

Director of Legal Aid Casework

Annual Report 2015-2016

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Report presented to the Northern Ireland Assembly pursuant to section 5(4) of the
Legal Aid and Coroners' Courts (Northern Ireland) Act 2014



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Foreword

I am pleased to present the first Annual Report of the Director of Legal Aid Casework for the financial year 2015/2016.

The Director of Legal Aid Casework (the Director) is designated by the Department of Justice (the Department) under Section 2 of the Legal Aid and Coroners' Courts Act 2014 (the Act). The role of the Director is to make determinations on applications for civil legal services in individual cases.

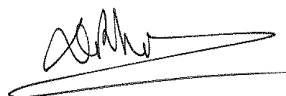
The Director acts independently from the Minister and Department and clear processes and structures have been put in place within the Legal Services Agency (the Agency) ensure this independence is maintained. These structures include an independent appeals mechanism. These arrangements are set out in more detail in this report.

In practice, many of the functions exercised by the Director are delegated to the staff within the Agency. The Agency, which is an executive agency within the Department, which came into

existence on 1 April 2015. This followed the dissolution of the Northern Ireland Legal Services Commission, a Non-Departmental Public Body sponsored by the Department, which had previously made determinations on applications for civil legal aid in individual cases.

The role of the Director and the Chief Executive of the Agency may be held by the same person. Currently both roles are held by Paul Andrews. However, different accountability and reporting arrangements exist for the two roles.

This report explains how the Director has carried out the functions conferred upon him by the Act in 2015/2016. The Agency has published an Annual Report and Accounts which covers the wider remit of the organisation during the same period.



Paul Andrews
Director of Legal Aid Casework

Interaction with the Department

Under the Act, the Department is able to issue directions and guidance to the Director about how to carry out his functions. However, the Department must not issue directions or guidance in relation to individual applications for civil legal services. The Director must comply with any directions given and have regard to any guidance issued. The Department exercised these powers in the following limited circumstances:

- (a) on 9 July 2015, the Minister issued an Authorisation which authorised the Director to decide all applications for exceptional legal aid, under Article 10A of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, in connection with excluded proceedings which were pending decision at that time subject to a number of conditions. This also authorised the Director to determine applications for further funding in respect of ongoing cases, in respect of exceptional funding decisions made prior to 1 April 2015;
- (b) on 23 March 2016 the Minister issued a Direction which provided

for the reinstatement of a 5% uplift on the prescribed fees payable to solicitors who are members of the Children Order Panel in respect of the provision of civil legal services in proceedings under the Children Order (Northern Ireland) Order 1992 heard in the Family Proceedings Court or the Family Care Centre under a certificate granted on or after 1 April 2015; and

- (c) on 24 March 2016, the Minister issued Guidance to explain the purpose and intentions of the Department in respect of the Exceptional Preparation provisions contained in the Legal Aid for Crown Court Proceedings (Costs) (Amendment No. 2) Rules (Northern Ireland) 2016. This guidance was issued in advance of the Rules coming into operation in April 2016.

It is, of course, essential that both the legal aid legislation and any guidance issued by the Department, are applied in a consistent manner. In preparation for the Act coming into force, Agency staff liaised with the Department on new legislation and developed new

forms and procedures to underpin the new arrangements.

As required by the Agency's Framework Document, the Director has also formally met with the Minister to discuss how he has carried out his functions over 2015-2016. In this meeting, which took place on 5 April 2016, the Director updated the Minister on his first year as Director and highlighted some of the trends that have emerged over the first year of civil legal services and lessons learnt. This meeting covered the matters referred to in this report.

At the meeting with the Minister, the Director confirmed that no attempt to influence decisions had been brought to his attention.

Casework Issues

Given the changes which were made with the introduction of civil legal services, it was inevitable that there would be some challenges in implementation. To date the primary challenge has been to the operation of the new appeals function under the Civil Legal Services (Appeal) Regulations (NI) 2015. The Regulations and arrangements put in

place provide for determination of appeals without an oral hearing except where the Presiding Member of an appeals panel considers it necessary if the case which is the subject matter of the appeal:

- (a) would establish or uphold and develop new and important legal principles;
- (b) would have an unprecedented impact in its consequences for the appellant and be of direct benefit to society at large; *or*
- (c) is, in terms of its complexity and expected duration, distinct from other cases.

Some judicial reviews have included challenges to decisions not permitting oral representations and challenges to the substance of the new Appeal Regulations. There has been one Judgment which upheld Appeal Regulations. This Judgment is the subject of an appeal.

The introduction of the range of new legislation created some practical challenges as a number of drafting issues arose which required amendments to the legislation. Again, these issues gave rise to challenges by way of Judicial Review. Specific challenges included:

- (a) clarification that the new Appeals Regulations are to be read as permitting an appeal from the refusal of emergency applications; *and*
- (b) the use of the exceptional legal aid provision as a mechanism to provide cover for proceedings in respect of declaration of parentage.

These issues were addressed by the Department with practical solutions found to enable cases to proceed pending the corrective legislative changes coming into force.

One of the recurring issues during the year was challenges brought against criminal legal aid Remuneration Rules. These challenges were often brought against the Agency and the Department.

The Decision-making Structure

To ensure decisions are made independently and consistently, the Agency put in place a robust organisational structure with a number of review mechanisms. Decisions on individual cases are made by caseworkers in the Agency's Civil Adjudication Section within the Civil

Legal Services Directorate managed by Sheila McPhillips, the Director of Civil Legal Aid.

The Civil Legal Services Directorate covered three decision groups:

- (a) Civil Adjudication;
- (b) Reviews; *and*
- (c) Appeals.

Within the Civil Adjudication Section there are separate teams dealing with legal merits tests and facilitating the financial means tests which are undertaken independently of the Agency by an arm of the Department for Communities.

A refusal of representation (higher courts) can be appealed. As part of this process, an internal review will be undertaken. Some 564 reviews were held and of these, 542 or 96% were upheld.

If a review upholds the original refusal, the matter will be considered by an Appeal Panel. The work of the appeals panel is set out later in this report.

There is also a Payments Directorate, managed by Jill Herron, Director of Payments. The Directorate has operational teams which determine

fees, authorise payments, and deal with associated correspondence in respect of civil legal services and criminal legal aid payments. These teams also interact with the Taxing Master’s Office in respect of those cases which are subject to formal taxation or appeal to the Master.

One of the teams within the Payments Directorate deals with the assessment of legacy high cost criminal cases as well as the grant and remuneration of exceptional grant applications.

Overview of Cases Funded

The Agency received a large number of applications for civil legal services across different categories of law. The details of the applications received and those granted are set out in the table below:

	2015/16	
	Applications Registered	Certificates Granted
Advice	48,010	48,661 ¹
Representation (Lower)	9,772	8,537
Representation (Higher)	9,016	6,808
Exceptional Grant Funding	34	32
Total	66,832	64,031 ²

¹ In respect of Advice “Certificates Granted” reflects the applications which were processed and paid.

Quality of Applications

One of the recurring issues with applications is the high number of applications which have to be returned as incomplete or lacking supporting documentation. This causes delay to applicants, practitioners and the Agency. The Agency liaised with the Law Society NI in training events on the new legislation in an attempt to address this issue.

Exceptional Funding

Exceptional grant applications are made under Article 12A of the Access to Justice (Northern Ireland) Order 2003. This scheme covers funding for cases that are not ordinarily within the scope of civil legal services, but where the failure to provide funding would be a breach, or where there is a substantial risk of breach of:

- (a) the individual’s Convention rights (within the meaning of the Human Rights Act 1998); *or*
- (b) any rights of the individual to the provision of legal services that are enforceable EU rights.

² There difference between applications registered and certificates granted does not reflect the refusal rate – as there will be timing issues between the date an application is received and finally determined, including receipt of responses to requests for further information and scheduling of appeals.

Processes have been put in place to provide a robust quality assurance and quality control mechanism for the consideration of these applications. In particular, a Director must approve all grants of exceptional funding. Of the 34 first time applications considered in 2015/2016 some 25 were granted (74%), with 9 refused (26%). Of the refusals, 4 requests for a review were received and considered in year. None of the reviews were successful.

As at 31 March 2016, the Agency received 44 applications under the exceptional funding scheme.

The vast majority of applications are in respect of Inquests. A number of these are historical inquests into deaths which engage Article 2 issues.

Appeals

Where an individual disagrees with the Director's determination on the merits of an application for representation (higher) they can appeal the refusal. Appeals are processed first by an internal review which can uphold the original decision or grant funding. If the refusal is upheld, the case is then considered by an independent appeals panel. The members of the appeals

panel are not employees of the LSA and were appointed by the Minister following an open recruitment competition. Appeals are usually heard by a panel comprising of a legally qualified Presiding Member and two other members, at least one of whom will also be legally qualified. The panel considers appeals on the papers, but may, in exceptional circumstances, permit oral representations.

The decision of the appeals panel is binding on the Director.

The Agency meets with the Presiding Members periodically to review the workload, timeliness and quality of decision-making, as well as gathering any learning points for the Agency. During the year, there was a programme of training for the establishment of the appeals panel and one training event was held to address specialist areas of law.

There are separate internal review and appeal arrangements for refusals of representation (lower) and advice and assistance.

The following table shows the number and outcomes of appeals lodged by applicants in 2015-2016:

Appeals Lodged	1,106
Appeals Withdrawn	13
Appeals Heard	426
Appeals Upheld (Full or Part)	186

Accountability

It is important that the way the Director's functions are carried out is open to public scrutiny. There are a number of mechanisms in place allowing interested parties to hold the Director to account. In particular, the Agency has an internal complaints procedure with an onward appeal to the Northern Ireland Public Services Ombudsman.

As a public body, the Agency can also be scrutinised through all the standard constitutional mechanisms. For example, Members of the Legislative Assembly can table Assembly Questions asking about the work carried out by the Director. Similarly, the public are able to submit requests about information held by the Agency under the Freedom of Information Act 2000 or Data Protection Act 1998.

Assembly Questions, Freedom of Information Act and Subject Access Requests under Data Protection Act 1998

In 2015-2016, the Agency received 43 requests for information under the Freedom of Information Act 2000 relating to the Director's functions. The majority of these questions related to the number of applications received and granted but they also asked for a variety of background information (e.g. guidance documents). The Agency also received 14 subject access requests for personal information under the Data Protection Act 1998 relating to the determination of legal aid bills and payments made to legal advisors. The majority of these requests related to determinations by the Director and the information the determinations were based upon.

In 2015-2016, 59 Assembly Questions were tabled to the Minister of Justice which related to functions of the Agency. The majority of the questions related to the cost of criminal cases.

Complaints

The Agency investigates thoroughly every complaint it receives, using a three-tier complaints procedure. The

initial complaint gives the Agency the opportunity to review the way the matter was handled at a local level and put the situation right if possible. If an individual or provider is not content with the initial response, they can escalate their complaint to the Chief Executive's Office and a Director will investigate the complaint. If the complainant is still dissatisfied, they can request that the Chief Executive investigate the complaint and how it was handled. The final stage of the complaints process is for the complainant, once the three stages of the Agency's complaints procedure have been exhausted, to refer the matter to the Northern Ireland Public Services Ombudsman under the Public Services Ombudsman Act (Northern Ireland) 2016. The complainant will have to be sponsored by a Member of the Legislative Assembly. The Agency has no record of any matters relating to the Director's functions under LACC Act being referred to the Ombudsman in 2015/2016.

The Agency does not separately record complaints which relate specifically to the remit of the Director; however, a significant proportion of all complaints received by the LSA relate

to individual cases and casework decisions.

Litigation

Another avenue of redress which can be used to hold the Director to account is litigation in the courts. In particular, as part of a public body, the Director's decision-making can be challenged by way of judicial review.

Given the changes to the legislation and the new appeals arrangements, it was inevitable that there would be a body of challenges to the new processes. There was an early series of challenges to the operation of the new appeals panel, including the Rules, the absence of an automatic right to an oral hearing and the decisions of the panel. The court has found against a judicial review of the Appeals regulations, but this decision is now the subject of an appeal to the Court of Appeal.

There were also a number of challenges involving the Agency's administration of the new criminal Remuneration Rules. The challenges against the Agency were misconceived as it has no freestanding discretion as to how it assesses claims.

Equality and Diversity

The LSA has been keenly aware of the need to have due regard to equality during the year. This duty was particularly relevant given the changes to legal aid introduced by the Act.

In April 2015 the Agency adopted a set of diversity priorities, one of which – “*to improve our capability to apply the equality duty to our work of delivering legal aid*” – was of particular relevance to the role of the Director.

During 2015-2016, the Agency took steps to improve the knowledge and awareness of staff about equality and diversity issues. For example, all Agency staff completed an e-learning training programme on equality and diversity. In addition, staff were encouraged to attend lunchtime seminars arranged by the Department on equality and diversity related matters. The Agency also encouraged those who are responsible for reviewing decisions to play an active role in reviewing whether decisions are compliant with the Agency’s equality duties, as well as being mindful of the need to have regard to equality in their own decision-making.

In April 2015, the Agency started to collect a revised set of equality information from legal aid applicants with a view to improving the relevance of its management information in order to better anticipate needs.

While there is limited information provided by applicants, preliminary indications suggest that the Agency receives applications from individuals across the majority of Section 75 groups although information has is not available for all groups.

Conclusion

It has been a busy and challenging first year as the Director of Legal Aid Casework. The planning with the Department for the introduction of the new legislation and the training of the Appeals Panel enabled the Agency to operate under the new legislation with minimal disruption.

Over the course of next year, the Agency will be using the lessons learned from the first year of the Act and subordinate legislation to further enhance the decision-making of the Director of Legal Aid Casework and to continue to ensure its independence

as further reforms to civil legal services are introduced.

A copy of this report has been sent to the Department in accordance with Section 5(3) of the Act. The Department will lay a copy of the report before the Assembly in accordance with Section 5(4) of the Act.

