

NSPCC Briefing for Committee stage (Commons) for the Legal Aid, Sentencing and Punishment of Offenders Bill

July 2011

The NSPCC has some concerns about specific aspects of the proposals to reform legal aid in England and Wales due to the potential impact that these proposals might have on children.

Reform of Legal Aid

The Legal Aid, Sentencing and Punishment of Offenders Bill sets out proposals to reform the legal aid system in England and Wales. The Bill proposes to reform legal aid by limiting the scope of the legal aid scheme, including who might be eligible for legal aid and in what circumstances people will be eligible. It is vital that in any reform of legal aid, that the impact which those reforms may have on children is fully and positively addressed. Having examined these proposals, NSPCC has some specific concerns about how they will impact on children and below we set out a summary of our key points in this briefing.

Key points

1. The increase in the number of litigants in person will put pressure on an already overstretched court system.
2. The definitions for which cases are eligible for legal aid in child abuse cases and domestic violence are too narrow and will thus leave significant numbers of cases involving vulnerable children without legal aid.
3. There is a risk of cross examination of child or victim or domestic abuse by the alleged perpetrator due to points 1 and 2 above.
4. The removal of legal aid in many family cases will have the affect of removing access to justice for many people in these cases.
5. The expectation in the proposals that everyone will be able to reach agreement through mediation is unrealistic.
6. The Community Legal Advice (CLA) helpline is not a suitable alternative to face to face advice in family cases.
7. The proposal to provide legal aid in cases involving international child abduction but not cases of domestic child abduction makes little sense. Legal aid should be provided in both instances.
8. Children could be removed from parents without the parents having access to legal aid e.g. where the court makes an interim order when asking the local authority to investigate child protection concerns.

1. Court delays due to Increase in litigants in person

A litigant in person is someone who conducts their own litigation or who represents themselves in court, sometimes because they cannot afford legal advice. By reducing the eligibility for legal aid, the current proposals will inevitably lead to an increase in the number of litigants in person which will put pressure on a court system that is already overstretched. Litigants in person generally are not in a position to understand what is relevant to the proceedings and what they need to do in order to move a case along at a good pace, thus causing greater delays in court proceedings. For example litigants in person may have a highly relevant document important to the case which they have not brought to court; to view this document an adjournment would then be necessary. This can happen repeatedly in a single case causing delays which have a detrimental effect on the welfare of children.

2. Domestic Violence Cases and Child Abuse Cases

The definition of domestic violence in the Bill should be further improved. The definition which should be adopted is the one used by the Association of Chief Police Officers (ACPO) and the Crown Prosecution Service. This agreed definition of domestic violence is: "any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults, aged 18 and over, who are or have been intimate partners or family members, regardless of gender and sexuality. (Family members are defined as mother, father, son, daughter, brother, sister and grandparents, whether directly related, in-laws or step-family.).

The new criteria in the Bill that stipulates which cases are eligible for legal aid in domestic violence and child abuse cases are still too narrowly defined and will leave significant numbers of cases involving vulnerable children without legal aid.

3. There is a risk of cross examination of child or victim of domestic abuse by the alleged perpetrator

The proposals as they stand could lead to a situation where parents represent themselves in court. This increases the potential for a child to be cross examined by an abusive parent which would be a deeply upsetting and damaging experience for an already vulnerable child. The risk of this is heightened due to the inevitable increase in litigants in person that the proposals will create.

4. Removal of Legal Aid in Private Law children cases

Family cases involve crucial decisions which affect the welfare and rights of vulnerable children and young people. Under current arrangements, people with parental responsibility for a child are made automatic parties to family court proceedings and are entitled to free legal representation. Other parties joining proceedings, for example grandparents, have no automatic right to legal aid but may be eligible for it on a means and merits tested basis.

The proposals in the Bill will remove legal aid in a number of family cases by excluding ancillary relief and private law children cases from the scope of legal aid. This will limit the availability of expert legal advice for the most vulnerable families when vital decisions are made about where a child should live and who they should have contact with. This limits parents' and children's rights.

5. Mediation is not an alternative to taking up a legal case in every situation

There is an unrealistic expectation in the proposals that everyone will be able to reach agreement through mediation. Not everyone will be able to reach agreement through mediation and this is not an option in every case. The recent House of Commons Justice Select Committee report highlights this when it states that "mediation cannot be a panacea and that it will not work in all cases."¹ During mediation a child's views may not always be heard and there are already problems with getting children's wishes and feelings voiced in private proceedings. The NSPCC has conducted research into children involved in residence and contact disputes, resolved by way of court proceedings, and noted that of those who did not attend court, 40 per cent would have liked to do so and to talk to the judge².

More needs to be done to ensure that the children's wishes and feelings emanate from the children themselves rather than through their parents' voices. Mediation will not always allow this to happen.

6. Community Legal Advice helpline is not an alternative to face to face advice

The NSPCC do not believe that the Community Legal Advice helpline is a suitable alternative to face-to-face advice in family cases and particularly in cases involving the welfare of children in serious children disputes. The issues in these cases are intensely sensitive and difficult for the parties to discuss. A telephone interview cannot assess non-verbal communication to determine the seriousness of the matter and to probe for more information where necessary.

Frequently parties do not reveal the full extent of their difficulties initially and it is important for the skilful lawyer to be able to assist parties so that all problems emerge at the earliest possible point, particularly where they involve the welfare of children. Additionally, individuals who are deaf, or whose first language is not English, will not be able to use the CLA service, unless, in the latter case, it is multi-lingual.

¹ Justice Select Committee report on Government's proposed reforms of Legal Aid
<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/681/681i.pdf> – March 2011, pg. 41

² *Your Shout Too* research by the NSPCC and CAF/CASS, Judith E Timms, Sue Bailey and June Thoburn, NSPCC Policy Practice Research Series, 2007

7. Legal Aid should be provided in domestic abduction cases as well as international abduction cases

The NSPCC does not consider there to be a rational argument for making legal aid available in cases of international child abduction but not domestic child abduction.

8. Children could be removed from parents without the parents having access to legal aid

Under the proposals children could be removed from parents without the parents receiving legal aid or advice. Where a court makes an order under s.37 of the Children Act 1989 for a local authority to investigate child protection concerns, an interim court order can be made during that investigation. Under the new proposals, the parents would not be entitled to legal aid until appeal and therefore children could be removed from parents without the parents having had legal representation. This could also lead to a situation where parents represent themselves and leaves the potential for a child to be cross examined by an abusive parent which would be a deeply upsetting and damaging experience for an already vulnerable child.

For further information, please contact:

James Bury
Public Affairs Officer
James.bury@nspcc.org.uk
020 7825 2853

About the NSPCC

The National Society for the Prevention of Cruelty to Children (NSPCC) is the UK's leading charity specialising in child protection and the prevention of cruelty to children.

The NSPCC aims to end cruelty to children by seeking to influence legislation, policy, practice, attitudes and behaviours for the benefit of children and young people. This is achieved through a combination of service provision, lobbying, campaigning and public education.

Our services include the NSPCC Helpline, for adults worried about a child, and ChildLine, the UK's free, confidential helpline for children and young people.

ChildLine is a service provided by the NSPCC. Registered charity numbers 216401 and SC037717.