Submission to the Commission on Justice in Wales

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1. Introduction
    1.1. This submission is made in a personal capacity. It draws on the results of doctoral research undertaken in 2014-18 at Åbo Akademi University, Finland, under the title 'The Machinery of Legal Aid: A critical comparison, from a public law perspective, of the United Kingdom, the Republic of Ireland and the Nordic countries'. Publication of the thesis is anticipated in early 2019.

    1.2. The focus of my research has been the structure of state-funded legal aid in the nine jurisdictions. Decision-making and appeals processes, the scope of legal aid and the merits tests applied when assessing applications are core elements of the research. In addition, I have considered the coverage of the population and the amount of assistance provided to legal aid recipients, as well as the context of legal aid within the access to justice mechanisms of each jurisdiction.

    1.3. I believe that the results of my research could usefully contribute to the Access to Justice work stream of the Commission on Justice in Wales. In order to be of assistance without taking too much of the Commission's time, I present this submission in the form of four pitfalls to avoid and four ideas I would strongly encourage the Commission to consider if designing a new legal aid scheme or adapting the existing joint English and Welsh system. The pitfalls are current aspects of legal aid policy or provision in England and Wales which I believe to be unacceptable and which should urgently be changed and certainly not replicated in a potential new legal aid scheme for Wales. Where helpful, I have given an indication of preferable arrangements in other jurisdictions. The list of important considerations consists of some suggestions of best practice deliberations which should form part of the groundwork before a new legal aid scheme is designed in any jurisdiction. My comparative research has shown a range of possible positions on matters from broad policy objectives to the structure of provision and the details of eligibility tests. The most significant issues are set out here, as a basic checklist for preparation of a new or amended legal aid scheme in Wales.

    1.4. These submissions are not specific to the Welsh situation, but within the cohort of jurisdictions studied there are several small jurisdictions: Denmark, Finland, Scotland and Norway all have between five and six million residents, the Republic of Ireland has just over four and a half million, Northern Ireland has under two million and of course Iceland's population is very small, at about one third of a million. The observations and conclusions of the research are

therefore relevant to Wales with its population of 3 million, although only the Republic of Ireland has a population which is as rural as that in Wales.

1.5. The issues which will be addressed in this submission are:

A. Pitfalls
- Avoid drawing simplistic conclusions from comparative legal aid spend in different jurisdictions
- Avoid the use of percentage prospects of success as an element of merits testing
- Avoid the risk of arbitrariness in legal aid decision-making by providing independent appeals
- Avoid breaches of human rights obligations by providing effective exceptional case provisions

B. Important considerations
- Assurance of the right to a fair trial, not only the right of access to court
- Internal coherence of the legal aid system
- Whether court processes are necessary for the resolution of (all) family disputes
- Whether a public defender scheme might be preferable to criminal legal aid

1.6. These will now be examined in turn, each with a summary followed by further explanation and evidence. Additional information is available if the Commission so requires.

A. Pitfalls

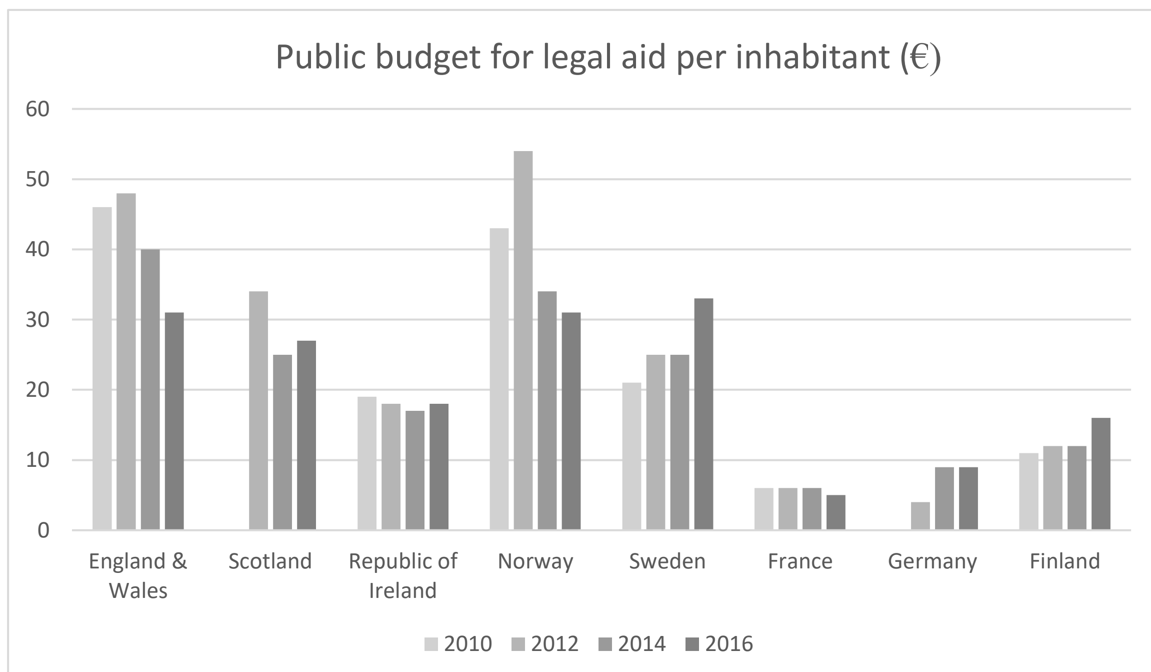
2. Avoid drawing simplistic conclusions from comparative legal aid spend in different jurisdictions

2.1. Legal aid spend per person is not useful comparative data. Legal aid has a very different role in different legal systems and societies, which affects its price. Spend per person is not a measure of generosity but of function. If comparative data is desired, spend per capita on the judicial system as a whole is preferable.

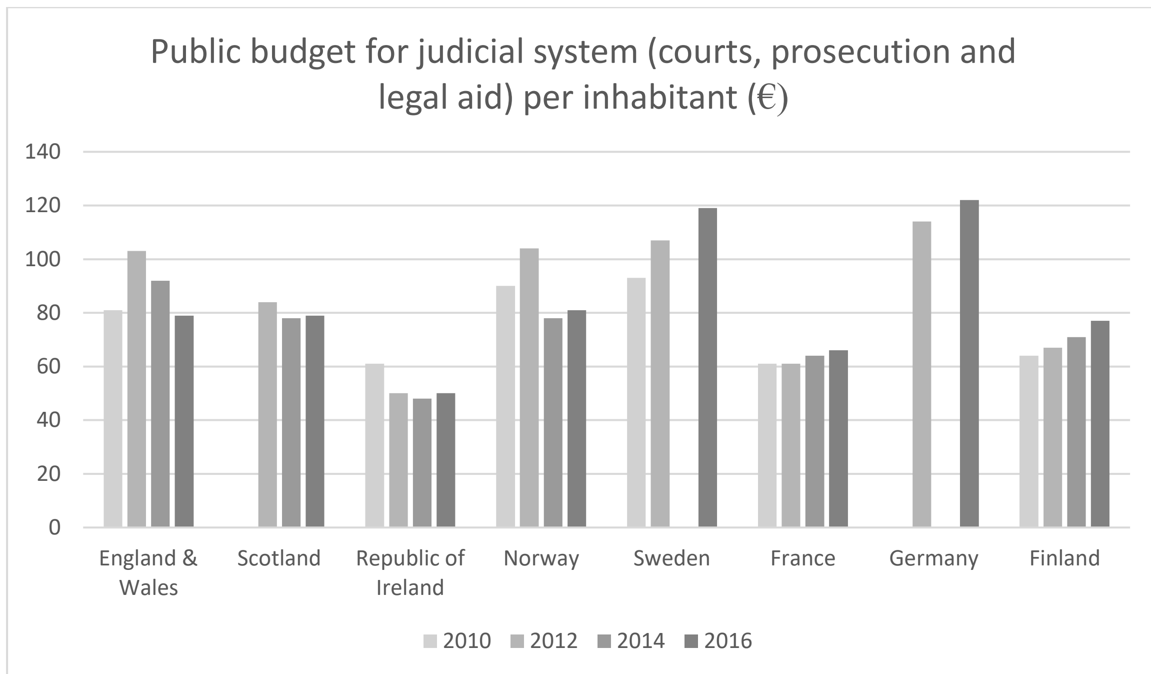
2.2. It is tempting to compare legal aid spend per person between jurisdictions, particularly if that comparison shows a relatively high spend and apparently justifies cuts. However, the role played by legal aid varies dramatically between jurisdictions and the figures are therefore misleading. A consideration of comparative legal aid spend alongside a comparison of spend on the whole

judicial system (courts, prosecution and legal aid) is telling in this regard. The figures are taken from the European Commission for the Efficiency of Justice (CEPEJ), whose latest report published in October 2018 uses figures from 2016.[1] CEPEJ rightly cautions against too simplistic an interpretation of the comparative data, and points out that economic and size differences between states, as well as differences in data collection and reporting, can cause mis-comparison. Changes in currency exchange rates over time can also skew the comparison, which is made in euros.

2.3. The first chart below shows the change in public budget for legal aid per inhabitant over time. Where a column is missing, for example for Scotland in 2010, the figures were not provided to CEPEJ. This chart shows the familiar picture that legal aid in England and Wales is comparatively expensive, although in some years outpaced by spending in Norway. However, the picture changes in the second chart, showing the public budget per inhabitant for the entire judicial system, including courts and prosecution as well as legal aid. Here, the differences are much less marked and indeed in 2016 judicial system spend was greater than England and Wales in Norway, Sweden and Germany. In 2016, Finland had half the spend of England and Wales per person on legal aid (16€ compared to 31€), but an equivalent amount per person on the judicial system overall (77€ compared to 79€).



[1] European Commission for the Efficiency of Justice, *European judicial systems: Efficiency and quality of justice CEPEJ Studies No. 26 Edition 2018 (2016 data)*, Strasbourg, Council of Europe, 2018.



2.4. The judicial system spend allows a more realistic comparison as it takes into account the differing roles which legal aid plays in different judicial systems. However, even this measure is flawed, as the range of variables within judicial systems is considerable. Judicial system budgets will be reduced by the use of administrative tribunals and appeal boards, mediation and mechanisms to divert family cases away from court, which also affect the need for legal representation.

2.5. My research shows that there are some similarities in the role of the judicial system in the Nordic countries on one hand and in the jurisdictions of the UK and Republic of Ireland on the other. The latter group share similar approaches to administrative tribunals, to family law cases and to legal expenses insurance, and are all common law systems, except for Scotland, which is a mixed system. The Nordic countries are all civil law systems with, in the main, either separate administrative law courts (Sweden and Finland) or administrative appeal boards (Denmark) which remove most administrative law matters from the courts. They also have active legal expenses insurance markets which provide meaningful cover for a considerable proportion of the population, and mechanisms which remove a large part of family law dispute resolution from the courts. Despite these similarities within the two groups, and the differences between the groups, there is no pattern showing higher spend on legal aid per capita in one of the groups.

2.6. I have ascertained that the more expensive schemes are not the most generous in terms of scope, merits tests, fees paid to lawyers or proportion of the population eligible. Furthermore, I considered whether there might be a correlation between economic or social factors and legal aid spend. No such correlation was found with the wealth of the state, poverty levels, level of risk of social exclusion, number of lawyers or levels of trust in the legal system. This suggests that there are complex factors behind the cost of legal aid in a jurisdiction and that care must be taken not to draw simplistic conclusions from these statistics.

3. Avoid the use of percentage prospects of success as an element of merits testing

3.1. The mathematical concept of percentages is not appropriate for use in measuring prospects of success of legal cases; it is difficult to apply and leads logically to unfortunate consequences. Prospects of success are very difficult to assess and this must be acknowledged either by reconsidering the advisability of such a merits test overall, or at least by accepting that the precision which attaches to percentage assessment cannot be reached.

3.2. Of the nine jurisdictions I studied, only England and Wales and Northern Ireland use percentages when judging prospects of success for the purpose of civil legal aid eligibility. This introduces scientific language into the exercise, which is unlikely to be properly understood. Furthermore, the logical conclusion of adopting a percentage test is not attractive as policy.

3.3. 'Percent' literally means 'in every hundred'; thus, if a case has a 60% chance of success this means that if it were possible to find 100 identical cases and follow their progress, 60 of them would win. Statistics works best on large numbers and we would not expect the figures to work out exactly with only 100 cases and much less so with a sample of ten, but if we could amass 10,000 cases then we would expect to find 6,000 of them winning. It seems unlikely that this mathematical meaning is what is in the minds of the practitioners making the legal aid applications; many may not even understand the statistical implication. Lawyers in general are likely to be much more comfortable with phrasing such as 'reasonably likely to succeed' (Republic of Ireland) or 'likely to succeed at court' (Iceland) than with the true meaning of the language of percentages in this context. However, if the ranges of percentage prospects of success are small, only a genuinely mathematical meaning can make sense. It is very hard to explain the difference between 50% and 60% likely to succeed unless the statistical definition is used; both are roughly equal chances of success or failure, both might be thought reasonably likely to succeed. Given the difficulty of predicting success

accurately, discussed below, it seems highly unlikely that there is in fact a 10% difference in how many cases actually succeed, depending on whether they are predicted to have a 50% or 60% chance of success, but this is what is being asserted through the application of such a test.

3.4. The logical conclusion of the use of statistical language raises a further concern. Taking an assumption that a given system of legal aid requires there to be a 50% chance of success before an individual will be funded, it is clear that a person with a 40% chance of success would not be assisted. However, statistically speaking, 40% of such persons would be successful in their cases if they proceeded. These people are faced with the choice of not proceeding with their litigation, in which case many claims which would succeed are not brought, or going ahead unrepresented under potentially unfair conditions. The rule of law means that a state cannot prevent persons taking their case to court even if it is relatively unlikely to succeed, and in cases where the litigant does choose to commence or defend proceedings, they risk an unfair hearing. Even if it is felt that limiting **access to court** to those with strong cases is acceptable, restricting **fair hearing** to those with strong cases seems counter-intuitive; those with very strong cases are less in need of legal assistance than those with borderline cases, as expert legal argumentation is less likely to make the difference between success and failure.

3.5. Furthermore, the use of prospects of success tests presupposes that it is possible to predict outcomes of legal cases. The issue of predictability of the outcome of litigation has not been much researched in the legal aid context, but has received attention in the field of conditional fee arrangements.[2] In that context, Higham concluded that "lawyers can predict the prospects of success in litigation in a way which is useful and valid. What they cannot do is a sum in objective probability".

3.6. The one reported study of lawyers' predictive ability in the context of legal aid decisions in England suggested that in fact lawyers are bad at forecasting likelihood of success in legal aid cases.[3] Predictions were approximately double the actual success rates across the range: of cases predicted as having above an 80% chance of success only 47% succeeded; of those predicted as having a 60-80% chance of success only 34% were successful and of those predicted as 50-60% likely to succeed, 30% were in the event successful. The accuracy of prediction varied substantially depending on the type of case, with lawyers' forecasts being much more successful in inheritance and probate cases than in business disputes, for example.

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[2] Higham, David, 'Does Justice Play Dice? Can lawyers predict the chances of success in litigation?', pp. 20-30 in *Nottingham Law Journal* , 12(1), 2003.

[3] Goriely, Tamara; Das Gupta, Pieta and Bowles, Roger, *Breaking the Code: the impact of Legal Aid reforms on general litigation*, London, Institute of Advanced Legal Studies, 2001.

3.7. Given the centrality of lawyer predictions to the grant of legal aid in UK jurisdictions, the fact that the reliability of such judgments is unknown is most concerning. It is not acceptable that decisions which have significant impact on individuals' lives and on the realisation of fair trial rights are made on such an apparently unreliable basis and more research is urgently needed to consider whether the predictions of prospects of success correlate to actual outcomes over a larger sample. If they do not, selection on this basis is at worst arbitrary and at best a subjective assessment of how optimistic the particular lawyer feels at that moment.

3.8. There are also important related issues, if prospects of success is chosen as a merits test at all: is the prediction of the chance of success with representation, or the chance of success without; and what is defined as success?

3.9. At present, merits testing based on prospects of success risks violating the right to a fair hearing and, given the research deficit, is potentially arbitrary. At the very least, percentages should no longer be used in determining prospects of success. [4]

4. Avoid the risk of arbitrariness in legal aid decision-making by providing independent appeals

4.1. Given that all legal aid decision-makers have some vested interest in the outcome of each application, the possibility of an independent appeal is vital to counteract potential bias. This should ideally be outside the original decision-making body, with an effective mechanism to feed appeal outcomes back to first instance decision-makers.

4.2. To comply with human rights obligations, applications for civil legal aid must be dealt with diligently,[5] the appearance of the fair administration of justice must be maintained,[6] decisions must not be arbitrary[7] and reasons must be given for rejection of an application for legal aid.[8] The making of decisions in a non-arbitrary manner, and the maintenance of the public appearance of fair administration of justice, both depend on good decision-making processes. The European Court of Human Rights has commented favourably on systems which provide neutrality or balance in decision-making bodies.[9] The

[4] For further discussion of this point, see Barlow, Anna, 'The Success Test for Civil Legal Aid in North-West Europe', pp. 148-172 in *Journal of Comparative Law*, 12:1, 2017.
[5] *Laskowska v. Poland*, App. No. 77765/01, Judgment 13 March 2007, para. 54.
[6] *Ibidem*.
[7] *Gnahore v. France*, App. No. 40031/98, Judgment 19 September 2000, para. 41; *Del Sol v. France*, App. No. 46800/99, Judgment 26 February 2002, para. 26.
[8] *Laskowska v. Poland,* App. No. 77765/01, Judgment 13 March 2007, para. 54.
[9] *Del Sol v. France*, App. No. 46800/99, Judgment 26 February 2002, Reports 2002-II.

interrelationship between the legal aid decision-makers at first-instance and at appeal is key to ensuring that decisions are legitimate and perceived to be so. If the vested interests of decision-makers at the initial and appeal stages are the same, there is a risk that inappropriate factors may influence decisions, and that inadvertent bias goes unchecked. It is not suggested that decisions in such jurisdictions are routinely partial; however, it is submitted that there is a real risk of both actual and perceived bias in any system which does not acknowledge and counter potential impartiality.

4.3. The jurisdictions of North-West Europe do not all achieve decision-making and appeal processes which are evidently protected against unconscious bias. There is considerable variation in the legal aid appeal and oversight processes. Some systems are straightforward, with courts making the original decisions on legal aid which are appealable to a higher court. Where legal aid decisions made by civil servants of some kind, some jurisdictions such as Finland provide for judicial oversight, but the most usual types of oversight of are non-judicial. However, these vary considerably in nature; some are completely independent from the original decision-making body and quasi-judicial; others are internal to the original authority.

4.4. One of the most interesting of these is Denmark, where civil legal aid applications are legislatively allocated to either the court or to the Minister of Justice [10] (in practice the Legal Aid Office within the Department of Civil Affairs). Appeals against judicial decisions are to the higher court, but appeals against decisions of the Legal Aid Office can be made on any grounds to the Appeals Permission Board (Procesbevillingsnaevnet).[11] This body was originally established for hearing requests for leave to appeal to higher courts but gained legal aid jurisdiction in addition in 2007. When sitting as the appeals instance for legal aid, the Board, which is appointed by the Minister for Justice, consists of a High Court Judge, a District Court Judge and a lawyer.[12] The Appeals Permission Board is an independent body administered within the Danish Court Administration. Thus, whilst the appeal is in a strict sense bureaucratic, the nature of the oversight body is quasi-judicial and it is completely outside the legal aid granting body, with responsibilities that extend beyond legal aid.

4.5. In Sweden, the bulk of legal aid decisions are made by the courts and appealed to higher courts. The remainder of applications are decided by the Legal Aid Authority, a public authority within the Department of Justice. Appeals against refusals of legal aid by the Legal Aid Authority can be made to the Legal Aid Board (Rättshjälpsnämnden),[13] a public administrative body which falls within

[10] Retsplejeloven, 2017, §328(5).
[11] *Ibidem*, §328(5).
[12] *Ibidem*, Chapter 1a.
[13] Rättshjälpslag, 1996, 44§.

the remit of the Department of Justice. The Legal Aid Board is not a court, but shares buildings and administration with one of the regional Courts of Appeal[14] and is chaired by a judge. The Board president and four additional members, two of whom must be lawyers, are appointed by the government. Legal Aid Board decisions cannot be appealed further.[15] The appeals system in Sweden is supplemented by over-arching oversight by the Chancellor of Justice, which applies to both bureaucratic and judicial legal aid decisions. The Chancellor's office falls under the responsibility of the Ministry of Justice, as does the Legal Aid Authority, but they are separate agencies and some objectivity is thus gained. Furthermore, Legal Aid Authority decisions are, as stated above, subject to appeal to the Legal Aid Board in addition to oversight by the Chancellor, and thus a non-governmental perspective is also provided. Court decisions on legal aid, which are appealable to higher courts, can receive input from the governmental perspective through the role of the Chancellor. Whilst the reporting duties are limited, the categories of case which must be notified to the Chancellor can be and from time to time are altered by regulation; if it was considered necessary, the reporting grounds could be broadened. As the ability of the Chancellor to intervene as a party and institute an appeal extends to all legal aid decisions,[16] not just those which must be reported, her role thus provides, in theory at least, comprehensive oversight.

4.6. The Norwegian system is such that some legal aid decisions are taken by the courts, and these are appealable to higher courts. The remaining decisions are taken by the County Governor, a regional level government post-holder. These decisions are subject to appeal to the Ministry of Justice;[17] in practice the Civil Affairs Authority. Appeal from many civil legal aid refusals in Norway is thus to another public body, but in this case the appeal does not involve judges or have other features which imply a judicial character to the process. However, the appeal instance is a completely different public body, at central rather than regional level.

4.7. Whilst in England and Wales some independence is inserted into the appeal process through the use of independent legal professionals, appeals are still in essence internal. Ideally, appeals should be heard completely outside the body taking the original decisions, as in Norway, Sweden, Denmark and Finland. In England and Wales, the recommendation of the Independent Funding Adjudicator is not always binding on the Legal Aid Agency and even though in fact it is almost always followed, this maintains ultimate control in the hands of the Legal Aid Agency in many cases. For legal aid decision-making

[14] The Hovrätten för Nedre Norrlands in Sundsvall, as directed by Förordning 2007:1079, 5§.
[15] Rättshjälpslag, 1996, 44§3.
[16] Lag om rätt för Justitiekanslern att överklaga vissa beslut, 2005; Rättshjälpslag, 1996, 45§.
[17] Rettshjelploven, 1980, §26.

to be seen to be fair, the independence of the appeals process should be enhanced and it should be binding on the Legal Aid Agency in all cases.

4.8. Even if this route is not chosen, feedback to first-instance decision-makers on appeal decisions should take place, to ensure that errors in decision-making practices are rectified and encourage the coherence of decision-making. In Northern Ireland the new appeals panel is developing a feedback loop to this end and such a system should also be formalised in Wales.

5. Avoid breaches of human rights obligations by providing effective exceptional case provisions

5.1. Legal aid must be granted in all cases where it is necessary for effective access to court, i.e. where in the specific circumstances of the case are such that the individual requires the assistance of a lawyer to be able to present her case properly.[18] Achieving this in a legal aid system with scope restrictions and means testing necessitates effective exceptional case provisions in respect of both scope and means.

5.2. It is well established that a legal aid scheme in which scope restrictions are in place may breach Article 6 if, in excluded case types, there are cases where an individual is denied access to court or a fair hearing as a result of their ineligibility for legal aid. It is highly unlikely that systems such as Norway and England and Wales, which have very limited scope, would move towards universal, or even considerably wider, scope, although this would of course be a theoretical option in a new legal aid scheme for Wales. However, in order to comply with international human rights obligations, schemes must at least provide a realistic possibility of legal aid being granted in out-of-scope cases where this is necessary for fair hearing to be achieved, bearing in mind at least 'the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively'.[19] The exceptional case funding scheme in s. 10 of LASPO is explicitly intended to ensure that breaches of Article 6 do not occur, but will only prevent human rights violations if it is effective in practice. The mere existence of s. 10 is not sufficient.

5.3. If a wider overhaul of legal aid in Wales was envisaged, one alternative could be to consider moving away from scope restrictions to an alternative of selecting eligible cases according to the type of client rather than the type of case. This possibility was mooted in the Access to Justice Review Northern

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[18] *McVicar v. UK*, App. No. 46311/99, Judgment 7 May 2002, para. 47 and 48.
[19] *Steel and Morris v. United Kingdom*, App. No. 68416/01, Judgment 15 February 2005, para. 61.

Ireland, in 2011,[20] and has also been previously considered in Norway. Such a change might prove a good way to target legal aid to those most in need whilst also avoiding the problems of 'exceptional' case administration.

5.4. In addition to exceptional case determinations in out of scope cases, consideration must also be given to exceptional grants for criminal cases where the applicant fails the means test. According to the international treaties, assistance must be given free of charge to a defendant who does not have 'sufficient means to pay'. Whilst it is unclear precisely how this element of the right would be applied in a case before the European Court of Human Rights, it is self-evident that non-means tested public defender schemes, such as those of the Nordic countries, would comply. The financial eligibility tests in the Republic of Ireland and Northern Ireland also comply, as they award legal aid if the defendant's means are insufficient to enable him to pay privately for a defence lawyer. In Scotland, a detailed test is applied but even if the income or capital limit is exceeded, legal aid may be granted if paying her own legal costs would cause the defendant undue hardship.[21] This provision, properly applied, should ensure that the requirements of Article 6 are met. In England and Wales there is no such relieving provision; in most criminal cases there are fixed income and capital limits above which legal aid will not be granted, whatever the likely costs of the defence or the difficulty which the defendant may have in meeting these costs. This situation would almost certainly be found a violation of Article 6 if a defendant successfully persuaded the Court that, despite being above the financial eligibility limits, he was unable to pay privately for his defence as the case was complex and lawyer's fees prohibitive even for a person of his means. In these circumstances a defendant may well not have 'sufficient means to pay', even with a comfortable middle-class income. In order to ensure compliance with the right to legal aid in criminal cases, Wales could introduce a provision to exempt a defendant from the financial eligibility test if paying privately would be unrealistic. A similar provision to that in Scotland might well be suitable.

B. Important considerations

6. Assurance of the right to a fair trial, not only the right of access to court

6.1. Fair trial or hearing is an explicit human right under several international human rights treaties, and an important element of the rule of law. This right should be borne in mind by legal aid policy-makers, who are well placed to assist in its realisation. The right of access to court does not

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[20] Department of Justice Northern Ireland, *Access to Justice Review Northern Ireland: The Report*, 2011. Available at https://www.justice-ni.gov.uk/sites/default/files/publications/doj/access-to-justice-review-final-report.pdf, para. 5.80.

[21] Scottish Legal Aid Board *Criminal Legal Assistance Handbook*, Part III, paras. 12.2 and 14.

supersede the right to a fair hearing and policy which focuses solely on the former is insufficient.

6.2. The explicit provisions of the human rights treaties refer to fair trial (or hearing), rather than to access to court (or to justice); the latter concept has developed through the interpretation of the provisions by the treaty bodies but has gained, arguably, a pre-eminence over the explicit provisions.

6.3. Access to court and fair trial are very different rights and impose different obligations on states. Access to court is a weak basis for arguing the need for civil legal aid: in most cases it is possible to bring or defend proceedings without representation and therefore legal aid is not required for the realisation of the right to access to court. The imposition of even quite harsh eligibility tests on merits, including prospects of success, can be deemed acceptable. A concentration on fairness of hearing produces a different result as the implication is that both sides in a civil dispute should be able to present their side of the dispute effectively. This would logically appear to be the case whatever the value of the case, cost of providing legal assistance or the strength of the respective positions of the parties. The fact that a person has theoretical access to court does not mean that they are able to obtain a fair hearing; for the latter to be ensured legal assistance may be needed.

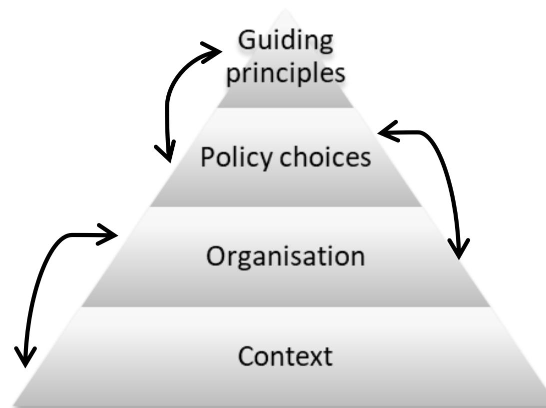
6.4. It is important that governments continue to be aware of the need for fair trial, not only as a treaty obligation but also as an element of the rule of law. The rule of law requires equal access to the law and equality before the law; an access to justice focus can work against equality by leading to the establishment of different justice processes for those who are of limited means, whilst the formal court-based justice system becomes the preserve of the well-to-do. Alternative methods of dispute resolution undoubtedly have their place, but only if they apply to all cases of a certain type or if they represent a real choice by the parties to the dispute to eschew the courts. If, however, a person of low means cannot exercise the option to go to court due to financial difficulties, there is not equal access to the courts. Furthermore, it must be remembered that the dispute resolution venue may be imposed by the party who commences the action, and an individual defending a court case also has the right to a fair hearing.

6.5. I would encourage the Commission on Justice in Wales to go beyond a discussion of access to court and access to justice and give serious consideration to improving the realisation of the right to a fair trial.

7. Internal coherence of the legal aid system

7.1. *Each jurisdiction must develop a legal aid scheme which is appropriate for its own circumstances, which makes direct comparison difficult. However, legal aid systems can be measured objectively against a need for internal coherence and logic. Any initiation of or change to a legal aid scheme should strive for these qualities.*

7.2. The elements of a legal aid scheme may appear discrete, and thus alterable as expedient. However, a closer examination reveals links between various aspects, raising the possibility of incoherency if the system is not sufficiently coordinated. In order to consider coherence, it is useful to consider a legal aid scheme as a pyramid consisting of guiding principles at the apex, below which is a layer of policy choices. Beneath these is the organisation of the system, resting on the lowest level, context.



7.3. Three of these groups are internal to legal aid and represent the choices which can be made in creating a scheme, at three different levels. The highest level is the establishment of underlying principles; these may be expressly determined by parliament or government or may only be discernible by implication from the next category, policy choices. These are, ideally, consistent with the underlying principles, and largely derive from them. However, it may be that there is conflict between the stated ideals of a legal aid system and the policies which determine the reach of the scheme in practice. The lowest level of elements of variation is the practical delivery methods. These have little connection to the theoretical basis of the scheme but may be dictated to a greater or lesser extent by the policy choices. Again, ideally there should be a logical harmony between the policy choices and practical delivery methods. The fourth and final category of variables is the elements making up the structural, societal and economic context of the legal aid scheme. Whilst this is not chosen by legal aid policy-makers, it is highly

relevant. Choices at any level may have consequences for other elements in the same or other categories, either mandating a change elsewhere in the system or resulting in logical inconsistency.

7.4. Some significant examples of connections can be seen in the relationship between declarations of principle and the specific policies which are set for the governance of legal aid. The guiding principles of legal aid are not uniform. Governments may focus on access to justice or may consider legal aid primarily to be a social benefit or a mechanism for reducing poverty and inequality. Even within the access to justice aim, there is an important difference of principle depending on whether the focus is on access to court or fair trial.

7.5. The declarations of principle should have consequences on legal aid policy choices if the legal aid system is to be coherent. Thus, if a government sets the purpose of legal aid as being a social benefit, their stance is in keeping with financial eligibility criteria which lead to only the poorest members of society being eligible. Conversely, if the primary aim is to ensure access to justice, it may be that high private lawyer fees mean that a large percentage of the population must be financially eligible for access to be guaranteed. Financial eligibility is also relevant to the principles demonstrated in publicly funded criminal defence work; a non-means tested system is more in keeping with the concept that suspects are innocent until proven guilty than a means-tested system where some presumed innocent individuals must pay for legal assistance during a prosecution, as discussed below.

7.6. The choice of merits criteria for civil legal aid can also conflict with commonly declared guiding principles. In particular, as argued above, prospects of success tests are inconsistent with a commitment to ensuring fair trial. Providing assistance only to those who are likely to win their case denies fair trial to those who are not predicted to be successful; this restriction on the right is not present in the expression of principle. A legal aid scheme with a decisive prospects of success test, but where there is a commitment to fair trial, will be internally incoherent. Similarly, a strict test of proportionality between cost and benefit may be justifiable within the right of access to court, which is capable of limitation according to the European Court of Human Rights;[22] however it is not consistent with the right to fair trial, which in theory guarantees that all trials should be fair, not just those where the value of the claim is sufficiently high.

7.7. Significant scope restrictions for civil legal aid are most cogently justified by a social welfare purpose of legal aid such as that in Norway, where legal aid is

[22] See e.g. *Ashingdane v. UK*, App. No. 8225/78, Judgment of 28 May 1985.

‘a social benefit’ intended ‘to guarantee necessary legal assistance for persons who do not have the financial means themselves to enable them to meet a need for legal aid that is of great importance to their persons and their welfare’.[23] This provides a coherent explanation for the very restrictive approach to scope, as assistance is provided in those cases (and only those cases) where the individual’s welfare is deemed to be threatened.

7.8. Coherency should also be ensured between policy and the organisational details of the scheme. Thus, a policy focus on early advice should be reflected in organisational structures which provide easy access for clients; choices on financial eligibility tests should be made such that the results correspond to the proportion of the population which policy intends to be covered. If scope is very restricted, the regulations defining scope may be better expressed by inclusion of the specific covered areas rather than exclusion of those matters which are not covered, but in a system with generous scope the opposite will be true.

7.9. The legal aid system in England and Wales has been subject to a number of reforms which, I would argue, have resulted in a somewhat chaotic scheme. Government statements of principle do not always correlate to legal aid policy, which in turn is not always borne out by the actual organisation of legal aid delivery. Incoherency, it is submitted, is a failing which should be avoided if a legal aid scheme is to be judged successful.

7.10. Illogicality is a slightly different problem, seen in some legal aid schemes. For example, the preciseness of the scope provisions for Norwegian civil legal aid has resulted in some surprising and seemingly illogical results, such as that tenancy termination cases are covered if due to a breach of contract but not if due to a gross breach of contract, and deportation cases are included in the scheme if they occur in consequence of a breach of immigration law but not if the trigger was a breach of criminal law.[24] Such outcomes should clearly be avoided.

8. Whether court processes are necessary for the resolution of (all) family disputes

8.1. Family disputes take up a large share of legal aid in the UK jurisdictions, as a necessary consequence of the almost universal involvement of courts in the resolution of these issues. The Nordic countries use other

[23] Rettshjelploven, 1980, §1.
[24] Halvorsen Rønning, Olaf, ‘Legal Aid in Norway’, pp. 15-41 in Halvorsen Rønning, Olaf and Hammerslev, Ole (eds.) *Outsourcing Legal Aid in the Nordic Welfare States*, Open Access, 2018, p. 21.

structures for this purpose, which could be usefully considered as options in Wales.

8.2. Family law in particular is an area in which many jurisdictions try to reduce reliance on courts for resolving disputes. This is seen as being better for the ongoing relationship between parents and thus better for the children concerned. Furthermore, family disputes tend to make up a high proportion of non-criminal legal cases, and therefore any success in keeping these out of court is likely to provide significant financial savings. All the Nordic jurisdictions have to a greater or lesser extent diverted private family law cases away from the ordinary courts.

8.3. In Sweden, financial issues arising on relationship breakdown are in the first instance dealt with completely outside the court system. In the case of a dispute concerning division of property, one or both parties can apply to the court to appoint a “division of property official” (bodelningsförrättare), usually a practising lawyer. The official will meet with the parties and attempt to negotiate a settlement between them. If agreement is impossible, the official will impose a division and this decision will be binding on the parties. An application to court will occur only if one of the parties appeals the division imposed. Legal aid is not available for the division of property process, but depending on the financial circumstance up to 5 hours’ help from a division of property official can be reimbursed by the state.[25] Disputes concerning children are dealt with by the District Courts, but parents are encouraged to use local authority mediation services to try and agree child residence and contact issues before taking a case to court.

8.4. In Finland, family cases concerning residence of children and contact with their parents can, but need not, be dealt with by the courts. An equally binding outcome can be achieved with the help of local child welfare services. A welfare officer can give the parents information and advice and assist in reaching an agreement. The agreement can then be confirmed by the social welfare board, making it legally enforceable without the need for a court to be involved.[26] Mediation is also available if couples are willing to try to resolve their disputes through this means.

8.5. Local authorities also play a role in Denmark, where civil disputes in family matters do not go directly to court but are first considered by the regional State Administration (Statsforvaltningen)[27] whose nine offices administer various

[25] Äktenskapsbalken, 1987, Ch. 17, para. 7a.
[26] More information is available from the Finnish Department of Justice website.
[27] Further information on their website at http://www.statsforvaltningen.dk/site.aspx?p=5466.

areas on a local level. They attempt to settle family cases through mediation and negotiation and, if unsuccessful, forward the matter to court for a decision to be made. Similarly, in Iceland mediation is compulsory in custody disputes before a court application can be made.[28]

8.6. Access to the courts in many family matters (as well as other civil cases) in Norway is conditional upon an attempt at mediation having failed. In family cases free mediation is available at local family welfare offices, and it is compulsory for couples with at least one child under 16 to undergo mediation before divorce or separation.[29] Agreements about child access and related matters made between the parties can be given legal force by the County Governor without the need for a court process, if both parents agree to the administrative processing of the matter.[30]

8.7. The UK jurisdictions still rely heavily on court processes to resolve disputes arising from the breakdown of relationships but the experience of the Nordic jurisdictions suggests other alternatives may be possible. Resources are of course needed in these alternative arrangements, but pressure on courts is reduced and in general the number of publicly-paid persons involved in settling each dispute is lower. Such alternatives might be of interest in Wales.

9. Whether a public defender scheme might be preferable to criminal legal aid

9.1. Public defender schemes need not be delivered by state-employed lawyers and can look similar to criminal legal aid, in terms of delivery. However, they have some policy and efficiency advantages which may be of interest in Wales.

9.2. Public defender schemes are in place in all the Nordic jurisdictions.[31] However, the characteristics of these schemes are different from the public defender schemes often considered and rejected by UK policy-makers. Elsewhere in the world, for example in some US and Australian states, public defender schemes are operated by salaried lawyers and this characteristic of employing full-time lawyers is sometimes taken as part of the definition of a public defender system.[32]

9.3. This is not the case in the Nordic countries which nonetheless all describe their systems as public defender schemes and administer them separately from legal aid. These schemes share some characteristics which are absent from

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[28] Barnalög, 2003, Article 33a.
[29] Barnelova, 1981, §51 and Ekteskapsloven, 1991, §26.
[30] Barnelova, 1981, §55.
[31] although in the case of Finland there is also criminal legal aid.
[32] See e.g. Republic of Ireland Criminal Legal Aid Review Committee First Report 1999, p. 9.

criminal legal aid. All the Nordic public defence attorney schemes are administered by the court, and provide state-paid assistance to defendants in cases considered sufficiently serious. There is no means-testing for the services of such an attorney, but defendants who are subsequently convicted may be required to repay a proportion of the costs incurred. Provision is made for legal assistance at the police station through the public defence attorney schemes.

9.4. The public defender services in the Nordic jurisdictions are provided almost entirely by private practitioners rather than a cohort of state-employed public defence lawyers. The only exception is in Finland, where a public legal aid attorney may be appointed as the public defender; however, private practitioners can also be so appointed, and the choice of lawyer is for the defendant.

9.5. Public defender systems are not means-tested and thus available to any person accused of a sufficiently serious crime. There is a clear point of principle expressed through the public defender schemes: any person accused of a sufficiently serious crime is entitled to a defence, which will be paid for by the state. The fact that repayment of costs only arises after conviction is a practical commitment to the principle of 'innocent until proven guilty'. Unlike in systems relying on criminal legal aid, no-one wrongly accused of a crime will suffer financially through having to fund their defence.

9.6. The amount of repayment required upon conviction varies across the Nordic jurisdictions. In Denmark, for example, the legislation provides that if the defendant is found guilty he is obliged to reimburse the public purse,[33] regardless of his means. The amounts can be substantial and some fear that the possibility of an attachment of earnings order for recovery of the debt may act as a deterrent to obtaining regular employment after conviction and even be an incitement to further criminal activity.[34] Approximately a third of the costs ordered to be paid are actually recovered.[35] The requirement to repay defence costs in Norway is less absolute; upon conviction the defendant should 'normally' be ordered to pay the costs incurred in the prosecution,[36] however, "costs shall only be imposed if it is deemed possible to obtain payment thereof, and they shall be proportionate to the financial capacity of the person

[33] Retsplejeloven, 2017, § 1008(1).
[34] Danmarks Nationale Menneskerettighedsinstitution, *Retfærdig Rettergang Status 2015-16*, Copenhagen, Institut for Menneskerettigheder, 2016, Chapter 5.4.
[35] *Ibidem.* In 2014, 450 million Danish Krone were ordered to be paid and 150 million Krone were recovered.
[36] Straffeprosessloven, 1981, §436.

charged"[37] with the result that in practice recovery of prosecution costs is often symbolic in cases other than white-collar crime.

9.7. The consideration of the means of the convicted person is in Sweden linked to the rules on financial eligibility for civil legal aid,[38] resulting in a percentage contribution to be applied to the costs of the Public Defence Attorney and any fee for counsel for the victim.[39] However, if the defendant has been sentenced to a long prison term it is usual for the fee to be waived.[40] Similarly, under the Finnish scheme, a person found guilty will be ordered to reimburse the state for the amount paid to the public defence attorney from state funds, up to the level which would have been payable under legal aid according to the defendant's financial situation (as in Sweden, a percentage contribution).[41]

9.8. The public defender schemes involve the state paying for the successful defence of any defendant, even one who has the financial means to pay for her own defence. This does mean that in a small number of cases there is additional cost to the state, however there are savings to be made over the system as a whole by the removal of the need for means-testing, and the administration of the scheme by the courts rather than by a legal aid organ. Furthermore, a public defence scheme may engender a more positive public attitude to criminal legal aid clients and different public and political commitment to proper funding for the system. A general awareness that a public defender would be appointed for each individual, if ever accused of crime, seems likely to engender a more positive appreciation of the system than criminal legal aid schemes, in which entitlement depends on a certain level of poverty and thus may encourage a view of publicly funded criminal defence as a social welfare benefit rather than a fundamental civil right.

9.9. Depending on the proportion of criminal defendants in Wales who are financially ineligible for legal aid and pay for their own defence, it may be that a public defence scheme would be no more expensive that criminal legal aid, but would confer advantages as discussed above.

10. Conclusion

The comparative research I have undertaken contains many findings which may be useful for the Commission on Justice in Wales in its consideration of access to justice arrangements. I have summarised here those I believe to be most relevant, but am

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[37] *Ibidem*, §437.
[38] Rättegångsbalk, 1942, Chapter 31, 1§.
[39] Lag om målsägandebiträde, 1988, 8§.
[40] Rättegångsbalk, 1942, Chapter 31, 1§4.
[41] Lag om rättegång i brottmål, 1997, Chapter 2, 11§.

more than happy to provide further information on these or other points if the Commission so wishes.

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