The Coalition Government’s Cuts to Legal Aid

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The Italian poet Dante, in the middle of his life, famously found himself lost in a dark and overgrown wood in which he lost the direct path. In the end, things turned out well enough and he created one of the great works of world literature. His experience is not that dissimilar to anyone seeking to work through the economic, social and political consequences of what are often called the ‘LASPO’ (Legal Aid, Sentencing and Punishment of Offenders Act 2012) cuts. They are, however, unlikely to turn misfortune to such good effect. There is - indeed, without more work, could not be - any really authoritative examination of the consequences. We have some indication from authoritative sources such as the National Audit Office but those who argue how extreme they are need to develop better ways of demonstrating that if there is to be a hope of getting any successor government to reel them back to any degree beyond the marginal.

This is not to say that the legal aid forest is not full of noise. Echoing through it are the screams of bruised providers whose funding has been cut and ire raised: they proffer a clear assertion - though often little proof - of the consequences in terms of human misery, the cost to the economy and other government departments. But hanging in the air is also the deep boom of official statements, all basically making variations of: ‘We don’t know and we don’t care’. As it was put to the House of Commons Public Accounts Committee: ‘The Ministry told us that it was not possible to know what the impact of the reforms might be outside of the Ministry. We heard from the Treasury Officer of Accounts that impact assessments often do not quantify costs of politic changes to the wider public sector … the Ministry told us that the failure to monetise potential knock-on costs of reforms is “representative of a common pattern seen across government”’.

There is no shortage of voices trilling the need for more research - from the majestic thunder of the National Audit Office to the high pitched squeak of academics. Thus, the former: ‘The Ministry of Justice is on track to make significant and quick reductions in its spending on civil legal aid. However, it has been slower to think through how and why people access civil legal aid; the scale of the additional costs to the Ministry likely to be generated by people choosing to represent themselves; and the impact on the ability and willingness of providers to provide legal services for the fees paid. Without this understanding, the Ministry’s implementation of the reforms to civil legal aid cannot be said to have delivered better overall value for money for the taxpayer.’ And, as an example of the latter: ‘There was universal agreement in the literature that advice results in positive outcomes for clients and their households. However, almost all of the evidence originated from the ‘grey literature’, i.e. informally published work, where the quality of the evidence was generally poor. For instance, only a handful of reports were able to provide detailed information on the data, a clear and robust methodology, and sound analysis from which they draw their conclusions.

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1 See e.g. Review of Evidence to the LASPO Act Enquiry Legal Action June 2014
2 Para 22, Implementing Reforms of Civil Legal Aid House of Commons Committee of Public Accounts, HC 808, 2015
3 Amyas Morse, head of the National Audit Office, 20 November 2014
clear problem throughout the literature was the lack of a consistent or universally adopted measure of outcome or quality.\(^4\)

A debate on the consequences of the LASPO cuts segues into a wider discussion of the economic costs and benefits of legal aid more generally. The legal services program in the United States was launched as part of an explicit anti-poverty objective. And there has been consistent interest in how you might measure effectiveness ever since - both in the US and elsewhere.\(^5\) The jury remains out, however, and the need for further research acknowledged even by those in the thick of advancing the economic benefits of legal aid.\(^6\)

So, the consequences of the LASPO cuts raise difficult issues of a political, theoretical and practical nature encountered both in this jurisdiction and abroad. Let us try to limit these by way of the following opening definitions and limitations:

1. This paper is concerned here primarily with the effect of the “LASPO’ cuts, that is to say the following ways in which the government intended to make savings from the legal aid budget - all of which came on stream around or about early 2013: the removal of most civil legal aid and advice save for (tightly defined) cases of domestic violence and some other matters (largely those protected by the European Convention on Human Rights and the Human Rights Act); the introduction of a ‘mandatory’ telephone ‘gateway’ for some residual areas of advice; raising the merits test; reduction in financial eligibility; tightening of the conditions for judicial review applications; reductions in remuneration.\(^5\) Thus, other issues such as wider restrictions to judicial review (where battles continue), costs reform (the aftermath of the ‘Jackson’ report) or even local authority funding cuts are not considered - even though obviously linked. However, the catastrophic fall in the number of tribunal applications is referred to below since it may, at least in part, be related to the reduction of legal aid availability and was abruptly manifest in the first quarter of 2013.

2. Within the LASPO cuts, the paper is concerned with the consequences for those who would formerly have received legal aid and advice. The cuts removed around £300m from the public funding of providers. This has had a massive effect in terms of those providers who concentrated on civil legal aid both in private practice and in law centres or other NGOs. Many in the latter category were simply wiped out or had, at the very least, to cut back completely on their legal aid work. Charting the wider effect of that slashing of provision is being left for another day.

3. Preference has deliberately been given to ‘official’ or (allegedly) ‘neutral’ sources of information - such as the reports of the House of Commons Public Accounts Committee or the Audit Office - over the assertions of providers or former providers for obvious reasons. But, from whatever sources, objective hard statistics are hard to find. It should, however, be

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\(^4\) Low Commission Professor Graham Cookson and Dr Freda Mold *The business case for social welfare advice services: An evidence review – lay summary* July/August 2014

\(^5\) See A Houseman and E Minhoff *The Anti-Poverty Effects of Civil Legal Aid* Prepared for the Public Welfare Foundation., October 2014

\(^6\) See above

\(^7\) The remaining issues in scope contained specified matters in relation to actions against the police, clinical negligence (only neurological damage to infants); community care, debt, discrimination, education, family (very limited), housing (also very limited), immigration and asylum (again very limited), mental health, various miscellaneous matters, public law, and welfare benefits (very limited).

\(^8\) See, for a good summary, House of Commons Library *Civil legal aid: changes since 1 April 2013*
noted that a stream of studies emanating largely from the advice sector in this country and the legal sector more internationally assert methodologies sufficiently good to allow reasonable calculation. Citizens Advice, for example, calculated the return per pound spent on legal aid on housing advice as £2.34. As to the consequences of the LASPO cuts, let us borrow wholesale from the report of the National Audit Office for a definitive statement:

£300m: NAO estimate of spending reduction in 2013-4 from the LASPO reforms  
£268m: NAO estimate of expected annual reduction in spending as a result of LASPO reforms  
685,459: civil legal aid matters the Legal Aid Agency (the Agency) would have been expected to approve in 2013-14 without the reforms  
361,551: civil legal aid matters the Agency expected to approve in 2013-14 as a result of the reforms  
300,496: civil legal aid matters actually approved in 2013-14 (17% fewer than expected)  
18,519 or 30 per cent: increase in the number of cases starting in the family courts in which neither party had representation  
9,000: increase in family mediation assessments that the Ministry of Justice expected in 2013-14  
17,246 or 56 per cent: decrease in family mediation assessments in the year after the reforms

The picture, overall, is of cuts even more severe than were initially expected. The savings were over £30m (around 10 per cent) more than expected. The fall in the number of cases was greater by 17 per cent than expected. Family mediation fell by more than a half when it was expected to grow. Thus, the cuts themselves had a wider ‘chilling’ effect on provision which meant that even those theoretically still within scope failed to claim. The effect of the cuts (linked with related issues such as rises in tribunal fees and small claims court costs) can be seen in related statistics.

First, all tribunal appeals (except those relating to immigration) fell off a cliff in the second quarter of 2013. The Ministry of Justice reported: HMCTS Tribunals recorded 74,401 receipts in the period April to June 2014. This is down 16% on the previous quarter, and 71% when compared with the same period of 2013.

To some extent, this fall is due to procedural diversion from appeals through mandatory review in the case of social security or referral to ACAS in employment. However, the Ministry was forced to acknowledge a likely explanation for the latter: Fees for Employment Tribunals and the Employment Appeals Tribunal were introduced for claims received on or after 29th July 2013, alongside wider reform of procedural rules (following the Underhill Review of Employment Tribunal Rules). As to the consequences of mandatory social

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security review, the Ministry, alas, reported: Robust data is not yet available to assess the impact of these changes on tribunal receipts.12

Second, there is evidence of displacement. An advice structure, underfunded and under pressure, still exists to take some degree of overflow from the cuts to legal aid. Behold, the National Audit Office:

Some individuals who are no longer eligible for civil legal aid may choose to pay for legal advice themselves. However, many who would have received legal aid are unlikely to be able to afford full legal advice or representation for their case. The Ministry acknowledged it was likely that more individuals would seek free advice from third-sector providers because of the reforms. It did not try to forecast the extra demand for these services.

Our consultation with providers indicates that third-sector providers may not be able to meet the extra demand generated by the reforms. Among legal firms/advocate respondents, 49% told us they were referring more clients to third-sector organisations since April 2013 and 70% of third-sector respondents told us they could meet half or less of the demand from clients who were not eligible for civil legal aid.

This finding is consistent with other recent research. For example, Citizens Advice reports that there has been a 62% increase in people seeking advice online about help with legal costs since the reforms, while 92% of Citizens Advice Bureaux are finding it difficult to refer people to specialist legal advice since the reforms were implemented.13 Similarly, the Bar Pro Bono Unit reports that requests for assistance have increased by almost 50% since April 2013.13

Third, we have evidence that increasing numbers of people are representing themselves - presumably from the beginning of a case - where we would have no data - through to litigation. This was recognised by both the Public Accounts Committee and the National Audit Office: this from the former:

16. In the year following the reforms, there was an increase of 18,519 cases (30%) in which both parties were representing themselves (known as litigants in person or LIPs) in family courts. Within this, there were 8,110 more cases involving contact with children in which both parties were LIPs in 2013–14, an increase of 89% from the previous year. Judges have estimated that cases involving LIPs can take 50% longer and many legal professionals have said that they place additional demands upon court staff. The NAO also identified an increase in the number of contested family cases reaching the courts, with the figure rising from 64% in 2012–13 to 89% in 2013-14. We heard evidence from the Magistrates’ Association that magistrates feel that the significant rise in the number of LIPs in family courts has had a negative impact on the administration of justice.14

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12 as above
The NAO was willing to put a figure on the cost of this growth in self-representation though its methodology is probably somewhat rough and ready:

Based on the increase in self-representation, we estimate the additional cost to HM Courts & Tribunals Service at £3 million per year, plus direct costs to the Ministry of approximately £400,000. There may also be costs to the wider public sector if people whose problems could have been resolved by legal aid-funded advice suffer adverse consequences to their health and wellbeing as a result of no longer having access to legal aid.\footnote{15}

Fourth, some people may just lose out. The Public Accounts Committee reported:

We heard from the Magistrates’ Association that some people have difficulties with the court forms and processes involved in family law matters. For example, the application form for a case involving contact with children is 24 pages long, and the guidance document for that form is 32 pages long. The Magistrates’ Association told us that this complexity may prevent people from accessing support to maintain a relationship with their children.\footnote{16}

The cuts have clearly had an influence beyond themselves. Solicitors evidently played a major role in encouraging mediation in family cases. Even though funding remains, the number of cases going to mediation has slumped:

The Ministry continues to fund mediation through civil legal aid and expected 9,000 more mediation assessments and 10,000 more mediations to start in 2013-14. However, mediation assessments fell by more than 17,000 and there were more than 5,000 fewer mediations starting in 2013-14 than there were in 2012-13.\footnote{17}

Both the National Audit Office and the Public Accounts Committee criticised the Ministry of Justice’s lack of wider perspective than simply delivering the cuts to its legal aid budget. The NAO recommended that:

\begin{itemize}
  \item a The Ministry should develop measures to evaluate the impact of the reforms more fully, including estimating any wider costs to the courts system. For example, it should improve its data on court case duration, potentially as part of its criminal justice system efficiency programme.
  \item b The Ministry should consider what further steps it could take to meet its objective of reducing the number of cases going to courts in the areas of law removed from the scope of civil legal aid. This includes continuing to monitor the use of mediation, and considering what further action it should take if take-up does not increase in line with expectations.
  \item c The Ministry should establish the extent to which those who are eligible for civil legal aid are able to access it and what obstacles, if any, exist.
\end{itemize}

\footnote{15}{as above}
\footnote{16}{http://www.parliament.uk/documents/commons-committees/public-accounts/HC%20808%20civil%20aid%20final%20(web%20version)%20v2.pdf}
d The Ministry should develop its understanding of the challenges facing civil legal aid providers and the provision of support across the country. It should use this improved understanding to ensure sustainability in the market and coverage across the country.\textsuperscript{18}

In calling for more research on impact measures, the NAO joins just about every interested institution or researcher in the field. Thus, we have Professor Cookson and Dr Mold on evidence to the Low Commission:

Primarily, there is a need for further evaluation of advice services, to determine their effectiveness and value for money. Currently there is an absence of good-quality research on the economic value of legal aid, focusing on costs of services and return of investment, especially research based in the UK. More quantitative, longitudinal studies are warranted in this area.\textsuperscript{19}

The US study referred to above is demanding about the methodology of what needs to be done:

Many of the economic benefit and Social Return on Investment studies make inadequately supported assumptions in the course of describing the cost savings resulting from legal services. A classic example of an inadequately supported assertion is the assertion that a certain percentage of people who legal services attorneys saved from eviction or from having their mortgage foreclosed would have had to go into emergency housing had it not been for the legal services intervention. Because little research has been done on the number of people who resort to emergency housing in the absence of a legal services intervention, the economic benefits studies rely on a single, small, outdated study from New York State to suggest that somewhere in the neighborhood of 20 percent of homeless people resort to emergency housing. An updated study, tracking people evicted from rental housing or mortgage foreclosure, would offer us a much more realistic picture of what actually would have happened to people evicted or whose mortgages were foreclosed. A corollary study could examine what happened to people who were not evicted.\textsuperscript{20}

Any comprehensive study of the impact of the LASPO cuts would require at least three elements. First, an analysis of the economic consequences undertaken with the rigour suggested above. We just don’t really have the data to go beyond assertion at the present time. And the truth is that we may never be able to get absolutely reliable figures but we should certainly try. Approaches do not have to be drily mathematical. It may be possible to find areas in the country where the effects have been mitigated - through the provision of pro bono services or with funding from local authorities or foundations - which can be compared with those where the cuts bit as intended. If these cuts are ever to be ameliorated we need more than assertion to back up argument - even if we are addressing ourselves to a more sympathetic government than the present. Second, we need to chart, if we can, the consequences of the cuts in terms of social exclusion and community (in)cohesion. What is the experience of women excluded from legal aid during divorce? What are the consequences

\textsuperscript{18} para 17 as above  \textsuperscript{19} as above  \textsuperscript{20} Houseman and Minoff as above.
for their children? Third, we need to identify the decline in public accountability that arises from the reduction of appeal, review and challenge rights. At stake here are some of the great gains of the ‘welfare rights’ movement which shifted the discourse from discretionary donation to legally backed entitlement. Can this be done? Well, undoubtedly not perfectly. But, it will help us in the struggle to preserve services and to regain them to do our best. And, finally, the ultimate test of a legal aid scheme for the poor is how well ‘justiciable problems’ might be resolved at all levels of society. We need something like the British Crime Survey which nationally charts whether people are finding it easier or harder to resolve their legal problems. Here, we do have a methodology - developed by Professor Hazel Genn21, used by the Legal Services Research Centre before it was abolished as part of the LASPO cuts and followed around the world. Somebody needs to fund surveys that allow comparison of access to justice over time. But don’t hold your breath. It won’t be this government that does that. Who then will take up the role of the Dante of the justice system? The role is vacant: the need is pressing.

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21 H Genn *Paths to Justice: What people do and think about going to law* Hart, 19990