

Legal Aid and Advice Act 1949: 70th Anniversary

Summary

Before 1949, the UK had a piecemeal system of providing assistance to those people who could not afford to access the courts or pay for advice from a lawyer. The Legal Aid and Advice Act 1949 introduced a consistent approach in England and Wales based on a means test. Its overall aim was to make legal aid and advice more readily available for “persons of small or moderate means”.¹ The Act received royal assent on 30 July 1949.

Since then, there have been many changes to the scope and terms of legal aid, including through five acts of parliament. The most recent was the Legal Aid Sentencing and Punishment of Offenders Act 2012, which forms the basis of the current system. A review of this Act was published in February 2019 and the provision of legal assistance remains a disputed area of policy.

Separate systems exist for legal aid and advice in Scotland and Northern Ireland. Historically, there have been some links with that of England. For example, the 1949 Act contained provisions so that it could also be applied to Scotland and/or Northern Ireland in respect of legal advice.²

This briefing discusses the provision of legal assistance before 1949. It then outlines the discussions which led to the Act, and its main features. The briefing also summarises how legal aid has changed in the last 70 years. Finally, it provides suggestions for further reading, including on the issues facing the system today.

Background

A former chair of the Law Commission, Sir Henry Brooke, described the historic distinction between access to justice as a theoretical right and whether citizens could actually afford to exercise that right in practice. He said:

Although access to the courts was recognised as a constitutional right, there was no constitutional right to the provision of legal assistance at public expense if one could not afford a lawyer, although from time to time statutory or quasi-statutory arrangements provided some form of help.³

In 1944, the Rushcliffe Committee was set up to consider the provision of legal advice to “poor persons”.⁴ It reported the following year. The committee surveyed the history of legal assistance in the UK and made recommendations about how this should be changed.

Legal Assistance Before 1949

The Rushcliffe Committee described various earlier systems for assisting poor people to use the services of solicitors and the courts. For example, it said that “for probably more than 150 years there has existed [...] a system whereby poor persons could sue or defend in forma pauperis [in the manner of a pauper]”.⁵ It also stated that, in criminal courts, systems had existed “perhaps from time immemorial” by which barristers would be obliged to take cases without payment.

The committee also described a number of more formal structures. These included one for criminal cases, introduced in 1903, and the first regular scheme for civil cases, introduced in 1914.⁶ In the civil scheme, for example, the conditions were that the person’s “means” did not exceed £50, and that they had a “reasonable cause of action or defence”. People who met this test had to pay no court fees or other costs, and the solicitor representing them could take no fee. The committee’s report said that “substantial use was made of the system”.⁷

By the start of the Second World War, there was a shortage of solicitors willing to conduct cases on these terms.⁸ After 1939, this situation was made worse by solicitors joining the armed forces or serving the war effort in other ways.

The Rushcliffe Committee report also noted a likely increase in demand. It said that:

The great increase in legislation and the growing complexity of modern life have created a situation in which increasing numbers of people must have recourse to professional legal assistance.⁹

As a result, the committee concluded that the system needed to change:

It follows that a service which was at best somewhat patchy has become totally inadequate and that this situation will become worse.¹⁰

Rushcliffe Committee Recommendations

The Rushcliffe Committee made a series of recommendations for the design of a new system. For legal aid, it set out a number of principles, which included the following:¹¹

- Legal aid should be available in all courts.
- It “should not be limited to those who are normally classed as poor but should include a wider income group”.
- Those who cannot afford to pay anything should receive the service free, but there should be a “scale of contributions for those who can pay something”.
- The cost of the scheme should be borne by the state.
- Barristers and solicitors should receive “adequate remuneration” for their services.

The committee recommended that in assessing means, both income and savings should be taken into account. It went on to make a series of detailed recommendations on the level of the means test, the administration of the scheme (suggesting this should be done by the Law Society) and other matters.¹²

The committee proposed that all applicants should be provided with legal advice on payment of a fee (2s. 6d.). It said that the fee should be remitted in suitable cases, but if it was “apparent” that the applicant was able to pay the costs of normal legal advice, this route should not be available.¹³

Legal Aid and Advice Bill 1949

The post-war Attlee Government accepted the recommendations of the committee. It published a white paper in 1948, followed by the Legal Aid and Advice Bill itself.¹⁴ Introducing the bill at second reading, the then Attorney-General, Hartley Shawcross, said that it was a “charter of the little man to the British courts of justice [...] without regard to the question of their wealth or ability to pay”.¹⁵ He noted that the Government had received the “fullest support” from both branches of the legal profession (the Law Society and the Bar Council) in drawing up the proposals.¹⁶

The Attorney-General stated that the only significant departure from the Rushcliffe report recommendations in the bill was that legal aid would be limited to hearings in “ordinary courts of justice” and not in tribunals.¹⁷ There were also some restrictions to exclude types of action, such as libel and slander, where he said there was “most room for bringing vexatious, frivolous, unmeritorious or unnecessary claims”.

Speaking for the Opposition, David Maxwell Fyfe said that the Conservative Party was in “general agreement” with the bill.¹⁸ However, he requested close monitoring of various aspects of the operation of the scheme, including the means test and the exclusion of tribunals.¹⁹

The civil scheme under the Act began in 1950, and the criminal scheme began in 1952.²⁰

Legal Aid as Part of the Welfare State

An article in the Law Society Gazette in 2015 discussed the legacy of the Rushcliffe Committee.²¹ It said that while the report is “nothing like as celebrated as the 1942 Beveridge report or the 1944 Education Act, it forms just as crucial a part of the post-war welfare state”. However, Sir Henry Brooke stated that legal aid was “never one of the four pillars of the welfare state”. These, he said, were “the NHS; universal housing; state security (benefits) and universal education”.²²

Changes to the Legal Aid System Since 1949

The legal aid system has undergone many changes since 1949. Considering primary legislation alone, further acts include the:

- Legal Aid Acts 1974, 1979 and 1988 (the 1974 Act repealed the original 1949 Act);²³
- Access to Justice Act 1999; and
- Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which is the basis of the current system.²⁴

Sir Henry Brooke described some of the changes to the legal aid system over this period. For example, he said that initially the system covered only divorce work in the High Court. It was then introduced gradually into other areas of civil work, and other courts.

He stated that criminal legal aid also expanded in the 1960s, and again in the 1970s and 1980s, including introducing duty solicitors in magistrates' courts and police stations.

The Government stated that the aim of LASPO was to “ensure legal aid would remain sustainable by refocusing on those who most need it and delivering significant savings for the taxpayer”.²⁵ The Act restricted the types of cases eligible for civil legal aid.²⁶ It also introduced a means test on an applicant's capital and increased the maximum level of income-based contributions.²⁷

In the most recent review of the system, published in February 2019, the Government committed to expanding legal aid provision for the most vulnerable in society and to reviewing the means test thresholds.²⁸ The review also placed an emphasis on early intervention to prevent cases reaching the court system. In response to the review, the Shadow Lord Chancellor and Shadow Secretary of State for Justice, Richard Burgon, criticised the cuts to legal aid since 2013.²⁹ He called for “emergency measures” to ameliorate the worst effects of those cuts.

Costs

The Rushcliffe report estimated that the total cost of the system it recommended might be “slightly under £200,000 per annum”.³⁰ £200,000 in 1945 would be equivalent to approximately £8.5 million in 2018.³¹

Sir Henry Brooke reported that, in 1970, despite annual increases in costs of over 50%, overall legal aid expenditure was “still low”.³² However, he then described how the rising cost of legal aid became “increasingly a matter of political concern” from the 1980s onwards. He said that it increased to £342 million by 1986 and £1.4 billion in 1995/96.³³

Official figures reported legal aid spending in real terms (ie adjusted for inflation) from 2005/06 to 2018/19.³⁴ They showed that in 2005/06, total legal aid spending, expressed in 2018/19 prices, was £2.6 billion. In 2011/12 it was £2.5 billion. After the introduction of LASPO, spending fell to £1.6 billion per annum by 2015/16 and it has remained at that level up to 2018/19.

Coverage

Official figures suggested that in 2016, 25% of the population was, in principle, eligible for legal aid in civil cases.³⁵ This had fallen from 52% in 1998. The Rushcliffe report did not include an equivalent estimate for the original scheme. A 2018 article in the *Guardian* estimated that about 80% of the population was covered by legal aid under the 1949 Act, but it is not clear whether this referred only to civil legal aid.³⁶ In criminal cases today, all those arrested in England and Wales are eligible to receive free advice and assistance at the police station.³⁷ Assistance as a defendant in a criminal trial is available for those under 16 (or under 18 and in full-time education) or on certain benefits.³⁸

Sir Henry Brooke stated that between 1969 and 1986, the percentage of defendants in criminal cases in magistrates' courts who were covered by legal aid rose from 20% to 80%.³⁹

Further Information

- Young Legal Aid Lawyers, [Legal Aid—An Introduction](#), September 2012
- Greg Powell, ‘[A Brief History of Legal Aid](#)’, Secret Barrister Blog, 21 June 2019
- [Statement on ‘Legal Aid, Sentencing and Punishment of Offenders Act 2012’](#), HL Hansard, 7 February 2019, cols 1645–52
- Jane Croft and Barney Thompson, ‘[Justice for All? Inside the Legal Aid Crisis](#)’, *Financial Times* (£), 27 September 2018
- Law Society, ‘[Amending the Advocates’ Graduated Fee Scheme—Law Society Response](#)’, 12 October 2018
- Law Society, ‘[Disqualified from Justice: Legal Aid Means Test Report](#)’, 1 April 2018.
- European Commission for the Efficiency of Justice, [European Judicial Systems: Efficiency and Quality of Justice: 2018 Edition \(2016 Data\)](#), Council of Europe, October 2018, pp 78–80. This includes international comparisons of legal aid systems and spending among Council of Europe members.

¹ Joint Committee on Human Rights, [The Implications for Access to Justice of the Government’s Proposals to Reform Legal Aid](#), 13 December 2013, HL Paper 100 of session 2013–14, p 7.

² Legal Aid Act 1974, s 7, ss 5 and 6.

³ Henry Brooke, [The History of Legal Aid 1945 to 2010](#), Bach Commission on Access to Justice, September 2017, p 5.

⁴ Rushcliffe Committee, [Report of the Committee on Legal Aid and Legal Advice in England and Wales](#), May 1945, Cmd 6641.

⁵ *ibid.*, p 1. The practical effect of this was that court costs were waived.

⁶ *ibid.*, pp 2, 6.

⁷ *ibid.*, pp 3, 4.

⁸ *ibid.*, pp 4–5.

⁹ *ibid.*, p 23.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.*, pp 24–36.

¹³ *ibid.*, p 37.

¹⁴ Henry Brooke, [The History of Legal Aid 1945 to 2010](#), Bach Commission on Access to Justice, September 2017, p 5.

¹⁵ [HC Hansard, 15 December 1948, col 1221](#).

¹⁶ *ibid.*, col 1227.

¹⁷ *ibid.*, cols 1230–1.

¹⁸ *ibid.*, col 1242.

¹⁹ *ibid.*, cols 1247–9.

²⁰ Michael Cross, ‘[Legal Aid’s Founding Text Turns 70](#)’, *Law Society Gazette*, 28 May 2015.

²¹ *ibid.*

²² Henry Brooke, [The History of Legal Aid 1945 to 2010](#), Bach Commission on Access to Justice, September 2017, p 5.

²³ Joint Committee on Human Rights, [The Implications for Access to Justice of the Government’s Proposals to Reform Legal Aid](#), 13 December 2013, HL Paper 100 of session 2013–14, p 7.

²⁴ *ibid.*, p 8.

²⁵ Ministry of Justice, [Post-Implementation Review of Part One of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(LASPO\)](#), 7 February 2019, CP 37, p 5.

²⁶ Law Society, ‘[Legal Aid Changes: Key Information and Advice](#)’, 13 March 2013.

²⁷ *ibid.*

²⁸ Ministry of Justice, [Legal Support: The Way Ahead](#), 7 February 2019, CP 40. This paper followed a two-part post-implementation review of LASPO (Ministry of Justice, [Post-Implementation Review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(LASPO\)](#), [Part 1](#), CP 37; and [Part 2](#), CP 38, 7 February 2019), p 6.

²⁹ [HC Hansard, 7 February 2019, col 445](#).

³⁰ Rushcliffe Committee, [Report of the Committee on Legal Aid and Legal Advice in England and Wales](#), May 1945, Cmd 6641, p 40.

³¹ Bank of England, '[Inflation Calculator](#)', accessed 22 July 2019. Note, however, that this calculation uses a general rate of inflation and may not accurately reflect changes in the cost of the legal system.

³² Henry Brooke, [The History of Legal Aid 1945 to 2010](#), Bach Commission on Access to Justice, September 2017, p 7. The start date for the period of annual increases of "over 50%" is not given.

³³ *ibid*, pp 10, 22.

³⁴ Ministry of Justice and Legal Aid Agency, [Legal Aid Statistics Quarterly, England and Wales: January to March 2019](#), 27 June 2019.

³⁵ House of Commons Library, [Civil Legal Aid: England and Wales, Scotland and Northern Ireland Compared](#), 10 June 2016.

³⁶ Owen Bowcott, '[Legal Aid: How Has it Changed in 70 Years?](#)', *Guardian*, 26 December 2018.

³⁷ UK Government, '[Legal Aid: Eligibility](#)', accessed 22 July 2019.

³⁸ *ibid*.

³⁹ Henry Brooke, [The History of Legal Aid 1945 to 2010](#), Bach Commission on Access to Justice, September 2017, p 7.

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