

Legal aid at 65: is the government losing the argument over cuts?



About LAG

The Legal Action Group (LAG) promotes access to justice as a fundamental democratic right. We are a national charity that is independent of the providers and funders of legal services. We seek to represent the interests of the public, particularly the vulnerable and socially excluded, in improving legal services, the law and the administration of justice. LAG also undertakes policy research on access to justice issues particularly the public funding, quality and availability of legal services to the public. Through our publications and training courses for lawyers and advisors, LAG seeks to increase the quality and availability of legal advice. We are self-financing: our publishing and educational activities provide most of our income.

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Legal aid at 65: is the government losing the argument over cuts?

Sixty-five years ago, the modern legal aid system was born.¹ However, there has been no official recognition of this anniversary by the government, which is in keeping with what has been its highly negative approach to this important public service.

Since coming to power in 2010, ministers at the Ministry of Justice (MoJ) have had a clear agenda of wanting to cut the legal aid budget as part of the government's programme to reduce the public spending deficit. In April 2013, the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 introduced a radical reduction in the type of cases covered by the civil legal aid scheme.

The government estimated in 2012 that, overall, 623,000 people would lose out on civil legal aid due to the LASPO Act scope cuts.² The Act swept away entitlement to state-funded legal advice in family, benefits, employment, housing and other common civil legal cases.

To justify these cuts, the government has pursued a policy of traducing legal aid in the media by sticking to a few frequently repeated misrepresentations about the scheme. In spite of this, public support for legal aid remains remarkably robust and has over the last year shifted decisively against the government. According to the opinion polling evidence in this report, less than one-quarter of the public now agree that legal aid should be cut as part of the government's deficit reduction programme.

1. A poisonous discourse

An analysis of the news stories around legal aid illustrates that; in general, the government has pursued three main lines of attack to justify cuts to legal aid³ –

1. The lawyers who provide the service are overpaid.
2. Legal aid goes to the undeserving.
3. It is the most expensive system in the world.

The first statement can be characterised as the ‘gravy-train’ argument. A typical example of this is contained in an article in the *Daily Mail*, which was published in June 2013: ‘£15m for just one firm on legal aid gravy train. Scale of taxpayers’ bill revealed as coalition vows to save £200m⁴’.

This article cites figures published by the MoJ on the earnings of firms and individual barristers from the legal aid scheme. The article quotes Chris Grayling, Secretary of State for Justice, as saying that the figures demonstrated the legal aid system ‘is not sustainable’; however, it failed to explain that Duncan Lewis, the firm identified as earning nearly £15m, was the largest civil legal aid firm in the country, undertook around 20,000 cases a year and employed hundreds of staff. Similar articles can be found on barristers’ earnings, all of which fail to explain that the payments received by these self-employed lawyers are gross figures, and therefore their net income is considerably less. Finally, almost all the press coverage failed to mention that a large proportion of the cuts have been to the funding which subsidised the work of agencies such as citizens advice bureaux (CAB). For example, Birmingham CAB lost over £700,000 in legal aid funding in 2013, which reduced its service to the public by around one-third.⁵

The selective deployment of payments to the top legal aid earners to justify changes to the scheme is not a new tactic. In March 2010, Jack Straw, the then Secretary of State for Justice, published figures on high-earning criminal barristers.⁶ This information was used to support changes in fees which were introduced in the last days of the Labour government.⁷ Straw at least qualified his remarks by saying:

‘The large majority of legal aid lawyers work long hours and provide a valuable and vital public service.’

The current government has instead preferred to try and whip up anti-lawyer sentiment by encouraging a rather poisonous discourse around what is an essential part of the fabric of the justice system. Leo McKinstry’s June 2013 article in the *Daily Express* is an example of this.⁷

McKinstry argues that legal aid is 'no longer a genuine public service but rather a vast subsidy to a privileged elite'. He goes on to conflate legal aid, with the fees paid to lawyers acting on behalf of the government in public enquiries. His piece also touches on the other government attack lines as he asserts that British people see little benefit from a system which spends more than 'any other country in the world' as 'so much of the money is squandered on frivolous cases, politicised actions and legal claims by foreigners who have never contributed anything to our society'. This could be easily dismissed as the rant of a columnist who is paid to express trenchant, if not always fair, opinions but for the fact that McKinstry's article seems to be just a more colourful expression of the Secretary of State for Justice's own opinions.

In April 2013, Chris Grayling, wrote an article for the *Daily Telegraph* in which he accused lawyers and pressure groups of making 'a healthy living by finding more and more varied ways to challenge government in court - and getting you to pay the bill'.⁸ In his piece, Grayling attacked Public Interest Lawyers (PIL), the firm which has acted for clients who have accused British forces of misconduct in Iraq and Afghanistan. He used this example of the firm's work to justify his proposed reform to restrict legal aid to people who are resident in the UK: a move which has been derailed by a recent judicial review decision.⁹ Grayling's comments also served to highlight the invidious position he occupies.

While the Secretary of State for Justice does not make individual decisions on which cases receive legal aid, he does have direct control over legal aid policy and its administration under reforms brought in by the LASPO Act.¹⁰ By criticising decisions to grant legal aid, he is directly attacking his own department; his remarks also risk undermining the rule of law.

There are few votes to be won for politicians who boast that they will ensure that the justice system will guarantee that terrorist suspects and other accused criminals get a fair trial or their treatment will meet minimum international human rights standards; yet, this is a key role of the Secretary of State for Justice. Grayling's intemperate rhetoric both undermines his duty to defend the rule of law and could be blamed for giving implicit support to illegal acts. Phil Shiner, the owner of PIL, argued that articles attacking his decisions to pursue public interest cases are linked to death threats he has received. LAG believes that it is intolerable for a Secretary of State for Justice to be contributing to a climate of hostility which could be blamed for leading to death threats to a legal aid lawyer.

Like the first two lines of attack, the cost of legal aid compared with other countries is not an original one. It was referred to in November 2010, when the present government first announced its plans for civil legal aid; Kenneth Clarke, the then Secretary of State for Justice, argued that 'Legal aid has expanded so much that it is now one of the most expensive in the world.'¹²

Under the Labour government, the MoJ commissioned a report to compare the costs of legal aid systems from Roger Bowles and Amanda Perry of the University of York. The report, which was published in October 2009, did not give clear-cut answers on the costs of legal aid compared with other countries. It argued that there were many factors contributing to costs in different legal systems. In the UK, for example, a

higher divorce rate and a greater number of criminal prosecutions were important drivers of costs. The report concluded that the overall expenditure in different justice systems had to be taken into account to make fair comparisons, rather than quoting the headline costs of legal aid in isolation.¹⁴

This more nuanced approach to understanding legal aid expenditure has been ignored by the government. Instead, the mantra that England and Wales has 'one of the most expensive legal aid systems in the world' is trotted out by the MoJ press office in an almost automated response to any story on legal aid cuts. It made an appearance in the foreword to the November 2010 consultation document on the government's proposed reforms, and an internet search for stories on legal aid shows that this line is still used extensively to justify the further cuts which are planned for criminal legal aid.¹⁵ For example, in a piece published in January this year about the protests against the cuts a MoJ spokesperson is quoted as saying: 'At around £2bn a year we have one of the most expensive legal aid systems in the world, and it would remain very generous even after reform.'¹⁶ The following month, exactly the same quote was used in a story in response to a second round of protests by lawyers against legal cuts.¹⁷

Legal aid, mainly because of the debate over the LASPO Act and other cuts, has had higher media profile since the coalition government took power. Much of the public debate over legal aid policy, though, is conducted between the providers, mainly lawyers, and the government, and gets caught up in the detail of what is covered by the scheme and the rates the lawyers are paid for providing the service. It also misses the bigger picture that the vast majority of clients who benefit from legal aid are either (for those in the criminal justice system) defendants in minor crime cases before magistrates or (for those in the civil/family system) the poorest and most vulnerable people in society who are struggling to sort out contact and residence issues for children, or want to enforce rights to keep a roof over their head or challenge unjust decisions on benefits.

2. LAG opinion polls

In an attempt to try and find out what the public think about the priority which should be given to public funding for legal advice, LAG, with the support of the Baring Foundation, ran an opinion polls in October 2010 (carried out by GfK NOP), and then a follow-up poll in January 2012.¹⁸ Both polls found that over 80 per cent of the population agreed that the state should fund advice in cases involving everyday legal problems, such as in housing, benefits and employment law, for people whose income was at or below the national average.

While these opinion polls tested the public support for legal advice services paid for by the state, they did not directly address the question ***of if the government is right to reduce spending on legal aid.*** LAG, with financial support from the Law Society, commissioned Ipsos MORI (the independent research company) to conduct two separate opinion polls over 2013/2014 to identify whether or not British adults agreed legal aid should be cut to reduce the government spending deficit.²⁰

The first poll was conducted in April 2013, the month in which the LASPO Act cuts were brought in, with a follow-up poll conducted in April 2014. Both polls used a sample group of just over 1,000 adults aged 16+/18+ in Great Britain and were conducted as part of Ipsos MORI's regular Omnibus telephone/face-to-face surveys.

The two polls asked the public how much they agreed or disagreed with the statement:

“Legal aid should be cut to reduce the government spending deficit?”

3. The Results

- *For both studies, the proportion of British adults agreeing that legal aid should be cut to reduce the government spending deficit was significantly lower than those disagreeing*
- *In 2013, a third (34%) of adults aged 18+ in Great Britain agreed that legal aid should be cut to reduce the government spending deficit, but there has been a shift in opinion with only 23% agreeing in 2014.*
- *In 2013, 44% of British adults disagreed with the statement that legal aid should be cut to reduce the government spending deficit, compared to 49% this year – a five percentage point increase.*
- *A quarter of adults neither agreed nor disagreed that legal aid should be cut to reduce the deficit in 2014, compared to just under one in five (18%) in 2013, an increase of 7 percentage points.*

The two sets of data were tested for statistical significance i.e. a test to show the difference between the figures was not due to chance. The results showed a 95% degree of certainty that there has been a shift in public opinion in those who both agree and disagree with the statement cutting legal aid in order to reduce the government spending deficit. There was a 99% level of certainty that there was a statistically significant decrease in those who agreed with the legal aid cuts. 21

The following table breaks down the results-

Q. How much do you agree or disagree with the following statement:

“Legal aid should be cut to reduce the government spending deficit”

| | April '13 1,036 | April '14 1,104 |
|--|--------------------|--------------------|
| Unweighted base | | |
| Agree (those answering “strongly agree” or “tend to agree”) | 34% | 23% |
| Disagree (those answering “strongly disagree” or “tend to disagree”) | 44% | 49% |
| Neither agree nor disagree | 18% | 25% |
| Don't know | 4% | 3% |

4. Changing the story

Despite the consistent case the government has advanced to justify cutting legal aid, only a around a quarter of those questioned in 2014 agreed with that legal aid should be cut, with the level of support for the government's position falling over the last year. A significantly greater proportion of the British adults disagree with the decision to cut legal aid as a means to reduce the government deficit than did so twelve months ago.

In LAG's view these results show that the government is comprehensively losing the argument over legal aid policy. The lines of attack discussed above are clearly not convincing people that it is right to cut back on legal aid expenditure.

LAG believes that the Law Society and other organisations concerned with access to justice need to concentrate their research and related influencing work, around the gaps in services available to the public. Citizens Advice has already picked-up this baton. They reported on research to the recent Justice Select Committee which showed that nine in ten of their bureaux had no-where to refer clients to who needed specialist legal advice. ²²

In the run up to the general election this strategy of focusing on the gaps in services for the public should be linked to a call for the government to either restore legal aid or put in place alternatives, such as those suggested by the Low Commission. ²³ We'd argue that the evidence from these opinion polls indicates that this would be in tune with the mood of the public which is increasing not convinced of the need to cut legal aid.

Footnotes

1 On 30 July 1949, the Legal Aid and Advice Bill received royal assent. Visit:

<http://webarchive.nationalarchives.gov.uk/20100612210610/http://www.legalaid60.org.uk/sixty/decades.jsp>.

2 *Reform of legal aid in England and Wales: equality impact assessment*, MoJ, June 2012, p127.

3 LAG is grateful to Lauren M Karam, an intern research assistant from Hobart and William Smith Colleges, New York for her assistance on the research on the media coverage of legal aid.

4 Available at: www.dailymail.co.uk/news/article-2336003/15m-just-firm-legal-aid-gravy-train-Scale-taxpayers-revealed-Coalition-vows-save-200m.html!

5 The Low Commission Report suggests a strategy to support the provision of social welfare law, p8, available at: www.lag.org.uk/policy-campaigns/low-commission-report.aspx.

6 Available at: <http://metro.co.uk/2010/03/22/barrister-paid-1m-from-legal-aid-184806/>.

7 *Austerity Justice*, Steve Hynes, LAG, p36. 2012

8 Available at: www.telegraph.co.uk/news/uknews/law-and-order/10777505/Legal-aid-is-not-for-foreigners-to-fight-cases-through-British-courts-says-justice-minister.html.

9 Available at: www.legalactiongroupnews.org.uk/legal-aid-residence-test-what-next/?utm_source=rss&utm_medium=rss&utm_campaign=legal-aid-residence-test-what-next.

10 Before April 2013, legal aid was controlled by a separate body with its own governance, the Legal Services Commission

11 Available at: www.theguardian.com/law/2014/jun/06/lawyer-acted-against-british-soldiers-faces-death-threats.

12 Available at: www.dailymail.co.uk/news/article-1330028/Kenneth-Clarke-calls-halt-legal-aid-gravy-train.html.

13 See note 7, p92.

14 See note 7, p92.

15 *Proposals for the Reform of Legal Aid in England and Wales*, November 2010, p3. 16 For example, see: www.bbc.co.uk/news/uk-25597617.

17 Available at: www.theguardian.com/law/2014/feb/12/lawyers-walkout-legal-aid-cuts-england-wales <http://www.theweek.co.uk/law/56714/legal-aid-cuts-why-lawyers-are-walking-out>.

18 *Social welfare law - what is fair?* LAG, 2010, *Social welfare law: what the public wants from civil legal aid*, LAG 2012.

19 Visit: www.ipsos-mori.com/.

20 The 2014 research was conducted on CAPIBUS, Ipsos-MORI's face-to-face omnibus service, between 11–17 April 2014. Questions were asked of 1,104 adults aged 16+ in GB. The 2013 research was conducted on Ipsos- MORI's telephone omnibus service between 26–28 April 2013. Questions were asked of 1,036 adults aged 16+ in GB. A quota sample was interviewed with quotas set by age, gender and standard geographical regions. Full data tables are available on request

21 A statistical test called a Z-Test was applied to the results based on a sample group of 1,036 in 2013 and 1,104 in 2014.

22 Visit: www.parliamentlive.tv/Main/Player.aspx?meetingId=15726%20.

23 The Low Commission is an independent body which was established by LAG two years ago to examine the provision of social welfare law legal advice.

See: <http://www.lowcommission.org.uk/>

