

# Seeing the wood for the trees: the comparative cost of legal aid

**Arguments that legal aid in England and Wales is expensive might be countered by comparing our justice system with those of other jurisdictions, writes Anna Barlow.**



Anna Barlow

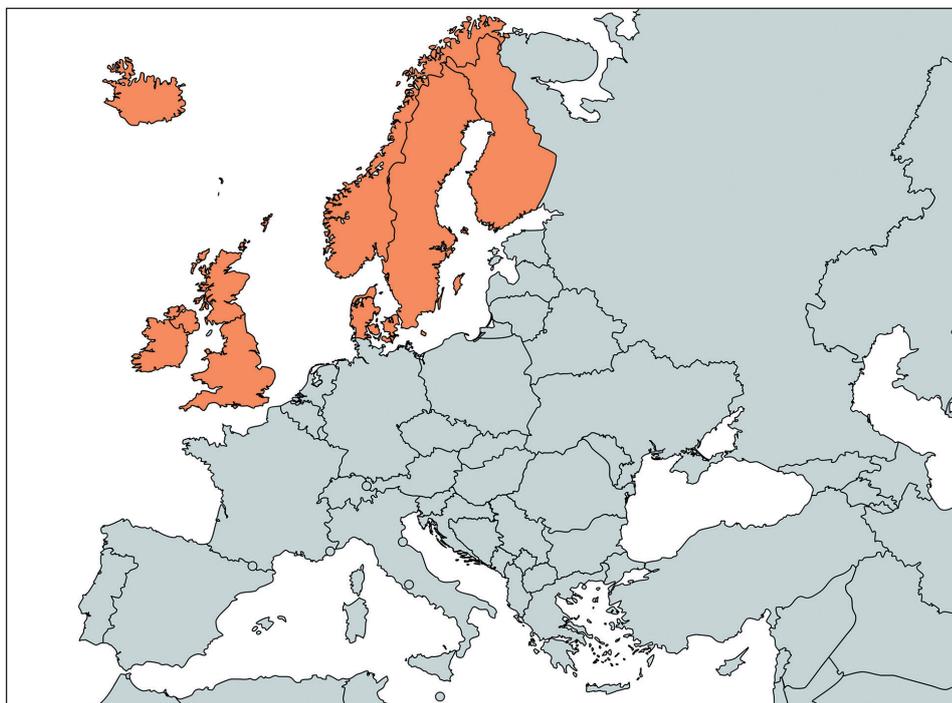
It is no exaggeration to say that legal aid in England and Wales is in crisis, and trite to point out that funding is the core issue. But might we be misunderstanding the nature of the problem and looking in the wrong place for solutions? Could it be that we are staring so hard at the legal aid scheme that we have lost the perspective to see it clearly? Rather than arguing about whether legal aid is too expensive, or whether, in fact, too little is being spent, we may be able to use a comparison with other jurisdictions to change the narrative.

It can be argued that, while legal aid in England and Wales is expensive, this does not lead to an unacceptably high overall expenditure on justice, and that the specific conditions that exist in this jurisdiction mean legal aid inevitably needs, and should be allocated, significant resources. My recently completed PhD comparative research on the legal aid systems in the Nordic countries, Ireland and the jurisdictions of the UK (see map below) gives a different perspective on the legal aid crisis in England and Wales and suggests that the battle lines over funding have been wrongly drawn.

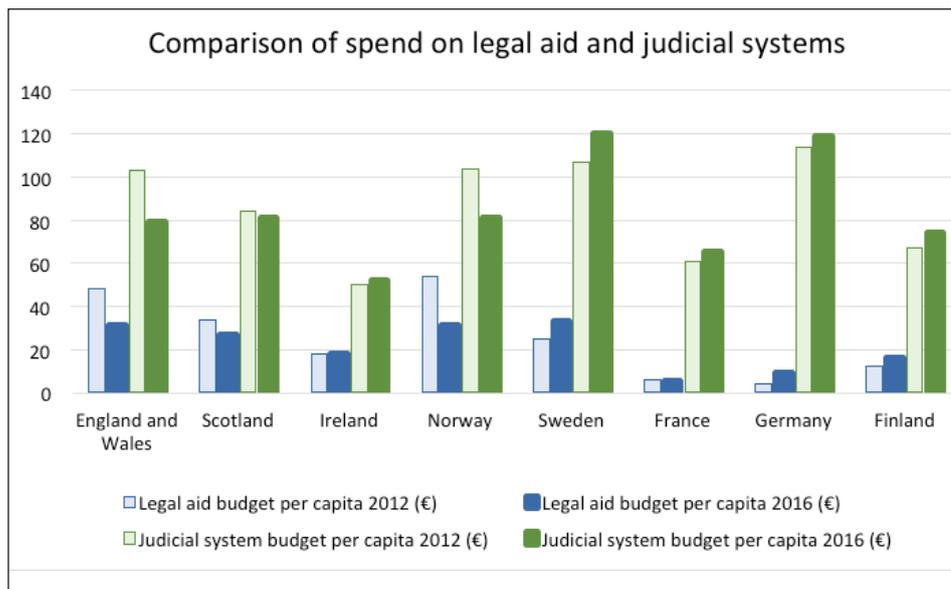
## Looking at the numbers

In reaching a view on legal aid expenditure, it is, of course, useful to consider the available evidence that indicates where England and Wales stands in comparison with other jurisdictions. One useful source of such information is the biannual study conducted by the European Commission for the Efficiency of Justice (CEPEJ), which addresses, inter alia, the budget devoted to justice systems. The latest figures, from 2016, were released in November 2018 (*European judicial systems: efficiency and quality of justice*, CEPEJ Studies No 26, 2018 edition (2016 data), CEPEJ/Council of Europe)<sup>1</sup> and allow a comparison of current spend on legal aid and on judicial systems overall, across Europe. CEPEJ rightly cautions against too simplistic an interpretation of the comparative data, and points out that evident economic and size differences between states, differences in data collection and reporting, and variable currency exchange rates, can cause mis-comparison. Nonetheless, the CEPEJ data is a valuable starting point in challenging misconceptions about the cost of legal aid in England and Wales.

To aid a comparison, data has been extracted from the CEPEJ report to show the legal aid budget and the judicial system budget of a selection of European jurisdictions: England and Wales; Scotland; Ireland; Norway; Sweden; France; Germany; and Finland. The figure for the judicial system budget is defined by CEPEJ as the total of the budgets of the court service, legal aid and prosecution



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services. As well as the 2016 figures, the chart also shows the equivalent 2012 data, for its pre-Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) interest.

It can be seen that while England and Wales was, in both 2016 and 2012, a relatively high per capita spender on legal aid, other European jurisdictions spent more. The idea that, pre-LASPO, England and Wales was the most expensive legal aid system is, according to CEPEJ figures, wrong. It is, however, clearly a high spender on legal aid: in 2012, the third-highest after Norway and Northern Ireland<sup>2</sup> and in 2016 second-highest after Sweden in the CEPEJ report, though Norway was very close (Northern Ireland also spent more, but was unable to provide figures to CEPEJ).<sup>3</sup> Elsewhere in Europe, the 2016 per capita legal aid budget in France was only €5, and in Germany only €9, compared with €31 in England and Wales.

However, if we look at the legal aid budget in the context of the budget for the entire judicial system, a different picture emerges. In 2016, England and Wales spent €79 per inhabitant on the entire judicial system, 15th highest among the European states covered by the CEPEJ study; furthermore, we fell exactly on the average amount spent per inhabitant as a proportion of GDP. It would be hard to argue that this represents an overspend on the judicial system as a whole. A contention that legal aid in England and Wales is too expensive can thus instead be thought of as an assertion that too high a proportion of our judicial system budget is spent on legal aid. This begs the question of whether our legal aid scheme is inherently costly or whether it is required to fulfil a more substantial role in the judicial system than is the case in other jurisdictions.

### Digging deeper

From a domestic perspective, the role of legal aid may seem self-evident. In truth, legal aid schemes, even of our near neighbours, vary enormously in the purpose they fulfil as well as how they operate. One important initial caveat is that in criminal cases, legal aid or public defender schemes play a comparable role across all jurisdictions, as non-minor criminal cases must be heard before a court and there is a right under international law to a defence lawyer, paid for by the state if necessary. The level of demand for defence assistance will, however, vary according to prosecution rates and the extent of use of police- or prosecution-imposed fines, as well as financial eligibility levels.

The burden placed on civil legal aid, conversely, is not equivalent across jurisdictions, partly due to differing reliance on the formal legal system. The Nordic states, significantly, have mechanisms that remove a large part of family law dispute resolution from the judicial system. In Finland, Denmark and Norway, local or regional authorities play a significant role in the resolution of disputes upon relationship breakdown and can give legally binding force to mediated agreements without the need for court involvement. In Sweden, practising lawyers can gain an accreditation that enables them to attempt to negotiate a settlement between the parties but also, critically, in the absence of agreement, to impose a property division that will be binding unless one of the parties appeals to court. These processes are significant in reducing the reliance on court for the resolution of family disputes, which in turn reduces the demands

on legal aid. In some of the Nordic countries, in addition, separate administrative law courts (Sweden and Finland) or administrative appeal boards (Denmark), where representation is rare, remove most administrative law matters from the general courts to a greater extent than is the case with tribunals in England and Wales.

In disputes that remain the province of the formal courts, the demand for legal aid is significantly reduced in the Nordic countries by legal expenses insurance, which provides meaningful cover for a considerable proportion of the population. In addition to these structural factors, the field of operation of legal aid shrinks yet further in jurisdictions where there is a cultural reluctance to use legal mechanisms for resolving disputes at all, as appears to be the case in Finland. It is thus apparent that the burden on legal aid systems is not equivalent across jurisdictions.

Whatever the magnitude of the task, each jurisdiction also has its own approach to the provision of legal aid. A consideration of some of the alternatives adopted may indicate whether it is realistic to blame high spend in England and Wales on the alleged 'generosity' of our scheme (*Proposals for the reform of legal aid in England and Wales*, Consultation Paper CP12/10, Cm 7967, Ministry of Justice, November 2010, para. 3.41, page 30). The level of variation is considerable and cannot be fully described here, but some elements are particularly striking.

An important underlying variation is in the percentage of the population eligible for legal aid; this is not officially calculated in all the jurisdictions, but estimates vary from about 75 per cent in Finland<sup>4</sup> and Scotland<sup>5</sup> down to about 25 per cent in Norway<sup>6</sup> and in England and Wales.<sup>7</sup> While eligible clients in England and Wales must find a lawyer with a legal aid contract, several jurisdictions only require lawyers to register to conduct legally aided cases, and in Sweden, even an unqualified person could receive legal aid to advise, assist or represent a client.

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legal aid, but these schemes do not involve a salaried service; rather, private practitioners are appointed by the court to represent defendants on a non-means-tested basis, usually with a duty on the client to repay their defence costs at least partially, if convicted. Courts also play a considerable role in granting civil legal aid in Sweden, Denmark and Norway, although in the latter two jurisdictions, courts only assess legal aid for cases where no, or generous, merits tests apply. In Finland and Ireland, legally-aided services are very largely provided by lawyers employed in state-run law centres. These lawyers make the civil legal aid decisions in all cases, including those where private solicitors are acting; in effect, a private lawyer has their legal aid application decided by a publicly employed competitor. This would be highly contentious in other jurisdictions.

The extreme level of civil scope restriction seen in England and Wales is also found in Norway, whereas Finland, Iceland and Denmark have virtually no scope restrictions. Civil merits tests also show a considerable range. England and Wales has by far the most complex set of provisions, and the strictest. The Irish, Nordic and UK jurisdictions all have reasonableness in some form as part of their merits testing, and in Sweden, Scotland and Northern Ireland, this is the main factor determining eligibility. Prospects of success do not feature in the merits test in Finland, and explicitly may not be the deciding factor in refusing civil legal aid in Norway. In Finland and Sweden, a grant of legal aid automatically includes funding for an appeal.

It is notable from the above outline that legal aid in England and Wales is, comparatively, very restricted, despite its high cost. In contrast, the Finnish legal aid system is very generous, yet relatively cheap. Part of the explanation for this paradox may lie in the judicial system factors set out above: Finland keeps most family disputes out of the court, operates an administrative court that hears most cases on paper only, and has a high level of coverage by legal expenses insurance. Importantly, legal aid in Finland also offers no

protection against inter partes costs, which appears to act as a significant disincentive to involvement in proceedings, although the same rule in Norway does not seem to have this effect.<sup>8</sup>

### Justifying the cost

This brief exploration suggests that there are complex factors behind the cost of legal aid in a jurisdiction. In England and Wales, it is plainly not generosity that makes legal aid expensive, but wider factors in the justice system and society as a whole. In particular, we have complex legislation that is difficult for lay people to navigate, minimal informal family dispute resolution and low public trust in bureaucracy (possibly merited). High legal aid expenditure within a moderate judicial systems budget may, in fact, be an appropriate and necessary part of the unique access to justice fingerprint of our jurisdiction. ■

1. For interactive tables, see CEPEJ – Explorer v4.0 at: [https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Explorerv4\\_0/Tables](https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Explorerv4_0/Tables).
2. See CEPEJ – Budget v3.1 at: <https://public.tableau.com/profile/cepej#!/vizhome/CEPEJ-Budgetv3.1/GDPBudget>.
3. The Northern Ireland government did not submit figures for 2016 to CEPEJ. However, taking the figures from the *Legal Services Agency Northern Ireland annual report and accounts* for the years 2015–16 and 2016–17, and apportioning them to give an estimate for the spend on legal aid in the calendar year 2016 gives a figure of £84.53m. With a population of 1.859m in 2016, according to Eurostat, the per capita spend is £45.47, which, at an exchange rate of an average of £1 to €0.82 in 2016 is €55.45. This is much higher than Sweden, at €33 per capita, so even making allowances for differences in data collection, it seems safe to suggest that Northern Ireland did have higher per capita spend in 2016 than England and Wales.
4. In Finland, reforms in 2002 increased the proportion of the population eligible for legal aid from 45 per cent to 75 per cent (Henriikka Rosti, Johanna Niemi and Marjukka Lasola, *Legal aid and legal services in Finland*, Research Report No 237, National Research Institute of Legal Policy, 2008, page 92). Since then, financial eligibility limits have been increased several times, most recently in 2009. Government statistics show that wages have not increased significantly in real terms since 2000

(Statistics Finland) and thus it is likely that approximately the same proportion of the population is still eligible for legal aid, some with a high percentage contribution.

5. Eligibility in Scotland was increased substantially in 2009, and it was estimated in 2014 that approximately 75 per cent of people in Scotland are currently eligible for civil legal aid either with or without a contribution (*Legal assistance in Scotland – fit for the 21st century: discussion paper*, Law Society of Scotland, 2014, page 37). This estimate still appeared to be accepted in 2016 (Sarah O'Neill, 'How Scotland has approached the challenge of austerity', in Ellie Palmer, Tom Cornford, Audrey Guinchard and Yseult Marique, eds, *Access to justice: beyond the policies and politics of austerity*, Hart Publishing, 2016, page 294) but in 2018 the estimated percentage was slightly lower, at 70 per cent (Martyn Evans, *Rethinking legal aid: an independent strategic review*, Scottish government, 2018, page 18).
6. In Norway, the civil eligibility limits were last amended in 2009, since when average incomes have increased significantly, as a result of which the proportion of people eligible for legal aid has decreased. When the current limits came into force, the Ministry of Justice estimated the number of eligible households at 32 per cent and almost immediately proposed a further increase, which would raise eligibility to 56 per cent of households (*Om offentlig rettsbistand – Rettshjelp*, St.meld nr. 26 (2008–2009), Det kongelige justis- og politidepartement, 17 April 2009, page 56, para. 8.2.5), but this was not acted upon. The eligible proportion is now inevitably much lower than 32 per cent but recent estimates of the exact figure are not available.
7. Official figures on percentage eligibility are not produced in England and Wales, but a request to the government statistics office led to the response: 'In 2015, we estimate that around 25% of the population is financially eligible for free or contributory civil legal aid. This is based on outputs from DWP [Department for Work and Pensions], informed by the Family Resources Survey (FRS) and DWP's Policy Simulation Model (PSM). Our modelling involves a number of assumptions, which bring uncertainty to the estimate' (email from Ministry of Justice, 31 May 2017).
8. This greatly reduces pressure on the legal aid system, but the chilling effect on litigation has been criticised by international human rights bodies. *General comment no 32, article 14, right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, UN Human Rights Committee, 23 August 2007, para 11, page 3; *Anni Äärelä and Jouni Näkkäläjärvi v Finland*, Communication No 779/1997, CCPR/C/73/D/779/1997, UN Human Rights Committee, 7 November 2001, para 7.2, page 10.

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