

THE **LAW SOCIETY**
OF NORTHERN IRELAND



RESPONSE TO ACCESS TO JUSTICE II REPORT: A STRATEGY FOR ACCESS TO JUSTICE

**Response of the Law Society of
Northern Ireland**

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Introduction

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (NI) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,700 solicitors working in approximately 530 firms, based in over 74 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients in legal matters, government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Law Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which local politicians have responsibility for the development of justice policy and law reform, this role is as important as ever.

The solicitor's profession, which operates as the interface between the justice system and the general public, is uniquely placed to comment on the particular circumstances of the Northern Irish justice system and to assess the practical workings of policy proposals.

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General Principles on Access to Justice and Legal Aid

1. The Society welcomes the publication of the Access to Justice II Report and the opportunity to constructively engage with its recommendations and the rationale therein. On that basis, the Society is responding to this Report on its general principles, bearing in mind that a large number of the recommendations will require further exploration and public consultation. On that basis, the Society is indicating our position provisionally on the substance of a range of the recommendations, whilst reserving the right to examine any proposals emerging from the Report on their own merits.
2. The Society believes that many of the Report's findings are positive, in particular the importance of a strong legal aid system without large reductions in scope, learning the lessons from England and Wales. Although the Report queries the evidence for the argument that strong legal aid provision prevents significant displaced costs elsewhere in public services and is correct to assert that the most compelling argument for legal aid is moral rather than financial, the difficulties of quantifying costs elsewhere is itself a reflection of the fact that such costs are disparately spread across Government Departments and Agencies. This lack of visibility does not however undermine the important principle that those who contribute to demand for legal aid should look at mechanisms to help the Department of Justice (DOJ) bear the cost.
3. For example, we note at para 6.13 that the DOJ recently reviewed the operation of Legal Aid Impact Assessments, establishing a register to measure contributing pressures to the Legal Aid Fund (the Fund) and their source. The Society would welcome further information on this development and in particular how this has assisted the Department in future planning. The Society remains of the view that those Government Departments or Agencies increasing pressure on the Fund should make a fiscal contribution to its operation and this could operate as a contingency fund to coincide with Monitoring Rounds. This would work to address the damaging perception mentioned in the Report that legal aid is out of control, which generates negative headlines around legal aid. The Society agrees that the case for legal aid needs to be made positively and comprehensively both in terms of the Executive and the wider public.
4. We strongly support the presumption against removal of categories of cases from the scope of legal aid as a blunt and unjust mechanism for reducing costs. This approach has had significantly negative consequences for the most vulnerable in England and Wales, particularly in the areas of family law,

children's proceedings and housing. It is the Society's view that the recommendation in para 3.6 of the Report that any proposals for reductions on scope should closely gauge the impact of such a decision and the viability of alternative sources of assistance will confirm the importance of legal aid as a means of resolving problems effectively at an early stage. The Society has emphasised the importance of conducting thorough and well-researched Impact Assessments, which would serve to strengthen the presumptive test set out in the Report.

5. The Report balances the importance of ensuring legal aid is available with a commitment to early, out of court resolution as a duty. The Society agrees that mediation and other forms of alternative dispute resolution (ADR) have an important role to play in appropriate cases. The identification of those cases is vital, as it is important that ADR does not become an additional cost in cases where no outcome outside of a formal court process is possible. On that basis, whilst we agree in principle with the duty to pursue alternative resolution strategies where possible, it is important to take a strategic view of ADR's place in the justice system- both to maximise its potential and minimise unnecessary expense. In relation to the discussion of a statement of priorities, the list outlined at para 2.35 should make explicit reference to the welfare of children and the importance of the family unit. This statement of priority should guide how the range of family proceedings should be treated in terms of any proposals to reform eligibility or access to legal aid.
6. In relation to setting levels of financial contributions, the Report notes at para 3.15 that they may provide an incentive for clients to pursue cases responsibly in terms of cost. However, specific proposals must balance this against the potential to discourage meritorious cases when setting contribution levels. This is because even strong cases retain the possibility for unforeseen circumstances and clients will not wish to erode their savings or capital if the bar is set too high in terms of contributions. This is a delicate balance to strike and it is correct in principle that some level of contribution is fair and just. However, flexibility should be retained within the system to avoid damaging practical access to justice and the Society has highlighted this throughout our response.
7. The recommendations made to simplify the administration of legal aid certificates in para 3.49 make good practical sense and mirror comments the Society has made in a number of responses to Consultations on the structure and operation of the Legal Services Agency NI (LSA) and its predecessor, in particular the elimination of unnecessary duplication and form filling. The more efficient the IT infrastructure that is put in place, the easier it will be to establish a single procedural regime for all legal aid certificates which can be flexible enough to cater for cases of greater complexity without producing

additional cost drivers into the system. This concern to simplify and avoid additional bureaucracy informs our response alongside the understanding that whilst it is important that controls are in place to focus resources, these should be so onerous as to discourage meritorious applications.

8. The Society notes that there is a parallel Consultation ongoing on the proposals within the Report for alternative funding mechanisms for personal injury/'money damages' litigation. Accordingly, the Society will be responding to the substantive proposals contained within this Report within the context of that separate Consultation and appropriate reference to this is contained within our response.
9. The Society would also echo the Report's support for ongoing reform initiatives which are taking place within the justice system and the leading role of the judiciary and practitioners within these. We have consistently maintained that there is scope for improvement and efficiencies within our justice system and we welcome the holistic and strategic approach being taken. Collaboration can achieve important reforms and the Society is willing to make a constructive contribution to processes which both promote access to justice and ease financial pressures on the system.
10. The Society will continue to engage constructively with the Department on the range of issues pertaining to Access to Justice and will carefully consider any proposals which may emerge as a result of the findings of this Report. We caution that a number of other review and reform initiatives are currently ongoing and that the outcomes of these should be taken into account when deciding upon the future direction of policy. The aim should be to promote access to justice without recourse to more draconian measures adopted elsewhere and it is in this spirit the Society recommends our response to the Access to Justice Review II to the Department.

For the purposes of this response the Society has numbered the recommendations as they appear in Chapter 27 from 1-150.

**Rec
No. Recommendation**

1 The positive case for legal aid should be made to the Executive, as a basis for future budgets (2.30)

The Society welcomes the publication of the Access to Justice II Report after a period of consultation and reflection by the Reviewer and his team. In particular, we support the Report's emphasis that legal aid is a frontline public service and that the positive case for legal aid would benefit from being set out in full.

The Report is correct in its assertion at para 2.39 that legal aid "may be the only practical means of enforcing basic legal rights". Unfortunately, the public debate has too often been weighted towards framing legal aid as a drain on public finances, without any corresponding discussion of the importance of securing effective access to justice in a fair and cohesive society. The Report rightly recognises that lawyers undertaking legal aid instructions are providing a service of benefit to the public analogous with that of professionals in the fields of education and medicine. On this basis, we fully support the Report's recommendation at para 2.30 that the Minister for Justice should distribute a paper to Executive colleagues outlining the negative social impacts that can accompany deep cuts to legal aid provision as part of the negotiating process for the DOJ's budget.

2 There should be a statement of the priorities for access to justice and for legal aid (2.38)

The Society does not object in principle to a mission statement of priorities for legal aid in terms of rights protection, however this must be sufficiently robust and comprehensive to reflect the range of issues affecting the most vulnerable in society. For example without seeking to be exhaustive, this should take into account matters such as liberty, family life, financial and housing security, personal health and wellbeing amongst other issues. It should not be vague or act as a pretext for reductions in scope and should serve as a roadmap to access to justice which would complement the Minister in making a high level case for the importance of legal aid as a frontline service.

3 Reductions in scope should take place only when all other savings options have been considered (3.6)

The Society agrees with the statement that reductions in the scope of legal aid are the most draconian form of cuts which can be applied and greatly damage access to justice. The damage caused by the policy course taken in England and Wales has been instructive. The Society maintains its position that efficiencies and economies within the justice system are achievable through looking at processes and procedures on a system wide basis, rather than restricting access to justice through a blunt reduction in scope of legal aid.

4 General principles of remuneration should be adopted to guide future reform of fees (4.13)

The Society notes the recommendations for guiding principles for remuneration as set out at para 4.13. Without prejudice to any further revision and consultation, the criteria suggested are too narrow to meet the aims of ensuring remuneration which effectively resources access to justice. For example, the Society disagrees with the inclusion of the term “lowest rates possible”. Although this is counterbalanced by a reference to good quality and well delivered advice, the suggestion of the bare minimum per se sits uneasily with other sections of the Report which emphasise the importance of avoiding this kind of thinking. The Society prefers terminology such as “fair rates” for work undertaken in good faith as this focuses on achieving reasonable but never excessive rates of remuneration.

Similarly, the suggestion in the draft criteria that it should not exceed rates paid in comparable jurisdictions for comparable work is more problematic than it first appears. Firstly, this formula does not require the decision maker to assess whether the rates of remuneration are sufficient to facilitate effective access to quality legal services and it does not seek to define comparability to any review of different systems in context. It is submitted that this current form of wording is suggestive of a simple ‘read over’ of rates from England and Wales rather than an examination in the context of fair rates for work undertaken. The Society believes this is a mistaken approach and the current draft remuneration principles suggested in the Report would require significant revision.

5 The budget for 2016/17 should be based upon the predicted cost of the scheme, not on earlier baseline budgets (6.10)

The Society has long argued that the true costs of legal aid should be both accurately forecast and appropriately attributed in terms of drivers for demand. This should be properly contextualised and could form part of the earlier exercise mentioned in terms of setting out the high level case for legal aid. Efforts to re-orientate the public debate away from an inaccurate perception of legal aid as an ever-spiralling cost burden would help produce a true cost-benefit analysis of the value of legal aid.

6 Contested and uncontested divorce proceedings should be removed from the scope of civil legal aid (18.22)

The Society notes that the current system for obtaining a Decree Nisi of divorce requires a party to issue a petition containing information and details, in compliance with statute and the related Rules. It is our view that to remove forthwith all divorce proceedings from the scope of Legal Aid would seriously impact on many vulnerable clients, including victims of domestic violence.

The current statutory ground for divorce allows for petitioners to rely on the other party’s fault including unreasonable behaviour and adultery. Petitions based on either of these grounds have to be drafted with precision. Those clients, without the means to engage legal representatives may find they are unable to exit a difficult and perhaps dangerous relationship. Not only may this have implications from a human perspective, it may have financial and other consequences for family life.

It is often assumed that because many divorces ultimately proceed on a consent basis there is no contention between the parties. That is simply not the case. Consent is often only achieved after discussion and negotiation and is often the out workings of proper advice from legal representatives.

Legal services have already been restricted in this area as representation is limited to solicitor only. If consent is forthcoming, legally assisted parties are required to assent to it, thereby keeping costs down. As a result, contested proceedings in this context are the rare exception and LSA is in a position to know that only meritorious cases proceed in this way.

7 Money damages claims should be removed from scope, but this should be coordinated with the introduction of conditional fee agreements (23.12)

This recommendation will be responded to within the Society's response to the DoJ's consultation on "*Alternative Method for Funding Money Damages Claims*".

8 Only a limited range of damages claims should remain within scope (23.15)

As at 7.

9 Most injunction cases should be removed from scope (23.21)

A definition of injunction cases is not contained within the Report, although as implied at para 23.20, the majority of these cases appear to fall under the remit of the Protection from Harassment (Northern Ireland) Order 1997.

The 1997 Order provides a civil remedy for individuals who are threatened or molested by the actions of others.

The Report recognises that the physical protection of the applicant is an overwhelming priority in determining entitlement in this area. It is also noted at para 23.20 that most of the funded cases are successful in achieving the Order sought from the Court. However, doubt is then cast as to whether such Orders are beneficial, although no research has been undertaken to assess the efficacy of such Orders.

It is suggested, that further research or investigation is required before a determination is made removing injunction cases from scope, particularly in the problematic circumstances still continuing in Northern Ireland and the suggestion that community based mediation services may not provide a realistic alternative.

10 Legal aid should remain for Housing cases (23.24)

The Society agrees with the thrust of the recommendation appearing at para 23.24 of the Report but notes and welcomes the suggestion that further consultation should take place with the Society to develop sign posting arrangements concerning work best undertaken by the Housing Rights Service.

As stated in the response post covering the operation of Directions under Article 28 of the Solicitors (Northern Ireland) Order 1976 (Recommendation 140), the Society is committed to working in partnership to ensure that access to justice is secured for all in our society.

These services are complementary rather than competitive, with referral mechanisms to ensure the clients receive professional help most appropriate to their circumstances.

11 Non housing debt cases should be removed from the scope of civil legal aid (23.26)

Part of the philosophical basis for making housing a continued priority area for legal aid is set out in para 23.24 of the Report. This section outlines that “timely advice and support in a housing matter may save a client from the risk of homelessness leading to a host of other social problems including physical and mental health”.

It would be our view that the corollary applies also in debt cases, namely that timely support and advice, can lead to a remedy for the client which can avoid both adverse consequences for him/her and for society in general. It is important to note that clients rarely present to solicitors with a single problem and the triage model reflects that many issues are complex and interlocking. If that is the case then debt related matters should remain within scope as a natural accompaniment to housing matters, as debt problems can have a hugely damaging effect on people’s lives.

12 A narrower range of immigration and asylum cases should remain in scope (23.27)

The Report recognises the prevailing conditions in Northern Ireland and that, the amount of legal aid expenditure in immigration and asylum cases is considerably lower than in England and Wales.

The reduction in scope in this area is balanced by a suggestion that the continuing availability of advice and assistance and exceptional funding will provide an appropriate safeguard to those areas which fall outside scope. It is suggested that this approach is perhaps too optimistic and places insufficient emphasis on the vulnerability of individuals seeking advice for immigration based problems. We consider further research is required in this area before any final decision is taken.

13 Article 2 inquests should be brought within mainstream funding (23.31)

In responding to this recommendation, the Society considers that it is important to distinguish between Legacy Inquests held to meet the State’s Article 2 obligations, as outlined in the *McKerr* case and other Article 2 Inquests. We believe that the former should be specifically resourced by the UK Government. These cases should not be presented as a cost spike on the Legal Aid Fund, as they arise out of the particular circumstances of Northern Ireland and should be resourced accordingly outside of the mainstream legal aid budget.

In relation to other Article 2 Inquests eg where there is a death in custody, the Society supports mainstream funding, noting that the Report agrees that representation in an Article 2 Inquest is part of the irreducible minimum of legal aid. On that basis, given that the Report notes at para 6.10 that the Budget for legal aid should be based on forecast costs, the inclusion of such Inquests would require to be appropriately taken into account as a recurring cost.

The Society notes however that if this recommendation is accepted by the DOJ then new appeal rights against the refusal of funding are required to be brought into place as set out

in para 23. of the Report. This is an essential requirement in these cases and will ensure consistency and fairness for applicants across the board.³²

14 Civil non family legal aid should be available only for specified descriptions of case (23.44)

The Society again emphasises the need for a planned approach based on clearly articulated principles within this area. It is well recognised that once an area of work is removed from scope then it is inherently unlikely that it will ever be placed back within scope. The motivation for removing areas of scope, is set out in the report at para 23.42, “to make substantial savings in civil non family”. The categories which it is proposed should remain within scope are set out at para 23.46 and are clearly not objectionable in principle, as are the policy justifications which appear underneath the recommendation at para 23.44.

However, there must remain an underlying concern that the approach ultimately to be adopted will not be on the basis of mature and considered policy grounds, but rather on a more simplistic motivation to make substantial savings. The implementation and operation of such reductions in scope must result from a thoughtful and empirically based foundation with appropriate impact assessments undertaken.

15 Advice on money damages claims should be removed from the scope of advice and assistance (25.27)

The Society is opposed to the removal of ‘money damages’ claims from the scope of advice and assistance. We reiterate the points which we have made in response to previous consultations in relation to the funding of personal injury litigation. This type of litigation:

- provides benefits to injured parties who are seeking compensation to cover the expenses and loss which the negligent action of another has caused them. A payment of ‘money damages’ is not the equivalent of a lottery pay-out. It is compensation for loss already suffered and for the sufferers of such loss it is money that is needed to cover expenses and to assist the injured person in coping with any change in lifestyle or capabilities.
- ensures a more accountable society. One might consider the increased safety standards which have been introduced in this jurisdiction on foot of litigation relating to hearing loss.
- brings benefits to the tax payer by way of recoupment through the Compensation Recovery Unit (CRU) of State Benefits paid and also hospital charges incurred. It also ensures recovery of wage loss for civil servants who are obliged under the terms of their Contracts of Employment to recover any wages paid in a successful claim arising out of a negligent accident.

16 Advice on debt and welfare benefits issues should be removed from the scope of advice and assistance (25.28)

Para 25.11 refers to discussions the Reviewer had with the Department of Social Development regarding the funding for advice services in Northern Ireland. The view is formed that such funding is on a more secure footing and in consequence, the need for solicitors under the Green Form Scheme to provide advice in debt and welfare matters is nullified, as other appropriate advice agencies are in a position to provide required support.

However, the support for other advice agencies, in a period of continuing austerity, is problematic and compares unfavourably with the low cost universal application of the Legal Advice and Assistance Scheme. Geographical coverage and security of supply are guaranteed through the network of solicitors' practices at 74 different locations throughout Northern Ireland.

It is generally recognised that initial meetings dealing with debt problems in particular, can provide a solution or support for the client under the remit of the Legal Advice and Assistance Scheme, which ultimately can save a good deal of further time and expense at a later date. Welfare Law problems, like Employment Law ones, can often involve complex legal issues and do not necessarily render themselves capable to simple general advice in all cases.

Also, absent from this element of the Report, is a proper appreciation of the benefit that the network of solicitors' practices in Northern Ireland provide for a wider civic society. The triage model is pertinent here as an individual with a family related problem e.g. marital breakdown, may also have debt and welfare concerns. As previously mentioned, clients presenting with multiple interlocking issues are very common in solicitor practices. If scope is removed from the Legal Advice and Assistance Scheme for debt and welfare issues, one would find the solicitor able to provide appropriate advice regarding the substantive family issues but unable to cost-effectively provide appropriate advice concerning consequences of that matter in the debt and welfare field e.g. the individual due to the breakdown finds himself or herself in debt but can be directed through the advice of the scheme to apply for benefits to ameliorate that initial urgency.

It is therefore suggested, that as there is a desire that the present Legal Advice and Assistance scheme operates as it presently does, with its low remuneration rates, that the removal of the debt and welfare provisions is not merited at this time.

17 Cost protection should be abolished in family proceedings (18.33)

The Society does not consider that costs protection should be abolished in family proceedings. Involvement in such proceedings is often very frightening and stressful for clients. Few would choose to engage in court proceedings if they could possibly avoid it. Hence, we do not consider that further deterrents are necessary.

There is already a merits test in place and undeserving cases should not now be funded by the LSA in any event. Furthermore clients in receipt of civil legal aid funding have already been means-tested. State benefits are paid out at subsistence level. This is recognised in the many passport benefits provisions. The proposal that such clients be expected to meet a proportion of their opponents' costs in unsuccessful cases would reduce their resources to below subsistence level. This seems to be illogical and unfair, and would effectively amount to a denial of access to the family court. Such a move also has the potential to exacerbate the bitterness already felt towards the ex-spouse, the effect of which may spread to the children, perhaps resulting in further contact difficulties.

Whilst we are not aware of any evidence that publicly funded claimants are acting unreasonably, the Society wishes to stress that it is anxious that any abuse of Civil Legal Aid Funding or court proceedings should not be tolerated. We believe however that the mechanisms for dealing with such problems are already in place. For example the courts

make use of Article 179(14) of the Children (NI) Order 1995 and parties are at liberty to bring contempt proceedings before the court. In such proceedings fines can be imposed on parties who are found to be in contempt of court orders.

Solicitors acting on behalf of a legally aided client are cognisant of their duty to account in respect of work carried out and paid for by the public purse and should report unreasonable behaviour. Furthermore the court ultimately makes a determination and is aware of the behaviour of all the parties whether legally aided or not. Accordingly in extreme cases, the court can order payment of costs.

18 There should be uniform civil income limits and a gross income cap (3.13)

This section of the Report states that 43% of the population in Northern Ireland were eligible for civil legal aid and that this was a more generous eligibility regime than operated in England and Wales. However, the context in which this higher level of eligibility occurs is absent from the discussion. Rather than the system being designed to be more “generous” as suggested at par 3.11, eligibility is impacted by the presence of more challenging socio-economic conditions. Moreover, as the Report acknowledges in the section on alternative funding methods for ‘money damages’ cases, there still exists a significant section of the population who do not qualify for legal aid but who are not in practice able to access justice due to limited resources. It is clear that in Northern Ireland there is a greater dependency on welfare benefits and the average income for those in work is significantly below the average in England and Wales. The relationship between eligibility and income levels is captured in Table 3.1 of the Report which shows improving economic conditions reduces pressure on legal aid. In consequence, any application to redefine income limits for civil legal aid eligibility, must recognise the prevailing economic and social conditions in Northern Ireland.

Uniformity in the application of limits clearly has an attraction, as it reduces administration and makes both the operation and the explanation of eligibility easier for both the LSA and practitioners. The concern is that the setting of such rates does not act in a manner which is disadvantageous to a significant section of the population of Northern Ireland, arising simply from a desire to create parity with England and Wales, where a different set of social and economic conditions prevail. In short, eligibility is determined less by the generosity of the regime and more by the needs of our population and an objective assessment of that need should inform policy.

19 All civil legal aid should be subject to a disposable capital limit of £8,000 (3.13)

A uniformity of approach to civil legal aid is welcome but it has to be accepted that any cut off point for capital will be somewhat arbitrary in operation. Equally, for cases which are in the High Court and may encompass greater complexity or public interest issues, the setting of a capital limit of £8,000 may disproportionately impact upon the larger and more significant cases which may merit some form of flexibility in the concerned capital limit.

20 Benefit receipt should operate as a passport on income only, not capital (3.13)

It seems axiomatic that if someone has large capital funds then the limits on their income should not mean that they are exempted from utilising those capital funds to pursue the legal remedy they seek. However, in practice, one wonders about the necessity of this recommendation. It is already the case that in means tested benefits, such as Income

Support, when a certain capital threshold is reached benefit entitlement ends, and equally above a certain threshold benefit is proportionally reduced.

Legal aid practitioners already declare on application forms whether or not their client has any capital reserves so that this can be taken into account. The Society would emphasise that whilst capital should of course be taken into account, there should be no question of any risk to the client's home as a result of initiating meritorious legal proceedings. Similarly, from a practical perspective it is important that changes to State Benefits should be taken into account when setting income and capital limits.

21 There should be Increased income contributions for civil legal aid (3.20)

The recommendation is that there should be modest increases in the contributions due under Civil Legal Aid. However it is already the situation that the present thresholds triggering contributions are set quite low and frequently individuals with little capital and a basic disposable income, are requested to pay not insignificant sums to obtain a Legal Aid Certificate. As the Report is also directing itself towards reducing the scope of Civil Legal Aid, the combination of an increase in contributions, albeit referred to as "modest" and a reduction of scope cumulatively could mean that a large proportion of individuals who presently fall within eligibility under the Civil Legal Aid system would be removed from it entirely and by definition, access to the Civil Courts and appropriate civil remedies potentially denied.

The Department should take care to substantially assess the cumulative impact of any proposals flowing from this Report, keeping in mind the likelihood of unintended consequences. Furthermore, the Society believes that the current 12 month time limit for receipt of contributions is counterproductive and that a degree of flexibility around repayments would simultaneously recoup monies more quickly and serve to promote access to justice.

22 A £100,000 limit should be placed on the subject matter of the dispute exemption (18.40)

The Society submits that there is no need for a £100,000 rule, as the Statutory Charge would apply here in any event, and the sums involved would be recovered by the LSA. In these cases legal aid acts more like a loan than a grant and the funds are paid back to the public purse in due course. The Society accepts that there is a wider societal issue as to how far the taxpayer should go to fund the recovery of assets for a private individual and support the application of the Statutory Charge to avoid this scenario.

23 Statutory charge regulations should cover registration and the charging of interest (3.24)

We have no difficulty in principle with the cost of securing Land Registry registration being included within the ambit of the Statutory Charge, as would be the case with other disbursements. We have some concerns that to have an interest charge added to this fee might penalise the litigant unfairly.

24 The £2,500 statutory charge exemption should be abolished except for Early Resolution Certificates (18.52)

The £2,500 statutory charge exemption was originally established in the early 1970s to allow people to secure the value of a house without incurring legal costs under legal aid. This sum has never been updated, despite the significant rise in house prices since that time. Accordingly, without any incremental increases or inflationary protection, clients have been paying proportionately more year on year.

The removal of such an exemption would increase the cost to the litigant in terms of the size of the eventual statutory charge cost. This is effectively a reduction in legal aid cover to the litigant and raises concerns about clients feeling discouraged from bringing meritorious proceedings in a context whereby seemingly more straightforward issues can cause significant problems for particular clients.

25 Family mediation costs should be exempt from the statutory charge (17.31)

The Society considers that practitioners already encourage clients to consider mediation in appropriate cases, in particular where there is an absence of compelling reasons not to (e.g. domestic violence cases, distances involved and the state of relationships between parties etc). We emphasise that this must be voluntary and tailored. However we take the view that there is no issue with the costs of mediation being exempt from the Statutory Charge. Furthermore, there is no difficulty foreseen in considering how, if at all, court procedures could be amended to encourage mediation at an early stage.

26 Homeowners should be under a new obligation to repay their legal aid costs: “Legal aid as a loan” (3.29)

In principle the Society considers that there is no difficulty in expecting a litigant to fund their own case or repay funding where it is reasonable to do so. In those cases where a home owner is being asked to repay legal costs, consideration must be given to the person’s ability to repay the same in advance of a grant/loan, in order to ensure future debt issues do not arise.

27 Legal aid as a loan should apply to ancillary relief cases but not to children disputes resolved under an Early Resolution Certificate (ERC) (18.52 and 18.57)

The proposal that legal aid in ancillary relief cases be treated like a loan is already effectively in place through the Statutory Charge scheme. If this proposal was to go forward then a significant degree of educating the public will be required to clarify the concept. As will be discussed later, the danger with the introduction of ERCs is that an additional layer of bureaucracy is introduced which creates additional hurdles to resourcing appropriate legal assistance. The Society will listen carefully to any proposals emerging on consultation which are geared towards ensuring agreed arrangements for children are put in place where possible in appropriate cases.

28 A new financial obligation should apply to successful damages claims to make them self-funding (24.19)

As at 7.

29 All funded services should be subject to clear and strict merits criteria based upon the Northern Ireland Funding Code (3.34)

A concern with the original provisions of the Funding Code was that the applicant may effectively be required to try their case twice - once in paper to satisfy the cost benefit test set out by the LSA and then in court when the matter is determined or litigated upon. If the strict merits criteria under the Funding Code places a burden of proof which is in fact higher than that required by the civil court then that is likely to lead to an injustice and a reduction in accessibility to the courts. Merits criteria are very important, but they should be clear, concise and not produce a level of bureaucracy which results in a quasi-hearing.

30 There should be a new power to refuse a high cost case on affordability grounds (3.40)

This would represent an unprecedented revision of the Legal Aid code and similar to its application in England and Wales, would be controversial. Whilst the Report says that the operation of the affordability criteria would only occur in “exceptional cases and circumstances”, it would appear to lead to a situation where matters already before the Court and in which substantial work has been undertaken, would no longer have the benefit of legal aid.

The danger with this proposal is that it creates a perverse incentive for respondents with greater resources to attempt to force up costs in order to frustrate the party supported by legal aid. On that basis, there are strong objections to this proposal on grounds of equality of arms and providing effective access to justice. The Report states that the threshold and operation of this power should be the subject of further consultation and this is a view which would be strongly supported by the Society in the event of the DOJ considering proceeding with this controversial recommendation.

31 Family legal aid may be refused if mediation has not been attempted (17.31)

Mediation is not always appropriate in family cases and in any event mediation works most effectively when it is voluntary and tailored to the particular circumstances of the case. It is accepted in the Report that this should not apply to cases where there has been domestic violence perpetrated. It also indicates that the discretion to refuse Legal Aid should not be “an absolute rule”. Often in cases where parties are newly separated both parties may be reluctant to enter into mediation. If they are therefore prohibited from seeking Civil Legal Aid in Private Law Proceedings this could delay settlement and prevent the parties achieving outcomes such as access to children or financial relief.

Alternative Dispute Resolution (“ADR”) may well be of benefit in some, cases but not all. This is why screening is essential particularly where safeguarding issues may arise. For example, relationships characterised by the following are not suitable for ADR:

- Domestic violence
- Domestic abuse of a non-physical kind;
- A stark difference in numeracy, literacy, self-confidence which can create a power imbalance;

- The inability to sit in the same room together – some parties are simply not equipped with the skills and abilities to use the mediation process effectively;
- Downright dishonesty and nastiness.

In addition, parties may live in rural areas where they could experience difficulty accessing mediation services within a reasonable period. At present the majority of mediators are located in larger towns and cities such as the Greater Belfast area and the spread of mediation services across Northern Ireland may mean that parties have difficulty accessing mediation. If they cannot then obtain a certificate to progress proceedings there may be a significant delay in achieving outcomes to the detriment of family life.

Although mediation is an important means to try and settle difficulties at an early stage, much can be achieved at an early stage by way of solicitor negotiation rather than imposing a new merits criterion specifying that a certificate should be refused if mediation has not been attempted. Equal recognition should be given to the role of solicitor negotiation in trying to reach a settlement. Currently there are a number of providers of mediation in Northern Ireland. The Society is of the view that the most effective in respect of family proceedings currently within the courts system is the Court Children’s Officers.

Given their background as social workers they are arguably best placed to deal with children disputes and to identify, and deal with, dynamics in families such as one partner being more controlling and manipulative of the other for example. The ethos of family practitioners as set out in greater detail in the answer to Recommendation 81 is to arrive at fair and effective resolutions for families as quickly as possible. This may involve mediation, inter-party negotiation or the full court process. This can only be determined in light of the prevailing relationships involved and circumstances within the case and therefore to impose such a blunt requirement for mediation would likely cause further delay in achieving outcomes as there are many cases for which it is simply not appropriate.

32 All public law family cases should be merits tested, based upon whether representation is necessary to enable the court to determine the proceedings (18.18)

The Society considers that in public law proceedings, the available outcomes to the Court under the Children (NI) Order 1995 contain the most draconian orders which can be made concerning a family. It is our view that any recommendation imposing a “merits test” on parties’ access to legal representation will have the potential to deter parties from proceedings and to restrict access to justice. The framework, could result in inequality and lack of consistency were the LSA to determine which parties “add real value to the determination of the issues before the Court” (page 159) and which do not.

Contained within the Children (NI) Order 1995 are a range of orders which look at not only the powers to be given to local Trusts but also the composition of a family unit in terms of contact and residence following Trust intervention. Whilst a case may originate with an application to remove a child into care, often the case will involve a complex matrix of much more than a removal, with consideration being given to the placement of the child, on-going relationships with biological paternal and maternal families as well as education and welfare issues. As a result of this complex factual matrix, the Society recommends all parties with parental responsibility should continue to automatically receive legal aid funding.

In an application by the local Trust, the immediate parties are those who hold parental responsibility. Even a party holding parental responsibility, who does not care for the child, is entitled to express his/her opinion with regards to the welfare of the child as determined by Article 7 of the 1995 Order, regardless of his/her level of involvement with the child. Page 159 of the Report references an estranged parent who has hitherto shown little interest in the children or in the proceedings and determines this category of party should not be entitled to access legal funding. In response, the Society would emphasise that in order to determine what role a party wishes to play in proceedings, detailed instructions are taken from a party and legal advice given prior to any application to come on record for a party.

Accordingly, if a party accesses a solicitor for such advice then it is unreasonable to state that they have shown little interest in the children or in the proceedings if that party was to concur with the Trust application. In practice it is often the case that a party may concur with the Trust's overall plan for the child but nuances may arise concerning how that care is provided practically and how the relationship with the biological parent is maintained.

In addition, there are also safeguards built into public law cases as a result of the Guide to Case Management Outline as per COAC guidelines. This has resulted in assessments of a party who is "nowhere to be seen" being determined at a much earlier stage (by day 45 of the proceedings), with the parties being required to file statements outlining their position. If a party, having secured legal representation, subsequently disengages with the process then the courts are robust at determining that party should have no further part to play in the case.

If the funding of these cases by the LSA were made subject to merits testing it may become academic, as all interested parties would automatically require legal aid funding owing to the complexities involved. To restrict funding to parties who will "add real value" to the determination of the issues before the court will introduce greater uncertainty into proceedings when a focused use of the powers open to the court can limit the involvement to those with a genuine interest in the case.

33 Contested ancillary relief cases should not be funded where alternatives sources of funding are available (18.40)

The Society notes that it is already the case that when applying for legal aid funding, the applicant is required to state whether other funds are available. It currently is the case that legal aid would not normally be granted where the litigant can fund the case from other resources within their control. It is submitted however that these sources of funding have to be credible and sustainable rather than theoretical or speculative to constitute an alternative to legal aid funding.

34 Early Resolution Certificates (ERC) should be subject to the private client test and a test of whether a serious family dispute exists (18.48)

Although dealt with in another section, the Society cautions that ERC's will create further bureaucracy as initially these will have to be applied for by solicitors and will involve a detailed means and merits assessment. It is not clear how "a serious family dispute" will be defined although it is suggested that it will be similar to the merits test under the current regime. If early resolution is not achieved a further application would then be required to

extend the certificate to cover representation in proceedings. This will be coupled with stricter merits criteria. If the ERC is going to reflect the same merits test as the current regime this would mean in practice that to receive a certificate for further representation it would be more difficult than it is at present and would thus risk precluding many applicants from pursuing proceedings.

35 A range of specific merits criteria should apply to family legal aid (18.55)

The Society notes that currently all legal aid applications are subject to merits testing and this is correct in principle. In responding to this recommendation, we note that merits criteria require to be clearly defined in draft form and considered in context. Accordingly, the Society will closely examine any proposals which are put forward as a result of the proposals in the Table at para 18.55. We caution however that the burden of proof to be provided to LSA to satisfy the tests must not outweigh the work involved or it risks undermining the credibility of the scheme. Similarly, tests should be appropriately weighted to ensure that high hurdles are not constructed as a barrier to the protection of important rights. Accordingly, more detail would need to be forthcoming on the application of such criteria before substantive commentary can be made and public consultation would be critical before proposing any such changes.

36 Where alternatives to litigation are available, the court should be regarded as the last resort (20.5)

The Society believes that it is inaccurate to imply that court proceedings are currently regarded as anything other than the remedy of last resort for clients. The principle is correct but the implication behind it is not. There are layers to the litigation process which include research into the strengths of a case, solicitor negotiations between parties and in appropriate cases, mediation.

The Society would emphasise that one of the strengths of mediation as a resolution mechanism is that it is entirely voluntary, as making it mandatory could have the effect of introducing an additional layer of bureaucracy and hardening the attitudes of clients towards its effectiveness.

Ensuring effective and efficient ADR procedures acts as an important component of the dispute resolution process, but it cannot act as a panacea to meet the needs of all clients in each and every case. The important aspect of dispute resolution is to ensure that the client has the options available to fit the circumstances of his/her case and it is not accurate to suggest that a rush to court is the default position.

37 The grant of leave for judicial review should be recognised in the merits criteria (21.25)

The phraseology used in the Report at para 21.25 and in Chapter 24 in relation to “borderline” prospects for cases is somewhat unhelpful in judicial review, where there is already an implied threshold via the leave process. The threshold for leave is that of “an arguable case” and this phraseology should be used in defining criteria for prospects of success.

The LSA already issue limited certificates for leave proceedings/counsel’s opinion on the merits of the case etc. It is not appropriate to require that human rights issues must be

“significant” before the merits threshold is met. Every human rights issue is, *de facto* significant.

There is no particular difficulty with the requirement for a “significant wider” public interest with the caveat that a challenge by an individual can have complementary benefits for the wider public. However it is unclear how the LSA would apply the requirement for “overwhelming importance” to the client – as this term is somewhat imprecise. The Judicature Act and Court of Judicature Rules require an applicant in judicial review proceedings to have sufficient interest in the impugned decision already.

38 Legal aid for judicial review should be based on the prospects of securing the substantive relief sought (21.27)

It is submitted that this is a misnomer as the relief granted in judicial review, even in EU related proceedings, is **always** at the discretion of the court and it is not possible to second guess the mind of the court in any particular case.

39 Funding should be based on the prospects of success at trial, not the prospects of securing a settlement (24.5)

The Society submits that this recommendation is based on a false assumption that there are currently legally aided plaintiffs who have obtained civil aid certificates which they ought not to have received, and that those plaintiffs have been given an advantage against defendants and other non-legally aided plaintiffs. Most defendants are funded by insurers. In fact, there are currently very strict controls in relation to the issue of civil aid certificates.

The misperception that undeserving plaintiffs are in receipt of civil aid certificates gives rise to this recommendation. Applications for legal aid are not currently made on the basis of securing settlement. Rather, they are made on the basis that there are good prospects for success at trial. That does not necessarily mean that the plaintiff is likely to succeed in full. A plaintiff may be likely to succeed, in part only. The plaintiff should not be denied a certificate merely because his or her case may only succeed partially. That would be a denial of access to justice.

The case of *Carr v Poots* [1995] NI 420 is illustrative of a personal injury case in which justice required that the plaintiff should recover substantial damages, albeit mitigated by contributory negligence. The quantum of damages in this case made a significant difference to the life of someone who had suffered great loss. To discount such circumstances would not be in the interests of justice. This reflects the fact that calculating the value of a case is difficult without significant outlay on disbursements and investigative work, meaning that attempts to restrict access to legal aid in this manner would impact access to justice.

40 There should be defined bands of prospects of success (24.6)

There are already defined bands of prospects of success which the applicant’s solicitor must declare in every application for a civil aid certificate. That is the current position and the Society sees no reason why it should be changed.

41 Cases with borderline prospects of success may be funded in high priority areas (24.7)

When considering this recommendation it is important to bear in mind that there are meritorious cases which may not succeed in full. There may be cases where it is clear that there is some fault on the part of the applicant, but that there is also fault on behalf of the defendant. It would be quite unjust to disallow a certificate on the basis that the applicant would only be partially successful. Similarly, in the high priority areas, it would be appropriate that cases which do not fall within the range of high prospects of success should still be funded.

42 Cost benefit criteria for non-quantifiable claims should be based on public interest or the private client test (24.9)

The Society would take issue with some of the suggestions made at para 24.9, in particular it should be noted that claims for damages are intended as compensation for clear and demonstrable losses suffered. The idea that “financial benefit” is the driving force behind such claims is unfair, as the plaintiff is only seeking to be restored to the position he was in prior to suffering the loss. Similarly, there are problems with such an approach based on the degree of foresight of the value to a plaintiff of litigation and the need for this to be assessed in the context of a particular case. Accordingly, the Society is sceptical of this recommendation. There is a significant risk of applying uncertain cost-benefit ratios too bluntly and the Society would wish to scrutinise any such proposals on consultation in order to ensure that they do not damage access to justice.

43 There should be strict damages to costs ratios for quantifiable claims (24.10)

Where an applicant has a case with high prospects of success, it would be quite unjust to refuse access to courts on the basis of an arbitrary damages to costs ratio. It is also in the interests of justice to reiterate that significant investigative work often needs to be carried out in order to determine the likely value of a claim. A prima facie case is distinct from the eventual value of a case in terms of the likely damages to be awarded and often the degree of foresight required to make this recommendation workable is simply not present.

44 Investigative funding for potential damages claims should be restricted to those likely to be worth at least £10,000 (24.11)

It is our strong view that implementation of this recommendation would have a devastating effect on access to justice. Just over 40% of the population is entitled to legal aid. The vast majority of civil claims are under £10,000 in value. By way of illustration, only 21% of assessed civil bills in the County Court in 2014, 20% in 2013 and 16% in 2012 resulted in an award of damages greater than £5,000. This underscores the importance of putting modest costs in the context of the rights protected. The Legal Aid Fund is reimbursed in successful cases. This recommendation would, in effect, remove access to courts for the impecunious, in the great majority of injury and damages cases. As above, the value of claims often cannot be adequately estimated without significant investigative work being carried out in advance, bona fide work carried out in order to facilitate access to justice. Accordingly, setting limits under which cases will not be funded is both an unwieldy mechanism to reduce costs and likely to frustrate access to justice.

45 A range of standard and category specific merits criteria should apply to non-family civil legal aid (24.12 and 24.13)

There is already a range of standards and category specific merits criteria applicable in non-family civil legal aid cases.

46 The private client test should apply to all civil and family advice and assistance (25.30)

The private client test already applies to all civil non-family cases. It is rigorously applied, at present. There is no reason why this should change.

47 Binding cost limitations should apply to all certificates (3.45 and 18.32)

Bearing in mind that the historic success rate of non-family civil cases has been extremely high (we would welcome the Department providing us with figures for this over the last number of years and to identify any changes for clarification), the cost of those cases ought to be borne by the losing party, who is invariably insured or is a public body. To fix binding cost limitations on plaintiffs' legal aid certificates, may give rise to the unexpected consequence that the defendants seek to have the benefit of the costs limitations, for themselves. The benefit would therefore not be to the public purse, but to the private sector. The Society stresses that containment of costs flow from efficient case management and a willingness to find a resolution to disputes rather than setting arbitrary limits which would damage access to justice.

48 There should be a single procedure governing all civil legal aid certificates (3.49)

The current multifaceted array of legal aid documentation is long overdue for reform by way of streamlining. The current system is repetitive, unwieldy, vastly time-consuming and not fit for purpose. There is no proper IT capability. There should be a procedure where an application can be lodged using IT. If such a procedure existed, then it ought to be designed to be capable of coping with the various types of application which would require to be lodged.

49 Quality standards should be recognised for family mediation (17.34)

The Society accepts in principle that there should be some form of quality assurance for mediation in publicly funded cases. Whilst Family Mediation NI is one provider, there are a number of other providers offering quality mediation services such as the Dispute Resolution Service at the Society and the Bar Council..

Much of the mediation which takes place in the family court arena is provided by the Court Children's Service. This is a very high calibre of mediation and is often very successful in reaching a settlement. The Court Children's Officers are all trained social workers and highly experienced in their field with an appropriate degree of specialism and understanding of the issues involved.

50 No prior authority should be required for mediation (17.35)

The Society agrees that no prior authority should be required to incur mediation costs so as to prevent unnecessary delay and avoid an increase in bureaucracy.

51 Legal aid solicitors must report to the LSA if their client refuses any offer of mediation or ENE from an opponent (20.13 and 20.17)

Again, the Society would caution that any attempt to make ADR processes binding or to make the application process prohibitive for not engaging in ADR is wrong in principle. ENE and Mediation work best when they form part of a menu of options for the client which their solicitor can advise them on.

Whilst the Society supports the extension and improvement of mediation services in the marketplace, clients should not be held to ransom to use these processes as they may not be appropriate in their particular circumstances. In any case, there must be a real risk of a breach of Article 6 ECHR rights if ADR processes are made binding or designed to act as a barrier to accessing the courts. It is correct that strong and attractive options for out of court resolution exist and should be developed for appropriate cases but they should not act as a constraint upon use of the court, but rather as an alternative to it.

52 A new system of Early Resolution Certificates (ERCs) should be established to emphasise settlement over court procedures (18.47)

The Society does not agree that ERCs are required. From the outset of taking instructions solicitors are involved in negotiating to reach a settlement, both under the Green Form Scheme and also once a certificate has been granted to progress the matter to court. There is an ongoing obligation on solicitors to attempt to settle matters without redress to court. Unfortunately many of the more acrimonious cases, or those that involve complex issues such as domestic violence or abuse or neglect of the children, are not capable of being settled at an early stage and require a hearing.

The principle of an ERC suggests that solicitors are not currently settling those cases which are capable of being settled at the earliest possible opportunity. If cases are not settled under an ERC, and a further certificate is required to issue proceedings, the solicitors will be penalised in costs, as only one fee will be payable under the new certificate.

The Society is of the view that the requirement for an ERC will also create a further level of bureaucracy as an initial ERC will have to be applied for and, if necessary, a further application to extend the certificate would be necessary with the higher threshold in terms of the merits test as discussed above. This would again create delay for those cases which require court proceedings at an early stage to resolve issues such as access to children.

53 Early Resolution Certificates should also to be available for pre proceedings meetings in public law cases (18.10)

The Society would welcome clarification as to the extent (if any) by which this proposal would differ from the current arrangements in public law children's cases for pre-proceedings before commenting further.

54 The interests of the opponent should be taken into account in long running family cases (18.33)

The Society believes that this would effectively result in a 'hearing within a hearing' approach being taken, which would prove particularly difficult when it comes to dealing with personal litigants.

The court is the appropriate mechanism to ensure cases are being dealt with expeditiously and for solicitors to have to report further to the LSA would not represent a good or efficient use of time spent for that client. We noted in our Response to the initial Agenda Paper that the courts retain the powers to penalise litigants acting unfairly within proceedings with a view to ensuring parity and fairness between parties.

55 There should be a new power to revoke legal aid certificates for non-compliance with court orders (18.33)

The Society is of the view that giving judiciary in the Magistrates' Courts powers to issue sanctions against parties who breach a court order would be a more effective mechanism. Revoking legal aid would result in a personal litigant who – by virtue of the fact they have refused to comply with a court order to reach that position – would be difficult to deal with and add time and possibly expense to the opponent in the case.

A solicitor appearing for those in breach would assist the court and client to understand the potential repercussions of failure to comply and help reach a solution. There is also the concern that a party may have very good reason for failing to comply with an order, or there may be an allegation of non-compliance which is unfounded. The Society feels this test is too subjective to be workable and will result in significant contests over the grounds for breach. Placing the power in the hands of the judiciary works within the spirit of their case management responsibilities and of ensuring overall fairness of proceedings, taking a holistic view of efficiency within the system.

56 Judicial review certificates should be issued only after pre-action steps are complete and the opponent has had an opportunity to respond (21.23)

There is significant room for improvement in the pre-action process by all parties. There is not always uniform compliance by proposed respondents to pre-action protocol letters. With the DoJ proposal to remove the obligation to apply “promptly” when initiating judicial review proceedings, this should enable greater exchange of information inter partes before proceedings are issued (save in emergency type cases.)

Judicial review is and should remain a “remedy” of last resort. But proposed respondents must engage more fully and completely in the pre action process. The survey of legally aided judicial reviews referred to in Recommendation 93 *post* should identify the common respondents in such cases from whom an improved culture of pre action correspondence response should be requested.

57 The Director of legal aid casework should be under an obligation to review decisions where no right of appeal lies (23.50)

The Society had understood that Regulation 14 of the Civil Legal Services (General) Regulations (NI) 2015 (SR2015 No.195) provided a general right of review in relation to any decision or determination relating to civil legal services.

If that is not the case, we consider it is imperative that there should be some form of review procedure to review decisions where no right of appeal lies. The inclusion of this recommendation offers reassurance that the papers submitted in support of any application have been fully and adequately considered. This affords the opportunity to reconsider grounds for refusal and will also allow an applicant the opportunity to expand upon or

further clarify grounds that they feel may have led to a refusal on perceived erroneous grounds.

58 A legal aid certificate may cover only partial funding of a case (23.13 and 24.16)

It is important to preserve the idea that if a case does not qualify within a specific category for legal aid that at least partial funding is in place to facilitate large expenditure outlays where a viable case is shown to exist. Often a case can take on additional elements of a damage claim which can require highly specialised reports which involves 'high value' expenditure, and partial funding ought to be in place to ensure that an applicant's case can be properly prepared and presented on their behalf. In addition, it is already the case that legal aid certificates may be limited by the LSA as a means of controlling expenditure.

59 Grant funding should be available from a new Access to Justice Development and Innovation Fund (26.26)

The Society submits that the Report needs to be more specific about what is intended. Making funding available is one thing but ensuring proper and adequate use of those resources granted is another. There is a danger that in the absence of stringent guidelines for use of funds that precious savings can end up dissipated in administrative costings that only serve to dilute the efficiencies of the services that they were intended to progress.

60 Services for children and vulnerable adults should be prioritised in applications to the fund (26.24)

The Society agrees in principle with this recommendation and it does not require further expansion. Those who are most vulnerable in society must be able to enjoy a prioritised degree of funding in pursuing their legal rights and entitlements. Article 3 of the Protection of Vulnerable Groups (NI) Order 2007 prioritises those adults in care and through no fault of their own require the stewardship of the State in some form and it is clear that as with children, these groups are deserving of legal assistance.

61 A Panel should be established to review grant funding applications (26.28)

It is important that a regulatory body be established to determine applications for grant funding and to review applications. A broad cross section of 'interested parties' would be required to be appointed to provide adequate input in to the review process and to ensure that vital funds are directed to the most meritorious cases for prioritised public funding.

62 The private client test should apply to criminal advice and assistance (except at a police station or youth engagement clinic) (11.20)

This appears to suggest a fundamental misunderstanding of how a criminal case works. No defendant chooses to be prosecuted so the decision to take a case is made by the prosecution. In terms of defending the case or pleading guilty, this is decided by the instructions provided and proper professional advice is given on that basis.

The purpose of legal advice is to secure the best result possible for the client in terms of acquittal or minimum sentence in the case of conviction. This is the professional duty owed to the client. The suggestion that the private client test should be applied appears to assume this is not what is happening. There is a clear concern that this in fact would be

used to refuse funding for representation to ensure fairness in the exercise by the State of its most draconian power.

63 There should be a new application form for criminal legal aid, on which the court should give reasons for decisions on interests of justice (12.10)

In Northern Ireland in the latest report issued by the LSA (then the NILSC) 2013/2014 there were 34,000 criminal certificates granted in the Magistrates Court and Crown Court. The Report advises the figure was actually 35,190 (It is unclear as to whether this figure also includes applications for warrants of further detention under the PACE Order 1989).

In essence a Judicial figure, whether a Crown Court Judge or a District Judge has on each of these occasions made a decision to grant a criminal legal aid certificate to a defendant on the basis of the *Widgery* criteria to ensure that the citizen is in a position to defend him or herself against criminal charges. The existing application form for Criminal Legal Aid is known as a Statement of Means. This is a prescribed form which was created under the auspices of The Legal Aid in Criminal Cases (Statement of Means) Rules (Northern Ireland) 1999. This form as indicated in the Report contains information in respect of the client's financial means and details of the charges the client faces.

The NICTS has added a further two pages to the form which was prescribed, and the first page is as follows:

APPROVAL OF CRIMINAL LEGAL AID

A) General

B) Means Test Person on Benefit

Has entitlement to welfare benefits been confirmed by SSA?

Yes No

Person NOT on Benefit

Has documentary evidence of capital and/or means been supplied?

Yes No

C) Merits Test

D) Decision

1. Name of Applicant

2. ICOS Reference Number Court List No.

Is it in the interests of justice that the applicant should receive full criminal legal aid?

Yes No

The interests of justice criteria were set out by the Widgery Committee as a) that the charge is a grave one in the sense that the accused is in real jeopardy of losing his/her liberty or livelihood or suffering serious damage to his/her reputation; b) that the charge raises a substantial question of law; c) that the accused is unable to follow the proceedings and state his own case because of his inadequate knowledge of English, mental illness or other

mental or physical disability; d) that the nature of the defence involves the tracing and interviewing of witnesses or expert cross-examination of a witness for the prosecution; or e) that legal representation is desirable in the interest of someone other than the accused, as for example, in the case of sexual offences against young children when it is undesirable that the accused should cross-examine the witness in person.

Granted Refused Reserved

Signed (Judge) Date

Granted after reservation

Signed (Judge) Date

The above page is attached to every application for a criminal legal aid certificate which the District Judge or Crown Court Judge grants or indeed refuses. The judge signs the above form indicating firstly whether legal aid was granted or refused and the basis for the grant of legal aid.

It is unclear from the Report whether the Reviewer has taken this into consideration when making a recommendation for a new form. It clearly indicates that the judicial figures are making decisions grounded upon the Widgery criteria.

It may be the case that an additional box could be included for a short summation of the Judge's reasoning in individual cases, but there is no need for the introduction of new or additional forms to achieve this. The Report draws an inference that due to the assertion by young barristers that there is inconsistency in terms of certifications for counsel, that this must necessarily mean the interests of justice test may be inconsistently applied. There is no robust, objective evidence to support this presumption and does not accord with the experiences of Society members who make application to the judiciary for legal aid.

Consequently, the Society does not agree that a new application form for criminal legal aid is needed, however the current one could perhaps be slightly modified. The existing Rules do however need to be amended to incorporate the above two pages which have been used for a number of years as the new prescribed form.

64 The court should also give reasons for certifications of counsel (4.46)

Applications for certification are made to the District Judge by way of oral submissions. The judge considers the submissions and rules on the application, quite often providing reasons for either granting or refusing the application in open court. It is a developing practice in the Magistrates' Court in Belfast that any application for certification must also be made in writing, setting out the reasons for the application in full.

It is therefore submitted that the giving of reasons for certification decisions is a practice already being adopted by most courts across the jurisdiction.

The Society has no objection to a provision that courts should give reasons for the certification of counsel. The application is made to a judge in a public court and it is perfectly feasible that reasons for the decision are also given.

65 There should be a new structured approach to criminal means testing, taking into account gross income, available capital and benefit status (13.9)

The present system functions reasonably well. Our concern is that a more structured approach will invariably result in more bureaucracy and delay. This could result in legal representatives being expected to undertake further work on behalf of defendants without knowing who is funding this work or if it will be funded at all.

A structured approach exists in relation to the granting of Civil Legal Aid. However it can take more than 12 months for a decision to be made in civil cases as to Legal Aid funding. On the basis that a more structured approach would invariably increase bureaucracy and delay, we would not be in support of same.

Assuming a more structured approach included a right of appeal against refusal of granting Criminal Legal Aid (on the basis of means or merits), we would submit that solicitors should not be expected by the courts to undertake any work until such a decision is made. One way of avoiding these problems but still imposing a more structured approach would be that if strict financial limits or merits testing were imposed then the fund should meet costs to legal representatives and then recover this from the defendants who were subsequently refused legal aid. This would introduce a desirable element of certainty into Criminal Legal Aid funding and would avoid the delay that would otherwise arise.

In these cases a Legal Aid certificate would essentially be a loan to defendants and recovery would operate in the same way the statutory charge does in family cases.

66 Maximum hourly rates should be prescribed for all work not covered by existing schemes (4.21)

The Report states that this recommendation should be the subject of further consultation and this view would be endorsed by the Society. The relevant section of the Report at 4.21 concerns itself with the operation of the hourly rates by barristers but an obvious concern is the absence of any discretion in the component of a maximum hourly rate to take account of exceptionality. Rigidity and unfairness is a clear risk of regimes seeking to cap costs at specific levels and this can leave remuneration regimes open to the charge of arbitrariness. The need to cater for exceptionality and the provision of adequate remuneration structures thereto has been commented upon previously, particularly by the Supreme Court in the *Brownlee* decision.

67 The right to instruct and agree payment to counsel should be clarified in the regulations (4.34)

It is recognised at para 4.34 that there are situations when the solicitor in any legal aid case can instruct counsel and an agreement with regards to the provision of fees is made between the lawyers concerned. Such an arrangement obviously has no impact on the amount which is claimed from the Legal Aid Fund and the operation in practice does not seem to have caused any particular concern.

To that extent, the need for regulations to be adopted to set out more clearly the circumstances in which agreement to pay counsel by solicitors are required seems at best superfluous and at worst wholly unnecessary.

68 There should be consultation on options for tightening the test for certification for counsel in the magistrates' court (4.46)

The Society has no objection to such a consultation. The Society would reiterate that any changes to the current statutory test under the 1981 Order should be based upon properly researched evidence rather than anecdote.

69 Counsel's scale costs in the county court should operate as a ceiling rather than an entitlement (4.50)

The Society is strongly of the view that the system of scale costs in the County Court is very successful and is the envy of other jurisdictions in terms of controlling costs at rates which are reasonable. We have serious concerns about recommendations which appear to signal a drift towards capping professional fees at lower levels in practice if not in letter. The issue should be considered in line with our earlier remarks about the important principles to be taken into consideration when considering remuneration. We do not support any reductions in the current operation of costs in the County Court jurisdiction.

70 A far more restrictive approach should be adopted to the rules for authorising leading counsel or two counsel, across all case categories (4.58)

It is unclear to what extent the Reviewer was aware of the changes introduced by both the Department and the LSA in this area in recent years. Whilst reference is made in a footnote to the 2012 Criminal Aid Certificate Rules, no reference is made to the provisions of LSC Circular 08/14 and the extent to which it has had on the granting of Senior Counsel on the civil side.

Should it be intended that an even more restrictive approach is now required, an immediate concern with this recommendation would relate to equality of arms. Whilst it is proper that an evaluation of the requirement for two counsel in legally aided cases should be undertaken (and should be subject to further consultation), it should be remembered that publically assisted individuals under the Legal Aid Scheme do not represent the sole use of public money in the provision of legal services. All Government Agencies, Departments, Health Trusts and Public Authorities also engage counsel who are publically funded and there must be a serious risk that an individual will find that he or she is denied the services of a Senior Counsel in a case of importance whilst the Government body or Agency concerned is able to utilise those services.

It is also problematic, that a decision to authorise two counsel should rest wholly with the LSA and not with the Court. There is a strong argument that the court is better placed to determine the complexity of the case and the need for Senior Counsel. Furthermore, the DoJ has already undertaken a review of the levels of representation in civil and family proceedings, the recommendations of which were implemented in May 2014 by LSC Circular 08/14.

It is our understanding that the most recent figures show that the Department has achieved substantial savings through reductions in levels of representation in such proceedings. In the context of these cuts, it does not seem plausible to suggest that a "far more restrictive" approach to authorising Counsel be followed, given that the Department is already concerned about a 'chill factor' discouraging meritorious applications.

It is also disconcerting that it is suggested that a decision to refuse to authorise Senior Counsel should not be subject to any right of appeal. The absence of appropriate safeguards if the extent of this recommendation is followed is concerning and the Society would thoroughly scrutinise any such proposals.

71 Guideline rates for expert fees should be adopted (4.60)

In November 2014 DOJ issued a consultation entitled '*Examining the use of Expert Witnesses in Northern Ireland*'. It included a question in relation to the setting of fixed fees for expert witness services in legal aid cases. We are unaware of any Post-Consultation Report having been issued by the Department. Perhaps this explains why the Reviewer makes no reference to this consultation in his Report.

The Society believes that savings could be explored in relation to expert reports. Solicitors are often in a position where they have to agree to experts' fees at rates that are effectively non-negotiable, and also have very limited leverage over the quality of the reports that they receive. The Society would be supportive of the auditing of work carried out by experts in order to ensure value for money.

It is also a perennial difficulty that the pool of experts available in this jurisdiction is considerably smaller than that available elsewhere in these islands.

The Department might seek to address these problems by working with relevant professional bodies such as the BMA and the Royal Colleges. It might be possible for the Agency to negotiate fixed fees for certain types of disbursement, with an escape clause for unusual circumstances.

By capping the rates and reducing the amount of time dedicated to the expert, there may be more resources available for other forms of representation.

72 Standard fees should be established for family mediation (17.35)

The Society has considerable reservations about the appropriateness of standard fees in cases involving family law issues. Accordingly, the Society does not agree that standard fees for mediation should be established, as this may limit the number of mediation sessions.

In the experience of our members, in family disputes, often a number of mediation sessions are required. The mediation process should not be rushed and people should not be pushed into settlement. This would frustrate the aims of the Report of improving the effectiveness of mediation as a resolution tool. There does not appear to be any suggestion that mediators are not incentivised to resolve cases as soon as possible.

Standard fees can create difficulties of their own in properly catering for exceptionality and ensuring that the provision of services is economically viable in more complex cases and on this basis it should not be assumed that standard fees are a panacea for costs reduction.

73 Legal aid prescribed rates should not affect the level of costs recovery from an opponent (24.26)

As at 7.

74 A new system of payment at “risk rates” should apply to non-family civil legal aid (24.26)

As at 7.

75 New fee schemes should target savings on the higher courts and fees and incentivise desirable behaviours (4.30)

It remains the Society’s views that there must be embedded within any standard fee scheme appropriate flexibility to provide for adequate remunerative rates in cases of clear exceptionality. Whilst the thrust of this recommendation is on savings within the Higher Court, this is likely to fall within the band of cases which do provide exceptional challenges as the scale of work required reflects the complexity of the issues within a case. It should also be noted that the application of standard fees is not per se a means to incentivise desirable behaviour, as most lawyers do in discharging their obligations to the client seek to resolve matters in the best way possible.

Moreover, the legal activity which can occur within a case is often generated by the Court and the setting of Case Management Review hearings, rather than any desire by the parties concerned to embark upon such activity on an unnecessary basis. It is not the case that lawyers are artificially inflating costs; judicial case management and limitations on legal aid certificates act as control mechanisms on the conduct of cases.

The desire therefore to target savings and to concentrate on the High Courts must be tempered by a clear recognition that exceptionality must always be recognised and appropriately provided for.

76 Family fee schemes should consider the requirement for counsel in the Family Care Centre and county court (4.51)

The Society notes that there is already a control mechanism built in to the current scheme, in that authorisation must be sought at FCC level to engage counsel. The reductions introduced to the levels of representation in family proceedings have produced significant financial savings to the Department, seemingly far in excess of initial projections.

On that basis and the reduction in applications, it is difficult to see how further reductions could be introduced without damaging access to justice. It is absolutely essential that the Department should consult with both branches of the profession before any changes are made to the authorisation of counsel at this level. Views are strong on this issue as our members focus on the needs of their clients and the aspiration to present the best possible case to the court using all available means, whether solicitor-advocates or counsel.

77 Family fee schemes should be structured to discourage long running contact disputes (18.32)

It is not the case that long running contact disputes only return to court because one side is being unreasonable. It is often the case that issues arise and there may be changes in family circumstances, for example a parent may relocate, become unwell, lose employment. Protecting the interests of children and parents in this environment is the core of family law. The Society would emphasise that long running contact disputes are the exception to the rule, as there is strong judicial management of cases to ensure best practice and that any delay in resolution is in the children and parties best interests.

This should be a matter for judicial scrutiny and a case should not be brought to too hasty a conclusion on the basis of the funding available. Often it is the most difficult and complex cases that take the longest time. It is not appropriate therefore that the remuneration for such cases be "significantly less generous" than for cases which resolve early. If cases are not given the appropriate time and representation required it is likely that good outcomes will not be achieved and these cases may be required to be returned to Court. This is another important example of short-run long-run calculations in terms of delivering good outcomes for families whilst avoiding unnecessary litigation and costs further down the line.

78 Family fee schemes should be adapted to cater for Early Resolution Certificates (18.51)

The Society has made extensive reference to ERCs above and how they are unlikely to deliver the outcomes sought. There are proposals currently being consulted upon which are proposing standard fees in all family cases. The Society feels that such an early resolution structure would create further bureaucracy, requiring an initial application and a further extension should the matter be required to be taken to Court. This would create delay in cases which would currently receive authority pursuant to the merits test and may be precluded if a settlement is not achieved under an E R C. Given the fees that are proposed for the lowest paid cases under the new proposals, it is difficult to see how an E R C would appropriately remunerate solicitors for the work undertaken.

79 A date should be set for implementation of the scheme (5.11)

The Society agrees with this recommendation and will engage further with the Department in the consultation process required to finalise the implementing Regulations and content of the Scheme.

80 Standards should be developed for police station advice (11.8)

See Response at Recommendation 139.

81 Cooperative standards should apply to family lawyers (18.43)

The Society has in place practice guidance for family solicitors which echo many of the objectives set out in this Report, for example the need to ensure out of court resolution where possible. The approach championed in 'Guidance for Practice' issued by the Society's Family Law Committee (a full copy of which is appended hereto as an Appendix) is as follows:

"The practice of Family Law requires a special approach and the development of skills which enable the practitioner to assist the parties to reach a constructive settlement of their differences and places the welfare of children as a first priority.

The Committee believes that solicitors should work to preserve the dignity of the parties and encourage them to reach agreement. The result will often be to achieve the same or more satisfactory solutions than going to court but at less cost in terms of emotion and money.

Most importantly this approach is more likely to encourage family members to deal with each other in a civilised fashion. It should help parents to put their own differences aside and to agree arrangements that are best for their children. Experience shows that agreed

solutions are more likely to work in the long term than arrangements imposed by a court. Even when proceedings are necessary, it is best for the whole family if the proceedings are conducted in a constructive and realistic way rather than in an aggressive and hostile style.”

82 The Department should engage with the NI Land Registry on statutory charge registration procedures (3.24)

The Society agrees in principle with this recommendation and efforts made to improve the operation of the statutory charge, subject to our comments about fair repayments and the avoidance of further debt issues for economically deprived clients. We consider engagement may also be required with the Enforcement of Judgements Office.

83 The merits provisions in the 2003 Order should be replaced with a general power to set merits criteria in regulations (3.34)

It is clearly a legitimate aim for the LSA to apply a degree of control, consistency and transparency in the granting of Civil Legal Aid. The setting of merits criteria for legal aid applications as such is fundamental in order to achieve those objectives. However, the Society would caution against changing the mechanism whereby such criteria is set, as requiring these to be carried forward in the form of amendments to primary legislation ensures the highest degree of parliamentary scrutiny is applied.

Whilst the recommendation that merits provisions in the 2003 Order should be replaced by a general power to set such merits criteria in regulations has its attractions, the concern is how such merits criteria will be set out. There is also an important point to be made about minimising the complexity of applications, focusing applications on the most deserving applicants and achieving consistency of decision making. The potential for multiplication of merits criteria in legal aid regulations may frustrate these important aims and have the potential to produce inconsistent decision-making. The reference to the *I.S* case (para 3.5 of the Report) is an illustration that the scope for application of stricter merits criteria may have clear limitations.

84 A system of stage limitations should be established for all legal aid certificates (3.47)

The Society considers that the provision of a Legal Aid Certificate stating the level of assistance provided would be helpful both for the LSA in its oversight capacity and to the lawyers involved in processing the case.

The suggestion appearing at para 3.46 is also welcome - namely that it would be better if all Certificates stated what stage they covered and that all further work, appeal or indeed transfer to a new court level was dealt with by amendment to the original Certificate rather than the present situation which requires a fresh application.

Such a change will reduce administrative burden and the attendant costs which that incurs. It is notable also that whilst time limits are applied to the submission of applications, this is not the case when it comes to the making of decisions thereon. The Society would welcome greater consistency and forecasting of decision making in this regard.

85 The statutory factors governing remuneration orders should be deleted (4.5)

The Society is strongly opposed to this recommendation and would refer to our initial response to the Access to Justice II Review. The present statutory criteria which operate in

Northern Ireland are more detailed than those which are applicable in England & Wales and reflect the importance of ensuring effective and efficient legal professionals to carry out legal aid work. It has been recognised by the Supreme Court in *Re Brownlee* [2014] UKSC 4 that factors of time, skill and professional competence are important in any remuneration structure.

Simply removing these factors would send out a very negative signal about the quality of services envisaged for legal aid clients. It is important to note judicial review of remuneration structures cannot substitute the court's assessment of remuneration for that of the Department, but rather requires that the decision making process should have regard to the importance of legal aid clients acquiring a service equivalent to that of a private client. In this respect, the prospect of judicial review helps to improve decision making by focusing on the overall fairness of the rules in achieving the aims stated.

Given that the Report makes positive reference to the private client test in a number of sections, it is important to note that as legal aid clients are expected to exercise the same sobriety of reflection of a client investing his own money, the corollary of this is that they should be entitled to the same quality of representation such resources can fund. The professional skill and commitment of professionals must be reflected in appropriate statutory remuneration principles and the Society would therefore support the retention of the statutory criteria in their current form.

86 The Department should engage with stakeholders with a view to commissioning a study of cost profiles to inform future remuneration policy (4.18)

The Society reserves its position pending further consultation on the terms of reference for any such study but in principle welcomes this initiative.

87 There should be a process to simplify and harmonise miscellaneous legal aid fee schemes (4.32)

The desire to harmonise and simplify the Legal Aid Fee Schemes in Northern Ireland whilst welcome, does require as the recommendation has said "close consultation with stakeholders". Accordingly the Society reserves its position on this recommendation pending appropriate consultation by the Department.

88 LSA should develop proposals and a business case for creating an online process for criminal legal aid decision making (4.47)

The Society is opposed in principle to any suggestion of transferring the decision making process in respect of the granting of legal aid from the judiciary to Government. It is a long held principle that the State should not both hold prosecutorial powers and the means to determine grant of legal aid for criminal defence.

The independence of the judiciary is an important pillar of our criminal justice system and the separation of powers and control of the grant of criminal legal aid is a critical element of this independence. In respect of any application presented to the court, the judges are aware of the elements of the charges the accused faces, evidential and sentencing principles and the sentencing guidelines issued by the Judicial Studies Board.

In England & Wales an example of preserving the safeguard of the power to grant legal aid resting with someone with knowledge of the legal issues is when legally qualified Court

Clerks guide the lay District Judges who are not legally qualified. By contrast the judiciary in Northern Ireland have a minimum period of seven years post qualification before appointment.

Accordingly, the Society strongly disagrees with the sentiment as expressed at para 12.15 “that there is no reason in principle why determinations of entitlement to criminal legal aid should necessarily remain with the Courts”.

The Society will engage constructively with any proposals which emerge about how application processes can be made more efficient but this must not infringe on the independence of judiciary and the granting of criminal legal aid as is currently operated. To remove the grant of criminal legal aid to assist a defendant in facing the combined forces of the PSNI and PPS and leave it in the hands of a government agency has the potential to impact negatively on the defendant and the integrity of the criminal justice system.

89 There should be engagement with before the event legal insurers, and identification of BTE policies on the civil legal aid application form (5.22)

The Society would advise that the current application forms for legal aid enquire as to whether there are any alternative sources of funding and reiterate that these sources should be both credible and sustainable to constitute an effective alternative. We recommend the Department clarify this with the Agency and identify in what respect this recommendation would materially change the current position.

Our members currently ask clients to identify whether such funding is available and outside of this approach we are entering in the question of the supply of insurance and the degree of coverage which would be offered. The Society will carefully consider any proposals which are brought forward as a consequence of this recommendation with the important principle of securing access to justice in mind.

90 The Department should review the potential for overlaps between the different criminal schemes (11.22)

Whilst the Department may wish to undertake such a review, we would respectfully submit that no new issues arise with the introduction of the 2015 Regulations. The schemes have always been separate.

91 The “benefit of the doubt” provision for criminal legal aid should be deleted (13.12)

The Legal Advice and Assistance legislation was introduced by the State to ensure that any person charged with a criminal offence and appearing before the criminal courts had access to expert legal advice and to provide an equality of arms between the State and its citizens. More often than not, those availing of the grant of legal aid are from a deprived socio-economic background. The interests of justice test is a flexible provision to ensure that those charged and appearing before the Courts with limited means have access to that advice.

Any attempt to dilute access to expert legal advice should be firmly resisted and the Society does not agree with this recommendation. The presumption of innocence requires a counterweight to the resources of the prosecution. In para 13.3 of the Report there is an assertion by the Reviewer that “in practice the defendants’ finances are seldom considered in detail”. This assertion does not accord with the experience of our members with regard to

the decision making exercise undertaken in respect of the grant of criminal legal aid to defendants by the District Judges, who rigorously police the merits of such applications.

Similarly, the suggestion contained in para 13.10 that there be a two tier access to criminal legal aid on the basis of the forum for hearing is also concerning. The consequences upon conviction remain the same for the defendant irrespective of which forum he or she is tried in.

92 There should be power to refuse payment for judicial reviews found by the court to be totally without merit (21.18)

Although the court does not have discretion to refuse to order taxation in accordance with Schedule 2 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (see regulation 21(5) of the 1965 Regulations), there are already a number of judicial decisions in which the court has expressed its disapproval of unmeritorious cases being brought and/or the merits of judicial review as the appropriate remedy (see *Re Harper's Application [2015] NIQB 49*).

The High Court can exercise existing powers under Order 62 of the Rules of the Court of Judicature (Northern Ireland) 1980 to disallow some part of a legally assisted persons costs (not to render the assisted person personally liable but merely to deprive the legal representatives of their remuneration) - see also Article 11(1)(b) of the 1981 Order and Regulation 15(16) of the Legal Aid (General) Regulations (NI) 1965. In *Re Harper*, Stephens J directed that a copy of his remarks were made available to the (then) Legal Services Commission to indicate the importance of sufficient strength and quality of evidence informing applications for leave for judicial review. The Society indicated in its response to the initial Agenda Paper that legal aid costs should be revocable only if the court makes a finding that the application was totally without merit.

93 A survey should be undertaken of legally aided judicial reviews (21.32)

The Society believes that this recommendation would be very beneficial to all stakeholders and would welcome opportunity to have input into the terms of reference/overall shape of such a survey prior to its being rolled out. Clearly in England & Wales there is a major problem with immigration decisions (as per Table 8.2 in report). A survey of the Respondents and the range of decisions challenged would certainly assist in ensuring that those Respondents most commonly involved in judicial review proceedings can benefit from appropriate training to improve the pre-action correspondence and provision of information to assist Applicants and the LSA in considering the merits of granting certificates. There needs to be greater clarification on the reasons why judicial review applications were dismissed, refused or withdrawn. The Report comments that 208 such applications were so categorised in 2013/4. Yet the Court can dismiss applications because the relief sought has been obtained and/or the impugned decision rectified. This would not have occurred but for the existence of the judicial review proceedings in question.

Such a statistic should not support the proposition that fewer applications are ultimately successful than are refused/dismissed/withdrawn. An analysis of the orders made by the court would also be instructive and whether declaratory relief or other order(s) is more prevalent in successful applications.

94 CFAs should be made available in Northern Ireland (22.43)

As at 7.

95 CFAs should operate with no additional liabilities upon defendants (22.43)

As at 7.

96 A system of qualified one-way cost shifting should be adopted to protect claimants from the risk of adverse costs (22.43)

As at 7.

97 The level of success fees claimable under a CFA should be regulated and capped at 20% of damages recovered (22.43 and 22.44)

As at 7.

98 The operation of CFAs should be reviewed after three years (22.42)

As at 7.

99 There should be provision for *pro bono* costs orders (5.31)

The Society supports provision for pro bono costs orders as an effective mechanism to extend access to justice to those without effective access to legal aid.

100 The courts should be prepared to use costs orders to penalise unreasonable refusal of ADR (20.7)

The Society would highlight that judges already have the power to penalise a party by refusing an order of costs for unreasonable behaviour or omissions under Order 62, Rule 10 of the Rules of the Court of Judicature (Northern Ireland) 1980. This clearly encompasses unreasonable refusals to mediate and we believe it is important that judicial discretion is the most important means through which to remedy any such issues. In short this is unnecessary as the powers already exist.

101 There should be wider use of protective costs orders (21.21)

The Society supports the use of protective costs orders as a means of providing protection for constructive third party interventions in judicial review proceedings. The Society supports the view expressed in the Report that the public interest is served through facilitating such interventions where appropriate.

102 The indemnity principle of costs should be abolished (22.24)

As at 7.

103 There should be a general move away from adversarial towards more inquisitorial processes (7.11)

We strongly oppose the notion that continental court procedures stemming from very different traditions to our Common Law should be incorporated into our system. This would be a radical departure, costing a significant amount of money and time to operationalise for little discernible benefit. On examination it is evident that continental systems merely

transfer areas of expenditure from one branch of the justice budget to another and it is therefore questionable how these processes can reduce costs.

Whilst it is our strong view that the core principles and practice of the adversarial system work very effectively and should be retained, we accept that some inquisitorial processes might help deliver efficiencies in certain limited respects.

In both criminal and civil justice cases, courts in Northern Ireland are moving towards the introduction of some inquisitorial processes in the pre-trial process. The Society agrees that preliminary directions should be conducted by e-mail, as well as any issues regarding listing of cases and case management. If there is a dispute in relation to a particular area, then the parties may be given an opportunity to make representation prior to final hearing.

Criminal law is founded on the basis of the adversarial process to ensure that an accused party should have the right to be tried in front of his/her peers. Thus "It is better that ten guilty persons escape than that one innocent suffer" as expressed by the English jurist William Blackstone in his seminal work *Commentaries on the Laws of England*, published in the 1760s. Historically, the details of the ratio have varied, but the message that Government and the courts must err on the side of innocence has remained constant and should not be jeopardised by the issue of cost and an inaccurate assumption that the wholesale introduction of inquisitorial processes is a remedy for costs when in fact they would cost a lot to introduce and shift costs within the budget rather than eliminating them.

In criminal matters there is an investigation by PSNI/PPS prior to any decision as to whether a prosecution should proceed. If a decision to prosecute is made, then at the early stages of the prosecution there should be a more inquisitorial process to determine whether or not the matter should proceed to trial. This would reduce the number of adjournment applications made by the defence or prosecution, saving court time and resources. However the adverse impact of an over-extension of inquisitorial processes in the criminal court would result in the defence not being given an opportunity to test the witness evidence by way of cross examination which is critical to the Article 6 ECHR rights of defendants.

104 Parties should be under a general obligation to engage with each other and the court prior to a hearing (7.13)

In recent years the whole thrust of reforms to the justice system through the use of Pre-Action Protocols and court Practice Directions has been for early engagement between the parties – particularly in civil proceedings.

The Society agrees with the common sense principle that there should be a general duty of engagement and pre-hearing communication applied to all proceedings. It should be noted that the LSA already requires sight of all correspondence moving between legal teams to accompany all applications for civil legal aid. In this respect, the introduction of a duty would merely serve to formalise what is already custom and practice in applications for legal aid.

105 Where possible, business should be conducted by telephone or email rather than at oral hearings (7.15)

The Society supports the principle of electronic engagement where this is an appropriate and cost-effective means of communication on issues. It is important however to note that

trials cannot be conducted this way. Much business is already conducted inter-office between parties and efforts made to minimise resort to court appearances. The Society would welcome and encourage greater email communication between practitioners and the LSA as a means of introducing efficiencies in legal aid applications.

There are some examples when business could be conducted more speedily, e.g. there is no reason why agreed adjournments cannot be e-mailed to Court Offices, setting out the grounds for the adjournment rather than travelling to the court and waiting to make an adjournment application. Accordingly, the Society will constructively engage with any proposals the Department, the LSA or NICTS have in terms of improving efficiencies of the civil and criminal justice processes.

106 The practice of placing cases on a whole day list should cease (7.18)

The Society notes that timetabling systems have already operated in a number of courts and appear to have worked reasonably effectively. Accordingly, we agree that this should be much more effective than the current process and will listen constructively to any proposals brought forward which flow from this recommendation.

107 The practice of over-listing should be reduced (7.20)

In theory the process of single/fixed listings would be of benefit to save time and expense. The current system wastes a lot of time for practitioners and clients who can spend all day at court only to find out that their case cannot be heard. If it became apparent that there was an issue which would prevent a case proceeding on the listing date, there should be a process to facilitate agreed adjournments as mentioned in Response 105 which could help reduce the number of contested cases listed on a specific date.

108 Judicial duties should extend beyond completion of the list (7.22)

The Society agrees with this recommendation.

109 Plain English should be used in all reforms (7.27)

The Society agrees with this recommendation.

110 Judges should lead working groups on procedural reform (7.38)

The Society supports the model of judge-led reform initiatives with appropriate involvement from practitioners as an important mechanism for delivering efficiencies within the justice system. The pilot in Family Care Proceedings and the ongoing Civil & Family Justice Review led by Lord Justice Gillen are important examples of this.

111 There should be a statement and action plan to support litigants in person across all court levels (7.34)

The Society believes that personal litigants require appropriate support and guidance to ensure that access to justice is promoted for all in our community. There should be savings as a consequence of such reforms which will improve the process and introduce flexibilities for those lacking the skills of a lawyer. Accordingly, we refer favourably to a number of the proposals contained within the Report of the Judicial Working Group on Litigants in Person in England & Wales. This should encompass ways in which personal litigants can be effectively assisted, trained and facilitated in court proceedings. Thankfully, proportionate

measures can be undertaken in Northern Ireland without the additional pressures on the system due to increasing personal litigants which have resulted from the cuts to the scope of family legal aid in England and Wales.

112 The court's powers to authorise McKenzie friends should be liberalised (7.36)

The Society has considerable reservations about encouraging a market for fee charging McKenzie Friends. The Society exercises control over training, professional development, regulation and the keeping of sufficient professional indemnity insurance to protect the interests of clients. These assurances are not available when McKenzie Friends are used and the boundary lines between appropriately insured, regulated advice and lay assistance should not be blurred.

The Report is correct in stating that every effort should be made to ensure that the disadvantages of personal litigants are minimised. The Society would submit that the approach to the authorisation of McKenzie Friends in court is directed towards that aim. The implication of this recommendation is that courts should be directed to take a more "flexible" approach and that the current approach is damaging to access to justice for personal litigants.

The Society believes that McKenzie Friends do not bring uncomplicated benefits to proceedings and that a nuanced approach is required for their authorisation. This is because McKenzie Friends have the potential to frustrate the process of the courts and an assessment of the value which can be added to proceedings by McKenzie Friends should be conducted on a case by case basis. This is the best way for the court to act in the interests of personal litigants; authorising those McKenzie Friends who add real value and support the litigant whilst retaining the discretion to exclude those who do not.

There is a place for personal litigants obtaining the assistance of lay people in line with their rights under Article 6 ECHR, however the decision over when and in what terms this is appropriate should remain a matter for the court and this discretion should not be fettered by a legislative or administrative presumption that McKenzie Friends should be given rights of audience as matter of course. The Society would recommend the remarks of the Judicial Working Group on Litigants in Person on this issue in their 2013 Report:

"Generally, the practice has been that where it will be beneficial to the fair and just determination of a case to have a lay person conduct a hearing on behalf of a litigant in person, then the right is granted in the interests of justice. However, there has in recent years been a substantial increase in "professional" lay advocates who, without the requisite training or regulation of a professional lawyer, seek to act as advocates for litigants in person in court on the payment of a fee. Some of these representatives charge fees which are similar if not more than those of a professional lawyer. Some are unable effectively to represent the litigant. Some are positively disruptive to the proceedings.

The courts have a similar power to allow lay persons to conduct litigation for litigants in person. Although litigants in person, without doubt, often have assistance in preparing their case, the power to allow a lay person to conduct litigation is very infrequently exercised, for obvious good reason; such individuals are not legally trained; they are unregulated and hence owe no obligations derived from such professional regulation; and they do not owe any obligation to the court. These requirements are generally regarded as essential for the

protection of other parties and to the proper administration of justice.”

The Society is supportive of clear guidance from the judiciary on the principles to be applied when considering to what extent McKenzie Friends should be involved in litigation. However, we do not support the assumption that there is scope to radically extend their involvement in all cases involving personal litigants.

113 A working group should be established on improving the efficiency of magistrates’ court criminal proceedings, taking into account the underlying principles of justice reform listed above (10.14)

The Society agrees in principle with this recommendation and would welcome the opportunity to participate within such a review group. As previously stated, we believe such working groups should be judge-led and involve a range of participants with every day experience of the courts in order to yield best results. The terms of reference of any such group should be informed by wider developments across the justice system and how best to achieve ‘joined up’ reforms which are internally coherent.

114 Consideration should be given to longer term criminal justice reform options (10.19)

Three distinct reform areas are identified in the Report – abolition of committal proceedings, reduction of trial by jury and a defence option to opt for non-jury trial.

The Society would be cautious about dispensing completely with committals. They do not necessarily amount to a “duplication” of work as identified in the Report. Rather, they act as an opportunity to sift out cases which ought not to make it into the trial phase in the Crown Court. If this facility was not available in the Magistrates’ Court, then this would be reducing the opportunity for the defendant to challenge the Crown case and thus would negatively impact upon the fairness of the trial process.

Equally, the notion of reducing the number of offences triable either way might seem logical on the basis advanced in the Report – that seems to be to take the view that “minor” offences ought not to trouble the Crown Court. However, a supposedly minor offence, such as theft, can be much more significant in cases where the defendant’s liberty may be at risk and thus the right of trial by jury ought to be available. Bearing in mind the relatively small number of cases where there is an election for jury trial it seems unwise to remove the right. This is emphasised by the remarks in the Report whereby it is recognised that additional procedures would be required to deal with exceptional cases.

The option for a defendant to elect for non-jury trial is perhaps less controversial. We can see no reason why a defendant ought not to be allowed to elect for a non-jury trial but believe that there ought to be careful consideration of the range of cases where this might be available.

115 A joint approach to family justice should be agreed between the responsible departments (15.4)

The Society takes the view that a joined up approach to the issues involved can only assist in the administration of justice. Agreement on clear leadership for any reforms is essential so that the division of responsibilities do not deflect from an efficient and effective justice system that is fit for purpose and promotes access to justice.

116 A joint policy should be agreed covering the funding of family mediation at all stages (17.32)

It would be important for the relevant Departments to liaise to agree a unified strategy for funding for family mediation. Currently, pre court mediation requires specific authority whilst the mediation offered by the Children's Court Officer is not paid for by the LSA. It would be important that there is some form of unified strategy.

117 The tandem model of representation for the child in public law proceedings should be adapted or abolished (15.24)

The Society strongly opposes any dilution or abolition of the tandem model of representation for the child.

The tandem model has been one of the most successful innovations in the family law system, being referred to as 'the envy of many other jurisdictions' by Thorpe LJ in *Mabon v Mabon* [2005] EWCA Civ 634, [2005] 2 FLR 011. It is important that we prioritise legal aid funding to protect and assist the most vulnerable in our society to strengthen family life for generations to come.

By permitting a child to have representation by a Guardian and a Solicitor a critical partnership flows from the converging of two essential skill bases, with the Guardian providing his/her skills in the area of social work and the solicitor providing his/her skills in legal knowledge. The Society does not accept that these roles overlap, but instead are functionally separate and interdependent in terms of the overall process of the case. The tandem module operates like a pendulum, with momentum in the earlier part of the case weighted in favour of the Guardian obtaining and filtering information at source, then switching to the role of the solicitor presenting and analysing this information in an evidential basis before the court.

The Society refutes the assertion that the tandem model is about "adding more lawyers to the public law process" (page 131). The dual representation model permits an effective partnership no different to that of a social worker and his/her own legal advisor from the Directorate of Legal Services. The child enjoys full party status in public law proceedings and should be entitled to the same level of legal representation as enjoyed by other parties. It is also important to note that the solicitor acts independently for the interests of the child and this may be crucial in situations where there is disagreement with the assessment of the Guardian.

At page 130 of the Report, reference is made to an assumption that the more articulate the child is then the greater the access to legal representation. In other words, the older the child the more likely s/he will need access to a solicitor as well as a Guardian. It is

submitted that the competency or otherwise of a child should not be the determining factor in whether access is given to legal representation. Whether a case involves a baby, an infant, a child or a teenager the same complex factual matrix exists and all public law cases involve detailed analysis of the law and cases to determine the appropriateness of orders.

By requesting Guardians to determine which of their cases require legal representation and which do not, the Department risks putting the Guardian under further pressure by creating a job-share style role of quasi-guardian, quasi-solicitor. This will result in stifling the role of the Guardian and drain valuable resources in aspects of his/her work currently shared with legal representatives. To abolish the tandem model will result in the Guardian attending all court reviews/hearings (currently a role shared with legal advisors) as well as undertaking his/her duties as a professional expert to the Court. This will create a conflict for the Guardian and place an intolerable burden on the role of Guardian, the outcome of which risks, causing permanent damage to how children are represented. Moreover, any changes made to remove the tandem model could place our system in direct conflict with Article 12 of the UN Convention of the Rights of the Child.

118 The budget for legal representation for the child should be transferred from the legal aid fund to NIGALA (15.24)

The Society regards the retention of the tandem model in family proceedings as imperative and due to the separate and distinct functions of the Guardian and legal representative, it would not be appropriate for NIGALA to assume control over the legal aid budget in this respect and this should remain with the LSA. We would stress that the outcomes of the recent pilots in family proceedings in England and Wales support the idea that cost savings and a reduction in unnecessary delay and hearings can be achieved without compromising the model of family justice in this jurisdiction which works extremely well. Moreover, such improvements in efficiency occurred due to the close partnership between legal professionals, the court, local authorities and Guardians. On that basis, we believe efforts should focus on ongoing pilots and Reviews as a means of achieving efficiencies within the system overall rather than reshaping the funding arrangements.

119 The Department should consult on the establishment of a unified family court (15.31)

Previously in England & Wales the vast majority of family cases entered the court system at a tier equivalent to the Family Care Centre, with the possibility for cases to move downwards or upwards. To address the problems this presented for best use of resources, a unified family court was introduced. Whilst we can see the benefits of one unified set of rules for the family courts, we remain to be convinced that it is necessary to have a unified family court if this results in increased bureaucracy.

In Northern Ireland, save for cases in relation to divorce and ancillary relief, the Family Proceedings Court is the starting place for virtually all family cases. It already provides triage with over 90% of all cases commenced there staying there. Application is made to the District Judge if, due to particular circumstances, the case is viewed as one that requires to be transferred to a higher court.

The court system will always have to deal with differing degrees of cases based on content, complexity and special circumstances. The more complex cases will naturally involve more

time and expertise, thus resulting in higher costs, whether there is one unified court or three different levels.

We would propose that a consultation does not take place until such times as the Department carries out fuller research on any problems presenting with the current structure in Northern Ireland and has the benefit of any research carried out in relation to the unified family court in England & Wales.

120 The Review of Civil and Family Justice should consider the family justice reform options suggested in this report, taking into account the underlying principles of justice reform listed above (15.33)

The Society understands that Lord Justice Gillen is mindful of this Report and its Recommendations and will comment accordingly when reporting on the Review of Civil & Family Justice. The Society has continually emphasised the importance of a holistic, comprehensive view being taken of the civil and criminal justice system as a means of identifying more efficient and effective methods of working. In that respect we await the outworking of the Gillen Review to assess next steps.

121 Issues raised by consultees concerning public law proceedings should be addressed in the forthcoming public law pilot (15.39)

As stated above, the Society supports the principle that all relevant issues and proposals should be explored within the context of ongoing review work within the justice system. If there are issues relevant to the terms of reference to the new public proceedings pilot within this Report which could be usefully explored in that exercise without prejudice to its aims then the Society is content that these are explored.

We believe that both the pilot and the Review present an important opportunity to bear down on inefficiencies within the court system. The evidence of similar pilots in England & Wales bears this out. The Society would emphasise that any proposed recommendations/changes resulting from this Report should await the outcome of these Reviews and a consultation process with all stakeholders. This is appropriate not least due to the importance of a collaborative, 'joined up' approach to new policy initiatives and the increased chance of achieving efficiencies based on such an approach.

122 Consideration should be given to the abolition of lay magistrates in the Family Proceedings Court (15.40)

The Society is of the view that further research is required in this area before substantive comment can be made.

123 Divorce procedures should be made more administrative (15.44)

The Society is aware that this area is the subject of further consideration by the Review of Civil & Family Justice being carried out by Lord Justice Gillen who has presented details of other jurisdictions which operate such an administrative process for the consideration of the Review Group.

Whilst it is acknowledged that such a system has some potential, the Society submits that it is simply not appropriate for all cases. For example in cases where there are children under 18 (16 if not in full time education), the judge has a statutory function to fulfil in approving

the arrangements for those children. This cannot be done administratively and similarly there are often interlocutory matters which require to be dealt with, such as issuing amended or second petitions, proving service etc. which are not suited to an administrative process. Contested divorces cannot be dealt with in this manner emphasising that all divorces cannot be completely administrative.

Even if the granting of a decree nisi can be facilitated by an administrative process there has to be a regime for disposing of otherwise unresolved financial matters.

In Northern Ireland, the ending of a marriage has always been considered to be a serious matter and the Society recognises that for many people, attending court is a way to acknowledge the step being taken. The Society argues that this proposal assumes a degree of knowledge and capability among the divorcing population which does not exist.

We are of the view that in Northern Ireland, the current infrastructure does not exist to enable this proposal to be implemented. It will require a support system to be in place which could cost as much as the current system. Furthermore, such a system would require both legislative and Statutory Rule changes. Accordingly, a cost-benefit analysis should precede any decision to introduce this model to ensure that any savings are real and sustained and that it does not impact access to justice.

124 All divorce petitions should start in the county court (15.44)

The Society can see no reason why proceedings should not issue in the County Court in those cases where legally assisted divorcing parties have no assets and/or no issues relating to children in dispute between them. Similarly if issues in relation to assets and/or children have been resolved by the parties and committed to an agreement, the County Court is clearly the more appropriate forum for the issue of divorce proceedings. As we understand that just under 50% of cases have County Court Legal Aid Certificates issued, it may be that the majority of these cases are already adjudicated at this court tier.

At present there are considerable advantages for clients who issued divorce proceedings in the High Court with regard to the following:-

Property

There is a developed system within the High Court for dealing with property disputes, with an assigned Family Master who has acquired a detailed knowledge of this area of practice by virtue of dealing with these issues on a daily basis. A Pre-Action Protocol applies which provides for pre-application disclosure and negotiation in appropriate cases to facilitate the parties being in a position to settle the case fairly and early without litigation. This Protocol does not extend to the County Court.

Considerable progress in reducing the number of court hearings involved in the High Court and expediting the determination of these cases has been made in recent years with the introduction of Ancillary Relief Guidance issued by the Family Master and the introduction of a Financial Dispute Resolution Hearing Stage.

This system is supportive of parties arriving at their own financial settlement. At the Financial Dispute Resolution Hearing, the parties are given an opportunity to negotiate prior to the final hearing, with the parties being obliged to record all offers, responses and agreed matters. It is heard by a High Court Master, other than the one who is assigned to dispose

of the Final Hearing. These arrangements do not extend to the County Court – one particular difficulty being the absence of a second District Judge in each County Court Division to hear the Financial Dispute Resolution Hearing.

Children

Many divorcing parents are unable to separate their children's interests from their own. Complex issues arise with regard to the welfare of children which require determination by the court to ensure that rights are protected and upheld. For disputes involving children in the High Court, there is also an assigned Master and Judge who again deal with these issues on a day and daily basis, thereby acquiring specialist knowledge and considerable experience of the problems arising.

Listing arrangements

The High Court Masters sit on a daily basis. This facilitates flexibility in obtaining hearing dates. It is also possible to have disputed cases listed for hearing which are likely to extend over a number of days. Ancillary relief proceedings represent only a small part of the work undertaken by District Judges in the County Court. In regional court hearing centres, only one day a month is usually assigned in the court calendar for the hearing of ancillary relief disputes. This can lead to lengthy delays in having cases resolved.

Accordingly we are unable to support a recommendation that all petitions should start in the county court without having some clarification with regard to the circumstances in which it would be considered appropriate for an applicant to issue proceedings in the High Court.

At this stage our view is that in the interests of the parties involved, a significant number of those cases involving disputes about property and/or children should not be disposed of in the County Court until such times as similar provisions and procedures as are currently in place in the High Court are brought into operation at that court tier.

One further point arises. Where a divorce petition is issued in the High Court for reasons of complexity which are then resolved, the case must remain in the High Court. Consideration may wish to be given to changes in Rules of Court which would facilitate transfer of these cases to the County Court.

125 Family court procedures should require parties to attend information meetings to learn of alternatives to the court (17.31)

The Society draws attention to the fact that solicitors regularly advise clients of alternatives to court remedies. These clients are not recognised in statistics as they never apply for legal aid or come before the court as they are signposted elsewhere. We feel that the inclusion of a box to complete asking for confirmation that they have been advised and are aware of alternatives to the court would be a more efficient way of achieving the aims of this recommendation.

The likelihood of having to deal with missed meetings and the impact of opponents having to attend the same meeting in potentially hostile situations would be counterproductive. This reinforces the Society's view that mediation and ADR processes must be voluntary in order to maximise their effectiveness, as without the necessary will on behalf of the parties to seek resolution this could become a largely academic (and potentially costly) exercise ahead of proceedings.

126 There should be a practice direction on enforcement of contact orders (15.50)

As discussed earlier, giving District Judges in the Family Proceedings Court the power to issue sanctions would be a useful tool for courts to enforce compliance with contact orders.

The Department will also wish to liaise with the Civil Law Reform Division of the Department of Finance & Personnel who carried out a consultation on *Contact with Children Post Separation* in late 2014, the enforcement of contact orders being one of the issues which was consulted upon.

127 Greater use should be made of costs and financial sanctions for non-compliance with orders (15.50)

It is the Society's view that where courts can impose these sanctions, they are being utilised appropriately. It is a matter for judicial discretion, but often given the nature of alleged breaches it is difficult to reach a determination, as the net effect of a sanction could be to give rise to further hostilities in a case rather than swifter resolution of the issues. In this respect judicial discretion is of vital importance as flexibility is required to judge what is appropriate and likely to be effective within the individual circumstances of the case.

Again this was an issue which was considered in the DFP consultation referred in the Response to Recommendation 126.

128 There should be power to impose community orders for non-compliance with orders (15.50)

Again this was an issue which was considered in the DFP consultation referred in the Response to Recommendation 126. It would be important to learn of the experience from England & Wales in relation to the operation of sections 4 and 5 of the Children and Adoption Act 2006. It would also appear that similar legislative provision has been considered by the Republic of Ireland.

The Society's initial view is that for people who have children, these orders would inevitably be difficult to comply with. However, we take the view that if they were used in a reasonable way, they might prove useful. The Society recognises that this is again a matter for judicial discretion. It is the responsibility of the judge to use the information s/he would have to decide the best course of action. An example might be seen in a situation where custody is not warranted but a financial penalty would result in financial hardship, leading to a detrimental impact on a child/children.

129 There should be a practice direction on the use of assets to fund ancillary relief (18.40)

The Society notes that existing legislation allows for costs orders to be made in all ancillary relief cases; whether privately or publicly funded. There is currently a culture of costs orders only being made in rare cases. There is a wider issue here of looking at the overall ancillary relief procedure to encourage early settlement and not just encouraging costs orders to be made in order to recoup legal aid costs. This is a wider issue beyond just legal aid expenditure. A consideration of the experience of other jurisdictions would be beneficial.

130 A feasibility study should be commissioned into introducing the Scottish system of Children’s Hearings into Northern Ireland (16.22)

The Society would caution that making straightforward comparisons in terms of legal aid costs and outcomes between the Scottish system and those operating in Northern Ireland and England & Wales is misleading. For example, whilst para 16.16 of the Report compares legal aid spending per head of the population, this is not comparing like with like as in the Scottish system, costs are driven by the operation of the Scottish Children’s Reporter Administration (SCRA) and The Children’s Panels (CP). For example, in the most recent financial year, the publicly funded budget for the SCRA was over £20 million and the budget for the CP was £3.3 million. This combined figure does not include the amount allocated for legal aid for lawyers in Children’s Hearings or the training of panel members and others directly by the Scottish Executive. Moreover, the Society understand that local authorities also contribute a variety of funding to the operation of the Scottish model.

Taking the figures from the ATJ II Agenda Paper on public and private law family proceedings in 2013/2014, the combined figure was approximately £23 million which had remained roughly consistent across three financial years since 2011/2012. Whilst it is true that this does not provide a fully comprehensive comparison and any such exercise would have to fully audit cost pressures across the system, it does significantly question the Report’s enthusiasm for the Scottish model on grounds of cost. This exercise aptly captures the Society’s point that system-wide costs need to be assessed in the round and that cost pressures are brought to bear on different sections of the Budget in different systems. Broadly speaking this reflects the inquisitorial/adversarial divide, with the former system investing significantly more in resourcing the courts process, the latter significantly more in legal aid.

Further to our earlier discussion about the inquisitorial/adversarial divide, the Society considers that there would be little benefit in undertaking an exercise to scope the introduction of a wholly separate system of family justice in children’s cases, with no precedent in this jurisdiction and with uncertain effects. In addition to the uncertain application of such a system, any move in this direction would lead to unprecedented upheaval and a likely spike in costs during a lengthy transition into a new system. The Society is strongly of the view that a more economical and prudent approach would be to examine the outcomes of the Gillen Review of Civil & Family Justice and the Family Proceedings Pilot to look at ways efficiencies within our system can be achieved and delay reduced.

131 The county court should be made the compulsory point of entry for an increased range of cases (19.21)

The Society understands that this issue is being considered by the Civil & Family Justice Review. We have concerns that this proposal has the potential to add to costs and delay in litigation, both in terms of the need for increased case management and applications to transfer cases to the High Court. The County Court works very effectively at the present time and this should not be jeopardised as compressing business into lower courts does not necessarily improve cost-effectiveness.

132 The Review of Civil and Family Justice should consider the non-family justice reform options suggested in this report, taking into account the underlying principles of justice reform listed above (19.22)

The Society agrees that the Civil & Family Justice Review should engage with the ideas contained within this Report as part of its work. It is our understanding that this process is already underway

133 The courts should have power to certify judicial review cases as “totally without merit” (21.18)

See response in respect of Recommendation 92.

134 The courts should exercise a wider court discretion over judicial review time limits to facilitate ADR (21.20)

The 3-month time limit needs to be jealously guarded - in particular if the obligation for “promptness” is removed from Order 53 r 4 RCJ following the recent DoJ Consultation. Good administration (of which public decision-making is an integral part) benefits from legal certainty; and this can be undermined if decisions are impugned after a defined period of time. The courts already exercise flexibility in terms of time limits after leave has been granted – often to facilitate mediation/ADR. If it is applied and policed appropriately, the pre action protocol should provide a form of ADR, in that the proposed Respondent is informed of what action is considered necessary to avoid the issue of leave proceedings. If leave is granted then greater flexibility could be afforded to facilitate ADR, if appropriate to the circumstances to the decision under challenge.

Judicial review has been described as an invitation to the High Court to “conduct an audit of legality”¹; and as such, the outcome of the audit is for the betterment of society at large which benefits from the highest standards of decision-making. This is the cost benefit analysis of the merits test and the importance of ensuring that any dilution to the access to the remedy of judicial review does not have “a chilling effect on access to justice.” As a result, whilst it is important to ensure that the possibility of effective ADR in appropriate circumstances is open to clients, it is also critical to note that in many cases recourse to court will be necessary to provide effective redress¹ see McCloskey J in *Re Board of Governors of Loreto Grammar School's Application* [2011] NIQB 36.

135 The Rechtwijzer system and its potential in Northern Ireland should be kept under review (26.6)

The Society understands that this is a matter which is being considered by the Civil & Family Justice Review and we agree that any new proposals should be examined on their merits. However, the Society has reservations about the rendering of the divorce process as purely administrative and we have set these out in our answer to Recommendation 123.

One of the key risks to digitised systems is that they may only be appropriate for clients with a much stronger grasp of the system and many clients availing of legal aid funding do not necessarily fit into that category and this should be borne in mind. Face to face advice is an efficient means of addressing multiple issues which clients present with and there is a real risk of ‘salami slicing’ of functions which can frustrate clients.

The Society is committed to improving the efficiency and online capacity of our justice system, however such efficiencies are a complement to, rather than a replacement for our existing face to face processes.

136 The development of online courts and their potential in Northern Ireland should be kept under review (26.8)

As at 135.

137 A pilot scheme for basing dispute resolution “registrars” in a Northern Ireland court or tribunal should be considered (26.12)

The organisation Justice has proposed such a scheme for England & Wales. It would be helpful to benefit from the experience of any pilot there. Provided it has an opportunity to input to the shape and terms of reference of any pilot, the Society would be agreeable to participating in same.

138 The Law Society should encourage more *pro bono* provision from larger firms (5.31)

The Society’s membership currently undertake a large number of pro-bono cases as a commitment to extending access to justice within the community. The readiness of individual businesses to undertake pro-bono work will depend upon the economic position of the firm and available expertise in the areas concerned. The Society regularly review our policies in line with our statutory functions and will continue to do so in the interests of promoting access to justice for the community.

139 The Law Society should publish the rules for a comprehensive duty solicitor scheme (11.8)

The Society currently operates a Duty Solicitor Scheme for the Belfast Police District. The Society had planned to develop a more comprehensive scheme across Northern Ireland in 2015 but decided not to proceed with same at that time for reasons related to changes to police divisions to accord with local government boundary changes, the closure of a number of police stations, new arrangements made for Designated Holding Centres due to the refurbishment of a number of police stations and the relocation of the Serious Crime Suite.

As the out workings of these developments become clearer in coming months, the Society will proceed to scope a more comprehensive scheme. In doing so the Society recognises that standards should be set at an appropriately high level for police station advice with an appropriate quality assurance mechanism in place. The Society’s work in this area is a priority for development and we are happy to brief the Department on this matter and its current progress.

140 The DFP should review the operation of the Law Society waiver and other protectionist professional rules (9.13)

The Society does not accept that the operation of Article 28 of the Solicitors (Northern Ireland) Order 1976 is protectionist in intent. As in other professional contexts, reserving areas of work for qualified professionals with appropriate supervision actually assists the market principle through security of supply and greater consistency of quality. Rather than being protectionist, the operation of Directions of waiver under Article 28 creates a carefully

crafted statutory framework which safeguards the client rather than the profession. Rather than seeking to exclude access to legal advice, Article 28 actually creates space for the Society to depart from the private practice model to ensure the provision of advice to those most in need within the community. This is clearly in the public interest and an aim which we support.

The Society takes its statutory duty in this regard very seriously and has granted a Direction of waiver to a number of organisations in specific cases to help to facilitate access to justice. As part of this exercise, the Society safeguards the protection of clients by clearly defining the areas of work such organisations can offer and requiring such organisations to take out adequate professional indemnity insurance. The suggestion in the Report that this model in some way constrains access to quality of advice is a misnomer. It is a flexible regime to facilitate such access.

141 The Bar Council should liberalise the rules for QCs acting alone (4.58)

This recommendation is for response by the Bar Council.

142 The Law Society and Bar Council should consider a protocol for the provision of an ENE service (20.17)

The Society is open to considering means to promote ADR in appropriate cases as part of the mix of dispute resolution options. However we do not support making the process compulsory or making legal aid funding contingent upon exploration of ADR.

143 Decisions on certification for counsel should remain with the court, pending an alternative online system (4.47)

The Society is of the view that the present arrangement whereby certification decisions for counsel is with the court should be retained. In line with our earlier comments concerning the introduction of electronic systems, we support the exploration of alternative mechanisms such as online systems and see no reason why the court itself could not operate such a system.

144 There should be no general move to contracting for all legal aid services (5.8)

The Society supports and endorses this recommendation for the reasons outlined both in our response to the Agenda Paper and in previous Consultations. Contracting for legal aid services in Northern Ireland is unnecessary as the network of solicitors here already provides a skilled and comprehensive service to the community.

145 The Widgery criteria for criminal legal aid should not be amended (12.4)

The Society agrees that the Widgery criteria should be retained in their current form.

146 The grant of criminal legal aid should remain with the court, pending an alternative online system (12.17)

The Society agrees that the grant of criminal legal aid should remain with the court and that judges are the most appropriate persons to take such decisions. Interaction with the court may be digitised where this improves the overall efficiency of the process, but we do not think such decisions should be made administratively or taken away from the courts.

147 No panel of Crown Court advocates should be established (14.6)

The Society supports the affirmation by the Report of the importance of client choice of representative as an essential principle of our system of justice. The Society believes that client choice bolsters the independence of defence services from the State who are charged with prosecution and that is an important constitutional imperative. The Society is constructively engaging with the DOJ on the scope and shape of the Registration Scheme for legal aid providers and aims to support quality assurance in a manner which does not interfere with client choice.

148 No public defender service should be established (14.11)

The Society agrees with the conclusion of the Report that there is no business case for the introduction of a Public Defender Service (PDS) in Northern Ireland for a number of reasons. However, we would depart from the Report and reiterate that criminal defence services provided by an independent profession increases client confidence in the independence of the defence from the State. Any Public Defender model, irrespective of any institutional mechanisms to stress its independence, will create a public perception that criminal defence services are now effectively an arm of the State. Given the particular importance in Northern Ireland of protecting the reality and perception of independence in the rule of law and due process, a PDS holds little attraction for this jurisdiction on that basis.

The Society believes that a strong base of private providers provides a bulwark against populist approaches to criminal defendants, as strong independent advocates explain the importance of a fair trial and the rule of law for all in society and are an important counterbalance to government, who come under a different range of pressures. This engagement from a position of separation preserves a balance of power within the justice system. This position also avoids the situation of salaried defence lawyers having to enter into a politicised debate with their own employers, avoiding any perception of unfairness to defence clients.

Furthermore, of the available evidence on other Public Defender models, it is clear such a system does not recommend itself for implementation in Northern Ireland. The Society would refer to previous representations we provided to the DOJ in our response to the Consultation which led to the introduction of the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015. The Society has not seen evidence which contradicts these findings and as a result there are sound reasons both in terms of principle and cost to favour the current network of solicitors practices as a high quality reliable provider.

149 Private law family legal aid should remain in scope (18.7 and 18.34)

The Society considers that it is absolutely imperative that private law family proceedings remain within the scope of legal aid. Dealing with issues involving children are extremely sensitive and important. Parties involved in these proceedings are often lacking the necessary education to advocate effectively on their own behalf, are financially unable to fund legal representation and in cases where there are issues of domestic violence, criminality, drug misuse, alcohol addiction issues it is entirely unacceptable to expect parties to resolve matters directly. It could result in children being placed in even greater

hostile situations and adversely impact their wellbeing. The regrettable experience in England and Wales has been well documented and reported on by various stakeholders and Parliamentary Reports. The Society refers to its previous representations on these issues in its response to the Agenda Paper and in the Consultation on the scope of Civil Legal Aid for further discussion of these trenchant criticisms of the approach in England and Wales.

150 The Green Form scheme should be retained largely in its current form (25.26)

The Society supports and endorses this recommendation as we have consistently maintained that the Green Form Scheme provides skilled, cost effective advice which prevents legal problems escalating for many in our community. We would refer the Department to our previous responses in relation to the scope of the Scheme and why we believe it is a cost saving system.

APPENDIX 1

LSNI GUIDANCE FOR PRACTICE FOR FAMILY LAWYERS

- **Introduction**

As a result of the increasing volume of disputes in the area of Family Law and the introduction of new legislation, the Family Law Committee of the Law Society is of the view that a Guidance for Practice, specifically directed to the issues which arise for solicitors practising in this area, should be circulated to the profession. The Committee believes that this Code should be adopted as a sensible and attainable standard of professional practice.

It is clear that Family Law is different from all other areas of law because of the important and very personal aspects which arise in any family case. Consequently the practice of Family Law cannot be handled with the same approach and attitude as that employed in other civil cases. The practice of Family Law requires a special approach and the development of skills which enable the practitioner to assist the parties to reach a constructive settlement of their differences and places the welfare of children as a first priority.

The Committee believes that solicitors should work to preserve the dignity of the parties and encourage them to reach agreement. The result will often be to achieve the same or more satisfactory solutions than going to court but at less cost in terms of emotion and money.

Most importantly this approach is more likely to encourage family members to deal with each other in a civilised fashion. It should help parents to put their own differences aside and to agree arrangements that are best for their children. Experience shows that agreed solutions are more likely to work in the long term than arrangements imposed by a court. Even when proceedings are necessary it is best for the whole family if the proceedings are conducted in a constructive and realistic way rather than in an aggressive and hostile style.

GUIDANCE FOR PRACTICE

- **General**

1. At an early stage you should explain to your client the approach and ethos that you adopt in Family Law work.
2. You should encourage your client to see the advantages to the family of a constructive and non-confrontational approach as a way of resolving differences. You should advise, negotiate and conduct matters so as to help the family members settle their differences as quickly as possible and reach agreement, while allowing them time to reflect, consider and come to terms with their new situation.
3. You should ensure that your client understands that the interests of the children should be a primary concern. You should explain that where children are involved, your client's attitude to the other family members will affect the family as a whole and the children's relationship with their parents.
4. You should encourage the attitude that a family dispute is not a contest in which there is a winner and a loser but rather that it is a search for fair solutions. You should avoid using words or phrases that suggest or cause a dispute when no serious dispute necessarily exists.
5. You should appreciate that personal emotions are often intense in family disputes and you should avoid heightening such emotions in any way.
6. You should take great care over correspondence and have particular regard to the impact that it could have both on other family members and your own client. Remember that clients may see assertive letters between solicitors as aggressive and a personal attack on themselves. Your correspondence should aim to resolve issues and to settle matters, not to further antagonise other parties. You should always bear in mind that correspondence may, at some stage, be produced to the court. Also remember that any letters which you write to another solicitor may be seen by the opposing party.
7. You should aim to avoid mistrust between parties by encouraging, at an early stage, full, frank and clear disclosure of all information. You should also encourage honesty and openness. As a solicitor you should avoid expressing personal opinions as to the conduct of the other party.

- **Conflict of Interest**

8. Where you have acted for parties in non-contentious matters and subsequently one or other of the parties returns to you seeking advice, remember that you have a duty to ensure that the other party has no objection to your retainer and that, in the course of the work done for the parties, you have not acquired any information which could lead to a possible conflict of interest.
9. The Committee is of the view that it is unprofessional for a solicitor or a firm of solicitors to represent both parties in any family dispute.

- **Relationship with your client**

10. You should ensure that you are objective in your relationship with your client and do not allow your own emotions or personal opinions to influence your advice.
11. You must give advice and explain all options to your client. The client must understand the consequences of any decisions that have to be made. Remember that decisions must be made by your client and not by you.
12. You must ensure that your client is fully aware of the basis on which legal costs will be charged and the impact of costs on any chosen course of action. In appropriate cases, you should find out if your client is eligible for legal aid.
13. You should explore with your client the possibility of reconciliation if appropriate.
14. You should make your client aware of other available services such as mediation and counselling which may bring about a settlement and help your client or other family members.
15. While recognising the need to advise firmly and guide your client, you should ensure that where a decision is made by your client, the consequences of any decision are fully understood both as to its effects on the client and on any children.
16. You should inform your client of all offers made by the other side.
17. Your correspondence both with the client and with the other side should focus on resolving contentious issues rather than emphasising difficulties that have occurred in the past.

- **Dealing with other solicitors**

18. In all dealings with other solicitors you should show courtesy and endeavour to create and maintain a good working relationship.

19. You should try to avoid criticising the other solicitors involved in the case.

- **Dealing with the other party in person**

20. Where you are dealing with someone who is not represented by a solicitor you should take particular care to be courteous and restrained. You should try to express letters and other communications clearly, avoiding technical language where it is not readily comprehensible to the person or might not be understood.

21. In every case you should advise the un-represented person to consult a solicitor in the interests of the family.

- **Court Proceedings**

22. When taking any action or proceedings which are likely to cause or increase animosity between the parties you must balance the perceived advantage of proceeding against the long term effect on your client and other members of the family.

23. Where the purpose of taking a particular step in proceedings may be misunderstood or appear hostile, you should consider explaining it, at the first practical opportunity, to the others involved in the case or their solicitors.

24. In particular, when you are acting for a petitioner, before filing a divorce petition, you and your client should consider whether the other party or their solicitor should be contacted in advance about the petition, the statements on which the petition is to be based and the particulars, with a view to coming to an agreement and minimising misunderstandings.

25. On the other hand when you are acting for a respondent and either you or your client receive a petition or statement of arrangements for approval, unless there are exceptional circumstances, you should advise your client not to start their own proceedings without giving the other party at least 7 days' notice in writing of the intention to do so.

26. You may wish to discourage your client from naming a co-respondent unless there are very good reasons to do so.
27. You should conduct all Family Law proceedings including preparation and advocacy in the most cost effective manner and in such a way so as not to increase hostility unnecessarily and so as to allow reasonable opportunity for settlement.
28. You should encourage the parties to endeavour to agree as many issues as possible in advance of a court hearing so as to reduce the errors of conflict and you should cooperate with the other side on the production of documents to ensure the smooth running of the case.

- **Financial Provisions**

29. It is inevitable that an income which up to the time of the breakdown of the marriage was adequate to maintain a single establishment will be inadequate to maintain two separate establishments and you should bring this to the attention of the parties at the earliest opportunity in order to avoid unrealistic expectations.
30. You should ensure that your client is aware of the obligation to make full financial disclosure of all assets, liabilities and income.

- **Children**

31. In advising, negotiating and conducting proceedings you should encourage both your client and other members of the family to have regard to the welfare of the children as the first and paramount consideration.
32. You should aim to promote co-operation between parents in decisions concerning the children and should consider encouraging arrangements to be reached directly between the parties, through their solicitors or through mediation rather than through a court hearing.
33. You should endeavour to keep issues relating to the residence and contact of children on the one hand separate and independent from issues relating to finance on the other.
34. If you are acting for one of the parents, you should avoid direct contact with your client's children unless there are exceptional circumstances. You must remember that the

interests of the child may not reflect those of either parent. In exceptional cases it may be appropriate for the child to be separately represented.

- **When your child is a child**

35. You should only accept instructions from a child if you have the necessary training and expertise in this field.
36. You must continually assess the child's ability to give instructions.
37. You should make sure that the child has enough information to make informed decisions. You should advise and give information in a clear and understandable way. Also be aware that certain information may be harmful to the child.
38. You should not show favour to either parent or any other party involved in the court proceedings.