

## Evidence to the Commission on Justice in Wales

### *Independent Legal Aid programme for Wales.*

In my Hamlyn Lectures “Lawyers and the Public Good” I showed how the Scots, and English and Welsh legal aid programmes had diverged over the last 15 years from a common starting point. Although both jurisdictions have seen their legal aid budgets reduced ( in the Scots case largely by a decline in demand ) significantly during that period, the English and Welsh spend is still in the order of £1.5 Billion per annum and 39 Euros per head per annum. This represents the largest legal aid budget in the world and one of the highest spends per capita. Scotland does not lag far behind in per capita spend but in other respects e.g. scope, financial eligibility ( 70% of the population as contrasted with less than 40% in England and Wales ) , and independence, compares very favourably with England and Wales.<sup>1</sup>

First, its legal aid authority ( the Scottish Legal Aid Board ) remains independent of Government and located outside of its sponsoring Ministry. This is no longer the case for England and Wales. Yet independence of one’s legal aid programme contains benefits on several fronts. As the UN Principles and Guidelines on the Access to Legal Aid in Criminal Justice Systems Resolution 67/187 (2012) Guideline 11 para 59(a) on *A Nationwide Legal Aid System* specifies, LAA should :

“Be free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure.”

It is easier for an independent legal aid authority( LAA) to challenge its sponsoring Ministry where policy differences arise, indeed some independent LAA globally are specifically given the responsibility for day to day policymaking for legal aid. In a democracy it is important that unpopular litigants e.g. alleged illegal asylum seekers, terrorists, corrupt officials, prisoner human rights cases, citizens from the middle east with claims against the UK armed forces, be entitled to legal aid ( if they are eligible ) without government interference. Yet even when the LAA in England and Wales was outside the Ministry the Government did seek to interfere with some cases,<sup>2</sup> and despite new statutory protections for legal aid grants, when the LAA was taken inside the Ministry ( but not given a special statutory status ) few outside the UK consider that the English and Welsh legal aid programme is now as secure from Government pressures and influence as it used to be.

Next having an independent legal aid authority with a measure of budgetary autonomy and a strong policy and research team within the LAA can enable a small jurisdiction such as Scotland or the Netherlands to operate with an open-ended, uncapped legal aid budget. This is a major advantage for a legal aid system.

Again, the Scots LAA is particularly effective in relation to legal aid reform because the compact nature of the Scots Government encourages holistic approaches to the reform of the Justice System

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<sup>1</sup> See Paterson, Hamlyn Lectures 2010 *Lawyers and the Public Good*, Cambridge University Press, 2012 and the Evans, *Rethink Legal Aid: A Independent Strategic Review* <https://www.gov.scot/Resource/0053/00532544.pdf>

<sup>2</sup> See e.g the Evans case [2011] EWHC 1146

( including legal aid ) by considering legal aid as part of the courts, civil and criminal procedure, prosecution, police and other aspects of the justice system.

Being a smaller, nimbler and more flexible LAA and programme makes innovation easier. Thus SLAB was one of the earliest in Europe to embrace on-line legal aid applications and accounts. It has been able to use the same peer review quality assurance programme as in England and Wales ( the programme was jointly developed by academics in England, Wales and Scotland ) but apply it to all legal aid practitioners, not just a sample of them.

As against this the super tanker effect of a massive legal aid programme such as England and Wales at present coupled with a series of debilitating cuts whose coherence has been severely attacked has left England and Wales in the unenviable position of having the largest legal aid budget in the world but a legal aid system that this widely viewed ( both at home and abroad ) as dysfunctional , ineffective and failing to protect the needs of the most vulnerable.<sup>3</sup>

My argument from this comparison between Scotland on the one hand and England and Wales on the other is not based on some form of nationalistic hubris, but rather a recognition that there are advantages in size ( smallness ), flexibility and agility to be had if legal aid reform is approached carefully, prudently, and effectively. It follows that I consider that there would be real gains to be achieved in Wales if it was able to persuade the UK Government that it should have its own legal aid programme with pro rata funding of 30+ Euros per capita for the Welsh population.

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<sup>3</sup> The decision of the Government during the LASPO cuts to sweep away much of the funding for early intervention advice and assistance flew in the face of needs assessment research around the world which England and Wales had pioneered ( Hazel Genn, *Paths to Justice* Hart Publishing ,1999 ). This rejection of evidence based policymaking is widely viewed as a retrograde step amongst legal aid experts globally. On the defects of the current English and Welsh legal aid system see generally the Low Commission [https://www.lowcommission.org.uk/dyn/1435772523695/Getting\\_it\\_Right\\_Report\\_web.pdf](https://www.lowcommission.org.uk/dyn/1435772523695/Getting_it_Right_Report_web.pdf) and L. Green and J. Sandbach '*Our analysis demonstrates that the civil legal aid system is in free fall.*' (Legal Action, December 2016/ January 2017) pp8-