



## **Legal Aid, Sentencing and Punishment of Offenders Bill**

**Briefing for Report Stage  
House of Commons**

**18<sup>th</sup> October 2011**

**For further information regarding Part 1 contact  
Roger Smith, Director**

**Email: [rsmith@justice.org.uk](mailto:rsmith@justice.org.uk) Tel: 020 7762 6412**

**For further information regarding Part 3 contact  
Jodie Blackstock,**

**Director of Criminal and EU Justice Policy**

**Email: [jblackstock@justice.org.uk](mailto:jblackstock@justice.org.uk) Tel: 020 7762 6436**

JUSTICE, 59 Carter Lane, London EC4V 5AQ  
Tel: 020 7329 5100 Fax: 020 7329 5055 E-mail: [admin@justice.org.uk](mailto:admin@justice.org.uk) Website: [www.justice.org.uk](http://www.justice.org.uk)

## Summary

### Part One

1. For the purposes of the report stage, JUSTICE wishes to concentrate on five issues in this part of the Bill. They are:
  - a. the need to **pilot the proposed shift from ‘face to face’ advice to a ‘telephone gateway’**;
  - b. the **independence** required for the proposed Director of Legal Aid Casework;
  - c. a **right of appeal** against decisions of the Director;
  - d. the **definition of ‘domestic violence’** in relation to matrimonial cases;
  - e. the proposed removal of **clinical negligence** cases from the scope of legal aid.
2. JUSTICE is concerned that this Bill will allow major cuts to legal aid which will cause significant and widespread hardship. However, we recognise that this major issue of principle was discussed at second reading. We advance these five points on which the Bill could be improved without threatening the Government’s overall position.

### Part Three

3. We strongly welcome the Bill’s provisions on the **cautioning and remand of children**. These measures will help to ensure that children are not inappropriately escalated through the youth justice system (which enhances the likelihood of reoffending) and that those accused of minor offences who present no risk to public safety do not await trial in damaging custodial settings.
4. We have serious concerns about some of the other sentencing provisions, in particular, the **extension of curfew requirements** to up to 16 hours a day, and the **presumptive minimum sentence** for the new offences of threatening with a weapon/bladed article. We believe that these elements should be removed from the Bill.
5. We also oppose **clause 105**, which would provide for the transit of those imprisoned or detained by foreign courts through the UK to third countries.

We believe that this clause would create a serious risk that the UK would allow prisoner transit in breach of its international and Human Rights Act obligations not to send people from the UK to a state where they may be subject to serious human rights violations including torture.

6. We eagerly await the outcome of the review of **indeterminate sentencing for public protection** announced by the Secretary of State at Second Reading. We believe that urgent reform to these sentences at the parole and sentencing stages is needed and support their abolition. We oppose, however, the extension of mandatory or discretionary life sentences as an alternative to indeterminate sentences. Such sentences should be reserved for the most serious offences.

### **Part One**

#### **Clause 1- Lord Chancellor's functions**

Page 2, line 12, at end add-

**'(6) The Lord Chancellor must ensure that the proposed telephone gateway shall first be piloted prior to any permanent implementation of such a scheme. '**

7. The proposed single gateway for all civil legal aid advice is an interesting idea. The idea has the potential to be kind of Legal Aid Direct, similar to the NHS Direct.
8. The idea merits consideration and should be trialled. However, the scheme should be piloted on a small scale for a fixed period of time as a preliminary measure in order to ensure the scheme's feasibility. Any pilot scheme of a telephone gateway should be on a non-exclusive basis, with the provision of face-to-face advice where appropriate.
9. JUSTICE is encouraged that the Justice Minister gave assurances at Committee Stage that the single telephone gateway scheme will initially be confined to a finite number of legal areas, namely: *'debt, community care, discrimination—meaning claims relating to the contravention of the Equality*

*Act 2010—and special educational needs.* [HC Debates col 290, 6 September 2011]

10. However, how long the mandatory telephone gateway will apply to just these four areas of law is unclear, and the measures which the Government would have to undertake in order to ensure the pilot was sufficiently reviewed before the gateway were to apply to further areas of law, is also unclear. An assurance has been given by the Justice Minister in this regard, but it is unsatisfactorily vague: *'we will review implementation of the mandatory single gateway and mandatory specialist advice over the telephone for the four areas of law, and we will use the outcome of that review to determine any expansion of the helpline to other areas of law in due course.'* [HC Debates col 296, 6 September 2011]
  
11. A statutory duty should be included in the Bill in order to ensure that sufficient consideration is given to the success or otherwise of the Government's proposal as to a single telephone gateway.
  
12. A pilot scheme would allow the Government time to monitor and address some key concerns regarding the implementation of a single telephone gateway service so that these can be ironed out were the scheme to be fully implemented. Such concerns that a pilot scheme would assist to address include the following:
  
13. A telephone gateway service would not be appropriate for all users. Those with language difficulties, learning difficulties or mental health problems would be put at a distinct disadvantage in being compelled to use a telephone advice system; the Government are at risk of excluding vulnerable people from accessing meaningful and effective legal advice.
  
14. Thus, the provision of face-to-face advice needs to be protected. JUSTICE is encouraged that the Government has acknowledged that the single telephone gateway would not be appropriate for the following types of cases:  
*'emergency cases: instances where the client has previously been assessed*

*by the mandatory single gateway within the last 12 months as requiring face-to-face advice and are seeking further help from the same face-to-face provider to resolve linked problems; clients in detention, including prisons, detention centres and secure hospitals; and children, defined as those under 18.'* [HC Debates col 294, 6 September 2011]

15. However, this fails to deal with those who have low communication skills. Potential users may be deterred from using a telephone advice system due to perceptions that such a system is impersonal. Often, those who seek legal advice are facing a legal problem are suffering under a great deal of anxiety and are not always as able to easily articulate the issues they face. It is a concern that the confidence that is instilled in meeting a legal advisor face-to-face will be lacking from a telephone advice service, and so users of the telephone advice system will not be as open about the legal problems they face. This is best exemplified by users who may be victims of domestic abuse; it is known that such clients have a tendency to only disclose such abuse once a relationship of trust and confidence in the legal advisor has been developed.
  
16. Staff operating the single telephone gateway will not have the any specialist legal training in order to be able to identify all the issues and make the referral which is in the client's best interests. The Justice Minister confirmed in Committee that: *'Gateway operators will not offer the callers any advice tailored specifically to their circumstances, so legal qualifications will not be a contractual requirement.'* [HC Debates col 294, 6 September 2011] There is a danger in this that all legal issues and ramifications will not be recognised and so will go unpursued. The current proposals appear to expect unqualified staff to make difficult legal judgments on inadequate facts from clients who find it difficult to communicate by telephone.
  
17. The Justice Minister was unable to say anything definitive on the recording of the telephone calls: *'My understanding is that the information is recorded. On the extent to which it is accessible, I will come back to the hon. Gentleman by letter.'* [HC Debates col 295, 6 September 2011] JUSTICE is concerned that

the telephone advice scheme could become the target of secondary litigation were problems with the quality of the advice given to arise. Recording is important as a way of allowing quality control.

#### **Clause 4- Director of Legal Aid Casework**

**Page 3, line 25, leave out subsection (4) and replace with new subsections (4A and 4B)-**

**(4A) The Director must, except to the extent that section (4B) applies, act under the direction of the Lord Chancellor.**

**(4B) The Director must act independently when performing any functions or duties under this Part.**

18. A substantial change proposed by this Bill to the legal aid scheme is the abolition of the Legal Services Commission and the introduction of the Legal Aid Casework Director ('The Director') who is established to bring the system back under the control of the Government as a civil servant. This mirrors a recent change brought in by the New Zealand government which introduced a similar a scheme with the Legal Services Act 2011 ('LSA 2011 NZ'). The New Zealand legislation creates a statutory duty that the Director must conduct his role, powers and functions independently of the Government (see s71 (2)).
19. This proposed amendment is taken from the LSA 2011 NZ. It is of vital importance that the independence of the Director is not compromised and that it is set out in plain terms. The current wording suggests that this must only be in relation to individual cases but the duties undertaken in his role must be independent from that of the Lord Chancellor. There needs to be adequate provision in the Bill that ensure no government interference with how legal aid is administered. JUSTICE foresees that difficulties may arise where decisions have to be taken by civil servants as to whether to grant legal aid to individuals in order to pursue legal actions against the Government. The purpose of this amendment is to ensure that public confidence in the administration of legal aid is not compromised.

## **Clause 11- Determinations**

**Page 8, line 25, leave out 'may' and insert 'must'.**

20. Linked to the issue of independence of the Director in performing his duties is the key principle that there must be a mechanism for challenging a refusal of legal aid by the Director. We consider that it is vital that an appeal to an independent Tribunal must be offered and available in the event of a refusal to grant legal aid. The current wording of 'may' instead of the proposed 'must' leaves ambiguity as to whether any such provision for appeal will be put in place.
21. This is the minimum required to prevent the Lord Chancellor being seen as 'a judge in his own cause' and to avoid the absurdity of the Lord Chancellor being sued for refusal of legal aid in a judicial review application which substantively is made against another minister or, even, himself.
22. New Zealand has introduced legislation similarly to abolish its equivalent of the Legal Services Commission, LSA 2011 NZ: the equivalent to the Director is the Legal Services Commissioner. A person aggrieved by a decision of the Commissioner has the right to apply for a reconsideration (see s51). There is also a subsequent right of appeal to an independent Legal Aid Tribunal under s52:
23. Under the New Zealand legislation, an aided person or an applicant for legal aid may apply to the Tribunal for a review of the Commissioner's reconsideration of a decision referred to in subsection (2) on the grounds that it is-
  - manifestly unreasonable; or
  - wrong in law.
24. There is currently nothing in the Bill providing an equivalent safeguard, which we consider is the minimum acceptable element in decision-making in individual cases.
25. In Committee, the Justice Minister gave assurances that the Government would provide a mechanism for independent appeal via an adjudicator as

opposed to a Tribunal: *'There are currently review arrangements under the Access to Justice Act 1999, and it is our intention to continue with the current arrangements, including the use of independent funding adjudicators, rather than moving to another model, such as that of New Zealand.'* [HC Debate col 317, 6 September 2011] JUSTICE is of the view that an independent Tribunal would be best placed to effectively appeal decision of the Director. However, we consider that, at a minimum, the assurance given by the Justice Minister should be expressly stated in the Bill given the crucial importance the procedure of an independent appeal is to the legitimacy of the Director and the fair administration of legal aid.

## **Schedule 1**

### **Scope- The Definition of Domestic Violence**

**Page 103, leave out lines 35- 38 and insert-**

**'abuse' means any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality."**

26. The Government proposes that legal aid will no longer be routinely available for Family law for ancillary relief cases or private children law cases. It is proposed that now legal aid for these areas of law will only be available for applicants who have suffered domestic violence.
27. JUSTICE is encouraged that the Secretary of State has expressed that it is committed to ensuring that the legal aid system operates in such a way as to afford protection to those who suffer domestic violence:
28. *'The Government is committed to supporting victims of domestic violence ...We recognise that the state has a role to play in helping claimants to obtain protection and consider that those in abusive relationships need assistance in tackling their situation... we consider that victims of abuse may be particularly vulnerable. We have therefore concluded that the importance of the issue and*

*characteristics of the litigants are such that funding is justified...* [Proposals for the Reform of Legal Aid in England and Wales, p 41, para 4.64]

29. However, JUSTICE has concerns regarding the definition of domestic violence found in the Bill in Schedule 1. Domestic violence can take many forms. The Government's current proposals for the definition of domestic violence are too limited. The Government should adopt the definition of domestic violence used by the Association of Chief Police Officers (ACPO), which has been used to formulate this amendment.
30. By amending the Bill to incorporate a more expansive definition, the Bill's definition will be more accurate and it will mean that the Bill reflects the Government's commitment to affording access to justice and legal protection to victims of domestic violence. If a more expansive definition is not used, the Bill will exclude those the Government intends to protect.

### **Scope- Clinical Negligence**

**Page 118, line 27, at the end of paragraph 2 add 'except clinical negligence'.**

31. One area of law which has been removed completely from scope by the Bill is clinical negligence. JUSTICE has particular concerns about removing clinical negligence from scope; the effect of this cut will mean that the most disadvantaged and vulnerable in society are left without legal redress.
32. The Justice Minister has indicated that a viable funding alternative for clinical negligence claims is provided by conditional funding agreements (CFAs). However, JUSTICE does not agree that these are always viable funding alternatives for clinical negligence claims. Claims of this sort are manifestly not suitable for funding by CFAs. They frequently involve tricky and complex issues of causation. Often, it is necessary to obtain expensive medical reports on the issue of causation at the start of a clinical negligence case in order to assess the merits of the claim. It will be extremely difficult to secure funding under a CFA and insurance to pursue the claim prior to securing this expert

medical. The potential claimant or their families will be expected to fund a policy, which is far from satisfactory and for many will be an impossibility.

33. In committee, the Justice Minister accepted that this issue is a problem: *‘one aspect of clinical negligence cases is the significant up-front costs involved in obtaining expert evidence. Following consultation, the Government accept that this is a significant problem, which is why the Bill introduced a tightly drawn power to allow the recoverability of after-the-event insurance premiums in clinical negligence cases. Details will be set out in regulations.’* [HC Debate col 339, 6 September 2011] However, despite this the Government has still resist to deal with the issue adequately by bringing clinical negligence cases back into scope.

34. We would remind the government of Sir Rupert Jackson’s view that legal aid should continue to be available to fund clinical negligence claims: *Legal aid is still available for some key areas of litigation, in particular clinical negligence, housing cases and judicial review. It is vital that legal aid remains in these areas. However, the continued tightening of financial eligibility criteria, so as to exclude people who could not possibly afford to litigate, inhibits access to justice in those key areas. In my view any further tightening of the financial eligibility criteria would be unacceptable.*

35. There are real costs benefits overall to retaining clinical negligence within scope. In taking clinical negligence claims out of scope, the Government plans to make only a relatively small scale saving of around £10million. Moreover, if all clinical negligence claims are instead dealt with by CFAs, the costs of the litigation will simply be transferred from the Ministry of Justice to the NHS.

### **Part Three**

#### **Clause 54 – Duty to give reasons for and to explain effect of sentence**

**Page 39, line 35 [Clause 54], leave out “(8)” and insert “(9)”**

**Page 40, line 20 [Clause 54], leave out paragraph (b)**

**Page 40, line 20 [Clause 54], at end insert:**

**“(9) Where the court imposes a sentence that may only be imposed in the offender’s case if the court is of the opinion mentioned in –**  
**(a) section 148(1) of this Act (community sentence), or**  
**(b) section 152(2) of this Act (discretionary custodial sentence),**  
**the court must state why it is of that opinion.**

36. We welcome the duty in clause 53 to consider the making of a compensation order and the general duty in clause 54 to explain, in ordinary language, the reasons for and effects of the sentence when passing sentence. There is a lack of public understanding of the effect of many sentences – particularly those of imprisonment – in terms of time to be served in custody, release on licence, etc, which compromises confidence in the system. We have also been concerned at prisoners' lack of understanding of indeterminate sentencing (IPP).<sup>1</sup>

37. We are, however, concerned that the Bill would remove current duties upon sentencers to explain the court's consideration of the thresholds for a community or custodial sentence – ie why the relevant threshold has been passed in the particular case. While implicit in the general duty, the court's attention to these thresholds must not be diluted. The amendments above would ensure that courts remain under specific duties to give reasons why they is of the opinion that an offence is so serious that only a custodial sentence is appropriate, or why it is sufficiently serious that a community sentence should be imposed.

### **Clauses 60 and 68 – curfew requirements**

**Page 46, clause 60, leave out clause**

---

<sup>1</sup> See Prison Reform Trust, *Unjust Deserts: Imprisonment for Public Protection*, 2010.

Page 52, clause 68, leave out clause

**OR**

Page 46, line 7 [*clause 60*], after “hours)” insert “before “A relevant” add  
“Subject to subsection (2A)”

Page 46, line 7 [*clause 60*], at end insert

“( ) After subsection (2) add

“(2A) A relevant order may not impose a curfew requirement specifying periods that amount to more than twelve hours in any day unless the court would, but for the availability of a curfew requirement of between twelve and sixteen hours in any day under this section, be of the opinion in section 152(2) of this Act.”

Page 52, line 26 [*clause 68*], after “hours)” insert “before “A youth” add  
“Subject to sub-paragraph (2A)”

Page 52, line 7 [*clause 68*], at end insert

“( ) After sub-paragraph (2) add

“(2A) A youth rehabilitation order may not impose a curfew requirement specifying periods that amount to more than twelve hours in any day unless the court would, but for the availability of a curfew requirement of between twelve and sixteen hours in any day under this paragraph, be of the opinion in section 152(2) of this Act.”

38. We have serious human rights concerns regarding the extension of curfew requirements in clauses 60 and 68 to a maximum of 16 hours per day for up to 12 months. A curfew for so many hours a day could, in some cases, constitute a deprivation of liberty for the purposes of Article 5 European Convention on Human Rights if other aspects of the sentence were unusually

destructive of the life the person would otherwise have been living.<sup>2</sup> In order to be lawful, a deprivation of liberty must fall within one of the categories listed in Article 5. One is 'the lawful detention of a person after conviction by a competent court' (Article 5(1)(a)). The government's somewhat cursory human rights compliance assessment in relation to these clauses states that they will be lawful under Article 5 because they fall within Article 5(1)(a). However, we believe that there is a strong argument to the contrary: if the custody threshold has not been passed (as a matter of domestic law), then the imposition of a curfew constituting a deprivation of liberty would be contrary to domestic law and therefore not 'lawful' for the purposes of Article 5(1)(a).

39. In addition to their potential illegality, we believe that such long curfews are undesirable. They will limit the offender's capacity to carry out positive rehabilitative activities and can contain the offender in premises where they may perpetuate or fall victim to domestic violence, abuse or neglect. The lengthening of curfew is particularly inappropriate in the case of children for these reasons, not least because of the correlation between children suffering neglect and/or abuse and those who commit offences. It seems that the adult provision in clause 60 has been copied for children in clause 68 without consideration of children's differing characteristics and circumstances, contrary to the UN Convention on the Rights of the Child principle that the youth justice system should be distinct from that for adults and to the Convention's requirement that to take into account the desirability of reintegrating children into the community as productive adults.<sup>3</sup> We therefore believe that clauses 60 and 68 should be removed from the Bill.

40. The first two amendments here would leave out clauses 60 and 68. The second two would limit the application of curfews between 12 and 16 hours to cases where the custody threshold would have been passed but for the availability of curfews between 12 – 16 hours. This is intended to encourage sentencers to give effect to the Minister's stated intention 'that the provision will replace sentences where people would otherwise have gone to custody'.<sup>4</sup>

---

<sup>2</sup> *Secretary of State for the Home Department v AP* [2010] UKSC 24 & 26.

<sup>3</sup> See Article 40 UNCRC.

<sup>4</sup> *Hansard*, Committee debate, 14th sitting, House of Commons 15 September, 2011, col 460, Parliamentary Under Secretary of State (Crispin Blunt MP).

**Clause 73 and Schedule 10 – Amendment of enactments relating to bail**

**Page 173, [*Sched 10, para 12*], leave out lines 37 to 40 and insert:**

**(a) commit an offence on bail by engaging in conduct that would, or would be likely to, cause physical or mental injury to a person other than the defendant; or**

**(b) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person.**

**Page 175, [*Sched 10, para 23*], leave out lines 7 to 14 and insert:**

**“(2) For sub-paragraph (b) substitute:**

**(b) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person.”**

**Page 175, line 34 [*Sched 10, para 27*], leave out from “would” to end of line 43 and insert:**

**“(i) commit an offence on bail by engaging in conduct that would, or would be likely to, cause physical or mental injury to a person other than the defendant; or**

**(ii) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person.”**

41. Schedule 10 to the Bill would subject bail in adult cases<sup>5</sup> where a person has been accused or convicted of an imprisonable offence, or where a person has been released on bail but fails to surrender to custody, to a new test where bail could not be withheld if there were no real prospect that the person would receive a custodial sentence upon conviction, unless he might, if released on bail, commit an offence involving domestic violence. It would also remove the

---

<sup>5</sup> Except those to which s25 Criminal Justice and Public Order Act 1994 applies, that is to say, a person charged with or convicted of homicide or rape after a previous conviction for such an offence.

court's power where an adult was accused or convicted of a non-imprisonable offence to remand them in custody on grounds of likelihood of failure to surrender to custody or previous arrest for breach of bail plus likelihood of failure to surrender, to commit offences or interfere with witnesses/obstruct the course of justice – but would create a new ground for withholding bail on the grounds that he might commit an offence involving domestic violence.

42. JUSTICE is concerned that the new test leaves no residual discretion to the court to withhold bail even where there is strong evidence that a defendant will commit a violent offence, intimidate witnesses or otherwise interfere with the course of justice if released/if he remains at liberty. The exceptions in the Bill relating to domestic violence are, we believe, confined to too narrow a class of case, while in other cases – for example where there is a substantial risk of violent intimidation of a victim of crime not of the same household as the defendant – there is no equivalent protection.
43. We further question the new 'no real prospect' test: first, it may be very difficult for a court at an early stage in criminal proceedings (or even up to the end of a trial/guilty plea) effectively to assess any likely sentence in the case; and secondly, there may be a legitimate expectation created by its conclusion that there is no such real prospect. The sentencing court with full relevant information before it may, however, take a different view of the case and there should be no question of its being influenced or, particularly, bound by the court's earlier view.
44. We therefore believe that the reforms to the Bail Act proposed in the Bill are misconceived and that better changes could be made that would, for example, prevent bail from being withheld on the grounds of likelihood of failure to surrender to custody in minor cases while leaving other criteria for withholding bail unchanged.

#### **Clause 105 – Transit of prisoners**

#### **Page 87, clause 105, leave out clause**

45. Clause 105 would allow the transit of prisoners/detainees through the UK (except Scotland) who have been sentenced/detained by foreign criminal

courts or by foreign laws similar to the Repatriation of Prisoners Acts and are being sent to third countries. JUSTICE has serious human rights concerns about this provision, which would raise the prospect of the UK detaining and allowing transit through its jurisdiction of a person who may a) have been imprisoned after an unfair process/trial and/or subject to inhuman/degrading treatment or torture; b) may have been removed from the state from which he/she arrived in UK territory illegally and/or contrary to international human rights law/refugee law and/or c) may be on his/her way to a state where he/she may be subject to further human rights violations eg re right to life, prohibition on torture/inhuman or degrading treatment (including by prison conditions), or unfair trial. We note that in Committee the Minister gave an assurance regarding the death penalty, but our concerns regarding other major human rights violations are not allayed.

46. While the Human Rights Act 1998 (HRA) would of course apply in these circumstances, so that the Minister would be in breach of s6 HRA if, for example, a person was transferred out of the UK under this provision to a state where they were at real risk of torture or inhuman or degrading treatment, there is a risk that firstly, violations occurring in the sending state (eg unfair trial) or the likelihood of violations in the receiving state (eg re prison conditions) will not be known to the Minister and further, that the timescale will not allow for these concerns to be properly aired and investigated in a fair process that gives the prisoner/detainee the right to make representations. There is no provision in clause 105 for the detainee to claim asylum in the UK, to appeal against his removal from the UK to the receiving state or to alert the Minister to the likelihood of human rights violations in the receiving state or to those that have occurred in the sending state.
47. Article 3 of the European Convention on Human Rights prohibits the removal of a person to a state where they are at real risk of being subjected to torture or inhuman or degrading treatment or punishment and mandates the state to conduct an independent and effective investigation into allegations of Article 3 ill-treatment. Article 13 ECHR requires a person to be given an effective remedy if their ECHR rights are violated; Article 6 fair trial obligations, including the right to access to a court, may also apply in these circumstances. Further, Article 3 of the UN Convention Against Torture

prohibits a state from expelling, returning or extraditing a person to a state where there are substantial grounds for believing that he would be subjected to torture.

48. We therefore oppose the inclusion of this clause in the Bill. If the UK is to be party to 'transit' arrangements, which we do not support due to the inherent risks of human rights violations that are difficult to investigate in the UK but where the UK's responsibility is engaged by the transit, then such orders should be made by the High Court in a transparent, Article 6 compliant judicial process where the prisoner/detainee is present and represented.

**Clause 113 – Offences of threatening with article with blade or point or offensive weapon in public or on school premises**

**Page 91 [Clause 113], leave out lines 3 to 13**

**Page 92 [Clause 113], leave out lines 7 to 17**

49. While we have no objection in principle to the creation of the offence of threatening with an article with a blade or point or an offensive weapon (*clause 113*), we question whether it is necessary since other offences already exist to address the relevant behaviour; for example, along with offences of having an offensive weapon/bladed article in a public place, offences such as common assault, robbery/attempted robbery (in the context of which such threats will often be made) and offences under section 4 Public Order Act 1986.

50. We are, however, strongly opposed to the clause's presumptive minimum sentence of 6 months' imprisonment for these offences. Such minimum sentences distort the sentencing framework – since they can result in other, more serious, offences of a similar nature receiving a lesser sentence. Further, there is much to be admired in the current system whereby the Sentencing Council sets the guidelines to which courts must have regard but from which they can depart where the interests of justice demand it. This ensures a measure of consistency through guidelines created by experts

while allowing the sentencer in full position of the facts to do justice in the individual case. The prevailing considerations of culpability and harm by which seriousness is assessed for the purposes of sentencing guidelines are sensible and we believe that Parliament should allow the system to be followed for all new offences rather than setting a presumptive minimum for one offence while other, similar offences are subject to guidelines (for example, the recent definitive guideline on assault offences). Our suggested amendments would therefore remove the presumptive minimum sentences from this clause.

**JUSTICE**

**18<sup>th</sup> October 2011**