Proposals for the Reform of Legal Aid in England and Wales

Ministry of Justice consultation paper: the response from the Legal Action Group (LAG)

About LAG

LAG is a charity which through its publishing and training services plays an important role in increasing lawyers' and advisers' knowledge of the law. *Legal Action,* published by LAG, is the leading independent magazine for the advice sector and legal aid lawyers. We also publish around 40 books on law and practice, as well as providing over 30 training courses a year which enable lawyers and advice workers to update their skills and knowledge of the law.

We are independent from the funders and providers of legal services. LAG carries out research, policy and campaigning work mainly focused on access to justice and publicly funded legal services. Our primary aim is to speak on behalf of the users and potential users of publicly funded legal advice services.

General comments

The legal aid system was founded in 1949 following the recommendations of Lord Rushcliffe, a former Conservative MP and barrister, who had been asked by the government in 1944 to form a committee to examine establishing a legal aid system. His final report made the following key recommendations:[i]

1. Legal aid should be available in those types of case in which lawyers normally represented private individual clients.
2. Legal aid should not be limited to those people 'normally classed as poor'. but should include those of 'small or moderate means'.
3. There should be an increasing scale of contributions payable by those with income or capital above minimum levels, below which legal aid would be free.
4. In addition to the means test, cases should be subject to a means test of merit, designed to be judged by legal practitioners independent of government, on a similar basis to that applied to private clients.
5. Legal aid should be funded by the state but administered by the Law Society. The Lord Chancellor should be the minister responsible, assisted by an advisory committee.
6. 'Adequate' remuneration should be paid to barristers and solicitors working under the scheme.

It is wholly wrong for the government to imply that the legal aid system has moved away from what was originally intended as a very limited safety net to an overly generous system which needs to be cut back. Lord Rushcliffe's vision was a system in which all people of 'small or moderate means' could have access to advice and if necessary representation in cases in which lawyers would usually represent private clients. LAG would concede that in the austere times of post-war Britain, financial constraints meant that the reality of the legal aid system fell short of Lord Rushcliffe's vision for at least the first 20 years of its existence.

In 1970, in its 20th annual report on the scheme, the Law Society, which at that time ran the legal aid system, argued that scope and eligibility levels needed to be increased for the legal aid system to meet its purpose of providing access to justice for the many people who were unable to afford the cost of a lawyer. Both the main political parties had also acknowledged the need for change in the legal aid system.

Two influential reports, *Justice for all*, published by the Society of Labour Lawyers, and *Rough justice*, published by the Conservative Party, recognised that legal aid and the justice system were failing poor communities. In response to this, in the early 70s the government increased eligibility levels from 40 per cent to 80 per cent as well as expanding the scope of legal aid to cover most civil and criminal legal problems. The Police and Criminal Evidence Act in 1984, which established the right to legal advice in the police station, marked the last large expansion of the legal aid scheme.

In March 1986, the government rushed through legislation to reduce eligibility to legal aid in order to control the budget. The Legal Aid Act 1988 passed the control of legal aid to the Legal Aid Board. In LAG's opinion, successive governments have viewed legal aid as a budget problem to be controlled and concentrated on administrative structures to achieve this aim. The Legal Aid Act 1988 and its successor, the Access to Justice Act 1999, both fall into this trap and LAG fears that the present coalition government is also in danger of doing so. Whatever the size of its budget or the administrative structure put in place to manage it, the legal aid system needs to be underpinned by a clear statement about what it exists for.

LAG suggests that any proposed legislation needs to include a clear statement of purpose for the legal aid system which at its core reaffirms Lord Rushcliffe's original vision.

Scope cuts

We fear that the proposed cuts in legal aid are being contemplated in isolation from other cuts in government spending on advice, for example, the Financial Inclusion Fund and cutbacks in local authority expenditure.

We believe social welfare law is particularly important to ordinary members of the public and is in danger of being decimated by a combination of legal aid, other central government and local council cuts. The opinion poll research we carried out last year shows a remarkable degree of support from the general public for these types of civil law services (84 per cent of respondents believed that advice on civil law should be either free to all or to everyone on or below average income[ii]).

LAG is proposing that a cross-government review of social welfare law services is carried out in partnership with providers and other interested parties before decisions on scope are taken.

International law

LAG believes that the government is proposing to establish the exceptional provisions so that cases which engage rights under the European Convention on Human Rights are covered. However, we believe that such is the extent of the proposed changes to scope that many cases would be brought under these provisions. This would eventually lead to the establishment of a safety net legal aid system, which would cover much of what is presently in scope, but with unpredictable consequences for the planning and provision of legal aid services. We also fear what would be lost by the proposed scope cuts is the sort of initial advice in cases which prevents them from spiralling to a point at which litigation is necessary.

Finally, LAG believes that the government needs to address its obligations under the EU Charter of Fundamental Rights. The removal of so many areas of law from scope, without regard to the circumstances or the needs of individual clients, including those protected by equalities legislation, is in danger of denying them effective remedy under article 47 of the charter, which states:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

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[i] *The Justice Gap: whatever happened to legal aid?*, Steve Hynes and Jon Robins, LAG, 2009.

[ii] *Social welfare law: what is fair?,* LAG, November 2010, p8.