



National Audit Office



REPORT

Government's management of legal aid

Ministry of Justice, Legal Aid Agency

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HC 514

Key facts

April 2013 **£1,856mn** **£728mn**

implementation of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012

total spending on legal aid in 2022-23

real-term reduction in legal aid spending between 2012-13 and 2022-23

40% of family dispute cases in the period from January to March 2023 where neither the applicant nor respondent had legal representation (January to March 2013: 14%)

9 percentage point decrease in the proportion of the population in England and Wales within 10 kilometres of a provider of legal aid housing advice, for issues such as eviction proceedings, from 73% in 2013-14 to 64% in 2022-23

11 percentage point decrease in proportion of UK income taxpayers that had an income below the gross income threshold for civil legal aid between 2012-13 and 2020-21, from 73% to 62%

15% uplift to most legal aid fees for criminal cases in 2022, in response to a recommendation from a 2021 independent review into the sustainability of criminal legal aid¹

28 years since the Ministry of Justice (MoJ) last increased legal aid fees for civil cases – MoJ has not adjusted fees for inflation and it reduced fees by 10% in 2011-12

Note

¹ The overall impact of the uplifts differs for barristers and solicitors, see paragraphs 13 and 3.9 for more detail.

Summary

1 Legal aid is government funding for legal services for people who meet certain eligibility criteria. In England and Wales, legal aid funding is administered by the Legal Aid Agency (LAA), an agency of the Ministry of Justice (MoJ). Legal aid includes support for criminal and civil legal matters provided to individuals by private legal firms and not-for-profit organisations (providers).

2 MoJ introduced reforms to legal aid in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), implemented in April 2013. Through the reforms, MoJ aimed to:

- discourage unnecessary and adversarial litigation at public expense;
- target legal aid to those who need it most;
- make significant savings to the cost of the scheme; and
- deliver better overall value for money for the taxpayer.

The reforms significantly curtailed the types of cases for which people could claim legal aid and made some adjustments to financial eligibility criteria.

3 We last reported on civil legal aid in 2014.¹ We found that while the reforms had been successful in reducing legal aid expenditure, the wider impacts of the changes were poorly understood by MoJ. We have not reported on criminal legal aid since LASPO was implemented.

4 In recent years, MoJ has commissioned several reviews of legal aid, following stakeholder concerns about access to justice and the sustainability of both the criminal and civil legal aid sectors. Increases in the number of criminal cases and impacts of wider government policy such as the Illegal Migration Act 2023 are expected to further increase pressures on legal aid and the justice system. The focus of this report is to evaluate the processes and information MoJ and LAA have at their disposal to manage the overall legal aid system and to ensure value for money, now and in the long term. We have not examined LAA's operational efficiency, nor have we sought to examine each area of criminal or civil legal aid in depth. This report covers:

- MoJ's progress in understanding the full costs and savings from the LASPO reforms (Part One);

¹ Comptroller and Auditor General, *Implementing reforms to civil legal aid*, Session 2014-15, HC 784, National Audit Office, November 2014.

- how MoJ and LAA are ensuring that legal aid provides the level of access to justice that the reforms intended (Part Two); and
- how effectively MoJ and LAA understand and manage legal aid markets to ensure sustainability (Part Three).

5 We conclude on whether MoJ and LAA can demonstrate that they are delivering value for money from legal aid.

Key findings

Costs and savings of reforms

6 MoJ has achieved its aim of making significant reductions to its legal aid spending since the LASPO reforms, with real-term expenditure reduced by over a quarter. In real terms, spending on legal aid fell by £728 million (from £2,584 million to £1,856 million, a 28% reduction) between 2012-13 and 2022-23 (in 2022-23 prices) as case volumes fell. Although this reduction may not all be directly attributable to reforms, legal aid spending reduced by £694 million by 2019-20, £147 million more than MoJ had estimated it would when the reforms were introduced. Most of the reduction occurred from 2013-14 to 2015-16, with expenditure remaining largely stable since (paragraphs 1.4, 1.7 and 1.8, and Figure 2).

7 MoJ still does not know the full costs and benefits of LASPO as it has not made progress in understanding how the reforms may have affected costs in other parts of the criminal justice system and wider public sector. Since our 2014 report, MoJ has made some progress in probing wider impacts of the reforms. For example, in its 2019 review of the reforms, MoJ accepted stakeholder concerns that removing early advice for some categories of law from the scope of legal aid may mean that cases escalate into a more complex and therefore costly form. However, MoJ has made little progress in understanding the potential scale of these costs except for estimating the relative costs of mediation versus court for family cases (see paragraph 8). Legal sector stakeholders we consulted provided us with examples of where they feel costs have shifted from legal aid funding to elsewhere in the public sector. Examples included local authorities funding legal advice for immigration cases to mitigate costs to themselves later on, and the negative impact on court efficiency of a significant increase in people representing themselves in civil cases. Between January and March 2023, the proportion of family dispute cases where neither the applicant nor respondent had legal representation was 40% (compared to 14% for the same period in 2013). Stakeholders argue people representing themselves can increase case duration, but HM Courts & Tribunal Service (HMCTS) has not looked at the impact of self-representation in family courts since 2018. Data limitations hinder its ability to make an accurate assessment, for example, HMCTS only records estimated, not actual, hearing lengths (paragraphs 1.9 to 1.11, 1.17 and 1.19, and Figures 3 and 4).

8 MoJ recognises that changes introduced by LASPO reduced access to early advice and unintentionally reduced publicly funded mediation referrals, but more than a decade on it has not been able to increase take-up. Providing access to early legal advice and mediation has the potential to reduce wider costs to the system. MoJ acknowledges that removing early legal advice through the reforms may have caused additional costs elsewhere, but it does not hold the data it needs to understand the cost-benefit case for early advice. In 2022, MoJ attempted to pilot a scheme promoting legal aid funded access to early advice, to help build its case for change. However, the pilot was unsuccessful, securing three participants from an intended 1,600 due to shortcomings in its approach to recruiting participants. In family courts, referrals to mediation have reduced significantly since LASPO. This is because the reforms withdrew most funding for solicitor consultations which were the most common source of mediation referrals. MoJ estimates there would be substantial financial savings from diverting family court cases to mediation and so has introduced initiatives to boost mediation levels. However, legally aided mediation assessments have remained around 60% below their pre-LASPO levels. MoJ originally expected assessments to increase by around a third following the reforms (paragraphs 1.12 to 1.13, 1.15, and 1.18 to 1.19, and Figure 5).

Access to legal aid

9 MoJ does not collect sufficient data to understand whether those who are entitled to legal aid are able to access it. Delivering access to justice is one of MoJ's three key priorities. However, MoJ lacks a good understanding of both the demand for legal aid and the capacity of existing providers so it cannot ensure advice is available to those entitled to it. We recognise that assessing demand is inherently challenging but MoJ could do more. This report presents the available information on access and sets out the limitations of these datasets. MoJ and LAA do not estimate overall demand for legally aided services. LAA monitors capacity risks through its quarterly capacity reviews and holds data on contracted providers' legal aid activity, but it does not routinely capture why some providers may undertake few or no legal aid cases. In 2022-23, in all civil law categories except family and mental health, at least one in 10 contracted firms took on no cases. There may be various reasons why providers do not take on work. For example, providers may not have the capacity to take on new clients or there may be low demand. Respondents to our consultation also suggested providers may only take on more straightforward cases due to financial constraints. Without the necessary data it is not possible to tell, and MoJ and LAA do not collect routine data on the reasons for low provider activity. Similarly, MoJ does not track whether individual applicants to LAA's exceptional case funding scheme are able to access a provider once their application for funding is approved. The scheme provides legal aid for issues outside the scope of legal aid, where a failure to do so would breach or risk breaching an individual's human rights or EU law, or for inquest cases with a wider public interest determination (paragraphs 2.9 to 2.14, 2.19, and 2.23 to 2.24, and Figure 10).

10 The available evidence suggests that limited provision in some areas of the country may make it harder to access legal aid. Reducing the scope of legal aid naturally led to a smaller number of firms doing legal aid work as the market adjusted to fewer cases being eligible for funding. Our analysis shows that sustained decreases in the number of legal aid offices means a smaller proportion of the population are now within 10 kilometres of an office in most categories of civil law. For example, the proportion of the population in England and Wales within 10 kilometres of a legal aid office for housing advice, for issues including eviction, fell nine percentage points, from 73% in 2013-14 to 64% in 2022-23. The proportion in 2022-23 falls to 57% when looking only at housing offices that actively took on new cases. The lack of a local office does not automatically prevent people from accessing support, for example, firms can provide some advice remotely. However, MoJ and LAA recognise there are some areas of England and Wales where there may be unmet need in certain categories of law, including housing, immigration and advice in police stations. It also acknowledges that remote support will not be suitable for everyone (paragraphs 2.15 to 2.22, and Figures 7 to 9).

11 The proportion of the population eligible for support has reduced, as MoJ has not yet changed financial eligibility thresholds. MoJ recently reviewed its financial eligibility criteria for legal aid, the financial thresholds for which have not increased in cash terms for over a decade. The impact of static thresholds, set against wage inflation, means that a smaller proportion of the population are now eligible for legal aid. Between 2012-13 and 2020-21, there was an 11 percentage point decrease in the proportion of UK income taxpayers who had an income below the gross income threshold for civil legal aid. There was also a 16 percentage point decrease in those who had an income below the gross income threshold for criminal cases in magistrates' courts. MoJ has now proposed to update its financial eligibility criteria, which will make more people eligible for support. This includes clearer definitions of who it is trying to target, for example, those with below median income for civil legal aid. However, limitations of LAA's digital systems and changes required due to the Illegal Migration Act 2023 mean that some of the changes will not be implemented until 2025. Additionally, new thresholds risk being out of date even when they are introduced as they are currently based on 2019-20 data and average earnings increased by a quarter between April 2020 and October 2023. MoJ intends to consider the thresholds again prior to implementation and then within three to five years of the final elements of the new means test coming into operation (paragraphs 2.6 to 2.8).

12 The exceptional case funding scheme routinely approves certain types of immigration cases, but MoJ has not updated its approach to bring them into the scope of legal aid. This approach may not be cost effective and presents access to justice risks. Immigration cases accounted for two-thirds of applications for exceptional case funding in 2022-23. LAA approves the vast majority of these applications (87% in 2022-23), which typically relate to immigration action where a lack of legal support would breach the individual's human rights. These cases are being funded via a more complex and potentially more expensive route than standard legal aid applications, but have a very high likelihood of approval. Evidence suggests that compared with a standard legal aid application, exceptional case funding applications are more resource-intensive for LAA to process and more difficult for providers or individuals to apply for (paragraphs 2.24 to 2.26, and Figures 11 and 12).

Sustainability of the market

13 MoJ has been slow to respond to market sustainability issues. MoJ and LAA are aware that there are some areas of England and Wales where there may be unmet need for certain categories of law and of stakeholder concerns around the sustainability of the sector. For example, between 2018 and 2020, LAA ran retendering exercises for 14 schemes for on-the-day emergency housing advice, but no provider was found across eight schemes covering 11 courts. In 2021, Lord Bellamy published his review of criminal legal aid, which found that the current fee schemes do not accurately reflect work undertaken by providers. He recommended that MoJ increase overall fees for barristers and solicitors by at least 15%. In response, MoJ implemented a 15% increase to most fees for criminal cases in September 2022, but it only committed to raising overall fees for solicitors by 11%. MoJ stated that this was because it was still considering reforms to certain fee elements aimed at removing perverse incentives, following another review recommendation. This led to a Judicial Review which reached a judgment on 31 January 2024. Civil fees have been frozen since 1996, then MoJ reduced them by 10% between October 2011 and February 2012. In real terms, civil legal aid fees are now approximately half what they were 28 years ago. MoJ has only recently begun to review civil legal aid fees as part of its wider review of the system and has not committed to proposing changes to specific fees following this (paragraphs 2.21, 3.7 to 3.9, and 3.13).

14 LAA has started to explore how different contracting approaches may make the market more attractive for providers. LAA is limited in how it can incentivise providers and respond to risks to market sustainability, but it does have some levers it can use. For example, where the number of providers in an area falls below LAA's minimum provision thresholds during a contract term, LAA can address gaps in provision by running additional procurement activity. However, this is not always successful or cost effective due to the administrative burdens it creates for both LAA and providers. Generally, firms are otherwise limited to joining the market or expanding their provision of legal aid at the beginning of a contract period (typically three years), though evidence suggests that some firms may wish to join the market or expand their provision during the contract term. LAA is exploring how different approaches to contracting for criminal legal aid could reduce barriers to entry for providers. It intends to consider similar changes to civil procurement pending progress on MoJ's Review of Civil Legal aid (paragraph 3.7 and Figure 13).

15 Demand for criminal and some types of civil legal aid is likely to increase at a time when the market is in a fragile position to respond. MoJ expects that the government's Illegal Migration Act (IMA) will increase demand for civil legal aid. An increase in the number of police officers, which will likely lead to more arrests, is likely to increase demand for criminal legal aid. At the same time, many respondents to our consultation highlighted difficulties in training and recruiting staff and expressed plans to reduce or withdraw their legal aid services in the near future. MoJ has committed to a fee increase of 15% for areas of law covered by the IMA in an attempt to attract sufficient providers. However, MoJ expects that providers will de-prioritise other immigration work to meet expected demand (paragraphs 3.11 to 3.13).

16 MoJ cannot routinely identify emerging market sustainability risks, which undermines its ability to ensure the sustainability of legal aid. MoJ aims to assess the sustainability of legal aid through periodic large-scale reviews but does not do this regularly or routinely. Outside of these reviews, it relies on information from LAA to identify and respond to risks to market sustainability. However, while there are routes for LAA to raise risks with MoJ, LAA lacks routine financial and other data to help it raise sustainability risks early. For example, it lacks routine data on the profitability of legal aid work for providers. Until MoJ and LAA address weaknesses in their understanding of the demand for legal aid, capacity among providers, and whether providers are sufficiently incentivised to stay in the market, neither can sufficiently understand or assess short- or long-term sustainability risks (paragraphs 3.6, 3.9 and 3.14).

Conclusion

17 MoJ has succeeded in its objective of significantly reducing spending on legal aid, which has fallen by more than a quarter in the last decade in real terms. Since we last reported, MoJ has done some work to better understand the impact of its reforms and is aware of several areas where changes may have shifted costs elsewhere within government. But it still lacks an understanding of the scale of these costs and so cannot demonstrate how much its reforms represent a spending reduction for the public purse overall. Meanwhile, stakeholders have continued to raise concerns about the reforms' detrimental impact on the efficiency of the wider justice system, including the removal of early advice, and the increase in people representing themselves in courts. The increase in self-representation in family courts is largely due to MoJ's failure to divert people to mediation as planned, which has undermined its objective of reducing unnecessary litigation. MoJ must now build its evidence base on the costs and benefits of providing legal aid at different stages to ensure that it is achieving value for money from its choices.

18 MoJ has set providing swift access to justice as one of its primary objectives. Theoretical eligibility for legal aid is not enough to achieve this objective if there are an insufficient number of providers willing or able to provide it. MoJ must ensure that access to legal aid, a core element of access to justice, is supported by a sustainable and resilient legal aid market, where capacity meets demand. It is concerning that MoJ continues to lack an understanding of whether those eligible for legal aid can access it, particularly given available data, which suggest that access to legal aid may be worsening. Also concerning is its reactive approach to market sustainability issues. MoJ must take a more proactive approach and routinely seek early identification of emerging market sustainability issues, to ensure legal aid is available to all those who are eligible. Until then, it cannot demonstrate that it is meeting its core objectives and so securing value for money.

Recommendations

- a** MoJ should work with others to improve its understanding of the costs and benefits of legal issues removed from scope during legal aid reforms, to ensure that changes have not led to less efficient public spending. MoJ should focus on areas of stakeholder concerns including the impact of:
- the removal of early advice for issues such as housing and debt. It should work with stakeholders and other government departments to improve its research approach in this area;
 - increases in people representing themselves in court. It should work with HMCTS to improve data on both the number and impact of self-representation in family and magistrates' courts and any inefficiencies; and
 - reductions in immigration advice on local authorities. It should work with the Department for Levelling Up, Housing & Communities to establish the financial and other impacts on local authorities as a result of this change.

It should respond to any additional costs identified with an action plan to bear down on any wider costs or inefficiencies.

- b** MoJ should, working with LAA and others, ensure that those who want (and are eligible for) legal aid can access it in future by improving:
 - its view of demand and capacity in the legal aid market, for example, by running routine surveys on legal need, working with providers to capture better data on any individuals they cannot help due to lack of capacity, and addressing any barriers found; and
 - how it monitors whether those who apply for its exceptional case funding scheme individually are able to find a provider and acting to address any issues found.
- c** MoJ should assess whether it could reduce the cost of its exceptional case funding scheme by streamlining its approach to processing categories with high approval rates, and act upon its findings.
- d** MoJ should work with providers and representative bodies to establish a workforce strategy that considers the pipeline of future legal aid lawyers and their training to ensure future supply is sufficient to meet its objectives for access to justice, thereby enabling people who seek (and are eligible for) legal aid to access it in future.
- e** LAA should continue to develop its contracting approach to improve the attractiveness of legal aid markets to providers for civil legal aid as well as criminal legal aid. As part of this it should look to reduce barriers to providers entering the legal aid market and to minimise the costs of contracting.
- f** MoJ should work with providers to ensure its fees are set at a level that optimises the balance between cost effectiveness, affordability and access to legal aid (for those who are eligible). For example, with support from LAA, MoJ could liaise with providers to get a more routine understanding of the profitability of legal aid work and market sustainability, such as through open-book accounting.