A framework for the analysis and comparison

of legal aid structures

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ABSTRACT

Legal aid systems vary radically between jurisdictions in cost, organisation and focus. The differences have inspired academic comparisons and the interest of policy-makers but meaningful detailed evaluation is hampered by the many variables which interact in complex ways. This paper presents an overview of the organisation of legal aid in Finland and Sweden, as an illustration of the extent of variation, and discusses the difficulties of analysis and comparison of legal aid schemes arising from their complexity. Building on the results of a recent large-scale comparisons of nine jurisdictions (the Nordic countries, UK and the Republic of Ireland) from an administrative law perspective, the paper suggests a set of criteria, suitable across jurisdictions, against which the administration of legal aid can be assessed. In addition, a proposal is made for the development of a framework for the analysis of legal aid schemes. The framework facilitates the application of the criteria as well as providing a structure for the collation of cross-jurisdictional data to improve the understanding of legal aid schemes. In turn this can make it possible to systematically analyse individual schemes in the light of their context and to carry out informed comparisons and borrowing between jurisdictions.

1. Introduction

Establishing and maintaining an acceptable legal aid scheme is challenging. There are several constituencies with different understandings of what it would mean to have a successful legal aid scheme, and it appears to be rare that all of them are satisfied. However, this state of almost constant dissatisfaction from one or another interested group can be a positive as it provides the impetus for change and, hopefully, advancement towards ideal provision.

Interested parties, being frequently unhappy with elements of the existing scheme, are wont to propose changes and in doing so often look to the lessons of the past, either proposing a return to a previous arrangement or, more often, suggesting a radical departure. In addition to such historical comparison, international comparison is also a useful tool in legal aid law reform. Comparison can be a useful source of new law, if elements of a legal aid scheme in another jurisdiction are felt to be suitable for transposition. However, it can also be useful in allowing us to question elements which from a domestic perspective appear inevitable. More creative solutions are possible when ‘comparison enables a strong measure of objective neutrality and critical self-assessment to be applied’.[[2]](#footnote-2)

In this vein, doctoral research has recently been carried out at Åbo Akademi University in Finland, comparing legal aid in the Nordic countries, the Republic of Ireland and the jurisdictions of the UK. The comparison covers an unusually large number of jurisdictions; an intentional tactic to enable consideration of patterns which might be observable between and within legal aid schemes. In order to make such a broad project feasible, the comparison was restricted to the procedural and material aspects of legal aid structures, from a public and administrative law perspective. A narrow definition of legal aid was taken: the provision by the state of legal help and representation by lawyers, either through the provision of state employed lawyers or by paying for private lawyers. Other studies of legal aid have taken a wider definition and include the assistance provided through insurance and by volunteer advice services,[[3]](#footnote-3) and access to justice research is naturally much broader, including for example needs analysis, outcome measurement and a raft of other mechanisms in addition to legal aid. However, the study referred to here is focused on instances where three criteria are met: assistance is provided by lawyers; those lawyers are paid for their work; and payment is by the state (albeit potentially with client contributions). Legal aid relating to civil, administrative and criminal law was considered, thus whilst in the Nordic countries publicly funded legal assistance for criminal defendants is not called ‘legal aid’, their public defence schemes were included. It is accepted that this is a restrictive approach, and the proposals to be made in this paper speak to the advantages to be gained in extending the scope, and suggest a framework for collating a broader range of research findings on legal aid.

Before fully endorsing comparatism as an appropriate approach to legal aid research and policy development, some points should be made about the considerable challenges which arise from the structural complexity of legal aid schemes. This can best be illustrated through brief descriptions of the contrasting legal aid systems in two jurisdictions: Finland and Sweden. Finland and Sweden are not only neighbours; they have a long common history and their legal systems are very similar. Indeed, it is often suggested that these two jurisdictions form a discrete ‘East Nordic’ legal group. Despite this high level of congruence, their legal aid schemes are very different, which makes them an interesting case study. Furthermore, each scheme contains elements which will be novel to many readers, thus hopefully increasing awareness of the diversity of legal aid structures at the same time as enabling greater objectivity when returning to re-examine familiar systems.

Following these descriptions, consideration will be given to whether it is possible to judge legal aid schemes themselves as ‘good’ or ‘bad’, given the complexity and variety observed. Attention will remain on the procedural aspects of the legal aid systems, rather than the inputs and outcomes which have been studied elsewhere. Thus, the question asked will be whether it is possible to identify neutral criteria which can be applied to varied legal aid schemes despite the wide range of internal arrangements and different contexts of such schemes. Four criteria will be proposed: that a scheme must be fit for its environment, coherent, logical and lawful.

Finally, the need for a cohesive structure for the study and comparison of legal aid schemes will be suggested. Drawing on the descriptions of Finland and Sweden as well as on the wider research referred to above, a proposal will be made for a framework in the form of a pyramid, consisting of four levels: guiding principles, policy choices, delivery methods and context. This structure, it will be suggested, allows the consistent collection of relevant data from different jurisdiction and enables the criteria for evaluating legal aid schemes to be more effectively applied.

1. Diverse legal aid schemes
   1. Finland

Finland has a legal aid scheme which covers civil, administrative and criminal cases, in addition to having a public defender scheme which, at the choice of the defendant, can be used instead of legal aid in criminal cases. Approximately 75% of the population is eligible for legal aid,[[4]](#footnote-4) potentially with a financial contribution which can be up to 100%. Legal aid with high contributions has the value to clients that it fixes the rates of lawyer pay at legal aid levels (approximately half of private rates), and in practice will enable at least a free initial advice session.

The core of the provision of legal aid in Finland is a network of 23 Legal Aid Offices around the country, organised within six regions.[[5]](#footnote-5) The Offices employ altogether about 220 public legal aid attorneys who carry out all types of legal aid work: advice and representation in civil and criminal matters. However, legal aid in some cases can also be provided by private practitioners and a substantial minority of cases are dealt with this way; in 2013, 36% of legal aid matters were conducted by private practitioners.[[6]](#footnote-6) Whilst the starting point is that legal aid work is reserved to the Legal Aid Offices,[[7]](#footnote-7) private practitioners can act in cases which will go before a court[[8]](#footnote-8) or in non-court cases where the Legal Aid Office cannot act because of lack of capacity, conflict of interests, breakdown of trust or inability to provide the service in the appropriate national language.[[9]](#footnote-9) Thus, client choice is in some cases restricted; whilst in court cases the client may freely choose whether to instruct a private practitioner or the Legal Aid Office, in cases which are not destined for court the applicant may request a private attorney but this will only be granted if one of the listed grounds is present.[[10]](#footnote-10) Conversely, even if the client would prefer the Legal Aid Office to act, a private attorney may be appointed if the Office cannot act due to one of the listed difficulties. If legal aid is granted for a private practitioner, the client may choose the person to be appointed and is entitled to have that choice respected unless there are special reasons.[[11]](#footnote-11)

This distribution of legal aid work causes dissatisfaction in the legal profession, with particular concern expressed in respect of some family cases. As divorce and ancillary relief are not dealt with by the courts in Finland, these aspects of family law can only be dealt with by Legal Aid Offices unless conflict or capacity difficulties make this impossible. This situation is seen by the Bar Association as unfair competition, which has a particularly detrimental effect on practitioners because of the generous financial eligibility rules and the possibility of legal aid with a 100% contribution. It is argued that many clients currently reserved to the Legal Aid Offices could appropriately be dealt with by private practitioners; some already pay for their assistance, albeit at legal aid rates, and others could receive legal aid to be assisted by private practitioners.

One aspect of the Finnish legal aid scheme which is of note is that initial legal aid decision-making is in the hands of the lawyers in the Legal Aid Offices in both civil and criminal cases, and in advice as well as representation situations. This is the case whether the Legal Aid Office or a private practitioner will be conducting the case.[[12]](#footnote-12) Each legal aid office will make its own decisions on the cases which it is handling, but there is an allocation system for applications made electronically by private practitioners, which are dealt with by a smaller number of Legal Aid Offices, on a rotating allocation. The system results in private practitioners submitting claims for legal aid to the Legal Aid Offices, which are in competition with them for cases; an arrangement which would be surprising in many jurisdictions. Refusals of legal aid by the Legal Aid Offices can be submitted to court for ‘reconsideration’[[13]](#footnote-13) in a specific process outside the normal appeal process for administrative decisions.

Responsibility for legal aid at government level sits with the Ministry of Justice but the involvement of government is limited to oversight by a very small team (4 or 5 dedicated legal aid staff, plus assistance from others). The Ministry has no role in legal aid decision-making and even training on legal aid grants, arranged by the Ministry, is delivered by Legal Aid Office lawyers. Non-binding guidance on the application of legal aid rules is published online by the Ministry,[[14]](#footnote-14) but was drafted by a working group of Senior Legal Aid Office staff.

The scope of legal aid in Finland is extremely wide. As a matter of overarching principle all types of matter will be covered but the statutory provisions set out a number of types of case for which legal aid will generally not be provided, on the basis that such matters do not require the help of an attorney. Simple criminal cases are excluded, in addition to three civil case types: cases related to membership of a municipality or other public body; tax matters; and cases involving the registration of documents and records. In the latter two categories, legal aid can nonetheless be granted if there are especially weighty reasons for providing it.[[15]](#footnote-15) None of the exclusions are absolute, though, as in all three categories advice and assistance with preparation of documents can be provided.[[16]](#footnote-16) Thus, all questions of Finnish law can be the subject of legally aided assistance at the advice level, and representation is available in almost all types of case.

Merits testing is also generous in the Finnish legal aid system, and legal aid will generally be granted regardless of the merits of the case. The statutory provisions state that assistance will not be provided if: the matter is of minor importance to the applicant; it would be manifestly pointless in proportion to the benefit that would ensue to the applicant; pleading the case would constitute an abuse of process; or the matter is based on an assigned right and there is reason to believe that the purpose of the assignment was to receive legal aid.[[17]](#footnote-17) Unlike in other jurisdictions, no additional guidance is provided by the Ministry of Justice and no secondary legislation contains any merits tests. However, the handbook described above, designed to assist consistency of application of the law, suggests an agreed interpretation of the relevant paragraphs.[[18]](#footnote-18)

In referring to the requirement that legal aid cannot be granted if the matter is of minor importance to the applicant, the handbook suggests that the criterion is to be applied by considering whether a reasonably prudent person would bear the costs of taking the case privately, bearing in mind the advantage sought and the means of the applicant.[[19]](#footnote-19) Thus, whilst there is no ‘reasonable privately paying person’ test on the face of the legislation, such a criterion is applied in practice, in line with the intention expressed in the legislative proposal,[[20]](#footnote-20) although generously interpreted. The test is to be applied subjectively, i.e. by considering whether for that individual the matter is particularly important despite its objectively low value.[[21]](#footnote-21) However, there is also a provision that legal aid should be refused if a grant would be clearly meaningless in relation to the benefit to be gained, which according to the suggested interpretation should include cases where “the benefit to the applicant is objectively estimated to be so low, that legal aid would not be appropriate”, even if the applicant considers the claim important.[[22]](#footnote-22) This latter test does not appear to be very significant in practice and is not expanded upon further in the handbook, however it is of note that there is no equivalence to a cost-benefit test, as there is no reference to the cost of the case.

The legal aid eligibility criteria do not include any measure of likelihood of success and thus legal aid is available for very weak or even hopeless cases. This omission, which is a significant and unusual characteristic of the Finnish system, is partly possible because a grant of Finnish legal aid does not protect against inter-parties costs if the case is lost; the risk of having to pay the other side’s costs acts as a deterrent to clients wanting to pursue cases with low chances of success. This may also to a certain degree explain how the decision-makers can maintain a light touch on all the merits-testing without unacceptably pushing up expenditure.

A Finnish legal aid certificate covers work on the case at all levels of the court hierarchy; thus, appeals are covered by the same certificate.[[23]](#footnote-23) A grant can be made retrospectively[[24]](#footnote-24) although as a general rule an application should be made as soon as possible and in any event before the case is concluded.[[25]](#footnote-25) Legal aid is limited to 80 hours’ lawyer time in most cases and if work cannot be completed within this limit, an application can be made for a time extension of up to 30 hours at a time. These provisions would seem luxurious to legal aid lawyers in many other jurisdictions.

The Finnish legal aid scheme is therefore very generous in terms of coverage and content, yet is cheap compared to its neighbours. In 2014, the legal aid spend per capita in Finland was approximately 12 euros, the lowest in all of the Nordic countries, the UK and the Republic of Ireland.[[26]](#footnote-26)

* 1. Sweden

Sweden has a legal aid scheme which covers civil and, to a lesser extent, administrative cases. Legal aid cannot be granted for criminal cases, for which assistance is instead given through a public attorney scheme. Public Attorneys are also provided in other cases where the state is taking proceedings against an individual such as child care proceedings, compulsory treatment of addicts and incarceration under mental health legislation.[[27]](#footnote-27) The public attorney scheme is not means-tested, but for cases where legal aid is the appropriate source of assistance, a financial eligibility test is applied. In 2013 approximately 43% of the Swedish population was eligible for legal aid,[[28]](#footnote-28) considerably lower than the 75% eligible in Finland, but still generous compared to many other jurisdictions.

There have been no public law offices in Sweden since reforms in 1997; all lawyers providing services to members of the public are in private practice. There is in theory a wide choice of representative for the legally-aided party in Sweden as any lawyer and even a legally unqualified person may be paid for by legal aid.[[29]](#footnote-29) This choice is, however, dependent on the desired representative, whether legally qualified or not, being prepared to take the case at legal aid rates. If the client proposes a suitable unqualified person, they must be appointed unless there are special reasons for not doing so,[[30]](#footnote-30) in keeping with the unregulated nature of the practice of law in Sweden.

Sweden takes the distinctive approach of mandating between one and two hours’ legal advice as a pre-condition of legal aid, unless this is clearly unnecessary or there are special reasons why legal aid should nonetheless be granted.[[31]](#footnote-31) The requirement is strictly applied and decided cases show, for example, that the applicant having already been in receipt of legal aid for a related matter[[32]](#footnote-32) or being outside the country[[33]](#footnote-33) will not result in preliminary advice being held clearly unnecessary. The compulsory nature of the advice may be troublesome, as advice is not free to the client, however low his means. At most, half of the fixed advice fee will be paid by legal aid, which means that all clients (with the exception of indigent minors, for whom legal aid will pay the whole advice fee) must pay at least half an hour’s lawyer’s fee before entering the legal aid scheme. At 2017 rates, this amounts to a payment of at least 615 Swedish kronor.[[34]](#footnote-34) However, in practice lawyers do not always insist upon payment of the fee and some municipalities may pay the advice fee from their social security budget if a client cannot afford to pay. The requirement to pay towards legal assistance continues into full legal aid (covering all work beyond the initial 2 hours’ advice), where there is a minimum 2% contribution. In the relevant legislative preparatory materials, the government stressed the importance of an assisted person being aware of the costs of the help being given, through the imposition of easily understood contributions.[[35]](#footnote-35) The stance is at odds with that in Finland, where the poorest clients will receive assistance without a financial contribution, at all levels of assistance.

Applications for full legal aid are decided in most cases by the courts. The Legal Aid Authority (Rättshjälpsmyndigheten), which is a relatively small government department, decides only applications for legal aid in cases where court proceedings have not been issued and are not anticipated; an application for legal aid in most civil cases will be made to the court which is or will be dealing with the substantive case.[[36]](#footnote-36) The court makes the decision taking into account the guidance contained in online handbooks issued by the National Courts Administration and in decided cases, which are also collated into handbooks.[[37]](#footnote-37) The bifurcation in grant decisions is continued into the appeal process; appeals against court decisions on legal aid are to the higher court, whilst the Legal Aid Authority has its own appeal instance, the Legal Aid Board (Rättshjälpsnämnden),[[38]](#footnote-38) a public administrative body which falls within the remit of the Department of Justice. The Legal Aid Board, whilst not itself a court, shares buildings and administration with one of the regional Courts of Appeal[[39]](#footnote-39) and is chaired by a judge.

In addition to making decisions on a minority of applications for legal aid, the Legal Aid Authority also has a role in gathering information about legal aid. All grants of legal aid by courts must be reported to the Authority,[[40]](#footnote-40) as must changes to legal aid certificates,[[41]](#footnote-41) and at the conclusion of a court case the outcome of the proceedings and the court’s decision on the legal aid costs to be paid must be sent to the Legal Aid Authority for payment of the bill.[[42]](#footnote-42) The Legal Aid Authority does not have any policy role or budgetary responsibility.

There is an interesting oversight mechanism operating in Sweden in addition to the appeals processes referred to above. The Chancellor of Justice (Justitiekanslern)[[43]](#footnote-43) receives reports on particular types of legal aid decisions felt to indicate a possible risk to the public purse,such as grants made in exception to the usual rules concerning legal expenses insurance, grants of legal aid in certain exceptional cases and cases where costs exceed 150,000 SEK.[[44]](#footnote-44) Reports come from both the courts[[45]](#footnote-45) and the Legal Aid Authority and if it is concerned about the decision, the Chancellor’s office has locus standi to make an appeal to the Appeal Court or Administrative Appeal Court against the decision in question.[[46]](#footnote-46) This standing in appeals is a general one and applies equally to decisions for which there is no reporting duty;[[47]](#footnote-47) however, such decisions are of course highly unlikely to come to the attention of the Chancellor in order for an appeal to be contemplated by her. The intended effect of this arrangement is not only the saving of funds in particular individual cases but also wider benefits to the legal aid system. The original decision-makers will in principle think more carefully about their high-impact and high-value decisions as they know these are being monitored. Furthermore, it is believed that consistency of decisions between the numerous courts and the Legal Aid Authority can be improved by having a central body scrutinising decisions and taking appeals which will clarify the proper application of funding rules. Approximately 2,500 decisions are reported to the Chancellor’s office each year and about 35-40 appeals are brought by them annually.

Legal advice, partly paid for by legal aid, can be given in any type of case.[[48]](#footnote-48) However, in respect of full legal aid scope is more limited than in Finland, and the list identifying types of matter which are completely excluded from scope is considerably longer: the preparation of certain documents such as tax returns, marriage contracts and wills; registration of a property upon inheritance; debt restructuring; land registration and some other property related matters; registration of commercial shipping; the division of property after divorce or separation, apart from appeals against the decision of a division of property official; and cases seeking compensation from an insurance company for personal injury following a traffic accident. [[49]](#footnote-49)

A further group of matter types is excluded unless there are special reasons to grant legal aid:[[50]](#footnote-50) divorce and child support matters, tax and customs issues, matters worth below a certain sum[[51]](#footnote-51) and cases which will be dealt with outside Sweden. The interpretation of ‘special reasons’ is a matter for the decision-maker, but guidance is available from the online handbook. Examples of special circumstances which may justify a grant of legal aid in divorce cases and child support cases are: subsequently arising disputes over the care of children;[[52]](#footnote-52) issues of right to reside in the family home;[[53]](#footnote-53) the existence of domestic violence[[54]](#footnote-54) or of an injunction prohibiting contact between the parties.[[55]](#footnote-55) However, the fact that the applicant was an asylum seeker with limited knowledge of the Swedish language[[56]](#footnote-56) or in another case that there was no known address for the respondent[[57]](#footnote-57) did not amount to special grounds for the granting of legal aid. The length of time taken by a lawyer in ultimately dealing with the divorce is also relevant; where this was under five hours the Court of Appeal decided that the matter cannot have been so complex that special reasons existed.[[58]](#footnote-58)

Merits testing within the Swedish legal aid scheme is also more restrictive than that in Finland. The primary merits criteria in Sweden are that the applicant has a need for a legal representative which cannot be met in another way[[59]](#footnote-59) and that it is reasonable for the state to pay the legal costs, having regard to the type, importance, value and other circumstances of the case.[[60]](#footnote-60) Certain types of case are only eligible for a grant of legal aid if there are special reasons, as seen above.[[61]](#footnote-61) In addition, legal aid will not be granted if the matter can wait until the outcome of a similar case currently going through the courts or for claims relating to rights which have been transferred to the legal aid applicant where the transfer appears to have been for the purpose of obtaining eligibility for legal aid.[[62]](#footnote-62) These criteria apply equally to all decisions whether being taken by the courts or by the Legal Aid Authority.

The non-binding Swedish online handbook provides assistance with the interpretation of the reasonableness requirement; the starting point being the nature of the case including prospects of success,[[63]](#footnote-63) and it is advised that cases where the chances of success are very low may be refused legal aid. However, when the court which is dealing with the substantive matter is assessing a legal aid application, it must be careful to comply with the general principle that a court must not form an opinion on a case before hearing all the evidence and arguments. This makes assessment of chances of success sensitive, and only in cases where the case is evidently hopeless or of meaningless value should legal aid be refused on this ground.[[64]](#footnote-64) A matter which has already been decided by a court and in which no relevant new circumstances exist may be refused on the grounds that funding is not reasonable,[[65]](#footnote-65) even where the original court decision is not being honoured by the opponent.[[66]](#footnote-66) However, a wider public interest can make funding reasonable in cases which otherwise would not be eligible.[[67]](#footnote-67) As elsewhere in the handbook, specific examples are given of decided cases in which legal aid has and has not been authorised. It appears that to some extent a common usage approach is taken to the term ‘reasonable’; legal aid has for example been refused for a dispute over a leisure boat[[68]](#footnote-68) and for a claim for compensation for negligent advice from a stockbroker.[[69]](#footnote-69)

It is not possible in Sweden to limit legal aid to only one judicial instance and thus, as in Finland, appeals are automatically included in the original grant.[[70]](#footnote-70) Work carried out before the date of the application for legal aid can be paid for under the legal aid bill but only to the extent that it was urgent or small-scale.[[71]](#footnote-71) Under legal aid there is a standard ceiling of 100 hours of work,[[72]](#footnote-72) although this can be extended by the granting authority (court or Legal Aid Authority)[[73]](#footnote-73) by a number of hours to be specified in the decision; this option should be used sparingly.[[74]](#footnote-74) These time allowances are generous, and extension is possible when needed, the practical result being that a person in receipt of legal aid in Sweden will have access to as much legal assistance as is required for the case to be properly prepared and presented. However, a lawyer acting under legal aid must be cautious because bills are carefully, and sometimes strictly, assessed at the end of the case. Only work which was reasonable will be reimbursed.[[75]](#footnote-75) The hourly rates paid to lawyers under the civil legal aid scheme and under the Public Attorney schemes are the same,[[76]](#footnote-76) and considerably less than a lawyer would usually charge in civil cases.

It is not appropriate to attempt to understand legal aid in Sweden without addressing the issue of legal expenses insurance. One of the major reforms implemented in 1997 was that access to legal aid was stopped for those with legal expenses insurance. The government actively negotiated with insurance companies so that legal expenses insurance was included in home insurance policies under conditions which dovetail with the restructured legal aid scheme. Unifying features included the harmonisation of fees paid to lawyers under insurance and legal aid, although under insurance schemes lawyers can and often do charge an additional fee directly to the client, thus increasing the *de facto* fees, which is prohibited under the legal aid scheme.[[77]](#footnote-77) Legal expenses insurance tends not to cover employment cases, or family cases which arise within a year of divorce or separation. Furthermore, insurance does not usually cover low-value cases (generally those under half the ‘base sum’).[[78]](#footnote-78)

In addition to those who have applicable legal expenses insurance, in Sweden legal aid will also be refused to those who ought to have such insurance, unless there are special reasons to grant legal aid upon consideration of the type of case and its importance to the individual.[[79]](#footnote-79) The Legal Aid Agency uses a rule of thumb that it should not be found that those on a very low income should have had insurance. The interpretation of the rule on “ought to have had insurance” has been contentious and the Supreme Court has held that those entirely dependent on income maintenance benefits who do not have possessions worth insuring should not be expected to have legal expenses insurance.[[80]](#footnote-80) However in another case it was made clear that a mixed income including social security benefits should not be assumed to mean that a person need not have legal expenses insurance, particularly as the Social Services Act provides that home insurance should form part of the minimum costs covered by social security.[[81]](#footnote-81) The Court of Appeal has held that a person on low income who had only recently found accommodation after a prison sentence should also be allowed legal aid despite not having insurance[[82]](#footnote-82) and it has been confirmed that the overall economic and personal circumstances of the applicant should be considered as a whole.[[83]](#footnote-83) However, where a case comprised a dispute about the purchase of a car, the fact that the legal aid applicant was in the position to purchase a car meant that he ought to have had insurance covering the situation for which he sought legal aid;[[84]](#footnote-84) the same applied in the case of purchase of a horse.[[85]](#footnote-85) An applicant who wrongly believed his insurance would cover the circumstance which arose was not entitled to legal aid, and ought to have had effective insurance cover.[[86]](#footnote-86) The ‘ought to have had insurance’ rule is not generally applied in family cases as these are considered to be of such importance that the exemption applies, as illustrated by various decided cases.[[87]](#footnote-87)

Whilst in Finland there is also a rule that individuals with legal expenses insurance will not be eligible for legal aid for cases covered by that insurance,[[88]](#footnote-88) there is no equivalent ‘ought to have had insurance’ rule. Legal expenses insurance is an automatic additional element in most Finnish household insurance policies, but legal aid may be available to cover additional legal work beyond the limit of the insurance policy and in some cases also for the insurance excess payable by the client.[[89]](#footnote-89)

Overall, Sweden can be seen to have a much less generous system than Finland, with lower financial eligibility levels, more stringent scope and merits provisions, albeit even more generous limits on the amount of work per case. However, the scheme cost Sweden 26.5 euros on legal aid per capita in 2014,[[90]](#footnote-90) more than double the amount spent in Finland.

1. Judging legal aid systems

The descriptions, above, of the legal aid schemes in Finland and Sweden have illustrated their complexity, and also the considerable variation in legal aid administration which can be found even between two closely-connected jurisdictions. Neither country is particularly dissatisfied with its legal aid scheme and no proposals for change are under consideration, raising the possibility that very different schemes can be adequately successful in different circumstances. There may be no *de lege ferenda* conclusions to be drawn from a comparison of legal aid systems. The possibility of different but equally successful structures for legal aid also makes it difficult to identify objective internal measurements for the assessment of national schemes. Elements relating to the inputs into legal aid systems, such as client needs and the amount of money invested in the scheme, can be measured, and outputs such as client satisfaction, social benefits and improved access to justice can be and are evaluated by researchers from several disciplines. It should, though, also be possible for public and administrative lawyers to have a role to play in evaluating the structures of a legal aid scheme, independently of the results achieved. Outcomes for clients are of course of central importance, and the cost of providing legal aid will always be a core concern of government, but it may be possible also to judge whether a legal aid scheme is in itself of good quality.

It is suggested that, in addition to producing satisfactory outcomes at an acceptable cost, a legal aid system can also be judged on its internal qualities. *De minimis*, a scheme should be fit for its environment, coherent, logical and lawful. Each of these criteria will briefly be elaborated upon.

* 1. Fit for environment

When assessing a legal aid scheme, and particularly when comparing systems or considering the transposition of elements from another jurisdiction, it is important to remember that, whilst from a descriptive point of view the comparison is of like with like, from a functional perspective this may be only partially true. In every jurisdiction, legal aid is only part of the state’s response to several overlapping requirements. It has a role to play, inter alia, in: the functioning of the justice system as a whole; the upholding of the rule of law; the provision of access to justice; the guarantee of a fair trial; the relief of poverty and the promotion of equality. The way in which legal aid is perceived within a jurisdiction and the size and nature of the role it is designed to fulfil will have an effect on its organisation and also on the extent to which it can be judged as successful. The main purpose of legal aid is often to provide access to justice, but there are many other methods available for states to achieve this, such as keeping disputes out of the court system so far as possible; making adjustments to court procedure to improve fairness without the need for legal representation or finding other ways to fund legal assistance for those who cannot afford to pay privately. In the Finnish and Swedish schemes described above, the reliance on legal expenses insurance is a good illustration of the latter. The extent to which such other mechanisms are in use in a jurisdiction is an important part of the context for legal aid, without which a comparison can be misleading. Two identical legal aid systems in two different jurisdictions will not be equally appropriate or effective, yet different systems can be equally effective if they fit their context well.

The point also applies to comparisons of government spend on legal aid. The cost of legal aid can be controversial and both governments and the media are wont to draw comparisons between jurisdictions as ammunition for arguments in favour of reducing legal aid spend, but this is ill-conceived without an understanding of the wider context. On a very basic level, for example, the costs of legal aid in a state cannot be profitably compared with expenditure in another state unless it is understood that one country has an extensive parallel system which deflects a large proportion of cases from the court system and thus from legal aid, or that a whole judicial branch is run in such a way that representation is not the norm for any party.

The detailed organisation of legal aid should also be appropriate for the wider context. For example, access arrangements need to take account of geography, language and cultural attitudes to the law and to lawyers. Whether services are delivered by private practitioners or state-employed lawyers may be affected by not only the structure of the legal profession but also public confidence in lawyers and how high the threshold is for seeking legal advice from private firms. At a very basic level, the details of the financial eligibility test must harmonise with the social security system and the level of financial information available to government; in some jurisdictions government departments routinely share financial information about citizens and thus verified financial information is already available to legal aid decision-makers without the need for the applicant to provide evidence. Also at the level of detail, some systems limit the scope of civil legal aid by providing that representation before a particular court or tribunal is included or excluded. This will only be appropriate where the structure of the justice system is such that a group of cases which are intended to fall inside or outside legal aid are dealt with in a particular, separate venue.

* 1. Coherent

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 particular, coherency problems can arise between different levels of the organisation of legal aid, as 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.

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.

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.

The choice of merits criteria for civil legal aid can also conflict with commonly declared guiding principles. In particular, as argued by this author previously,[[91]](#footnote-91) 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 is a restriction of the general 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;[[92]](#footnote-92) 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.

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 ‘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’.[[93]](#footnote-93) 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.

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 and financial eligibility tests should be set 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 this 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.

* 1. Logical

The need for a legal aid system to be logical may appear self-evident, but examples can be found of situations where this is not the case, such as the use of percentage prospects of success tests in some jurisdictions. [[94]](#footnote-94) The explicit use of percentages when judging prospects of success for the purpose of civil legal aid eligibility lends an aura of reliability and objectivity but is, it is suggested, illogical for two reasons. The first relates to the consequence of the true meaning of the scientific language of percentages. ‘Percent’ literally means ‘in every hundred’; if a case has a 40% chance of success this means that out of 100 such cases, 40 of them will 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 4,000 of them winning. If a merits test provides that only cases with at least a 50% chance of success can be funded, clearly a case with a 40% chance will be refused legal aid. However, of all the cases refused because of having this probability of succeeding, 40% will succeed if they continue, according to the proper meaning of the statistical term. Indeed, if 40% did not succeed then the cases in the group did not in fact have a 40% chance of success. This results in a significant number of clients, who would succeed if able to proceed, having the choice of abandoning their case or proceeding without assistance and potentially being subject to an unfair hearing.

The other significant difficulty with the use of percentage prospects of success tests, which also affects other, more generally worded success tests to some extent, is the difficulty of prediction. The little evidence which is available on the accuracy of lawyers’ predictions of how likely their cases are to succeed suggests that lawyers are in fact very bad at forecasting outcomes.[[95]](#footnote-95) Given that the specific tests in certain jurisdictions such as Northern Ireland and England & Wales require lawyers to predict within bands as narrow as 10%, the lack of evidence of accuracy makes the criterion highly unsatisfactory. The use of a test with, at best, unproven accuracy, couched in scientific language which is poorly understood and the consequences of which have not been appreciated, is illogical and therefore an unacceptable element of a legal aid scheme.

The preciseness of the scope provisions for Norwegian civil legal aid has also 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.[[96]](#footnote-96) Such outcomes have no place in a satisfactory, logical legal aid scheme.

* 1. Lawful

Legal aid schemes must, naturally, comply with domestic law and with the applicable international obligations of a state. In an ideal world, this characteristic would be a given in all legal aid systems, but this is unfortunately not the case. Lawfulness must therefore be one of the criteria against which a scheme is measured.

Illegality within legal aid administration is corrected through the bringing of legal challenges either domestically or internationally, but such actions are demanding of money, commitment and time. As these resources are in short supply for those who are in need of legal aid, challenges are often brought by NGOs which support vulnerable individuals, or by pressure groups concerned with access to justice. Examples of findings of breach of domestic law include the finding by the Court of Appeal that rules concerning evidence of domestic violence for legal aid applicants in England & Wales were invalid because they frustrated the purpose of the legal aid legislation, and operated in a ‘completely arbitrary manner’.[[97]](#footnote-97) The evidence requirement was also, incidentally, criticised internationally, with the UN Committee for the Elimination of Discrimination Against Women expressing concern that it ‘unduly restricts women’s access to legal aid’.[[98]](#footnote-98)

In the Republic of Ireland undersupply of legally aided services for a time led to clients waiting up to 24 months for a first appointment with a solicitor at a Law Centre in non-priority cases.[[99]](#footnote-99) This was found by the High Court to amount to a breach of the constitutional entitlements of potential clients as ‘it is not enough to set up a scheme for the provision of legal aid to necessitous persons and then to render it effectively meaningless for a long period of time’.[[100]](#footnote-100)

Internationally, the European Court of Human Rights makes decisions on non-compliance with the provisions of the European Convention on Human Rights, again indicating that a system has been operating unlawfully. Instances where this has occurred include decisions that the absolute exclusion of any type of case from the scope of civil legal aid is unacceptable,[[101]](#footnote-101) and that in criminal cases legal assistance must be given in the early stages of police investigation.[[102]](#footnote-102) The Court has also made it clear that to comply with human rights obligations, applications for legal aid must be dealt with diligently,[[103]](#footnote-103) the appearance of the fair administration of justice must be maintained,[[104]](#footnote-104) decisions must not be arbitrary[[105]](#footnote-105) and that reasons must be given for rejection of an application for legal aid.[[106]](#footnote-106)

Of course, an element of a legal aid scheme does not only become unlawful at the point when it is so declared by a court; latent unlawfulness is also unacceptable.

1. Comparing legal aid schemes
   1. The need for a structure

It has been seen that it is possible to judge the organisation of a legal aid scheme against consistent criteria, despite the wide range of possible solutions chosen by states. In seeking to improve the operation of legal aid, states may also wish to use a comparative approach but this, also, is complicated by the scale of diversity.

It is clear from the descriptions of Finland and Sweden, above, that legal aid schemes are complex entities; comparison, whilst potentially very useful, is thus also very difficult. In attempting to learn from other jurisdictions it is important to not just consider selected details but to have an overview of the whole scheme and its place within the justice system and access to justice arrangements in the other jurisdiction. Delivery methods provide a good illustration of the difficulty. New approaches to legal aid service provision are interesting and often inspirational, but they are highly context-specific and care must be taken to ensure their context is understood before drawing conclusions as to their desirability. The other elements of the legal aid system such as financial eligibility rates and subject scope will have a significant impact on demand, and on capacity and ability to help. Factors external to legal aid will also be very significant; if, for example, family cases are diverted away from the judicial system, a desirable delivery method may look very different and be less appropriate in a jurisdiction where this is not the case. It is necessary to be aware of these contextual factors and their interrelationship with elements of the legal aid scheme before drawing any conclusions about the effectiveness of the delivery method and the possibility for transposing it to another system. Delivery methods are also often an appealing focus of comparative approaches because they can appear to be an easy way to resolve existing weaknesses in a system, however without changes at the policy level it is unlikely that alterations to delivery methods can be much more than a superficial solution.

It is thus crucial to acknowledge the presence of diversity, and to attempt to understand the functioning of legal aid schemes, rather than to attempt uninformed small-scale borrowing of individual elements of a scheme. As pointed out by many comparative lawyers, it is very difficult if not impossible to fully understand another legal system. However, increasing the understanding of our own and other legal aid systems will improve the likelihood of good policy-making and effective practical comparison. If comparative research is to reach its full potential in the field of legal aid a method must be found for comparing very different schemes in a structured and consistent manner. For appraisal of individual systems we can measure against criteria such as those proposed above, but for effective comparison a framework is needed so that different studies can be brought together to create a more thorough understanding of legal aid.

The criteria above were proposed for application to individual legal aid schemes; however, application of these criteria may itself benefit from a comparative approach. The examples given above relating to different jurisdictions are useful in providing a prompt to check for similar problems in other jurisdictions. Thus the uncovering of unlawfulness, particularly if related to international law or common domestic legal principles may have significance in other jurisdictions and be of great interest to scholars elsewhere. Similarly, problems relating to the inherent logic of a system may be replicated in other jurisdictions and understanding of the context in which certain elements are effective can be built up through examination of a number of legal aid schemes. Maybe the greatest use of a structure in applying the criteria is in respect of coherency; the theoretical and practical links between elements of the scheme will become more apparent when a logical framework is constructed.

The establishment of such a framework is a considerable task and one which can only be carried out collectively. In respect of access to justice as a whole, Barendrecht, Mulder and Giesen have suggested a framework for the measurement of the price and quality, including time and emotional costs,[[107]](#footnote-107) and work is underway to develop and test the framework.[[108]](#footnote-108) It is suggested that a similar, complementary exercise would be useful in the specific area of legal aid organisation. A framework could be tested whilst being populated with data, much of which is already available in various discrete studies but which could be given further reach and relevance by such structure. Current research would thus become more useful as an element in successful policy formulation. In such a development of comparative methodology in legal aid, the measurement criteria proposed above will be useful and, in particular, consideration of fitness for environment, coherency and logic will assist in building a valuable framework.

* 1. Proposal for a framework
     1. Overall structure

Existing research relevant to legal aid covers a variety of themes, including access to justice and human rights as well as lobbying and awareness-raising. There is also, inter alia, research on unmet legal needs and on outcomes of legal interventions. At present the various research threads remain largely separate but an interdisciplinary development of an analytical framework would enable them to be woven together into a more comprehensive and cohesive understanding of legal aid. In addition, the development of a framework would illuminate the gaps in understanding and suggest fruitful avenues for further research. The following is merely a tentative proposal for a framework, which invites comments and discussion.

To organise the variables identified by the author’s research into legal aid in the Nordic countries, the Republic of Ireland and the jurisdictions of the UK, four categories can be proposed, as illustrated below.

Three of these groupings 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 the state or may only be discernible by implication from the next category, policy choices. The contents of this second category 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, as seen above. The lowest level of the pyramid which relates exclusively to legal aid is the practical delivery methods. These generally have little connection to the theoretical basis of the scheme but may be dictated to a greater or lesser extent by policy choices. Again, ideally there should be a logical harmony between the policy choices and practical delivery methods. The fourth and final category of variable 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. In addition to identifying the constituent elements in these four categories, an understanding of the theoretical and practical links between them should be included as part of the framework. Choices or changes at any level may have consequences for other elements in the same or other categories, either mandating an alteration elsewhere in the system or creating logical inconsistency.

More research is needed, encompassing more jurisdictions and, importantly, other disciplines beyond administrative and public law. Nonetheless, a provisional attempt can be made to list some of the constituent elements of each category. The following section aims only to describe the outline of each category; a small start to the considerable work which is needed in the field.

* + 1. Guiding principles

Each of the suggested guiding principles of a legal aid scheme can usefully be envisaged as a position on a spectrum:

|  |  |  |
| --- | --- | --- |
| ***Spectrum of positions of principle*** | | |
| Commitment to the rule of law and the principle of fair trial |  | Commitment to fulfilling only constitutional and international obligations concerning legal aid |
| Legal aid is a justice issue |  | Legal aid is a social issue |
| Legal aid is part of the justice system |  | Legal aid is about access to the justice system, but is itself ancillary to it |
| Legal aid is the main element of access to justice |  | Legal aid is a minor player in access to justice |
| Costs control is paramount |  | Independent decision-making is paramount |
| Selection for assistance can best be achieved efficiently by categorising cases |  | Selection for assistance must be individualised so that those who need help are identified |
| Commitment to the principles of ‘innocent until proven guilty’ and the right to a defence |  | Willingness to make those with means pay to realise these rights |
| Budget generous and flexible |  | Budget low and fixed |

* + 1. Policy choices

Following on from these decisions of principle, policy must be determined. Again, policy decisions are not generally binary choices but can be placed on a scale:

|  |  |  |
| --- | --- | --- |
| ***Choice on policy*** | | |
| Legal aid decisions by courts |  | Legal aid decisions by government |
| Independent appeal and/or oversight |  | Internal review/appeal |
| Focus on advice and assistance |  | Focus on court representation |
| Legal aid should cover all case types |  | Legal aid should cover few case types |
| Public defender scheme | or | Criminal legal aid |
| No reliance on merits test |  | Significant reliance on merits test |
| High percentage of population financially eligible |  | Low percentage of population financially eligible |
| Universal contributions towards legal aid |  | No legal aid contributions |

* + 1. Delivery methods

Implementation of policy is achieved through the selection of consistent organisational methods; the procedural and material content of the legal aid scheme. At this level of the framework, there tend to be multiple discrete options, which are harder to arrange on a series of scales. Amongst the organisational choices to be made are:

* Access arrangements
* Whether provision is to be through private practitioners or state-employed lawyers
* Payment arrangements
* The delineation of scope restrictions, both the modes of determination (by venue or by case type) and the actual content of the categories
* The details of the civil and criminal legal aid merits test
* Financial eligibility details
  + 1. Context

Finally, in analysing legal aid schemes attention must be paid to the environment in which they operate, as discussed above. It is important to note, in particular when considering changes to legal aid, that the context is in many instances rigid compared to the elements within the legal aid system. Indeed, some significant contextual elements are outside the justice system and therefore unlikely to be within the scope of even access to justice reviews, let alone legal aid reform programmes. Elements within the justice sphere can also be resistant to change. Any framework for analysis, comparison or planning of legal aid systems must take account of the immovable context, but may include plans for change of those elements which can be altered. Attention must be paid to at least the following contextual factors:

* + External to the justice system
    - * Poverty levels
      * Public attitude to risk
      * Public ‘litigiousness’
      * Population size and density
      * Availability of other sources of funding for advice or litigation (e.g. insurance)
      * Affordability of private lawyers
  + Within the justice sphere
    - * Access to justice budget
      * Diversion of cases to non-court resolution mechanisms
      * Level of assistance for litigants from court during hearings
      * Complexity of laws
      * Permissibility of non-lawyer advice and representation
      * Nature of hearings, in particular the extent to which evidence and argument are oral

These four categories together with the interrelationships between and within them, make up the pyramidal structure proposed for the analysis of legal aid schemes.

1. Conclusions

The framework set out above, if developed, could have various applications in the analysis of existing legal aid systems, either individually or by comparison with each other, and also in the planning of change to schemes or indeed of altogether new schemes.

In analysis of existing legal aid systems, the structure could be used to consider delivery methods and policy and to indicate which principles are demonstrated by these. This could then be compared with the values which the system purports to uphold in order to determine whether the legal aid scheme is fit for its stated purpose. This will not always be the case, as the system may not have been set up in a coherent manner; often economics and a history of piecemeal reform lead to internal contradictions. Development through comparison with other jurisdictions may also have led to a system not being fully rational if the context and interrelationship of factors were not fully explored or understood when changes were made.

Comparison of legal aid schemes in different jurisdictions may also be facilitated by the application of such a framework. Breaking down the administrative law elements of legal aid systems according to the same schematic provides a structure which enables comparison of the equivalent element of each system; a more in-depth approach than comparing whole systems. By indicating the links between principles, policy and organisation the schematic can aid comparative analysis. For example, if two systems profess to follow similar guiding principles, significant difference in policy choices would be particularly interesting and invite further investigation. Conversely, discrepancy in policy may be of little note if it clearly relates to different values expressed in the guiding principles; in that situation it is the difference in principle which is of interest. Sometimes, also, as discussed above, difference in performance (particularly expense) may be found to relate very largely to context if principles and policy are aligned between two jurisdictions but outcomes are at variance.

When used in planning, the framework would provide a series of issues to be addressed, identify the range of options available and alert policy-makers to the implications of their choice for the values demonstrated by the legal aid system. It could also highlight practical consequences of a given choice and the interrelationship between that and other elements of the system. Very many of the choices to be made involve compromises, often with a tension between budget and principles, and these need to be carefully considered in a structured manner. A framework for doing this would improve the chances of a rational outcome and help to avoid unintended and unwanted consequences arising from the interactions between policy and practice in the interwoven elements of a necessarily complex legal aid system. The aim would be to enable the development of a coherent legal aid scheme, consistent with the underlying principles on which the system is founded.

This paper has merely suggested a starting point for the development of an analytical framework for legal aid and presented a fledgling structure. Discussion between researches across disciplines is needed to determine whether such a system would be useful and, if so, to develop the concept. However, the rewards are potentially great and it is hoped that there might be an appetite for the task.

1. Anna Barlow is a doctoral researcher in public law at Åbo Akademi University, Finland. [↑](#footnote-ref-1)
2. De Cruz, Peter, *Comparative law in a changing world* (3rd edition), 2008, p. 18. [↑](#footnote-ref-2)
3. E.g. Halvorsen Rønning, Olaf and Hammerslev, Ole (eds.) *Outsourcing Legal Aid in the Nordic Welfare States*, Open Access, 2018. [↑](#footnote-ref-3)
4. Rosti, Henriikka; Niemi, Johanna and Lasola, Marjukka, *Legal Aid and Legal Services in Finland*, *Research Report No. 237*, Helsinki, National Research Institute of Legal Policy, 2008, p.92. [↑](#footnote-ref-4)
5. Department of Justice website. [↑](#footnote-ref-5)
6. Statistics Finland. [↑](#footnote-ref-6)
7. Rättshjälpslag, 2002, 8§1. [↑](#footnote-ref-7)
8. *Ibidem*. [↑](#footnote-ref-8)
9. Lag om statens rättshjälps- och intressebevakningsdistrikt, 2016, 12§. [↑](#footnote-ref-9)
10. HFD:2016:27. [↑](#footnote-ref-10)
11. Rättshjälpslag, 2002, 8§3. [↑](#footnote-ref-11)
12. Rättshjälpslag, 2002, 11§1. [↑](#footnote-ref-12)
13. *Ibidem*, 11§1 and 24§. [↑](#footnote-ref-13)
14. Oikeusavun käsikirja 2013. [↑](#footnote-ref-14)
15. Rättshjälpslag, 2002, 6§. [↑](#footnote-ref-15)
16. *Ibidem*. [↑](#footnote-ref-16)
17. *Ibidem*, 7§. [↑](#footnote-ref-17)
18. Oikeusavun käsikirja 2013, section 2.2.2. [↑](#footnote-ref-18)
19. *Ibidem*. [↑](#footnote-ref-19)
20. RP132/1997 rd. [↑](#footnote-ref-20)
21. Oikeusavun käsikirja 2013, section 2.2.2. [↑](#footnote-ref-21)
22. *Ibidem*. [↑](#footnote-ref-22)
23. Rättshjälpslag, 2002, 13§1. [↑](#footnote-ref-23)
24. *Ibidem*. [↑](#footnote-ref-24)
25. Oikeusavun käsikirja 2013, section 1.4. [↑](#footnote-ref-25)
26. European Commission for the Efficiency of Justice, *European judicial systems: Efficiency and quality of justice CEPEJ Studies No. 23 Edition 2016 (2014 data)*, Strasbourg, Council of Europe, 2016, p.17. [↑](#footnote-ref-26)
27. See a list of some of the governing legislation at Kanslihandbook allmän förvaltningsdomstol 4.4.1 http://www.dvhandbok.domstol.se/. [↑](#footnote-ref-27)
28. SOU 2014:86, p. 26. [↑](#footnote-ref-28)
29. Rättshjälpslag, 1996, 26§. [↑](#footnote-ref-29)
30. *Ibidem*. [↑](#footnote-ref-30)
31. *Ibidem*, 2§. [↑](#footnote-ref-31)
32. RH 1998:25. [↑](#footnote-ref-32)
33. Rättshjälpsnämnden 363-1998. [↑](#footnote-ref-33)
34. Approximately 60 euros, plus tax. [↑](#footnote-ref-34)
35. Prop. 1996/97:9, p. 160-161. [↑](#footnote-ref-35)
36. Rättshjälpslag, 1996, 39§. [↑](#footnote-ref-36)
37. Renfors, Cecilia and Arvill, Ebba Sverne, *Rättshjälpslagen och annan lagstiftning om rättsligt bistånd: En kommentar* (3rd edition), Stockholm, Norstedts Juridik, 2012. [↑](#footnote-ref-37)
38. Rättshjälpslag, 1996, 44§. [↑](#footnote-ref-38)
39. The Hovrätten för Nedre Norrlands in Sundsvall, as directed by Förordning 2007:1079, 5§. [↑](#footnote-ref-39)
40. DVFS 2012:15, 17§. [↑](#footnote-ref-40)
41. *Ibidem*, 18§. Refusals of legal aid are not so reported, leading to a gap in the information available to the Legal Aid Authority. [↑](#footnote-ref-41)
42. *Ibidem*, 19§; Rättshjälpsförordning, 1997, 30§ places responsibility for payment on the Legal Aid Authority. [↑](#footnote-ref-42)
43. At the time of the transfer of responsibility for this task, the Chancellor of Justice expressed concerns that there might be a perceived conflict of interests between her office and lawyers acting in cases against the state. However, this concern was not sufficient to counteract the benefits of the transfer. *Justitiekanslerns remissyttrande över departementspromemorian (Ds 2003:55) Rättshjälp och ersättning till rättsliga biträden* document number 3866-03-80 of 9 February 2004. [↑](#footnote-ref-43)
44. Approximately 14,600 euros. DVFS 2016:16. [↑](#footnote-ref-44)
45. DVFS 2013:7, §28. [↑](#footnote-ref-45)
46. Rättshjälpslag, 1996, 45§. [↑](#footnote-ref-46)
47. See e.g. Rättshjälpslag, 1996, 45§ and Lag om offentligt biträde, 1996, 8§. [↑](#footnote-ref-47)
48. Rättshjälpslag, 1996, 4§. [↑](#footnote-ref-48)
49. *Ibidem*, 10§. [↑](#footnote-ref-49)
50. *Ibidem*, 11§. [↑](#footnote-ref-50)
51. Half the “prisbasbelopp”, which in 2018 is 45 500 Swedish kronor, with a resultant minimum value of case for legal aid of 22 750 kronor, or about 2 250 euros. Rättshjälpslag, 1996, 11§ 4 and Rättegångsbalken, Chapter 1, 3d§. [↑](#footnote-ref-51)
52. RH 1998:66, 1998 and Ö 1754-99, 2000. [↑](#footnote-ref-52)
53. Ö 1209-01, 2001. [↑](#footnote-ref-53)
54. Rättshjälpsnämnden 401-1999. [↑](#footnote-ref-54)
55. Rättshjälpsnämnden 227-1999. [↑](#footnote-ref-55)
56. NJA 1999 s.149 I. [↑](#footnote-ref-56)
57. RH 1998:9. [↑](#footnote-ref-57)
58. RH 1998:33. [↑](#footnote-ref-58)
59. Rättshjälpslag, 1996, 7§. [↑](#footnote-ref-59)
60. *Ibidem*, 8§. [↑](#footnote-ref-60)
61. *Ibidem*, 11§. Examples include divorce and ancillary matters and child maintenance. [↑](#footnote-ref-61)
62. *Ibidem*, 10§. [↑](#footnote-ref-62)
63. Domstolsverkets handböcker, Rättshjälp, Chapter 8, para. 8.2. [↑](#footnote-ref-63)
64. *Ibidem*, Chapter 8.3, referring case NJA 1982 s.175, I and II. [↑](#footnote-ref-64)
65. *Ibidem*. [↑](#footnote-ref-65)
66. Rättshjälpsnämnden 677-1998. [↑](#footnote-ref-66)
67. Domstolsverkets handböcker, Rättshjälp, Chapter 8, para. 8.2. [↑](#footnote-ref-67)
68. Rättshjälpsnämnden 58-1999. [↑](#footnote-ref-68)
69. Domstolsverkets handböcker, Rättshjälp, Chapter 8, para. 8.2, referring case RN 58/1999. [↑](#footnote-ref-69)
70. Renfors and Arvill 2012, *supra* note 37, p. 25. [↑](#footnote-ref-70)
71. Rättshjälpslag, 1996, 27§3. The Supreme Court has confirmed that this rule will be strictly applied; where the reason for the delay in application was that the applicant was awaiting the outcome of a claim for legal expenses insurance, the lawyer could only be paid under legal aid for 6 hours’ work, as there was no particular urgency: Högsta Domstolens avgörande Ö 5072-14, 2015. [↑](#footnote-ref-71)
72. Rättshjälpslag, 1996, 15§. [↑](#footnote-ref-72)
73. *Ibidem*, 34§. [↑](#footnote-ref-73)
74. Högsta domstolen Ö722-00, 2000. [↑](#footnote-ref-74)
75. Rättshjälpslag, 1996, 27§. [↑](#footnote-ref-75)
76. See e.g. Förordning om särskild företrädare för barn, 1999, 3§; Lag om målsägandebiträde, 1988, 5§. [↑](#footnote-ref-76)
77. Rättshjälpslagen, 1996, 29§ and Rättegångsbalken, 1942, Chapter 21, 10§. [↑](#footnote-ref-77)
78. This ‘prisbasbelopp’ is set annually; in 2018 it is 45 500 kronor, and thus legal expenses insurance will generally not cover cases worth under 22,750 kronor or about 2,300 euros. [↑](#footnote-ref-78)
79. Rättshjälpslagen, 1996, 9§2. [↑](#footnote-ref-79)
80. Ö647-99, 1999. [↑](#footnote-ref-80)
81. Ö1327-99, 2001. [↑](#footnote-ref-81)
82. RH 1998:26, 1998. [↑](#footnote-ref-82)
83. RH 1998:64, 1998. [↑](#footnote-ref-83)
84. Rättshjälpsnämnden 405-1998. [↑](#footnote-ref-84)
85. Rättshjälpsnämnden 623-1998. [↑](#footnote-ref-85)
86. Rättshjälpsnämnden 478-1998. [↑](#footnote-ref-86)
87. See e.g. Ö 38/00; Ö1327-99. [↑](#footnote-ref-87)
88. An applicant must produce any relevant policies when making an application for legal aid. Statsrådets förordning om rättshjälp, 2002, 8§2. [↑](#footnote-ref-88)
89. Rättshjälpslag, 2002, 3§. [↑](#footnote-ref-89)
90. European Commission for the Efficiency of Justice, *supra* note 26, p.17. [↑](#footnote-ref-90)
91. Barlow, Anna, ‘The Success Test for Civil Legal Aid in North-West Europe’, pp. 148-172 in *Journal of Comparative Law*, 12:1, 2017. [↑](#footnote-ref-91)
92. See e.g. *Ashingdane v. UK*, App. No. 8225/78, Judgment of 28 May 1985. [↑](#footnote-ref-92)
93. Rettshjelploven, 1980, §1. [↑](#footnote-ref-93)
94. Barlow, 2017, *supra* note 91. [↑](#footnote-ref-94)
95. 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; 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. [↑](#footnote-ref-95)
96. 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. [↑](#footnote-ref-96)
97. *R (on the application of Rights for Women) v. The Lord Chancellor*, 2016, para. 45. [↑](#footnote-ref-97)
98. CEDAW/C/GBR/CO/7, p. 4, para. 22. [↑](#footnote-ref-98)
99. Priority case types are given immediate or near-immediate attention. *Access to Justice: A Report of the Legal Aid Task Force*, Law Society of Ireland 2012. [↑](#footnote-ref-99)
100. *O'Donoghue -v- Legal Aid Board & ors*, 2004, as per Mr Justice Kelly. [↑](#footnote-ref-100)
101. *Steel and Morris v. the United Kingdom*, App. No. 68416/01, Judgment of 15 February 2005. [↑](#footnote-ref-101)
102. *Salduz v. Turkey*, App. No. 36391/02, Judgment of 27 November 2008. [↑](#footnote-ref-102)
103. *Laskowska v. Poland*, App. No. 77765/01, Judgment of 13 March 2007, para. 54. [↑](#footnote-ref-103)
104. *Ibidem*. [↑](#footnote-ref-104)
105. *Gnahore v. France*, App. No. 40031/982000, Judgment of 19 September 2000, para. 41; *Del Sol v. France*, App. No. 46800/99, Judgment of 26 February 2002, para. 26. [↑](#footnote-ref-105)
106. *Laskowska v. Poland, supra* note 104, para. 54. [↑](#footnote-ref-106)
107. Barendrecht, Maurits; Mulder, José and Giesen, Ivo, ‘How to Measure the Price and Quality of Access to Justice?’, *SSRN Electronic Journal*, November 2006, available at https://dx.doi.org/10.2139/ssrn.949209. [↑](#footnote-ref-107)
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