

MEANS-TESTING IN THE MAGISTRATES' COURT: IS THIS REALLY WHAT PARLIAMENT INTENDED?

With effect from October 2006, a defendant's right to receive legal aid for cases before a Magistrates' Court became subject once again to means-testing, this requirement having been abolished in 1999.

In justifying this re-introduction, ministers stressed that it was designed to ensure that those able to afford the cost of their own representation should not benefit from legal aid. The spectral figures of a convicted murderer and a professional footballer accused of spitting, both of whom had received legal aid, hovered over the debate. Yet our analysis of the new rules paints a very different picture of who, from now on, will have to pay for their own defence: in short, three quarters of adults in working households, including for example some lone parents working on the minimum wage. The question we ask in this briefing is: is this what parliament really intended?

Introduction

To anyone familiar with the voluminous detail of the Department for Work and Pensions' (DWP) rules for the means-testing of social security benefits, the arrangements that have been introduced for the Magistrates' Court are breathtakingly simple.

In essence, a single adult is definitely eligible for legal aid if their gross annual income is below £11,590 while they are definitely not eligible if it exceeds £20,740. Between these two limits, a further test is conducted to see if net income less a 'cost of living' amount, set at £5,304 a year, exceeds £3,156.*

For both the gross and net tests, adjustments are made if the individual has a partner and/or children. Where there is a partner, it is the income of the pair not just the individual on which eligibility depends.

Unlike most DWP rules, there is an all or nothing outcome: either someone is eligible for legal aid or they are not.

Findings

By using official data on household incomes, we have analysed who and how many are now no longer entitled to legal aid.

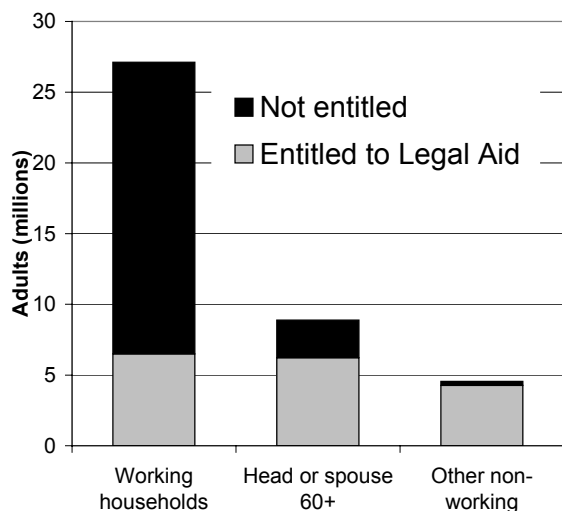
Our principal finding is that, of the some 40 million adults in England and Wales, a clear majority – 22 million or 55% – are now no longer eligible.† During the six or so years when there was no means testing, all were eligible. Before that, all but a tiny minority of individuals were eligible. The new arrangements therefore represent a dramatic shift in eligibility.

The proportion of people no longer eligible varies greatly between different groups. For example, figure 1 shows the 40 million adults according to the working status of their household and whether, according to our analysis, they are now eligible.

* The details of the means-testing rules are set out in Statutory Instrument 2006 No. 2492, "The Criminal Defence Service (Financial Eligibility) Regulations 2006". A ready reckoner to calculate eligibility in any particular case is available at http://www.legalservices.gov.uk/criminal/getting_legal_aid/criminal_means_calculator.xls

† This compares with the Final Regulatory Impact Assessment's estimate that 46% of defendants would no longer be eligible for legal aid.

Figure 1: estimate of adult eligibility to legal aid (England and Wales)*



Two things stand out here. First, as the left-hand bar shows, three quarters of adults in households where at least one person is doing paid work are now no longer eligible for legal aid. These 20 million people make up the great bulk of the 22 million in total who are no longer eligible.

Second, just 6% of the working-age households with no one in work are ineligible. From now on therefore, legal aid in the Magistrates' Court is restricted to people not in work and those in working households with the lowest incomes, chiefly those where part-time work only is being done.

Comment

Besides the huge shift in the extent of eligibility, what strikes us most is the gulf between the reality of the new test and the image of it presented by speakers during the parliamentary debates. Ministers stressed that it was designed to ensure that those able to afford to the cost of their own representation should no longer benefit from legal aid. Some 'celebrity' names were mentioned as examples. Yet when three quarters of all working people are no longer eligible, celebrities are at best irrelevant.

* The data source for the graph is *Households Below Average Income, 2004-05*. The electronic version of this briefing, available at www.npi.org.uk includes a technical appendix giving full details.

This 'top' three quarters contains some unlikely people: for example, a lone parent with one child (aged 10), who works full-time at the minimum wage of £5.35 an hour will not be eligible because of the boost to family income coming from tax credits.

The implication of our analysis is that the thresholds which determine whether a person is eligible for legal aid should be revised upwards so that more people are included. The difficulty, though, is that the greater the number of people eligible, the less will be the public money saved.

As it is, depriving more than half of the population of their right is estimated to save just £35 million a year.[†] Given the uncertainties about how much money is really saved, it is far from clear whether a means test that disqualified only a small minority would actually save money at all. That is what the pre-1999 regime did – and it was *abolished* in order to save money.

We also see a connection between this issue and the decline in the number of solicitors providing this service. An old saw among anti-poverty campaigners is that services mainly for the poor become poor services. With fewer than half of all adults now eligible, criminal legal aid risks heading in that direction. The increased difficulty that some clients now face in accessing the service, even when they have a right to it, is consistent with this.

Conclusion

Parliament is clearly not opposed in principle to the means testing of criminal legal aid. The question is whether the effects of what it has enacted are what it expected. In particular, did it intend to remove eligibility from 75% of adults in working households, leaving legal aid in the Magistrates' Court as a residual right chiefly for those in households where little or no paid work is being done?

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[†] Final Regulatory Impact Assessment

Technical appendix

Basis of the estimates

The estimates are based on analysis of the Department of Work and Pensions' *Households Below Average Income*, (HBAI) 2004/05, supplemented with additional information from the *Family Resources Survey* (FRS) for the same year.

The analysis is for England and Wales only and is conducted at the level of the Benefit Unit.

The eligibility test based on gross income uses the benefit unit gross income variable* from which the following have been deducted: Council Tax Benefit paid (from HBAI) plus Attendance Allowance, two type of Disability Living Allowance, Severe Disablement Allowance and Carers Allowance (from FRS).

The eligibility test based on net income uses a measure of after-housing costs income at the household level,[†] allocated to benefit units in multi-benefit unit households in proportion to gross income. Other than Council Tax Benefit, the same deductions are then made from this variable as in the gross test above.

This is not a wholly satisfactory representation of net income for two reasons, first because the measure of housing costs does not fully correspond to that set out in the regulations, and second, because neither childcare costs nor maintenance payments have been excluded from the calculation. Both of these factors will mean that the estimate of those eligible for legal aid has been under-stated.

Against this must be set the fact that these figures, though the latest available, are now two years old, meaning that the income figures are on the low side for 2006. If incomes in the dataset were 5% higher to reflect this, the numbers entitled to legal aid would be one million fewer than those estimated here.

* EGRINCBU

† S_NEWAHC unequivalised