

Commission on Justice in Wales
Oral Evidence Session
1 February 2019

Present:	Commission members	Secretariat team
Professor Alan Paterson, University of Strathclyde (AP) Anna Barlow, Åbo Akademi University, Finland (AB)	Lord Thomas of Cwmgiedd, Chair Simon Davies Professor Elwen Evans QC Dr Nerys Llewelyn Jones Juliet Lyon CBE Professor Peter Vaughan	Andrew Felton, Secretary to the Commission Dave Gordon Chris James
Question area: How does the cost of legal aid in England and Wales compare to other legal systems?		
<ul style="list-style-type: none"> • AP: The Council of Europe (in the shape of CEPEJ) produces comparative statistics on what countries spend on justice systems. Inquisitorial systems spend less per capita than adversarial systems in terms of legal aid but they have higher spends on courts. Looking at this comparative data, England and Wales is a third of the way down the list instead of being at the top. The country with highest spend per capita is probably Northern Ireland for historical reasons. It outstrips England and Wales per capita but not in absolute terms. The robustness of the figures is open to issues about collection of data and whether “legal aid” is the same in different countries. There are many complications. • AB: Not only do you come further down the list if you look at total judicial spend rather than only the spend on legal aid, if you also factor in GDP we are average in terms of judicial system spend per capita. The most expensive legal aid systems per capita are Sweden and Northern Ireland. Although we can't get away from the fact that we have a high spending rate. When you look at small jurisdictions one particular case can skew figures, for example the Breivik case in Norway. The cost per case spend is expensive in England and Wales. We also have the 9th highest number of legal aid funded court cases per 100,000 of population. This is 23% above the European average. The criminal court case numbers were 58% above the European average, whilst civil was 40% below. We need to look at judicial spend rather than legal aid spend. Also, to ask whether it is expensive, is not the same as too expensive, as other factors in a legal system may cause legal aid to be inevitably more expensive. • AP: The country with the highest spend per capita is Northern Ireland for historical reasons. Like all statistics they are open to a degree of interpretation, and even whether the definition is the same from country to country. • AB: If you are looking at the Nordic model there is a misconception of the Public defender schemes. They use private lawyers, rather than a State-employed service, to provide public defenders. This system looks a lot like criminal legal aid but it is non-means tested. If Defendants are convicted they will need to pay back some of these costs. In terms of operative costs it's not more expensive. • AP: Increasingly it is being seen that legal aid should be looked at as a holistic approach. The problem that I have with England and Wales is not the size of their budget, but the fact that they don't have a coherent system any longer. Apart from the need for the Government to save money, the cuts were made by looking at aspects which wouldn't be subject to a human right challenge. However early intervention saves money. For example someone being evicted from their home, putting legal aid in at this point is expensive and may not work. But dealing with the problem a lot further ahead of this, and tackling the reasons why, would be less expensive and more effective. Shouldn't legal aid be looked at in the health budget, by looking at problems in the way of early intervention? • AB: I agree entirely with that. Looking at how we can shave parts of the legal aid budget isn't working, a holistic approach is required. Looking at the entire justice system budget, and further afield would be more effective. 		

Question area: We have received evidence that Wales, especially its rural and post industrial areas, has been disproportionately affected by legal aid cuts. How do you think this can be addressed?

- AB: It's difficult for me – I don't understand the specific issues in Wales – I'd need to know if it is a demographic question, and whether advice deserts are the issue. So without knowing this it's difficult to find the solutions. If it is about rural areas then technology may help. It may well be that legal aid scope cuts need to be reversed.
- AP: Until I'd seen all the evidence I'd find it difficult to answer. People not being able to access family legal aid, as it is out of scope, causes considerable problems; this may be worse in Wales I don't know. One argument as to why the legal aid spend is so high is that England has a large number of high cost criminal cases. One advantage of a small jurisdiction would be the lack of complex fraud cases. If you are to stay within the England and Wales justice system you'd have to persuade the Ministry of Justice to review this. This is difficult. It's not clear that there is an appetite to change this. So within the current structure the best thing you could do would be to put all your weight behind the criticism of legal aid cuts, especially in relation to early intervention. Remote access by phone or internet doesn't solve all problems.

Question area: Do you think the legal aid budget for England and Wales could be used more effectively to meet people's legal need? What do you think should be the priorities of any budget available in Wales to address legal need?

- AP: It would cost £30 million or less to support early intervention, and this would have a dramatic impact. This would be the single easiest thing you could do. The money is not going to the right areas. The problem is you are not starting from a blank sheet of paper. You are starting from a position where money is going to some areas, but not others. It's difficult to reverse this. Fifteen years ago, Steve Orchard the leader of the Legal Services Commission, had an ambitious plan rooted in evidence based policy making, to develop legal aid based community legal services. He had a plan to integrate advice services with legal aid services. If you do legal needs assessments and look at the areas where legal aid is needed, you will see where the gaps are. This programme ground to a halt as it is difficult for oversupply in one area to be shifted to an area of undersupply. The priority for Wales should be to carry out a needs assessment. Fifty of these have been carried out around the world. It was started by Dame Hazel Genn. The mantle has now been taken up by Professor Pascoe Pleasence. You need a legal needs assessment and then to wrest the budget from England.
- AB: I agree that early advice should be a priority. This means advice, assistance, and other mechanisms. It's vital to more effectively use money to solve people's problems. Also the issue of rationalisation needs to be looked at. Part of the issue is historical. Drastic simplification and rationalisation of how to decide a claim for legal aid is required.

Question area: Do you think devolving legal aid to Wales would achieve better outcomes for those with legal needs, and how does this relate to health?

- AP: There are several studies looking at health and justice. One is being looked at by Dame Hazel Genn for the Legal Education Foundation. I also have six papers volunteered from around the world on this subject for a conference I am organising. I was astonished to find that the Chief Medical Officer for Scotland published a report focusing on improving health outcomes by providing early legal and welfare advice centres. The problems that affect health, social welfare and debt are all tied together. For example debt affects your work, family relationships, your home and your health. If problems are not tackled early on they may well escalate.
- AB: The other advantage to devolution would be to break the antagonistic relationship between funders and providers. It would allow you to start with a clean slate and have a fresh relationship with the legal profession.
- AP: Some of the better public defender programmes (e.g. New York) have found if you link the health function with the justice function the combined approach produces better results.

Lord Thomas referred to Portugal and the way the drugs issue is tackled there.

- AP: Yes – there is exactly that argument. Public defenders would be in a better position to explore the health links.

Question area: Are there lessons that can be learnt and models that can be applied from smaller jurisdictions on the provision and policy of an effective legal aid system?

- AB: Scotland has a lot to offer in terms of how a smaller jurisdiction can work. It also depends on how radical Wales would be prepared to be. You may want to consider a public defender scheme. One where legal aid would be non means tested, and administered by the courts. My understanding is that in Ireland court administration of a criminal legal aid system with flexible means testing is working well. In civil legal aid, this would be a good opportunity to stop, take a look, and ask if the merits test needs to be so convoluted. The scope rules are also complicated. Norway also has restricted scope rules, but is defined on two pages of A4 instead of the complication in England and Wales. Also consider in civil if the courts can decide some legal aid applications. In the Nordic countries court administrative staff can deal with means assessment, and the court can deal then and there with the merits test in cases with minimal or no merits testing. So the legal aid issue will be resolved earlier, and progress in a more streamlined fashion. The final thing would be to look at family cases and try to move away from court cases. In Northern Ireland there was recently a review of family justice to consider alternatives to court.
- AP: One of the better countries is Scotland, the other the Netherlands. The Scots system is coherent, it is effective, its scope is very wide, and there are few areas which are excluded. We have 70% eligibility and a high spend per capita. There are deficiencies, one of which is over-complication. The evidence report from Martyn Evans (for which I was the international adviser) talks about simplification and how it can be done. However it is bought at a price. The complex system is driven by fairness – it is therefore necessarily complex. They look at affordability and all in incomings and outgoings. The Dutch system looks at a blunt system based on income. It becomes a cruder system, and fairness is sacrificed. So a balance needs to be drawn between the two. The Dutch have another interesting system. They accept the invoices from legal aid firms but they only check 10% of them. They will also randomly check invoices. If they found there are anomalies the firms in question will lose their “high trust” status and then have all their invoices checked. Good relations between the legal aid board and the profession have not always been there. Another benefit to devolving legal aid would be that you could insist that the legal aid awarding body was independent of the government. That is important, it needs to be arms length, so that when the tabloids are attacking an unpopular defendant for obtaining legal aid, the government cannot be swayed. You should look to have an independent and uncapped legal aid budget. Ironically, independence and an uncapped budget means that you need to work very closely with the government, and produce very detailed figures and projections, and earn the trust of the government.

Question area: What systems could be considered for organising and funding legal aid and third sector advice services in Wales?

- AB: In terms of integration if Wales was starting from zero, you would need to decide what legal aid is for – it could be equality, poverty reduction, or simply access to justice and a fair trial. From there will come your priorities for legal aid funding. The gap that is left can then be filled by the third sector. I would encourage it to be seen as a holistic project following on from a needs survey. You might find that if you have, for example, trade unions which are able to fund employment advice, you can see how much is actually required to fund legal aid.
- AP: The ideal would be to have a seamless web between legal aid and the third sector. How do you get it funded? That's difficult. One reason why some advice providers survive is that they obtain funding from multiple sources, so if one fails they are able to carry on. Following Brexit the loss of EU funded grants may be a problem. One of the interesting things in Scotland is that the

money advice sector came to take to the legal aid bodies and the government. They asked can we not just use this money across the board? And that is what they did – together with legal aid they set up a series of projects which provided a lawyer in an advice centre, or providing housing advice. So we should ask how we can bring money together to look at a larger all embracing service. But how to transfer money from the oversupplied areas to the undersupplied is where you will run into difficulties.

- AB: Community Legal Advice Centres (CLACs) and Community Legal Advice Networks (CLANs) which were being set up had difficulties, where they could end up with a talking shop, and spend hours talking about how to coordinate themselves. The diverse range of agencies attending these meetings was too ambitious. It needed more rigour if it was to work. One possibility which has been considered in Northern Ireland is to consider the scope of legal aid funding in terms of groups of people instead of types of case. So that if it is identified that help is needed for that person to interact properly with the justice system, they are within scope for legal aid. For example, someone with a drug abuse problem might require legal aid, or someone who has other issues such as a low literacy level or social exclusion.

Question area: When legal aid is not available, what other funding mechanisms do you think could be promoted to ensure parties are properly represented?

- AP: Successive Governments have looked at legal expenses insurance, but it's always been balked at. There is no appetite to take it up – but it is already present in some housing and car insurance policies. In Scotland the scope has not been cut. But very little of personal injury claims are settled by legal aid – the lawyers prefer to work on a no win no fee basis rather than working on legal aid rates. So legal aid is not called on in these cases. But it is there to protect people who would not be looked at this way by law firms.
- AB: Legal expenses insurance is used in Nordic Countries – Sweden had a change in legal aid legislation in 1997 leading to significant reduction in legal aid spend. They used legal aid expenses insurance – it is a standard in home and motor insurance. There was a carrot for the insurance companies – the fees paid to lawyers were harmonised so that the fees paid to lawyers by insurance companies were lowered. Employment law was not covered, as trade unions will do that, and divorce was not covered. The vast majority of cases are covered by home insurance. So most people do have legal expenses insurance. In Finland a similar system is in place, but it is limited to a certain number of hours. If it goes over this level legal aid will kick in and cover this cost, which is more palatable for the insurance companies.
- AP: Crowd funding is exceptional. Policies are no use for criminal defences, and it is not permitted to insure against divorce and the relevant costs. So there are exclusions which exist here.