

COSTING THE *TRANSFORMING LEGAL AID* PROPOSALS

Dr Nick Armstrong, Matrix Chambers

1. This note represents an attempt to cost some of the civil aspects of the *Transforming Legal Aid* proposals. Even on the government figures, the total projected savings for these aspects are only £6m. This note shows that even those very modest savings are unlikely to be achieved. It is much more likely that the reforms will cost substantially more. This is quite apart from the fact that, as others have said¹, the constitutional implications of the civil legal aid changes are enormous.
2. The note focuses on the four key parts of the civil legal aid proposals: prison law; the introduction of a residence test; making judicial review funding dependant on the obtaining of permission; and removing funding from borderline cases.

Prison law

3. The consultation paper says the prison law proposals will save £4m². Two issues arise here: first, requiring firms carrying out prison law work to have criminal legal aid contracts. That almost certainly spells the end of specialist niche prison law practices. The second issue is the reductions in scope so that, for example, work done for prisoners in connection with their resettlement, and work on having prisoners recategorised, will not now receive legal aid.
4. The problem here is that anything that results in prisoners being detained longer will be extremely expensive. Hence:
 - a. The Parole Board's response to the consultation paper raised very particular concerns about the impact on its work of a loss of specialist representation³. Specialist solicitors ensure that prisoners secure timely access to offending behaviour courses and to education and employment opportunities; that local authorities have services in place for young, elderly and disabled prisoners who are approaching release; and that the probation service has conducted its assessment, and arranged and checked release addresses. Resettlement work of this kind will not now receive legal aid. The costs implications of this will include:
 - i. Releases being delayed. These delays may be incurred early in the sentence, and may accumulate/accrue. They may also be incurred when cases are not ready at the end of the process and hearings have to be adjourned. Some of these delays will be very substantial indeed (a year or more); other cases will be unaffected. Assuming an average delay of three months, in 2011/12 this would have affected 248 life sentence prisoners released after an oral hearing, and 273 IPP prisoners⁴ at a total cost of at least £3.45m⁵, this cost falling directly on the MOJ budget.

¹ See for example Helen Mountfield QC, *Note to the Constitutional Affairs Committee of the House of Lords* (17 June 2013); letter to Attorney General from 145 Treasury Counsel (4 June 2013); and letter to Daily Telegraph from 90 public law QCs, published 29 May 2013: all available at legalaiddchanges.wordpress.com.

² Consultation paper §3.15; f/n 17.

³ *Parole Boards's response to the government's consultation on transforming legal aid* (4 June 2013).

⁴ Parole Board *Annual Report and Accounts* 2011/12.

⁵ Based on the assumption that all lifers would be in the cheapest accommodation (open conditions), which costs £25,106 a year (see *Costs per place and costs per prisoner* (MOJ Oct 2012)), and IPPs would be either in open or in Cat C. It may be said that a three month delay overstates it. The present author's

- ii. This figure does not include the additional cost to the Parole Board of wasted hearings. The Board's response says this currently costs it £1.57m a year. It may be thought that could double under the proposals. There would also be on-costs to the probation service. Adding in the Board's figure alone takes the total cost of this aspect of the proposals to over **£5m** (so exceeding the £4m projected saving).
 - iii. This figure also excludes the cases where prisoners are released without the involvement of the Parole Board (so many determinate sentence, or fixed term, cases). Early release on tag, for example, may be delayed if solicitors are not involved to ensure release addresses are available. It has not been possible to put a figure on these cases, but they will have an impact.
- b. Prison is expensive. High security prison, however, is very expensive indeed. A Category A prison costs £61,594 per prisoner per year, whereas a Cat B prison costs £33,576⁶. Cat A status is reviewed annually and at the moment, solicitors gather evidence and make representations in support of progressive moves. That work will also now be out of scope. In 2011/12 there were 3,228 men in Cat A. If only 100 of them did not now move on because they have no solicitors to help them (potentially a very conservative estimate) then that would cost an additional **£2.8m**. This is another cost that would fall directly on the MOJ.
- c. The government says that matters that were now outside the scope of legal aid could properly be taken up within the prison complaints system, and by the Prisons and Probation Ombudsman ("PPO"). Even leaving to one side the very serious concerns about the viability of this proposal⁷, the average total cost of a PPO complaint is in the region of £1,000⁸ (and the PPO is already subject to very significant budgetary pressures⁹), whereas the current fixed fee for a solicitor doing this work is £220. The current prison population is 86,000, and last year 5,300 of them complained to the PPO. If that figure doubles it would cost £4.13m (5,300 x (£1,000 - £220)). Even if only 3,200 of them complained (because every Cat A prisoner now has to pursue that route) it would add **£2.5m**.
5. These figures alone, which may be very conservative and ignore a number of other potential impacts¹⁰, therefore add up to a total cost of **£10.3m**. That is more than 2 ½ times the projected saving.

experience is that it is conservative. At the same time, this figure gives no account of young and elderly prisoners, who may be delayed longer, and whose incarceration is much more expensive (a place for a child in a secure training establishment, for example, costs up to £215,000 a year. A Young Offender Institution place is £60,000 a year. There are at least 1,000 children in prison at any one time). Nor does the figure take account a concern raised by the Board, which is that it needs specialist solicitors to persuade prisoners not to make applications for parole when such applications are bound to fail. Factoring in these figures means again that the £3.45m figure is likely to be conservative, and perhaps very conservative.

⁶ MOJ figures, *ibid*.

⁷ See in particular the response of HM Inspectorate of Prisons, which says that even as it stands the complaints system is not working, with significant implications for prison safety: §9 and 12.

⁸ Prisons and Probation Ombudsman report for 2011/2012.

⁹ *Ibid*.

¹⁰ Like all the proposals, the prison scope proposal is very likely to lead to a rise in numbers of litigants in person. Some responses to the consultation have also said that the prison proposals will also lead to an increase in the number of prison disciplinary hearings.

The residence test

6. Because the Legal Services Commission does not keep residency data, the government has not been able to assign a figure to the savings associated with the introduction of a residency test (which would require applicants for any form of civil legal aid to be both in the UK, and to have at least 12 months lawful residence).
7. It is however clear that there would be significant costs associated with this proposal:
 - a. Of all the civil legal aid proposals, this may be the most controversial. It will exclude from legal aid some of the most vulnerable people, and some of the most significant cases of recent years. Examples that have been cited include babies (even British babies by definition cannot have 12 months lawful residence); trafficking victims; the Gurkhas; the Afghani interpreters; the family of Baha Mousa; Binyam Mohamed; and the parents of Victoria Climbié (to name but a few). The residency test, if introduced, would have an “exceptionality” filter¹¹. Given the importance of the cases excluded, it is thought likely that that filter would have to be very frequently used¹². That means no gain for those cases that are then funded once again, and very significant system and other on-costs as the applications have to be considered and refusals of exceptional funding are then litigated (before judges who will no doubt be very concerned about the prospects of having litigants in person in such important cases).
 - b. This may of itself wipe out any projected savings. In addition, however, the residency test will also bring the same kind of immediate on-costs that are associated with the prison proposals. Almost all people in immigration detention will fail the residency test. This will mean more people remaining in detention. On any given day in 2012 there were 3,500 people held under immigration powers, at the cost of £40,000 per person per year¹³. Unlike criminal custody, where people are serving sentences of imprisonment, immigration detention is always discretionary and so every detainee is in principle capable of being released, provided that someone engages with their case, analyses it, and persuades the Home Office or a judge. HM Inspectorate of Prisons is already very concerned about the lack of quality advice for immigration detainees (both in prison and in Immigration Removal Centres)¹⁴. If that goes completely, and each detainee were held for, say, four weeks longer (and this must be very conservative: in the UK, there are now periods of immigration detention which exceed five years), that would produce an additional cost of **£10.8m**.
 - c. There will also be very significant costs associated with confirming the residence status of those who are eligible under the test. In 2011-2012, 140,996 civil certificates were issued by the LSC¹⁵. The majority of people who received a certificate would have been entitled under the proposed residence test, and most would have already been receiving some form of LSC-funded assistance with

¹¹ Consultation paper §3.54.

¹² This means both applications being made; and applications being granted.

¹³ *The effectiveness and impact of immigration detention casework: A joint thematic review by HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration* (Dec 2012).

¹⁴ *Ibid.*

¹⁵ LSC *Annual Report 2011-12*. A legal aid certificate represents a grant of full legal aid funding.

seeking a certificate (*eg* under Legal Help¹⁶) so the costs of establishing that the residence test is met in such cases would have been passed on to the legal aid fund. Assuming, very conservatively, that an average of 30 minutes is needed to verify past lawful residence at a cost of £50 per hour to the LAA and, again conservatively, this is passed on to the LAA in 75% of certificated cases in future, that will produce an additional cost of **£2.6m**.

- d. It should also be noted that in significant numbers of cases it will be impossible to verify past lawful residence or to secure any exceptional funding available immediately. Urgent hearings (for example, in family public law proceedings, homelessness, some evictions and some mental health act detention cases) will inevitably proceed in any event, producing yet another driver towards greater numbers of litigants in person (an effect for all these proposals). The courts have already warned about this false economy in family cases for example¹⁷, but these additional costs do not feature in the impact assessment. They are also not quantified here. They do however need to be borne in mind.

8. It follows that the residence test is very unlikely to save any money.

Paying for permission work in judicial review cases

9. The consultation paper proposes that lawyers will now only be paid for work in connection with seeking permission for judicial review, where permission is granted. A number of responses have pointed out that this is likely to generate a number of perverse incentives for lawyers, who will now have to seek permission in cases where it would previously not have been necessary to proceed that far. The vast majority (between 60% and 90%) of judicial reviews settle without the need for proceedings, because public authorities realise they need to do what has been asked of them. That is likely now to alter.
10. The government says it hopes to save £1m from the introduction of this rule¹⁸. That is based on 800 cases at £1,350 per case¹⁹. That means 800 cases which are currently *seeking* permission for judicial review but not getting it (out of a total of 1800 such cases²⁰). However:
 - a. The consultation paper also says that in 2011-12 there were *an additional* 2,275 cases where permission was not even sought. It is very likely that in a sizeable number of these cases, this was because the relevant authority did what they were asked to do without the need for proceedings. If even 50% (a conservative estimate) of these cases now seek permission, because the incentives have changed, then that is 1,138 more cases for the system to deal with. Using the government figure of £1,350 that means an increased cost of £1.5m. The projected gain has therefore immediately disappeared.
 - b. In addition, however, if more cases are issued, there are then court costs, and costs to defendants, to be taken into account. Those appearing for defendants

¹⁶ Legal aid for preliminary advice and assistance, usually administered on a low fixed fee.

¹⁷ See *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234 *per* Lord Justice Ward at [2].

¹⁸ See the accompanying impact assessment.

¹⁹ *Ibid*, §31.

²⁰ Which means there is a success rate, on issued cases, of over 50%.

estimate that filing initial responses to straightforward judicial reviews (so many immigration claims) costs about £500 - £1,000 per claim, but other cases – including local authority cases²¹ - cost an average of £5,000 (solicitors and counsel). There is then court time to be taken into account, and the possibility of applications for costs against defendants²².

11. Assuming on-costs of only £3,000 (reflecting a conservative average for the court costs and defendants' own costs), and 1,000 affected cases, this amounts to an increased cost of **£4.5m**, or 4 ½ times the projected savings. That figure, however, is likely to substantially increase again if costs orders are made against defendants. At present, in judicial review, these ("*inter partes*") orders are relatively rarely sought, certainly at or close to the permission stage. Where they are obtained, however, the payment rates treble because they are now calculated at something close to commercial rates. If that happens in, say, half the new 1,000 cases, the additional cost to defendants (central government but also local authorities and other public bodies) would be **£1.35m**.

Removing legal aid for borderline cases

12. This is the "test cases" proposal. In this context "borderline" has a specific meaning. It means "it is not possible, by reason of disputed law, fact or expert evidence" to assess the prospects. This is often, therefore, because the law is developing, or because the evidence is highly contentious and requires testing. Cases such as that of Tony Nicklinson are good examples of the former: that concerned the right to die. Societal standards, and the requirements of the law, are obviously shifting in these areas.
13. These are therefore very important cases. The government proposes to remove them from scope for a total projected gain of £1m. It is difficult to assess the cost of the impact of this proposal, but it is clear that there will be significant add-on costs if test cases cannot be brought. There will certainly be a significant administrative cost in dealing with appeals against refusals of legal aid in these cases.

Conclusion

14. This note deals with a small number of specific impacts. Those, and in particular the detention impacts, show that the £6m projected savings of these civil legal aid proposals will be dwarfed by on-costs of nearly **£30m**. To that must be added the more general effects, which include an increase in litigants in person, an increase in court and Legal Aid Agency administrative costs, and implications for prison safety. There will also be costs in fighting challenges to the new system, including challenges arising out of individual refusals of legal aid, but also broader challenges where it is said that the system is simply not working. It is already clear that there will be a number of those.
15. All those costs should be borne in mind. What it is hoped this note has shown, however, is that on any view, these proposals will not save anything.

²¹ Which are particularly susceptible to a change in incentives. Social welfare and education cases tend to settle early because they concern failures to assess and provide services and compromise can usually be found. At the moment, therefore, very few of these cases fight.

²² As the consultation paper accepts: §3.76.