge sea-change in the way that offences are dealt with. Instead of being brought before an open court for evidence to be presented and judgment reached, well over a third of offences are now dealt with entirely by the police who act as investigator, prosecutor, and judge. In the wake of the recent serious public disorder, the dangers inherent in this system have never

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[86] Other such measures include the Violent Offender Order or VOO to the ASBO and the Parenting Order.

[87] Exercising Discretion: The Gateway to Justice, June 2011, Criminal Justice Joint Inspection – A study by Her Majesty's Inspectorate of Constabulary and Her Majesty's Crown Prosecution Service Inspectorate on cations, penalty notices for disorder and restorative justice available at: http://www.hmic.gov.uk/SiteCollectionDocuments/Joint%20Inspections/CJI_20110609.pdf.

[88] Ibid.

[89] Ibid.

been so apparent. The importance of open justice and due process are thrown into sharp focus by the swell of public concern over the recent riots.

86. As each new disposal power has been added to the statute book, Liberty has consistently raised concerns about the way in which summary justice of this type can undermine justice standards, make individuals subject to arbitrary and inconsistent decision-making and damage public perceptions of the police and the justice system as a whole. We have warned, in particular, that the powers are likely to result in an inconsistent approach by different police officers and different forces, especially where complicated judgments are necessary in determining whether a fixed penalty notice, for example, is appropriate. Where ascertaining guilt is a simple black and white matter (i.e. did this person drop a cigarette butt?) the risks are perhaps minimal. By contrast, where a police officer has to determine whether to issue a penalty notice for disorder the judgments are far more open to differing interpretations given that the definition of relevant behaviour can be as vague as whether the person's behaviour is "likely to cause harassment, alarm or distress".[90]

87. Indeed, our concerns have been borne out in practice. According to a recent report on out-of-court disposals by the Her Majesty's Inspectorate of Constabulary (HMIC) and the Crown Prosecution Service (CPS) there are "*wide variations in practice across police force areas in the proportion and types of offences handled out of court".*[91] The method accounted for from 26 to 49% of offences 'brought to justice' in different police force areas and the report found that "*where greater use is evident, this is linked in some places to a strong emphasis on achieving targets associated with improving performance in the level of offences brought to justice. Target chasing has not been conducive to the effective exercise of discretion."* The report recommends, in view of the wide variations in practice and the consequences for alleged offenders and victims, that there ought to be a national strategy for out-of-court disposals to improve consistency. The report also recommends better record-keeping to enhance public confidence. Perhaps most worryingly, of the 190 cases of out-of-court disposals that the report considered that in "*one-third of the cases the disposal selected did not meet the standards set out in the existing national and force guidelines that were available."*

[90] Section 1, Criminal Justice and Police Act 2001.
[91] Ibid at Footnote 29.

88. We do not take issue with the principle that the police should be able to use their professional discretion to determine that despite suspicions or evidence, a prosecution against a suspected offender should not be sought. Indeed, as Sir Hartley Shawcross (then Attorney-General) said in 1951: "*It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution".*[92] However the current system of formalised out-of court disposals fails on two counts. First, as a result of understandable cost-saving and target-achieving desires, it appears that persistent alleged offenders and those suspected of serious offences are not being prosecuted when they should be. Indeed, the recent HMIC report notes that (contrary to national guidance) out-of court disposals are being used to deal with those who appear to be persistent offenders and for alleged offences whose nature or gravity mean that they should not be dealt with out of court. One example being that "*An offender with numerous convictions was issued with a simple caution for criminal damage caused during a repeat domestic abuse incident, where the matter had not been referred to CPS for charging advice".*

89. The fact that out-of court disposals can be formally recorded and retained and punishment handed out only increases the temptation for this disposal mechanism to be used. Secondly, the system allows for punishment and criminal records to be created and kept without fundamental principles of justice being adhered to. Instead, prosecutors and police are able to impose on-the-spot punishment without the involvement of the judiciary. By-passing normal judicial and fair trial safeguards can leave individuals open to bias and irrationality in sentencing decisions. An out-of-court disposal, whilst undoubtedly sparing an individual the disruption of court proceedings, can have a significant and long-lasting impact on life chances. An individual who receives a conditional caution, for example, in addition to having to comply with a specified condition, will have a criminal record which may well affect his or her employment prospects as it is disclosable through a CRB check. A caution can also restrict someone's ability to obtain a visa to travel abroad.

90. While Liberty appreciates the desire to remove delays in the criminal justice system, powers designed to achieve this should not be at the expense of justice. The move towards summary justice is not only of concern from the perspective of the rights of the suspect. Fair trial safeguards, and the involvement of the independent

[92] House of Commons Debates, Volume 483, 29 January 1951.

court in the delivery of punishment, are also in the wider public interest and the interests of victims of crime. The rigours of a criminal trial, in which the prosecution is required to establish guilt beyond reasonable doubt and the defendant has the opportunity to argue their innocence, help to ensure that the right person is convicted. Furthermore, hearing criminal cases and handing down punishments in open court, demonstrates that justice is being done and that the state will not accept criminal behaviour, providing a public warning against offending.

New Offences

91. When the Bill was published, Chapter 8 created offences of threatening with a weapon in public and threatening with a bladed article in a public place or in school premises. During both Committee and Report Stage Chapter 8 was subject to a number of significant amendments. The new and widely publicised offences dealing with knife crime remain, but provision for the statutory maximum sentence has changed. Thanks to the removal of old clause 71 from the Bill, uncommenced provisions extending Magistrates sentencing powers from 6 months to 12 months for a single offence will remain on the statute book. If section 154 of the Criminal Justice Act 2003 is commenced, the statutory maximum sentence which could be given by a Magistrate for these offences would be 12 months as opposed to the 6 months envisaged when the Bill was published.[93] The minimum custodial sentence for both offences remains 6 months where the offender is aged over 18 and 4 months when the offender is aged 16 or 17 unless there are particular circumstances relating to the offender which make it unjust to do impose a sentence of this nature.[94]

92. Liberty has reservations about presumptive minimum sentences - these concerns are particularly pressing given the Government's recent decision to extend the regime to sentences for 16 and 17 year olds.[95] Liberty notes, however, that new clause 128 gives judges the scope to assess the demands of justice in an individual case and to consider the impact of a custodial sentence on a child.[96]

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[93] Clause 128(1) inserting new section 1A (5) and (7) of the Crime Prevention Act 1953 and Clause 128(2), inserting new section 139AA (8) and (10) of the Criminal Justice Act 1988.
[94] Clause 128(1) inserting new section 1A(6) of the Prevention of Crime Act and clause 128(2) inserting new section 139AA(9) into the Criminal Justice Act 1988.
[95] Clause 128 (1) introducing new section 1A(5) into the Prevention of Crime Act 1953.
[96] Clause 128 (1) introducing new section 1A(7) into the Prevention of Crime Act 1953.

93. A further amendment during Committee Stage would create an offence of causing serious injury by dangerous driving.[97] An individual summarily convicted of this offence would be liable to imprisonment for 6 months or for 12 months if section 154 of the Criminal Justice Act 2003 is commenced.[98] For those convicted on indictment, the offence would attract a maximum sentence of 5 years imprisonment.[99] New clause 130 introduced during Report stage creates an offence of squatting in a residential building. The clause will capture persons who have entered a building as a trespasser and are living, or intend to live in the building – it will not include those who remain in a property after the termination of a lease.[100] A person summarily convicted of this offence would be liable to imprisonment for a term not exceeding 51 weeks and/ or to a fine not exceeding level 5 on the standard scale.

94. New clause 130 introduced during Report stage creates an offence of squatting in a residential building. The clause will capture persons who have entered a building as a trespasser and are living, or intend to live in the building – it will not include those who remain in a property after the termination of a lease.[1] A person summarily convicted of this offence would be liable to imprisonment for a term not exceeding 51 weeks and/ or to a fine not exceeding level 5 on the standard scale.

95. Liberty understands the rationale behind a new offence targeting squatters and in particular notes the potential anguish suffered by home owners where residential property is illegally occupied. This notwithstanding, the criminal law already provides a significant level of protection. It is a criminal offence under section 7 of the Criminal Law Act 1977 for a person who entered premises as a trespasser to fail to leave at the request of a *'displaced residential occupier'* or *'an individual who is a protected intending occupier of the premises'*. It is a defence to show that the premises occupied formed part of premises used for non-residential purposes and that the trespasser was not on any part of the premises used wholly or mainly for residential purposes. Liberty believes that this offence provides important protection for home owners prevented from occupying their homes by squatters. Individuals convicted under this provision face 6 months imprisonment or a substantial fine. In some circumstances, squatters may be guilty of other offences such as criminal damage and burglary – both of which are well accommodated within

[97] New Clause 129.
[98] Clause 129 inserting new section 1A(5) of the Road Traffic Act 1988.
[99] Clause 129 inserting new section 1A(5) of the Road Traffic Act 1988.
[100] Clause 130(2).

the criminal law. The range of applicable offences currently available, particularly when combined with the civil law of trespass, provide a significant level of protection for home owners.

96. We are concerned that the proposed new offence will largely affect empty or abandoned homes and will expose vulnerable homeless people to the criminal law. Liberty is further concerned that, if passed, clause 130 could leave individuals with no choice but to sleep on the streets, exposing them to acute suffering and considerable risks to their personal safety. At the very least Liberty support an amendment proposed by Crisis which would see an exception to the new criminal offence where the occupied property has been empty for more than 6 months and where there are no steps being taken to bring it back into use.[101]

97. New clause 131 consolidates the law on the use of reasonable force for the purposes of self-defence, placing the common law defence of defence of property on a statutory footing.

Conclusion

98. The Government's sentencing reform proposals include a number of significant, positive measures particularly the abolition of IPPs and reform of the remand regime. Liberty urges the Government to rethink proposals which remove vital safeguards from the out-of-court disposal regime and to ensure that the proposed new squatting offence does not criminalize some of the most vulnerable people in our society.

99. Parts 1 and 2 of the Bill, however, contain overwhelmingly destructive and poorly reasoned 'quick fixes' which reveal a lack of understanding of the realities of advice provision on the ground and the wider social and constitutional importance of access to justice. Liberty urges the Government to reconsider proposals which will decimate access to justice in this country.

Rachel Robinson

[101] Crisis Report stage and amendment briefing: Offence of squatting in a residential building – available at: http://l-r-c.org.uk/files/CrisisSquattingamendmentbriefing.pdf.