

Comparisons are odious

The problems of comparing legal aid costs in different countries

Expenditure on legal aid in England and Wales is in the firing line. The impetus behind the legal aid proposals in the Legal Aid Sentencing and Punishment of Offenders Bill (LASPO) currently going through parliament is to cut the £2.1 billion budget by £350 or £450 million per annum. The exact figure is unclear.

The Government has employed a familiar narrative to justify these cuts; that we are an over litigious society, and that the current legal aid system is failing. The published statistics do not bear out the claim that we are living in an era marked by a rampant compensation culture. However, what of the other strand in the narrative, namely that as a result of our litigious profligacy the legal aid system in England and Wales is among the most expensive in the world? In absolute terms, England and Wales does indeed spend more on legal aid than almost every other jurisdiction, but then it is one of the largest welfare states in terms of population and GDP. A more cogent comparison is in relation to per capita expenditure or expenditure as a proportion of GDP. In June the Justice Secretary Ken Clarke said:

Our legal system has grown to an extent that we spend more than almost anywhere else in the world. France spends £3 per head of population. Germany £5. New Zealand, with a comparable legal system, spends £8. In England and Wales we spend a staggering £38 per head of population¹

It would indeed appear that per capital legal aid spend in England and Wales is one of the highest in the world. However this fact tells us nothing about the reasons for the differentials nor does it provide evidence that legal aid expenditure in England and Wales is out of control or too freely available. Moreover, the figure provided for New Zealand is almost certainly incorrect, being more in the region of £20 per capita, (a correction tacitly accepted by the Justice Secretary in the Guardian recently),² as are the spends for France and Germany.

Furthermore, comparisons with the legal aid spend in continental jurisdictions are highly problematic as inquisitorial systems generally require less input from legal representatives but significantly more resources are expended on prosecution services and the courts - which have a much greater role in investigating issues requiring determination. Once the overall expenditure on courts, the prosecution service and legal aid are taken together, England and Wales comes a third of the way down the European league table. Thus England and Wales spends more than twice as much per capita on legal aid than Holland. However with a total per capita spend of 90.61 euros on legal aid, courts and prosecutions, Holland spends a greater overall per capita sum on justice than England and Wales where the total is 80.40 euros. Sweden spends almost the same per capita as England and Wales overall at 71 euros whereas their per capita legal aid spend is around a fifth of that spent in England and Wales.³

¹ Kenneth Clarke, *The Government's vision for criminal justice reform*, (speech), 30 June 2011

² Kenneth Clarke, *Legal aid is safe where it matters most* The Guardian 19th December 2011

³ Bowles and Perry: International comparison of publicly funded legal services and justice systems, MoJ research series 14/09, October 2009, p 27

Comparing legal aid expenditure with other Commonwealth jurisdictions may on the face of it appear more appropriate. These comparisons show that in per capita terms England and Wales is still significantly more expensive than other jurisdictions, except for Northern Ireland. Within the Commonwealth jurisdictions there is a wide range of expenditure, from around £8 per capita in British Columbia⁴ to around £20 in New Zealand which is among the highest outside of the UK. Part of the explanation lies in the relative scope and eligibility limits of different jurisdictions. Yet in its written submission to the House of Commons Bill Committee on the LASPO Bill, the Law Society of England and Wales presented evidence that the differential was not in any significant way due to greater generosity in England and Wales in terms of financial eligibility and that New Zealand was actually marginally more generous in this regard.

There are many factors which may explain the higher cost of legal aid in England and Wales. Some of them have been identified by Bowles and Perry⁵ in their 2009 report commissioned by the Ministry of Justice.

- A higher crime rate in England and Wales than New Zealand and Canada.
- A higher number of legal aid criminal legal aid cases per capita than any other jurisdiction in their survey. England had Wales had 298 cases per 10,000 population compared to 102 in New Zealand and 79 in Canada. Bowles and Perry also took the view that this higher number of cases is unlikely to arise from more generous financial eligibility as eligibility in England and Wales is in line with other countries with well developed legal aid systems and 'thus unlikely of itself to be a major source of variation in legal aid spending per capita.'
- High expenditure per case, especially in very high cost criminal cases.
- A higher divorce rate in England and Wales (31 per 10,000) compared to 26 in New Zealand and 24 in Canada.

In my recent Hamlyn Lectures⁶ I pointed out that the Scottish Legal Aid Board (SLAB) spends around £29.00 per capita as opposed to £38 in England and Wales. What is significant about this figure is that with a smaller per capita budget the Scottish system is more generous both in terms of scope, (for example Scottish civil legal aid includes personal injury claims and some representation at employment tribunals) and in terms of the considerably higher proportion of the population who are financially eligible for legal aid. Moreover, the Scots still have an uncapped, demand led budget. I explored the detailed reasons for these differences in my Hamlyn lectures but one significant factor is the lack of very high cost fraud cases north of the border, as these cases account for a disproportionately large slice of the criminal legal aid budget in England and Wales. Another factor is that whilst the legal aid system in England and Wales has been subject to continuous change and uncertainty over the last decade, there has been greater stability in Scotland and Scottish practitioners have not had to face the bureaucratic hurdles imposed by the English system of contracting. Although rates of pay for practitioners are also under pressure in Scotland, the Scottish Government remains committed to maintaining current levels of scope. Indeed the intention of the Scottish Government is to spread the current cutbacks in legal aid expenditure across both the civil and criminal budgets. Unlike England and Wales, family law is not being disproportionately

⁴ The BC legal aid system has received considerable criticism for its lack of fitness for purpose, see FOUNDATION FOR CHANGE: Report of the Public Commission on Legal Aid in British Columbia by Leonard T. Doust, QC March 2011

⁵ Bowles and Perry: *ibid*

⁶ Alan Paterson, *Lawyers and the Public Good* (Cambridge University Press).



targeted, and neither is preventative law in the shape of advice for employment, immigration, debt and housing matters. Perhaps the most crucial difference between the two justice systems is that the Scots have been much more successful at holistic reform, that is, reforming court procedures (civil and criminal) to reduce legal aid spend.

Although there are significant differences between the two jurisdictions, the Scottish system perhaps demonstrates that by adopting a different approach, legal aid can be delivered at a lower cost without imposing socially damaging cuts in scope.

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Editor's Notes

Sound Off For Justice (SOFJ) is a campaign that wants to make a noise for all those who will be silenced in court if the Government's reforms to legal aid for civil justice go ahead. SOFJ believes that the right to legal representation is a fundamental principle of a civilised society and that no one should be denied legal help because they cannot afford it. Sound Off For Justice has put forward alternative savings that would make a bigger contribution to deficit reduction than the Government's proposed cuts - while at the same time protecting legal aid for civil justice problems affecting the country's most vulnerable and needy citizens. Justice should not be a right only for the wealthy few, but for everyone in this country. Sound Off For Justice is a sister campaign of Justice For All.

Find out more at www.soundoffforjustice.org