

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

Mr. Justice Harman's nanny used to say, "The world is a very unfair place and the sooner you get to know it the better."¹

It is a sad truth. A child might think that fairness is part of the natural order, but adults know better. Even so, human civilisation has always prized the notion of justice, and for good reason: a just society is happy and resilient. So, when justice fails, adults do not simply cry, "It's unfair!" They demand improvement.

Justice, then, is both a high ideal and a prosaic undertaking. This latter is the task of the Ministry of Justice, which pays for prisons, legal aid, the courts and related bodies. In the current year, it will spend £8.9 billion. Over the next four years, its budget will fall by 23% in real terms (deepening a real-terms cut of 4% over the last four years).

The question whether these cuts are fair leads to the further question: fair to whom? The government says, "Fairness starts with tackling the deficit." That suggests cuts must in the first instance be fair to the taxpayer. Cuts should also be fair to those who work in the justice system. Most of all, cuts should be fair to users of the justice system: defendants, claimants and the public as a whole.

The fair way to cut is through efficiencies: saving money without cutting services. Efficiencies are famously easy to promise and hard to deliver; but one can find them by considering what is really necessary to achieve one's objectives. In the words of Lord Judge, "As long as the car works efficiently... a Rolls-Royce is not needed."

¹ Cited by him in the context of competition between businesses in *Swedac Limited and Others v Magnet & Southern Plc* [1989] 1 F.S.R. 243, 249.

Prisons and probation offer the best prospect for efficiencies, and account for almost half of the Ministry of Justice's budget. Each prisoner costs the taxpayer £41,000 a year, so it is natural to consider reducing the prison population. That now stands at 85,000, having doubled in 15 years as the government strove to show it was 'tough on crime'.

A reduction of 3,000 prisoners has been mooted. The challenge is achieve this while protecting the public: for example, lenient sentences or early releases might undermine public confidence.

A fairer way is to send offenders to prison only where necessary. Sometimes, community sentences work better than short prison sentences, although they are still expensive. Another possibility is to assess the risk posed by individual offenders before processing them. A Cambridge Professor, Lawrence Sherman, is studying an 'actuarial' method to achieve this, collaborating with 10 police forces.

The fairest approach is rehabilitation. This depends on understanding the difficulties facing prisoners: 62% suffer from drug addiction and 82% can write no better than an 11-year-old. Treating these problems is fair to the prisoners and—by reducing re-offending—fair to the public.

Of course, prisons may be susceptible to more conventional efficiencies, such as reforming working practices, economies from larger prisons and outsourcing purchasing. Charities and social investors might also provide services to prisoners.

Another place to look for efficiencies is in courts and tribunals, which make up an eighth of the budget. Here, at least, the taxpayer gets a good deal: most magistrates work for nothing, and most judges earn less than the prime minister, even though they would earn significantly more in private practice. Also, court fees and fines meet

80% of the cost of civil justice, with the taxpayer supplying the remaining £100 million.

Still, there might be efficiencies available. For example, better technology or better administration might reduce costs without affecting the quality of service; closing 157 courts as proposed could save money and allow asset sales; and raising fees on commercial cases could reduce the burden on the taxpayer.

Beyond efficiencies, cuts will affect services. Here, the concern must be to mitigate the unfairness by protecting the people who depend on the justice system. Thus, the quarter of the budget that pays for legal aid will be hardest to cut.

Legal aid is crucial to sustain the rule of law, and the right to a fair trial includes a right to legal aid;² but the courts' daily business of answering questions about fact and law incurs an inevitable expense. Our legal-aid system is the most expensive in the world, costing £38 per capita, which will fall to £34. France, by contrast, spends £4, although its inquisitorial system of justice puts much of the expense on the court itself.

One approach is to prioritise cases where there are risks to people's liberty, safety or homes. Funding for other cases could come from insurance or no-win-no-fee agreements (Lord Justice Jackson's report proposes 'damages-based agreements').

Another approach is to cut lawyers' fees. Reducing rates of pay might appear to be an efficiency, but there have already been significant cuts for criminal work and the risk is of lower quality work. Reducing hours worked might offer genuine efficiencies, for example by removing incentives for defendants to delay pleading guilty, but again there is a risk of cutting corners.

² Art. 6(3)(c) ECHR

Regrettably, cuts to legal aid will not be the only source of injustice. Many people do not qualify for legal aid and cannot afford to pay privately. Those who can afford it will often prefer to settle than to risk legal action; or they will not recover damages because the defendant has no money, or because they cannot prove who was responsible.

In this context, it is *least* unfair to insist that litigants rely on the taxpayer only in cases of serious injustice.

To conclude, spending cuts show what an unfair place the world is. The task is to minimise the unfairness. Cuts should start by reducing waste in the justice system and tackling re-offending, and here what matters is what works. Beyond this, any cuts should mean withdrawing services from those who can resolve their disputes in other ways, but not from those who depend on the justice system. For although the world is unfair, justice is necessary to maintain civilised society, and cutting too deeply will damage it.

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