

The UK's unmet legal needs: a comparative study of legal aid and the social rights gap

Aidan Flegg & Katie Boyle

Access to Justice For Social Rights
Addressing The Accountability Gap

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Introduction & Methods

This briefing document has been prepared for the Nuffield Foundation project on 'Access to Justice for Social Rights: Addressing the Accountability Gap', led by Dr. Katie Boyle. This briefing summarises our work on the accountability gap in relation to social rights and legal aid provision across the UK. Social rights form part of the international human rights framework, including the right to housing, the right to food and fuel and the right to social security. State parties who have signed up to the international framework are under an obligation to protect these rights in the domestic context, this includes the UK.¹ As part of its international obligations, the UK is required to provide access to an effective remedy if there is a failure to meet these obligations.² In order to access an effective remedy people require support to access and navigate the legal system, legal aid is often a pre-requisite to enabling such access. Legal aid has in recent years suffered financial cuts, significant cuts to scope in England and Wales, and is increasingly governed by different legislation and practice across the UK's three legal jurisdictions leading to a complex and obfuscate system. The briefing is set out as a comparative study of the UK's three legal jurisdictions, namely England and Wales, Scotland, and Northern Ireland, and assesses the changes to civil legal aid in each jurisdiction as well as considering issues specific and common to each. Importantly, as the project is concerned with access to justice for social rights, legal aid for criminal proceedings is not considered within the briefing.

Part I sets out the importance of legal aid within the notion of access to justice and the rule of law. Moreover, it describes the core value of having access to legal aid within a justice system and conducts analysis as to where guidance has been provided by the international human rights framework in relation to its provision for social rights. Part II provides the comparative element, breaking down the development of and changes to legal aid in each jurisdiction of the UK. The section considers changes to legislation, reductions in funding, how legal aid is delivered practically, as well as issues with legal aid scope for each. Part III gets to the heart of the matter and considers where the accountability gap is created or widened in relation to legal aid. In more detail, the findings for carrying out a comparative study are applied to the social rights' legal framework, with consideration given to stifling effects of funding cuts, lack of scope and exceptional case funding for social rights, and emerging issues such as legal aid deserts. Finally, Part IV goes on to provide some recommendations for changes to the provision of legal aid in relation to social rights.

The methods for the research were predominantly a desk-based review of literature, reports, and government statistics on legal aid. However, the briefing also draws from literature relating to the wider project and is the result of two years of discussions around social rights and access to justice with numerous stakeholders including the various law societies and government departments.³

¹ The UK ratified the International Covenant on Economic, Social and Cultural Rights in 1976.

² CESCR General comment 9, 3 December 1998, E/C.12/1998/24; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, [1998] 20 Human Rights Quarterly, 691, para.23.

³ All views expressed and any errors are the authors own and not to be affiliated with any partner or stakeholder organisation

Part I - Legal Aid: The Social Rights Perspective

Legal aid is key to access to justice, indeed it can be viewed as a basic right in and of itself.⁴ Legal aid serves as a key element of human rights protection and a procedural means of ensuring equality before the law.⁵ International guidance in relation to legal aid, including commentary from the UN Committee on Economic, Social, and Cultural Rights (CESCR) suggests legal aid is fundamental to access to justice and access to effective remedies. While legal aid is rarely discussed explicitly, there is common reference throughout the CESCR's General Comments on the need for domestic remedies to be in place. On consideration of the CESCR's guidance, it is clear there is an expectation states must provide legal remedies as well as facilitate access to a remedy. In other words, for those who cannot afford access to a remedy for a social rights violation, legal aid should be made available to ensure access.⁶ CESCR in its concluding observations on the UK has made a series of recommendations in relation to legal aid provision.

The research highlights the essential nature of legal aid in receiving early advice and assistance, as well as in providing legal representation before the courts. There remains a lack of awareness amongst the UK's population on legal aid provision, with evidence bringing to light to impact of poor awareness raising programmes via government. For people to access justice, they must first know that their problem is a legal one, but further, that state assistance exists when trying to address it.

Part II – Civil Legal Aid in the UK: An Overview of Diverging Practice

As the UK is separated into three separate legal jurisdictions, the approach to legal aid provision for criminal and civil proceedings is different in each.⁷

The purpose of the comparative study was to bring to light where gaps exist in relation to social rights and if these are common to each jurisdiction or more specific. Where practice in relation to legal aid for much of the UK's history has been aligned, with minimal differences in relation to scope and funding, the adoption of the Legal Aid, Sentencing and Offenders (2012) Act (LASPO) in England and Wales has led to increasingly diverging practice. Essentially, the reforms to legal aid brought in by LASPO have not been followed by Scotland or Northern Ireland and thus the system for England and Wales is now starkly different. Scotland and Northern Ireland have not followed the approach set out in LASPO due to the chilling effects it has had on access to justice and the justice system more widely.⁸ Criticism of LASPO is widespread throughout practitioners, legal regulators, and academics alike. In brief, LASPO reformed the legal aid landscape by switching from a system in which everything was in scope for legal aid apart from that which was outlined in the legislation, to a system where everything is out of scope for legal aid unless prescribed for by LASPOs Schedules. It has left the legal aid system for England and Wales in apparent 'free fall' for both criminal and civil legal aid, with a 93% reduction in social welfare matters started with legal aid since 2010.⁹ The future of legal aid is currently under parliamentary scrutiny due to acknowledgement the current system is untenable.¹⁰

The research finds Scotland and Northern Ireland have a working legal aid system but with their own issues in relation to social rights. For example, reductions in funding and an overly onerous application system in Scotland have left less firms willing to take on legal aid cases, leaving many people in remote areas without access to a legal aid solicitor.¹¹ In Northern Ireland, where funding is also decreasing, issues became much more specific to the political turmoil suffered with issues such as trust in and between firms and the DoJ.

4 K Juriloo [2015] 'free legal aid – a human right' 33(3) *Nordic Journal of Human Rights*, pp 203-219. See also S Rice 'Reasoning a Human Right to Legal Aid' as found in A Flynn and J Hodgson [2017] *Access to Justice and Legal Aid* Hart publishing.

5 Lord Neuberger (2013) 'Justice in an Age of Austerity' Tom Sargant Memorial Lecture. Available at: <https://www.supremecourt.uk/docs/speech-131015.pdf>.

6 A Durbach 'The Right to Legal Aid in Social Rights Litigation' as found in M Langford [2012] *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* Cambridge University Press

7 B Politowski, G G Grimwood & Y Sallberg [2016] 'Civil Legal Aid: England & Wales, Scotland and N Ireland compared' House of Commons Research Briefing.

8 J Organ & J Sigafoos [2018] 'The impact of LASPO on routes to Justice' Equality and Human Rights Commission.

9 MoJ, Legal Aid Statistics quarterly: Jan-Mar 2021: Table 5.1. Social welfare in the table includes debt, housing, and welfare benefits. Available at: <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2021>.

10 Justice Committee [2021] 'Future of Legal Aid: Thirds Report of Session 2021-22' House of Commons

11 M Evans [2018] 'Rethinking Legal Aid: An Independent Strategic Review' Scottish Government

Part III – Civil Legal Aid and the Social Rights Gap

Where the comparative study delved into and uncovered problems both structural and procedural issues in relation to civil legal aid provision across the UK's nations, this section provides a more in-depth focus on where they create an accountability gap for social rights. Four key areas are considered:

1. Funding

Funding has reduced in real terms in all three jurisdictions and while this has been more severe in England and Wales, it is creating a barrier to access to justice for social rights across all three. Moreover, when the funding of each specific area is broken down, it becomes evident that much of the civil legal aid budget is spent on family law matters, with areas such as housing and social welfare receiving the least funding. Importantly, while a reduction in funding reduces the ability of a system to deliver more legal aid, it also has a knock-on effect throughout the justice system, with changes made to the way in which services are delivered, geographical distribution of services and firms, and a growing lack of early prevention.¹² The discussion goes on to highlight the answer does not always lie in more funding, but often funding needs to be spent earlier within the process.

2. Scope and Exceptional Case Funding (ECF)

There are numerous issues caused by the introduction of LASPO and the extensive cuts made to scope. For example, LASPO removed all welfare benefit proceedings from the scope of legal aid for advice and assistance, except for legal help for appeals to an Upper Tribunal and Higher courts, and civil representation for appeals relating to council tax reduction schemes. While much of the above is well known to practitioners and other interested parties in England & Wales, an underappreciated aspect of scope, applying to all three jurisdictions, is the exclusion of social rights from the scope of human rights cases which are eligible for legal aid. ECF makes funding available where the failure to provide legal aid would amount to a substantial risk of breach of the Human Rights Act 1998, or

rights within the European Convention on Human Rights.¹³ It has been argued ECF was put in place to ensure the cuts imposed by LASPO do not undermine the standards set by the European Court in *Airey v Ireland*,¹⁴ but in any case, the European Convention does not provide explicit protection for social rights related to an adequate standard of living. This presents as a major gap for access to justice for social rights violations.

3. Legal Aid Deserts

'Advice deserts' are a symptom of the many the issues raised within funding reduction and scope. In short, they are areas of the UK in which advice centres and legal aid firms have left, leaving little or no access to legal advice within legal aid. Legal aid deserts have become a key concern of the Law Society of England and Wales who have spent time mapping out what firms are available and for what types of case.¹⁵ Again, it is important to recognise these 'deserts' as they have been coined, are prominent in England & Wales but not in Scotland or Northern Ireland. Where issues arise in Scotland and Northern Ireland, is the provision of expert and trusted advice in rural areas, leaving many needing to travel (if possible) to major cities (Belfast, Edinburgh, Glasgow).

4. Trust, Independence, and Bureaucracy

Here, the issues become more specific to each jurisdiction. For example, within Scotland there is a good level of trust with the Scottish Legal Aid Board and its decision-making, but issues arise in relation to a seemingly over bureaucratic system which discourages solicitors from making applications for legal aid as it is time consuming, and they are not paid for this aspect of their work. On the other hand, trust in England and Wales is very clearly an issue, with practitioners concerned legal aid decision making is not independent from the government. In relation to Northern Ireland, there is a lot of distrust between the Legal Services Agency NI and solicitors working with legal aid. Highlighted by review into fraudulent payments to firms. Further, though there is not much evidence in the literature the informal discussions we undertook suggested the legacy of the conflict continues to have a chilling

12 N Byrom (2017) 'Cuts to Civil Legal Aid and the Identity Crisis in Lawyering: Lessons from the Experience of England and Wales' as found in A Flynn & J Hodgson (2017) *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Needs* Brill Publishing.

13 Scotland does not provide ECF but has a wider scope of what can qualify for civil legal aid in relation to the social welfare. For example, funding is available for human rights cases related to the Human Rights Act 1998.

14 A Barlow [2019] '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' Abo Akademi University press [pp 166-169]

15 Law Society of England and Wales (2021) 'Housing Legal Aid Deserts'. Available at: <https://www.lawsociety.org.uk/campaigns/legal-aid-deserts/housing>

impact on legal aid with law firms undertaking work along nationalist v unionist divisions.

Part 4 – Recommendations

A significant recommendation of the research suggests much further research is required to fully understand the social rights gap for legal aid in each of the UK's jurisdictions. For example, we suggest that access to legal advocacy, legal advice and legal representation is required when a social rights violation occurs. Our research suggests that this is currently not happening, with many forced to receive advice via other means. In order to adequately address this gap, an assessment of legal needs is required in each jurisdiction for both individual need and for the needs of groups such as children, migrants, older persons, persons with disabilities and across different geographical locations etc. I.e., more data is required, and this data requires to be disaggregated to ensure funding is prioritised to meet those needs. Further still, there is evidence to suggest the way in which legal aid forms a part of the justice system, across the UK's three jurisdictions, needs a wider review. Legal aid spend in each jurisdiction remains reasonably high when compared to other European nations, leading to the consideration it is currently an ineffective system delivering legal aid as a whole. While this cannot be achieved within the current research, we find that these structural questions of the justice system must continue to be addressed.

Our recommendations also include considering how to better fund legal aid. Partial-funding of legal aid, where solicitors are not paid for all of the work required to take a case is not working in practice. For example, we consider whether salaried lawyers across social welfare law would more adequately address legal need rather than legal aid schemes that require applications for funding on a case-by-case basis. Expanding existing services performed by law centres and third sector support mechanisms through salaried appointments could help address this gap. Likewise, the geographical location of such services requires attention with regard to the disaggregated data that helps identify potential advice deserts. We also make recommendations about the objective of funding to ensure that legal aid provision is not based on the realistic prospect of financial gain but the realistic prospect of social rights compliance. We encourage the opportunity for collaboration between different sectors of advice (street level/ first tier/ lawyer/ barrister), the co-location of services (bringing the advice sector to GP surgeries, food banks, job centres, places of employment etc.) and propose a joined-up approach to support rights holders participate and navigate the complexity of different routes to justice. Finally, we encourage a legal aid approach that recognises and responds to clustered injustice. Legal issues cannot be easily siloed into standalone problems. Social rights violations are often clustered and the violation of one right can impact on the protection and enjoyment of another, creating a snowball effect. Legal aid mechanisms require to be flexible enough to address multiple clustered legal problems when this happens.

The Access to Justice for Social Rights: Addressing the Accountability Gap project explores the barriers faced by rights holders in accessing justice for violations of social rights across the UK. The project seeks to better understand the existing gaps between social rights in international human rights law, and the practice, policy and legal frameworks across the UK at the domestic level. It aims to propose substantive legal solutions – embedding good practice early on in decision making as well as proposing new legal structures and developing our understanding of effective remedies (proposing substantive change to the conception of 'justice' as well as the means of accessing it).

Written by:

Aidan Flegg and Katie Boyle

Organisation details

Dr Katie Boyle | katie.boyle@stir.ac.uk
<https://www.stir.ac.uk/about/faculties/arts-humanities/law-and-philosophy/law-research/human-rights/access-to-justice-for-social-rights/>
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