

Missing millions

Government plans for civil legal aid offer unproven savings and will incur unaccounted-for costs



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This Government's immediate priority is to reduce the financial deficit and encourage economic recovery. We have made it clear that the main burden of the deficit reduction will be borne by reduced public spending, achieved by financial discipline and the most efficient and effective delivery of public services. I am seeking to develop an approach to legal aid spending which balances these necessary financial constraints with the interests of justice and the wider public interest.

Kenneth Clarke, announcing the Ministry of Justice review of legal aid, 23 June 2010

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Overview

The Government's proposed cuts to civil legal aid are based on flawed assumptions that cast doubt on whether they can deliver the savings that have been promised.

As presently drafted, the Legal Aid, Sentencing and Punishment of Offenders Bill will, on the Government's figures, end legal aid for 645,000 civil and family law cases every year. This figure includes 595,000 Legal Help cases and 50,000 cases of Legal Representation.

So, the changes restrict legal advice and access to justice for the country's poorest and most vulnerable: but they also are likely to add to costs elsewhere within the Ministry of Justice and other Government Departments, undermining the Government's deficit reduction programme.

The Law Society's new analysis of the detail behind the £350 million worth of savings claimed by the Ministry of Justice (MoJ) shows that:

- Most of the claimed savings have so little data or evidence underpinning them that there can be no confidence they will be achieved.
- The MoJ admits that it does not have evidence to support its position in 15 separate statements in the impact assessments published with the Bill.
- The same impact assessments include 30 admissions by the MoJ that it is speculating on the likely effects of its proposals.
- When asked by the Justice Select Committee to assess the cost of the legal aid cuts to other Government departments, the MoJ replied “It is not possible to quantify accurately these wider costs.”
- The MoJ predicts only 4,000 to 10,000 additional requests for family mediation a year after the cuts - despite withdrawing legal aid from 255,000 family law cases, including child contact and financial agreements.
- The number of cases that will lose legal aid has risen from 568,000 in the legal aid green paper last year to 645,000 in the Bill now before Parliament. But the claimed saving to taxpayers has risen by only £1m, from £279m to £280m. No explanation is given for the fact that the cost of the additional cases that will be lost appears to be under £1.50 each.

This is not evidence-based policy making. The MoJ says: “The lack of a robust evidence base means we are unable to draw conclusions as to whether wider economic and social costs are likely to result from the programme of reform or to estimate their size.”

The Law Society believes that the social consequences of the Legal Aid Bill, in terms of miscarriages of justice and barriers to people seeking remedies for harms that are no fault of their own, are disproportionate to the savings that can be achieved by withdrawing civil legal aid from 645,000 cases a year.

We call on the Government to work with us and bring forward better, evidence-based, reforms to civil legal aid that will make the required savings while maintaining access to justice for those most in need. It is not too late.

Missing millions

Background

Reducing expenditure on legal aid was one of the key drivers for reform.

Ministry of Justice Impact Assessment (MoJ090), 21 June 2011, para 10

The Ministry of Justice was the first Government department to agree its spending reduction target with the Treasury, offering a 23 per cent budget cut as its contribution to reducing the deficit. The MoJ's limit for non-capital spending has been reduced by £200m this financial year, with a further reduction of £400m in 2012-13.

But there is widespread concern that the MoJ does not have the financial information and management systems that would allow it to accurately identify actual savings or to realise them.

In a highly critical report in January, the Public Accounts Committee said:

It is essential that the Ministry implements its Spending Review settlement on the basis of a full understanding of the cost and value of its services, so that financial cuts are best targeted to minimise the impact on frontline services. Yet the Ministry and its arm's length bodies currently lack the detailed information they would need to do this.

"Without combined financial and operational performance data and a full understanding of its costs, there remains a risk that, in implementing its Spending Review settlement, the Ministry will not achieve best value for money and will not understand properly the impact of cost reductions on frontline services. Cost reductions should be based on a full understanding of relative costs of alternative cuts and a proper understanding of the value that will be lost, in particular so that a cut in one area does not lead to additional expenditure elsewhere.

Public Accounts Committee, Report on Ministry of Justice Financial Management, 18 January 2011

In March, the Justice Select Committee said:

"We are disappointed in the dearth of evidence on legal aid expenditure at case level to enable the identification of key influences on cost. The Ministry of Justice needs to develop a greater understanding about what is driving demand and the cost of cases in order for there to be confidence in its estimates of the impact of its proposals for reform. Reducing spending on legal aid may have financial implications – and indeed may inflate costs – in other parts of the legal system."

Justice Select Committee, Report on Legal Aid Reforms, 30 March 2011

In its response to the Justice Select Committee, the MoJ said it “would have ideally liked more information” on the costs of legal aid, and the justice system.

But the MoJ concluded:

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However, there is a pressing need for reform to meet our objectives for legal aid, including delivering substantial savings during the current spending review period and we must therefore proceed on the basis of the information that we have.

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The Law Society fully agrees that public spending must not be wasted and that savings need to be made. But within the MoJ, civil legal aid is bearing the biggest cut as a proportion of its current budget. Legal advice for family separation and child contact is being cut by 84% or 210,000 cases a year. Advice on welfare benefits, currently 135,000 cases a year, will lose legal aid altogether.

The Law Society has put forward alternative proposals that more than meet the Government’s target for savings while avoiding wholesale reductions in access to civil legal aid. But they have been dismissed by the MoJ, which has not provided any evidence to support its position or to undermine the Society’s assumptions.

The Government’s proposed savings are not supported by evidence

Two critical concerns lie in the balance of legal aid reform; access to justice, and the pressing need to reduce public spending. It is therefore crucial that at the heart of this process lies a system of evidence-based policymaking.

The Law Society has conducted a detailed analysis of the Impact Assessments published with the Legal Aid, Sentencing and Punishment of Offenders Bill, and identified a series of unsubstantiated assumptions, with no indication of their provenance; unexplained calculations regarding the levels of savings to be achieved, with no reference to supporting data; and optimistic extrapolation that selects unrepresentative samples and applies them to unsuitable contexts.

Without an evidence-based process, there is no way of knowing that the reforms will achieve the savings claimed.

The tables enclosed with this report, set out how the Government’s failure to adopt such a process leaves it uncertain as to the effect of its changes, on demand for services or on costs to the MoJ or other Departments. It is in no position to guarantee the savings it claims.

The MoJ's savings are over-stated

Our analysis of the impact assessments published with the Legal Aid Bill shows that the Government has overstated savings and ignored additional costs which would result from its proposals.

These are only direct impacts - there will be additional economic and social costs not captured by the impact assessments.

Errors and uncertainties in MoJ impact assessments:

Underestimating demand for family mediations	£48.6m
Overestimating savings from Telephone Gateway	£1m - £2m
Failure to justify claimed savings from Supplementary Legal Aid Scheme	£7m
Failure to justify savings from Legal Services Commission administration	£1m

The MoJ has also ignored, or denied the existence of, published evidence that contradicts its assumptions.

The most serious flaw in the Government's figures is over family mediations. The MoJ predicts that the cuts in legal aid for family separation will lead to 210,000 fewer legal help cases and 45,000 fewer cases with legal representation. But it says this will lead to an increase of only 4,000-10,000 in the number of mediations, at an extra cost of £6m to £10m.

Legal aid currently pays £16.2 million to support family mediations, with referrals for 55,000 cases a year, of which 14,000 cases go on to full mediation and about 8,000 reach agreement.

Based on current take-up, our report forecasts that after legal aid for family cases is cut, 90,000 extra cases will start mediation with 45,000 cases settling. This would cost an additional £48.6m above the Government's plans. And Justice Ministers have stated publicly that all applications for mediation will be funded.

Examples of where claimed savings may be eroded or overtaken by additional costs:

- £1m to £2m from the Telephone Gateway legal advice service. The MoJ's claims for these savings are contradicted by published research. The report notes that in November 2010 the MoJ claimed savings of £40m to £60m for the Telephone Gateway. There is no explanation of the lower figure published with the Bill. The available evidence suggests that there is a realistic likelihood that the scheme will cost more than if the current structure of face to face advice were maintained.
- £7m from the Supplementary Legal Aid Scheme, under which people using civil legal aid would pay 25% of their damages into a fund to support other cases. The MoJ does not have data on damages awarded and cannot forecast how many people would use the scheme.
- Ending automatic legal aid and means-testing some benefit claimants with between £8,000 and £16,000 could cost more in administration costs than it saves in legally aided services no longer provided. In its response to the initial legal aid Green Paper the National Audit Office stated:

"Our knowledge suggests that the Commission would need to consider the cost implications of increasing the scope of capital means testing to those on passporting benefits. Gaining the supporting evidence for individuals is time-consuming and not necessarily an easy task. There is therefore a risk that the implementation costs of this could outweigh the benefit of recouping costs from these applicants."



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Costs that the MoJ has ignored are:

- Extra court time used by people who represent themselves. Although Judges and academic researchers have given evidence to the Government showing that courts will be slowed down by people representing themselves, the MoJ said there was “no firm evidence that unrepresented cases on average impose additional operational cost burdens on courts and tribunals.”
- Higher costs for other government departments and society. Legal advice will not be available for the 595,000 Legal Help cases that currently qualify, and problems with housing, benefits, education and immigration will not be sorted out. Using data from the Civil and Social Justice Survey and the Legal Services Commission, Citizens Advice estimated that:
 - For every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34.
 - For every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98.
 - For every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80.
 - For every £1 of legal aid expenditure on employment advice, the state potentially saves £7.13.

It isn't too late for the Government to reconsider its cuts to legal aid, and look again at the data underpinning its arguments.

If you would like to support the Sound Off For Justice campaign in favour of justice and against the Government's changes, please visit <http://soundoffforjustice.org>

The Law Society's Principles of Legal Aid

1. The right to legal representation is a fundamental principle of a civilised society and is a cornerstone of our way of life.
2. No one should be denied legal help because they cannot afford it.
3. Everyone should be entitled to challenge the decisions of public authorities, institutions and big business and receive the help to do so.
4. Access to justice needs to be both fair and efficient with the system free of waste, unnecessary bureaucracy and expenditure.
5. The courts, their officers, suppliers and contractors have a duty to manage the judicial process with fairness and efficiency.
6. The state has a right to recoup money from those who misuse the system.

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It is essential that the Ministry implements its Spending Review settlement on the basis of a full understanding of the cost and value of its services, so that financial cuts are best targeted to minimise the impact on frontline services. Yet the Ministry and its arm's length bodies currently lack the detailed information they would need to do this.

Without combined financial and operational performance data and a full understanding of its costs, there remains a risk that, in implementing its Spending Review settlement, the Ministry will not achieve best value for money and will not understand properly the impact of cost reductions on frontline services. Cost reductions should be based on a full understanding of relative costs of alternative cuts and a proper understanding of the value that will be lost, in particular so that a cut in one area does not lead to additional expenditure elsewhere.

Public Accounts Committee, Report on Ministry of Justice Financial Management, 18 January 2011

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Justice Select Committee, 30 March 2011

We are disappointed in the dearth of evidence on legal aid expenditure at case level to enable the identification of key influences on cost. We note the difficulties in collating quantitative evidence for useful national and international observations to be made, and we believe that a series of small-scale domestic qualitative research studies, examining the drivers of cost per case, would provide the Government with more valuable data to inform its efforts to reduce spending. It may be possible to reduce the amount of legal work required, for example, by reducing the complexity of particular areas of law, and thereafter to adjust the level of fixed fees accordingly. (Paragraph 30)

The Ministry of Justice needs to develop a greater understanding about what is driving demand and the cost of cases in order for there to be confidence in its estimates of the impact of its proposals for reform. Reducing spending on legal aid may have financial implications – and indeed may inflate costs – in other parts of the legal system. (Paragraph 37)

Government response to Justice Select Committee 3rd Report, June 2011

The Government accepts that the evidence base available to inform policy making can always be improved. The Impact Assessment that we have published alongside our response to consultation draws on the existing evidence base to assess the impacts the programme of reform is expected to have, both on the costs of legal aid, and on the wider system of justice. These identify a number of areas where we would ideally have liked more information. We set out below the main pieces of analytical work which are planned or underway to address these gaps, including those that have been raised as being of specific concern both before and during the consultation period. This work will help us improve the evidence base and improve future policy making and implementation. However, there is a pressing need for reform to meet our objectives for legal aid, including delivering substantial savings during the current spending review period and we must therefore proceed on the basis of the information that we have.



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