

Justice under the axe: can the government's cuts
be fair?

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While giving evidence before the Justice Committee of the House of Commons, the Lord Chief Justice recently likened Her Majesty's Court Service to a car: 'I would love to think that we can afford a Rolls-Royce, but I know that a car that is not a Rolls-Royce can get from London to Nottingham or London to Birmingham and so a smaller car will do. What I can't have is a car that is going to break down.' With the present government seeking to shrink the Ministry of Justice's £9 billion budget by £2 billion, Lord Judge's concerns are surely appropriate: can cuts of this scale possibly be made without the machinery of justice breaking down?

A break down could occur in a number of different ways, not all of which would primarily be failures of fairness. But if the cuts undermined safeguards against miscarriages of justice in criminal trials or deprived some individuals engaged in genuine civil disputes of access to the courts, that would be a fundamental failure of fairness. Most of us take the need for fairness in criminal trials for granted, but the second point is just as compelling, for the reason stated succinctly by the late Lord Bingham: 'An unenforcable right or claim is a thing of little value to anyone.'

Some of the proposed cuts do not, or do not have to, undermine either of these basic requirements of fairness. However regrettable the closure of local magistrates' and county courts may be, it will not be a failure of fairness if steps are taken to ensure that vital witnesses are not deterred from attending and the courts remain accessible to those dependent on public transport. It would be difficult to argue, also, that the Ministry of Justice should be exempt from the pay freezes and redundancies affecting other parts of the civil service. But there is one area in which the proposals justify serious concern: legal aid.

The government has proposed a vast reduction in the scope of civil legal aid as well as a 10% reduction in fees in such cases. The projected savings amount to £350 million out of a present expenditure of £920 million: a reduction of almost 40%. Legal aid has been preserved in several areas where it is of especial and obvious importance, such as asylum appeals and judicial review. Equally, there may be areas where its availability is not a basic requirement of fairness. But there is reason to be concerned about much in between. If this means, for example, that vulnerable individuals unfairly or wrongfully dismissed from their jobs or those denied welfare benefits to which they are entitled no longer have access to legal advice, it will not merely be unfair. It will create such an impediment to the enforcement of their rights that it will not comply with the minimal standards required by the rule of law.

The government's consultation paper suggests a number of alternatives which could fill the gap which will be created by the withdrawal of legal aid, including conditional fee agreements (CFAs), Citizen's Advice Bureaux and pro bono work. This is not entirely reassuring.

There is undoubtedly a role for increased use of CFAs in civil litigation, but they may not be well-served to replace legal aid. Lawyers working under CFAs

will have an incentive to cherry pick the easiest cases to the exclusion of those with reasonable but less certain prospects of success. If Lord Justice Jackson's suggestion that success fees should be paid by the claimants is followed, those whose claims are strong will in most of the many cases when compensation is relatively small be left significantly worse off than those who did not have to resort to a CFA, even after the proposed 10% increase in compensation. So some claimants will end up taking away less compensation than was appropriate, given the extent to which their rights were infringed, while others whose claims are not frivolous may find it difficult to acquire representation at all. Lord Justice Jackson has himself expressed opposition to the use of CFAs to replace legal aid: 'It is vital that legal aid remains in these areas.... The legal aid system plays a crucial role in promoting access to justice at proportionate costs in key areas.'

If properly funded, CABs and law centres might be able to replace legal aid where properly advised litigants in person have a reasonable prospect of success. However, CABs and many law centres are funded by local government. There is no guarantee that councils will preserve them when faced with difficult choices about what to cut. Furthermore, it is unlikely that pro bono work will be able to fill the gap when organisations like the Free Representation Unit are unable to represent many of the clients currently referred. And it is far from clear that lawyers feeling the effects of the recession and disaffected by cuts to legal aid will step in to fill the gap.

If none of the above are adequate alternatives to legal aid, is there any alternative to cutting it? The Law Society has proposed that it should be paid for by an increase in the tax on alcohol on a 'polluter pays' principle: much criminal litigation ultimately results from alcohol abuse. Alternatively, many

companies only loosely associated with the UK resolve their disputes in the English courts. Given the leading position in the global market of English law, a small levy on such cases would be lucrative and unlikely to drive much of this business away.

In our straitened circumstances a second-hand mini may be a better purchase than a Rolls-Royce, but if there is any alternative we should not throwing the engine – or any of the passengers – away.