

Legal Aid: The First Cut is the Deepest

Kenneth Clarke's announcement about the Ministry of Justice's [consultation paper](#) on legal aid and more specifically on funding private family law cases is being touted as 'radical' and 'ambitious' by the MOJ itself.

These are words our current government like to use in the hope that it will persuade us, the general public, that Whitehall and Westminster are thinking outside the ballot box and with a renewed vigour that makes it daring and different. So far, it's just talk. And whilst much of what is in the paper is a fiscal exercise (with numbers being rejiggled and some quite creative ways to increase the amount of money available to fund legal aid like pooling interest from client accounts), much of what is being offered is simply just a harsher stance on funding: getting everyone to pay more, for whatever kind of service we have left.

The consultation paper's introduction by the Justice Secretary is rational, in its own context. That is to say, Mr Clarke would like to make the system less costly to the tax payer by, for example, discouraging people from using the private family law process in the first place. Unfortunately, one of the things I learned early on whilst working in the sector is that it cannot be separated from its sister system, the public family law process. Here's why.

Both private and public family law use exactly the same professionals and departmental organisations. They are not mutually exclusive fields and often overlap not just in relation to service usage but also in relation to case content. In the blink of an eye, a private family law matter can find itself part of a local authority investigation and subject to some of the procedures in public family law. The fact that we have little legislation in this area, although very heavy on conflicting precedent also turns these two sectors into giant grey areas only to be meddled with by a sophisticated understanding of the system. And need to include the above observations, which are very basic ones.

The consultation paper highlights the dual sector paradox by suggesting that legal aid will continue to be available for cases where domestic violence is alleged. This is tricky territory. Many separating couples face physical aggression during break up, some of it momentary, some of it endemic and some of it is not physical at all, as domestic violence has evolved to incorporate aspects of emotional harm too. The point is, creating thresholds using domestic violence as a distinguishing factor is not in real terms, going to drive down the number of applications for legal aid in this field; not in the way our Justice Secretary believes, I would modestly suggest.

Another concerning point is that the paper seeks further financial contributions for legal aid by scrutinizing parties' capital, including the equity in their homes. In a system which already takes forever to process a case and which still costs far too much to use, the upshot of this particular proposal is madness: families already in heightened states of distress now face the real possibility of losing their homes too. But hey, that's okay, because Big Society is going to make sure that it doles out (pun intended) jobs for everyone, especially once the new policies on benefits are introduced - so all slackers and family court goers will be dealt with.

This of course brings to the fore another point, which was mentioned very interestingly in a [BBC radio 4 programme](#) recently on the Welfare State. The concept of the deserving. Essentially, any system which aims to help the vulnerable will be subject to a group of users who less use and more abuse the help offered. But surely, that is a risk we must take, if we are to remain humane and progressive as a country? The consultation paper is also concerned with this concept, fearing that too many abuse legal aid. I don't doubt that some do, but this should not be a reason to unwittingly create an opportunity to shut out those who genuinely need help. Instead, it should be a challenge taken up by our government, to seek out those who take advantage, to allow those who are truly vulnerable to have access to these resources.

There is also another fundamental problem with viewing the entire sector as a public/ private division. As legal aid is denied to parties in what are deemed private family matters (usually divorce related, including contact and maintenance) some families may find themselves suffering under the pressure, unable to find the support they need and may be subject to further emotional harm as a result. This in turn, may leave a family spiraling downwards and could culminate in even more distressed family units; family units who may then find themselves subject to public family law procedure. An example of this might be where a couple want to get divorced but they disagree on contact. As legal aid is not an option and the parties have no money to pay for a private professional to help (and often, mediation, which is on offer, is ineffective) the hostility between the parties increases until the children are affected. The local authorities are then asked to step in to remove the children from what would be viewed as an emotional harm scenario. Of course, this could have been avoided if help had been at hand.

Emotional reactions are by and large still misunderstood in this sector and too much weight is given to personal whim; the whim of a social worker who takes a disliking to a parent because they have shouted or shown anger at the suggestion of having their children taken away, the whim of a judge who despite not having read the bundle due to lack of time, decides he prefers the demeanour of one parent over another and so favours that parent's testimony; the whim of a lawyer, who takes the view that they know better about your children and how to bring them up, even if they have never had any children themselves. The system is riddled with assumptions, most of which are not helpful and the greatest assumption the consultation paper makes is that cutting costs and reaching into the purses of the least financially stable in private family law matters, will keep the system afloat. It will not. All it will do is bring down the entire fabric of our society and the family justice system with it.

It is clear that government is still looking at private family law as if it is only used by the super rich. In some ways, it is not their fault. Our major precedents on things like relocation and ancillary relief are tried and tested by the financial elite and they shape our family law in this way. That is because our courts are trained to look at things on a case by case basis. This is a strength but can be a weakness if the judiciary are not mindful that in the process of trying to tailor solutions, they are also responsible for making sure those solutions can be universally applied. Unfortunately, this has proved to be too hard in the past. This consultation paper also seems to neglect this elementary principle, by trying to divide and rule in all the wrong places.

However, nothing has yet been decided. The consultation paper has a [questionnaire section](#) too, for anyone with an interest to fill out and the [Family Justice Review](#) Panel are also supposed to be looking into the system, which should include legal aid, although the review remit is a little ambiguous.

There is a fascinating positive though. For many couples who divorce and who are not looking for legal aid, the government's admission that the family courts are no longer able to help them is akin to permission to experiment. New services are starting to pop up, mediation, life coaching, therapy, informal negotiators, many of which will offer the one thing the system just can't seem to get to grips with: the emotional process of family breakdown. Essentially, family matters are emotional ones; law has a very marginal part to play in anything family and this consultation along with the Family Justice Review as but two examples, will only drive experimentation forward and offer families the opportunity to look for better ways of resolving their dilemmas.