



***Proposals for the Reform of Legal Aid in England and Wales***  
**Response**

**JUSTICE**

**Briefing Paper**  
**February 2011**

**For further information contact**

Roger Smith, Director of JUSTICE

email: [rsmith@justice.org.uk](mailto:rsmith@justice.org.uk) direct line: 020 7762 6412

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100  
fax: 020 7329 5055 email: [admin@justice.org.uk](mailto:admin@justice.org.uk) website: [www.justice.org.uk](http://www.justice.org.uk)

## **Proposals for the Reform of Legal Aid in England and Wales**

### **JUSTICE**

#### Summary

- *JUSTICE accepts that the government is committed to making substantial savings in relation to the justice system in general and legal aid, in particular. We note, however, that the consultation paper argues that its proposals are inherently desirable and we respond to them on that basis.*
- *The challenge is to ensure that England and Wales continues to have, as it now does, a justice system that is admired throughout the world and one that remains a model for other jurisdictions. As far as legal aid is concerned, this requires the removal of bureaucracy and complexity; the encouragement of efficiency; and the retention of expert representation, particularly in cases of substantial importance. As far as the system as a whole is concerned, two parties in dispute before the courts, whatever their disparity in resources, must be reasonably assured that their dispute will be determined on its inherent merits.*
- *We are concerned that individuals with civil problems - disproportionately, women, ethnic minority and those with a disability - are being asked to bear around two-thirds of the cuts through removal of scope and changes to eligibility. We consider that cuts to the criminal justice system, such as less use of prison and more use of diversion, will lead to savings which are not included in the report.*
- *We commend the focus in the proposals on protecting human rights and public law. However, the paper lacks the kind of integrated approach originally advocated under the concept of 'access to justice', a consideration of the interaction between substantive law, procedure and judicial approach with the need for legal and advice services. The Family Justice Review will be a welcome step in that direction. However, logically, legal aid proposals should follow, not precede, the review and the review should have included a review of family legislation in its terms of reference.*
- *We are concerned that the proposals will lead civil provision to be complicated and fragmented. There are indications of a shaky grasp of history. The Impact Assessment says that: 'The scope of legal aid has expanded beyond its original intentions ...'<sup>1</sup> but the Legal Aid Act 1949 was actually promoted with very wide objectives to provide: 'Legal advice for those of slender means and resources so*

*that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right'. We think that the institution of a national call centre could be an excellent move but its advice remit should not be exclusive.*

- *The impact of simultaneous cuts to advice services from the actions of local authorities has not been considered in the report. The reduction of assistance is likely to lead to depress the likelihood of resolving some problems and increase the likelihood of the unforeseen consequences and costs not only of more litigants in person but also of such litigants who are unassisted by prior advice.*
- *The impact of any cuts made should be reviewed within a three or four year period of their introduction.*

1. JUSTICE is a law reform and human rights organisation dedicated to advancing human rights, the rule of law and access to justice.
2. Attached to this paper is the completed consultation form published as part of the *Proposal for the Reform of Legal Aid in England and Wales* in November 2010.
3. The consultation paper proposes cuts to an estimated total of around £450m. Roughly two-thirds of these are to come from cuts directed at those who are currently legally aided clients and one-third from remuneration cuts to solicitors and barristers expected to do the same work as now but for less money.
4. We are particularly concerned with the effect on those seeking to obtain legal aid. The Ministry of Justice's own impact assessments indicate that around half a million people will lose entitlement. Relative to the general population, the Ministry's own equality impact assessment acknowledges that these will be predominantly women (57 per cent), ethnic minority (26 per cent) and ill or disabled (20 per cent – though this figure is very rough and could be higher).
5. The ministry concludes;  
We have identified the potential for the proposals to have a disproportionate impact on women ...<sup>2</sup>  
We have identified the potential for the proposals to have a disproportionate impact on [Black and Minority Ethnic clients] ...<sup>3</sup>

---

<sup>1</sup> *Impact Assessment; Cumulative Legal Aid Reform Proposals* para 12

<sup>2</sup> *Legal Aid Reform: cumulative impact – Equalities Impact Assessment* para 1.35

Our initial conclusion, therefore, is that we cannot rule out that there may be a disproportionate impact relative to the population as a whole [in relation to disabled or ill clients] ...<sup>4</sup>

6. The Secretary of State argues in his introduction to the consultation paper that the proposals for cuts are not just required by the Treasury: they are inherently desirable. We accept that there is nothing sacrosanct about current levels of expenditure and we support proposals for cuts where acceptable results in terms of fairness can be obtained. Whatever cuts are made in the short term, the Ministry must commit to a root and branch review of the quality of justice within each branch of civil and criminal law. In addition, the government should commit to re-investing in legal aid where cuts have been made which experience indicates have jeopardised adequate access to justice. There should be a further review in three or four years, before the end of this Parliament, when the current financial crisis is averted (see below).
  
7. If there are acceptable cuts to be made to the legal aid budget then they will derive from a holistic approach to the delivery of services which involves consideration of substantive law, procedure, methods of adjudication and systems of delivery as well as legal aid. Just as one example, it may be that considerable savings would be made to matrimonial costs if divorce were available on demand after, say, a year's marriage. This is the sort of fundamental reform which needs to be considered. Similarly, costs might well be saved on housing matters were the government to implement the proposals of the law commission on housing law. The failure to address fundamental issues leads to anomalies. Thus, the paper proposes to align advocates' fees in murder cases with those for other serious cases but, for historical reasons, murder remains a unique offence with a mandatory life sentence and, in consequence, over-complex rules on defences.
  
8. The consultation paper gives insufficient attention to the reasons why the state should provide access to justice. The paper should do more to recognise that the objective is to provide what, in the US, would be termed 'equal justice' ie an equally just result for both parties, regardless of their resources. This should be a fundamental constitutional principle and, indeed, is the phrase engraved on the outside of the US Supreme Court. The duty of a democratic state should be to ensure that members of society abide by,

---

<sup>3</sup> As above, para 1.37

<sup>4</sup> As above para 1.39

and benefit from, the provisions of the law. A major test of state's capacity to deliver equal justice is the extent to which any dispute is determined on its inherent legal merits, and is not unduly influenced by the imbalance of resources between the parties.

9. As a consequence of its limited approach, the consultation paper focuses too narrowly on the right to legal services.

Our consideration of the justification for public funding for civil and family cases is based on an assessment of the justification for public funding for civil and family cases is based on an assessment of the nature of the rights involved, the client's ability to represent his or her own case and the availability of alternative assistance, remedies or funding.<sup>5</sup>

These considerations focus too much on inputs: not the output. What is important is that people get a fair determination of a dispute – this requires consideration of legal assistance as only one of the relevant levers. In relation to family law, it is patently absurd to make proposals for legal aid in family cases which affect procedure by way of widespread diversion to mediation before publication of the report on family procedure which is currently being developed.

10. On the narrow question of relevant considerations for legal aid, we think that the government should clarify that a client's ability adequate to represent themselves requires, in the words of the European Court of Human Rights, 'effective participation' in the case. In other words, gross imbalance in the respective resources of the parties where this might affect the quality of justice obtained should be added to the list of priority considerations in terms of civil legal aid.

11. The consultation paper displays a shaky grasp of history. The Impact Assessment on the consultation paper says that:

The scope of legal aid has expanded beyond its original intentions ...<sup>6</sup>

Actually, the Legal Aid Act 1949 was promoted with very wide objectives that were explained to the House of Lords as providing :

Legal advice for those of slender means and resources so that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right.

---

<sup>5</sup> Para 2.27

<sup>6</sup> *Impact Assessment; Cumulative Legal Aid Reform Proposals* para 12

This is precisely the kind of wide approach to scope and eligibility under attack in the consultation paper.

12. The government should commit holistically to examining each area of law to see how citizens can get as fair a result from reform of substance and procedure as from representation. In this process, it should identify the kind of cases and clients who require traditional face-to-face legal services and those who do not.
13. A focus of equitable outcome widens the approach that government can take. In the 'McLibel case' (*Morris and Steel v UK*), the European Court of Human Rights emphasised that legal representation should be available where required for 'effective representation' to the defendants of a libel case. However, a perfectly adequate alternative would have been to remove the cause of action in the case against the two defendants. This provides another example of how a holistic approach should work.
14. The widespread removal of legal aid in civil cases will place an increased burden on the judge to balance the lack of representation on one side – which will have cost and training implications that should be calculated. For some disputes, lack of representation might be compensated for by more effective information and advice but the paper has no proposals for this. Indeed, the paper does not recognise that cuts elsewhere will dramatically reduce the assistance available to people from other sources such as advice agencies. The government might remember that in *Airey v Ireland* the European Court of Human Rights underlined the need for the 'effective participation' and required Ireland to provide legal aid in matrimonial cases where this was otherwise important.
15. We caution that some savings have been wrongly estimated. Cuts elsewhere to criminal justice agencies and institutions such as the police, Crown Prosecution Service and prisons - as well as the likely increased use of diversionary provision - are likely to result in substantial savings that have not been factored into the paper. We would, in consequence, argue for phased implementation of the proposals and certainly for review after a reasonable period. The cuts to civil provision may be more drastic than are required.
16. The speed with which these cuts have been devised has meant that:
  - Proposals are basically salami slicing cuts rather than, in any way strategic. One of the main proposals – the implementation of contracting in criminal cases – has been on the table for more than a decade. Some

of the cuts to remuneration are random – in civil cases, just ten per cent over the board.

- There has, in particular, been no time to consider the inter-relationship of cuts to legal aid provision to reforms that might be made to substantive or procedural law.
- The proposals are very broad brush. To take just one example, the idea of having a common fee for Crown Court and magistrates court guilty pleas in either way cases where the defendant has opted for trial but then pleads guilty has the potential for justifiable savings. However, in practice, defendants often plead guilty at the last moment because the CPS ‘charge bargains’ ie offers charges of another offence in return for a guilty plea or only accepts a plea at the last moment. The proposal needs more detail if it is to work properly.
- The proposed call centre for all civil cases is an interesting idea with which to experiment on a non-exclusive basis (as has occurred in Ontario, Canada for example). It will fail to deal with those with low communication skills. Its proposed link with a referral service from which it receives referral fees provides an inherent potential conflict of interest which will need some considerable thought to overcome.
- We welcome the preservation of public and human rights law services but the pattern of civil provision becomes extremely fragmentary under the proposals. It will be hard to advise on entitlement and one can predict a succession of judicial review applications challenging negative decisions by the call centre.
- Entitlement should be retained in a wider range of cases or a public nature, for example special needs cases in relation to education. Its proposed removal seems likely to cause considerable hardship – particularly as local authorities are more and more hit by cuts themselves. It may be appropriate to apply a test of household income and capital in such cases but individual children are likely to need assistance in making their case against a local authority which will, itself, be represented. The charities cited in the report as available to assist are unlikely to have sufficient resources to do so unless they were given additional funds. That would provide an alternative to legal help from individual solicitors but it would incur some cost. Such cases are,

effectively a branch of public law and should be funded in the same terms as the consultation paper admits for judicial review.

Because they are the means by which citizens can seek to ensure that state power is exercised responsibly.<sup>7</sup>

We note also that Lord Justice Jackson argues that: ‘consideration be given to retaining legal aid for reasonable pre-litigation disbursements in clinical negligence cases’.<sup>8</sup>

- The changes to financial eligibility and the liability for increased contributions are too Draconian. In particular, it is illogical for the means test for basic income benefits to be higher than that for legal aid.
- Mediation is the right way forward for dealing with divorce cases but research in this country and in the US indicates that it will not work for all. We would argue that one of the reasonable functions of the state is to assist individuals through difficult divorce cases. We advocate the introduction of divorce on demand and without conditions to minimise disputes. A foreseeable consequence of the proposal to retain legal advice in cases of domestic violence is that such allegations will rise: in many cases, such allegations are suppressed because the ‘victim’ calculates - or is advised - that they will not affect the result.

17. There must be joined up thinking by government. The legal aid consultation paper accepts the need for legal help with inquests but the Public Bodies Bill proposed in its original draft to get rid of the post of Chief Coroner, a measure intended to raise the standards of inquests.

18. The main concern of the profession will be the proposed introduction of competitive tendering for criminal cases and cuts to civil remuneration. We leave the main response to the legal representative bodies. We note also that there will be later consultation on compulsory competitive tendering for criminal contracts.

19. We would note, however, that there is considerable experience of contracting to be obtained from jurisdictions like the United States where it has been deployed over the last three decades which is not reflected in the paper. It indicates that criminal contracting can be successfully implemented – as it seems to be for federal cases and in

---

<sup>7</sup> Para 4.97

<sup>8</sup> Lord Justice Jackson *Response to the Consultation on Legal Aid* 14 January 2011, para 3.7



some states like Oregon – but that there are dangers. Most evidently, competitive tendering is competitive only at the point of award of the contract: thereafter, the successful tenderer has a monopoly which must be carefully managed to avoid what we may refer to as the Heathrow snow clearance problem – there can be problems over quality controls that require expenditure.

20. It is worth identifying the lessons from US experience so that proposals for England and Wales can be examined in their light. The first four below are the specific conclusions of the US Justice Department report: these are supplemented by those of a Nuffield Foundation study undertaken in 1998:<sup>9</sup>

- a. Certain types of contract models carry more risk than others  
In particular, this applies to contracts solely based on cost and those ‘with financial disincentives to investigate and litigate cases’.
- b. Requests for proposals should establish guidelines, qualifications and standards.
- c. National enforceable standards are needed. In particular, objective standards of caseload maxima are important.
- d. Monitoring and evaluation are important.
- e. The major determinant of high quality services is a high level of resources.
- f. Contracting is best suited to routine caseloads and tends to lead to cases being dealt with as routine.
- g. There should be separate funds for the separate disbursement of expenses, such as those on experts.
- h. Contracting works best in a co-operative environment between funder and providers.
- i. Strong professional and independent support for the integrity of the lawyer-client relationship is vital.

21. We argued in our response to the last government’s proposals on ‘best value tendering’ that competitive contracting should commence with ‘duty solicitor’ work in the police station and in the magistrates court.<sup>10</sup> The effect will be to create effectively a private practice public defender model of provision for these cases. Most contracts will have to be of a reasonable size to ensure that savings of scale are possible. However, some

---

<sup>9</sup> By JUSTICE’s now director, Roger Smith, and published by the Legal Action Group as above

<sup>10</sup> *JUSTICE response to Best Value Tendering of Criminal Defence Services; a consultation paper issued by the Legal Services Commission December 2007*

contracts should be offered for smaller number of cases to encourage 'new starters' and some threat of future competition for large suppliers.

22. At the present time, England and Wales has legal aid provision which a recent European survey in which JUSTICE was involved suggested was probably second only to Finland. With the Netherlands, it is one of a small group of jurisdictions with relatively good services that, by and large, meet European Convention standards in criminal matters and provide, comparatively, good provision in civil. It is important that the government should hold to the objective of wanting to provide services which continue to be among the best in the world. We should continue to make this our objective even while we seek savings from re-positioning legal aid within a reconceptualised justice system.

23. These cuts cannot be implemented in a 'fire and forget' way. The Ministry needs to accept that there will need to be review on at least four specific aspects:

First, what is the effect on potential clients, particularly when these cuts are supplemented by others? Is it providing adequate access to justice?

Second, how is the legal services market being managed? Can savings be made on contracting 'routine' cases but retaining the necessary detailed support for complex cases?

Third, what does the overall pattern of legal aid look like? Can priorities be shifted?

Fourth, what reform can be made to other elements of the justice system? What changes might be made substantive and procedural law and, indeed, the role of the judge in taking more active management of cases.

Accordingly, the Ministry should appoint a review group, including external experts, specifically to report on these crucial questions within a reasonable period of cuts being made.

**Roger Smith**  
**25 January 2011**