

# **A STRATEGY FOR ACCESS TO JUSTICE**

**The Report of Access to Justice (2)**

**September 2015**



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## Introduction

This is a good time to write a report on access to justice. It is 50 years since legal aid was established in Northern Ireland. It is the 800<sup>th</sup> anniversary of Magna Carta, history's most famous declaration of access to justice and the rule of law. This review takes place at a time when the financial pressures on legal aid and justice in Northern Ireland are greater than ever before.

The review provides an opportunity to stand back and take a fundamental look at justice in this jurisdiction. What is access to justice and why does it matter? Why are the courts organised as they are and what can be improved? What is the positive case for legal aid at a time of fiercely competing priorities for public funds?

At the time of writing, significant reductions in the scope of civil legal aid and in remuneration are under consideration by the Department of Justice to meet severe budget pressure in the current financial year (2015/16). Nothing in this report is intended to impede or undermine the urgent action that is necessary to address those immediate issues. The Access to Justice Review is about developing a longer term strategy for a sustainable legal aid scheme operating within a more efficient and effective justice system. It also explores ways of enhancing access to justice for the citizens of Northern Ireland not covered by legal aid.

Views on the future of legal aid and access to justice are rightly held and expressed with great passion but cannot always be reconciled with the reality of a decreasing budget. I do not expect to achieve a consensus among all the key justice stakeholders on the proposals in this report, but I do believe that there is much common ground on the underlying principles and priorities.

This report, together with that of the first review, contains a large number of principles, ideas, and recommendations. Given the limited resources available to the Department of Justice and other departments and agencies, prioritisation and well targeted action will be essential. I have tried to make this report as comprehensive as possible, taking stock of past and current initiatives. I hope that the Department and all the justice stakeholders will commit to working together within the guiding principles outlined in this report to take forward an agenda that will deliver access to a quality justice system within the available finite resources. I say more about this at the end of this report.

The strength of this report is that it offers a wholly independent, objective and pragmatic set of recommendations, based on all the work of my predecessor, Jim Daniell, and my own work and observations informed by 25 years' experience of legal aid and access to justice issues. Some of the recommendations in this report will positively improve access to justice, some will save money while maintaining access and some will save money at the cost of targeted reductions in access. Overall however, I am convinced that a world class justice and legal aid scheme can be preserved in Northern Ireland even in these times of austerity.

Achieving this will require some bold, innovative and radical reforms and a clear sense of direction. I hope this report will help to bring this about.

## **Terms of Reference**

This review was established by the Minister of Justice, David Ford MLA, with the following terms of reference:

“Publicly funded legal services have undergone significant reform and change in recent years. Looking to the future, it is important to have a clear strategic approach to the development of publicly funded legal services and access to justice.

A strategic approach is necessary to safeguard the interests of justice in an environment where there are many competing demands on public expenditure. It helps ensure that decisions on resources are informed by clearly articulated and prioritised business needs. It will help government to meet its obligations by ensuring that the right services are prioritised and can be sustained at the appropriate level and quality into the future.

Building on the review conducted in 2011, and taking account of changes already in hand, this further review of access to justice will contribute to the development of the vision for the future of publicly funded legal services in Northern Ireland, drawing on the views of the legal profession and other stakeholders, taking account of the experiences of other jurisdictions and reflecting on the financial implications.

The review will:-

- Identify and prioritise those services where publicly funded advice and/or representation should be provided in order to meet human rights obligations, safeguard the interests of the vulnerable and meet the wider public interest.
- Consider the delivery models that might be best suited to the provision of publicly funded legal services including through mechanisms other than legal aid.
- Consider whether there are aspects of the justice system where efficiencies might contribute towards reducing the cost of publicly funded legal services while sustaining the quality of service provision.”

## **Structure of the Report**

The future scope and cost of legal aid in Northern Ireland is central to this review but, as the above Terms of Reference make clear, reforms of the wider justice system within which legal aid operates are just as important. In each area of work I have addressed justice issues first, followed by legal aid issues.

There are also many themes and issues which are relevant to both criminal and civil cases so I cover them first. This divides this report into four main sections: General Principles and Context; Criminal Justice; Family Justice; Civil Non Family Justice. A summary of recommendations and suggestions for implementation are included at the end. All the questions raised in the Agenda consultation paper are covered in this report but in a rather different order. Instead of preparing a separate summary of consultation responses I have tried to briefly summarise the principal views expressed by consultees on each issue in the main text of this report. The full consultation responses are all

available on the Department's website. Lists of all consultation responses received and meetings held are set out in the annexes to this report.

This report follows from and builds on the first Access to Justice Report published in 2011. For brevity I have tried to avoid repeating the principles set out in that report, with which I agree. The first annex contains an update on all the reforms arising from the first report.

## **Terminology**

"2003 Order" means the Access to Justice (Northern Ireland) Order 2003, the legislation currently governing civil legal aid in Northern Ireland

"ABWOR" means Assistance by way of Representation; it is a form of civil legal aid which used to have its own procedures and eligibility rules; it was formally abolished in Northern Ireland in April 2015, replaced by "representation (lower courts)"

"Access to Justice 1", "AJR" or "AJ1" means the Access to Justice Review Northern Ireland by Jim Daniell and others, published in August 2011

"Alternative Dispute Resolution" or "ADR" refers to ways of resolving disputes outside the formal court process, for example mediation or arbitration

"Article 6" means article 6 of the European Convention on Human Rights; article 6 is often summarised as the "right to a fair hearing" – see further Chapter 2

"Agenda" means the consultation paper published in September 2014 as part of this current review

"BSA" means the Belfast Solicitors Association

"CANI" means Citizen's Advice Northern Ireland

"CAFCASS" means the Children and Family Court Advisory and Support Service, the body which safeguards and promotes the welfare of children involved in family court proceedings in England; CAFCASS CYMRU covers Wales; the equivalent body in Northern Ireland is NIGALA

"Civil legal aid": it is unfortunate that legal aid terminology changes rather frequently; I use the term civil legal aid as a general term to cover publicly funded representation in civil proceedings, as distinct from advice and assistance

"Civil Legal Services" is the proper term for all non criminal legal aid funded under the 2003 Order. The term covers both representation in proceedings (civil legal aid) and advice and assistance

"CJINI" means the Criminal Justice Inspection Northern Ireland, an independent statutory body with responsibility for inspection of all aspects of the criminal justice system

"COAC" means the Children Order Advisory Committee, which provides guidance on family proceedings in Northern Ireland (the Children (Northern Ireland) Order 1995 is the main legislation governing public and private law children proceedings)

“Conditional fee agreement” or “CFA” is a type of ‘no win – no fee’ agreement between lawyer and client, used to fund civil claims in England and Wales; the usual model of a CFA involves the lawyer receiving no payment if he or she loses the case, but a bonus “success fee” on top of normal fees in the event of a win

“Department” or “DOJ” means the Department of Justice, Northern Ireland

“DETI” means the Department of Enterprise, Trade and Investment, Northern Ireland

“DFP” means the Department of Finance and Personnel, Northern Ireland

“DHSSPS” means the Department of Health, Social Services and Public Safety, Northern Ireland

“DSD” means the Department for Social Development, Northern Ireland

“ECHR” means the European Convention on Human Rights, which is enforceable in the United Kingdom under the Human Rights Act 1998

“FLSA” means the Family Law Solicitors Association, Northern Ireland; the equivalent body in England and Wales is called Resolution (which also includes barrister members)

“Funding Code” means the set of statutory rules which defined and set the criteria for civil legal aid in England and Wales under the Access to Justice Act 1999; a Northern Ireland Funding Code was consulted upon from 2006 but not implemented; in April 2013 the Funding Code in England and Wales was replaced by the Civil Legal Aid (Merits Criteria) Regulations 2013

“Green Form” is the common name for the system of funding advice and assistance under the legal aid scheme in Northern Ireland; in England and Wales Green Form was replaced in 2000 with a system called “Legal Help”

“HRS” means the Housing Rights Service

“Indemnity principle” is an old legal rule which provides that the amount of costs recovered from an opponent may not exceed the amount which the successful party would have been charged by his or her own lawyers; the indemnity principle is not the same as the “indemnity basis” which is a particular approach to quantifying legal costs

“Indictable proceedings” means serious criminal proceedings which can be heard before a judge and jury in the Crown Court; indictable proceedings divide into the most serious “indictable only” cases which can only be heard at the higher level, and offences “triable either way” which can be heard in either the Crown Court or a magistrates’ court, determined by the court or the defendant

“Judicare” means a system of providing legal aid by funding lawyers in private practice to deliver the service; it is the dominant means of legal aid provision in the United Kingdom

“LASPO” means the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This is the legislation which implemented substantial reductions in the scope of legal aid in England and Wales with effect from 1<sup>st</sup> April 2013

“Legal Aid Agency” or “LAA” means the Agency which, as part of the Ministry of Justice, is responsible for the administration of legal aid in England and Wales

“Legal Services Agency” or “LSA” means the Agency which came into being on 1<sup>st</sup> April 2015, as part of the Department of Justice, responsible for the administration of legal aid in Northern Ireland, taking over from the Legal Services Commission

“Legal Services Commission” or “LSC” means the Northern Ireland Legal Services Commission, which was the body responsible for legal aid prior to the establishment of the Legal Services Agency

“Litigant in Person” or “LIP” means someone who is involved in legal proceedings but is not formally represented by a lawyer, and so has to conduct their own case or defence. “Self-represented litigant” was proposed as a better description by the Civil Justice Council in 2011 but is less widely used

“NAO” means the National Audit Office

“NIACRO” means the Northern Ireland Association for the Care and Resettlement of Offenders

“NIGALA” means the Northern Ireland Guardian ad Litem Agency

“PPS” means the Public Prosecution Service, the body responsible for bringing criminal prosecutions in Northern Ireland – the equivalent in England and Wales is the Crown Prosecution Service or “CPS”

“PSNI” means the Police Service Northern Ireland

“SLAB” means the Scottish Legal Aid Board

“Success fee” is an additional amount of costs which a lawyer may be able claim under a CFA

“STEP” means the South Tyrone Empowerment Programme

“Summary proceedings” means less serious criminal offences which can only be tried in a magistrates’ court

“Triable either way” – see “indictable proceedings” above

### **Acknowledgments**

I would like to thank all the stakeholders who have contributed to this review, not just in the expert and informative written responses to consultation, but in the genuine engagement and passion demonstrated in meetings and discussions held throughout the review. I would also like to acknowledge the unstinting support I have had from the Northern Ireland Department of Justice, with special thanks to David Lavery, Mark McGuckin, Paul Andrews, Paul Black and their teams. Most of all I would like to thank Jim Daniell whose incisive analysis, generous support and guidance has made the whole project possible. It has been a privilege to work with you all.

**Colin Stutt**  
**September 2015**

# Executive Summary

## GENERAL PRINCIPLES AND CONTEXT

### The Nature of Access to Justice

1 Access to justice is an essential and non-negotiable feature of a rights-based democratic society. Without some means of enforcement, rights become worthless. In relation to criminal justice, governments must provide a fair and effective system for the investigation and prosecution of offences, with trials presided over by an independent judiciary. Access to civil justice is a more complex concept than it first appears. It is not synonymous with access to the courts or access to lawyers. It seems to me that the responsibility of government is fourfold:

- i) To provide fair and effective civil courts, presided over by an independent judiciary;
- ii) To encourage a culture of compromise and reasonable settlement of disputes, backed up by a range of systems to facilitate the fair and early resolution of disputes without recourse to the courts;
- iii) To ensure that the public, especially the poorest and most vulnerable members of society, have reasonable access to the full range of dispute resolution systems, and are assisted towards the most effective and proportionate means of resolving their problems; and
- iv) To ensure that law and procedure are clear, unambiguous and, so far as possible, capable of being understood and followed by members of the public.

### The significance of legal aid

2 Legal aid is an indispensable part of our justice system. For many vulnerable clients, legal aid may be the only practical means of enforcing basic legal rights. Legal aid lawyers provide frontline services for the public across a range of criminal and civil cases.

3 If the scheme were reduced to its minimum possible extent, consistent with our human rights obligations, it would cover only criminal cases and a very small range of civil proceedings, excluding almost all advice services. This would neither reflect the fundamental importance of access to justice for the most vulnerable, nor would it represent good value for money. Removing too much from scope also risks undermining the viability of what remains.

4 Like all areas of discretionary government expenditure, legal aid must be rationed and targeted towards the areas of greatest need. Priorities must be decided upon and reflected in a more tightly controlled future scheme. Priorities for justice are not the same as priorities for legal aid, especially if alternative means of securing access to justice are available.

5 The positive case for legal aid and its importance to society must be articulated so that a greater consensus can be developed around the scope of the scheme and the budget needed to sustain it for the longer term.

### Control of legal aid expenditure

6 Reducing the scope of legal aid is an effective way to make savings but can severely reduce access. Before scope changes are introduced, other savings options should be considered and consulted on and alternatives to legal aid put in place where possible. Effective consultation and learning from other jurisdictions will provide the best evidence on which to base reform.

7 Civil eligibility limits should be simplified and harmonised as recommended in Access to Justice 1, with increased contributions from income. The operation of the statutory charge should be strengthened. Legal aid costs should be repayable in appropriate cases, so that legal aid operates as a loan rather than a gift. This should apply to clients who own or have an interest in a home and be administered just like the statutory charge.

8 More robust controls should be implemented on civil legal aid, including:

- Stricter, more transparent and targeted merits criteria for all case types;
- Cost limitations restricting the total spend on each certificate;
- Scope limitations;
- A reserve power to refuse or defer funding for very high cost cases on affordability grounds;
- Simplified procedures with reduced form-filling.

9 Although there are many ways of controlling legal aid expenditure, if short term savings are needed there may be no alternative to scope and remuneration cuts. A more strategic approach allows time for wider justice reforms to have an impact while those services still within scope are rigorously controlled. This could be the basis for a more streamlined and sustainable legal aid scheme for the longer term.

### **Remuneration strategy**

10 When setting remuneration levels, the objective should be to pay the lowest rates possible consistent with securing good access to high quality legal services from well run and efficiently structured providers. Payment levels in other jurisdictions and for other public sector professional services should be taken into account. Reductions should be targeted on the highest earners and the higher court levels. Further research should be considered to inform future remuneration rates for typical legal aid cases.

11 Steps should be taken to regulate and simplify legal aid payment rates for all levels of court. Legal aid payments should continue the move towards standard fees per case, instead of hourly rates. Standard fees give better control and reward supplier efficiency.

12 Levels of representation in legal aid cases must be reviewed. Representation by a solicitor and a barrister may secure good quality advocacy services, but is not part of the irreducible minimum of legal aid provision. Reform of the rules for payment of counsel in the magistrates' court should be considered; legal aid should not automatically cover representation by counsel in the county court and Family Care Centre. The priority for achieving savings should be a radical reduction in the use of two counsel in legal aid cases. Funding Queen's Counsel and junior counsel together in complex cases is no longer affordable in light of higher priorities, especially the need to maintain a reasonable level of support for family cases.

### **Delivery models**

13 Most legal aid services in Northern Ireland should continue to be provided without contracts for the foreseeable future. In the absence of a contractual regime a more structured system of grant funding can be deployed to respond to identified priority legal needs. The registration scheme should proceed with a set timetable for implementation.

14 Legal expenses insurance, pro bono provision and self help tools should all be supported and can have a role in enhancing access to justice. However, none of these is likely to have a significant impact on the majority of services currently funded by the legal aid scheme.

### **The budget for legal aid**

15 The cost of legal aid in Northern Ireland has remained stubbornly high in recent years despite a period of austerity which has seen substantial reductions in most other areas of public spending. The past practice of setting unrealistic budgets for legal aid and topping up funds in year must not be allowed to disguise the fact that current levels of spend are not sustainable.

16 Budgets will soon need to be planned for 2016/17 onwards. This review provides the opportunity to deliver a lower cost and sustainable legal aid scheme that is better targeted and controlled. Such a scheme could form the basis on which budgets are determined for the next financial cycle.

### **Justice reform – some common themes**

17 Some aspects of the justice system of Northern Ireland have been remarkably resistant to change. Targeted reforms should now be considered to tackle inefficiencies in criminal and civil justice, both on their own merits and because such improvements may help to safeguard the legal aid budget for the longer term.

18 Many barriers to access to justice are a product of the adversarial tradition of justice. The move towards more inquisitorial court procedures and active case management should be strengthened and encouraged. Much court business currently conducted at oral hearings should in future take place by email or phone. Ineffective and wasteful court hearings should be reduced with improved communications between the court and all parties before a hearing. The way cases are listed for hearing before the courts needs significant reform. The current practice of over-listing and failing to give timed appointments is wasteful of public funds and represents poor customer service.

19 Developing effective alternatives to the courts, through diversion or alternative dispute resolution, is just as important as court reform. Such approaches will often be more effective at addressing the underlying issues behind a legal dispute.

20 Whatever happens to legal aid, the courts need to continue to adapt to become more accessible to unrepresented litigants, who should no longer be seen as a “problem” for the justice system. A more flexible approach should be adopted to informal assistance for litigants in person from “McKenzie friends”.

21 Plain English should be used in all justice communications and reforms. The judiciary of Northern Ireland should continue to play an active role in delivering the reform of criminal and civil court procedures.

### **Comparisons with other jurisdictions**

22 With the possible exception of Norway, Northern Ireland has the most expensive legal aid scheme in the world. In the past, the higher spend per head in Northern Ireland compared to England and Wales could largely be attributed to differing economic conditions, but there is now a growing divergence between the scope and cost of the two schemes. In a period of austerity it is very hard to argue that current levels of expenditure can be maintained.

### **Structure of the legal profession**

23 The structure of the legal profession in Northern Ireland is distinctive but I make no recommendation in this review for its structural reform, except in relation to those rules which appear to be protectionist in nature. However, the way lawyers are organised in Northern Ireland should not act as a constraint in the development of wider policy on access to justice.

## **CRIMINAL JUSTICE**

### **Criminal justice reform**

24 There remains considerable scope for improvement of the efficiency of criminal proceedings in the United Kingdom. The Leveson review in England and Wales gives a useful steer towards the reforms which should be considered, especially in relation to improved communications and listing. A judicial working group should be established to devise the procedures and rule changes necessary to deliver improved efficiency for criminal proceedings before the magistrates' court.

25 There are wider criminal procedure reform options which could be considered but require primary legislation and may raise sensitive political issues.

### **Criminal advice services**

26 Advice and assistance at the police station is a vital part of the criminal justice system. The Law Society are developing duty solicitor rotas covering all Northern Ireland. Guidance on the operation of this scheme should be transparent and allow for new entrants. Quality criteria for solicitors providing this service should be developed with the Law Society and introduced as part of the new Registration Scheme. There is no necessity to introduce contracting at this time but the option should be kept under review.

27 Criminal advice and assistance other than at a police station, including on diversionary measures, should remain in the scope of the legal aid scheme but be subject to stricter controls. Free standing advice on criminal matters should only be funded on issues which are of real significance to the client, such that a reasonable client would pay for the advice privately if they could afford it.

### **The interests of justice test**

28 The Widgery criteria should remain the basis for grants of criminal legal aid under the interests of justice test. The Legal Services Agency should investigate the cost and practicalities of an online process to administer the test. Pending any such reform, decisions on the grant of criminal legal aid should remain with the courts, but the courts should be required to record and give reasons for their decisions by reference to the Widgery criteria.

### **The financial conditions of criminal legal aid**

29 Criminal legal aid in Northern Ireland should be subject to a structured means test. Regulations should require eligibility to be determined initially by an assessment of gross income, disposable capital and benefit receipt, subject to a determination of whether the defendant can afford to pay for his or her own defence.

30 There should be no immediate change to criminal contributions or the obligation to repay costs on conviction, but these areas should be kept under review.

### **Delivery of criminal legal aid**

31 There should be no objection in principle to the introduction of panels of advocates or public defenders in Northern Ireland. However, there is no business case for introducing such reforms as long as there remains a reliable supply of criminal defence services from the private sector. The Department should plan for the possibility of future failure of supply.

## **FAMILY JUSTICE**

### **Family Justice Reform**

32 There needs to be clearer leadership and responsibility for the reform of family law and procedure in Northern Ireland, which is currently split between three different Departments. This would make it easier to identify and address underlying cost drivers within family law, including divorce procedures.

33 The principles underpinning the Family Justice Review in England and Wales are largely applicable to this jurisdiction. Consultation should take place on the establishment of a unified family court in Northern Ireland, addressing the inconsistencies and anomalies between the three levels of family court while identifying and preserving those aspects of the system which are currently working well.

34 In public law proceedings it should not be assumed that the voice and interests of the child can only be protected by preserving the “tandem model” under which the child is represented by both a guardian and a lawyer. Separate legal representation for the child should not be regarded as part of the irreducible minimum provision of legal aid. Other issues relating to the streamlining of public law proceedings should be addressed in the forthcoming pilot.

35 In private law proceedings, the court needs greater powers and a more consistent approach to controlling long running contact disputes. To encourage compliance with court orders for contact, there should be a greater use of financial sanctions, including costs orders, and the power to impose community orders.

### **Public law proceedings – different worlds**

36 In Scotland, many public law family proceedings are dealt with outside the court system, by a lay panel with an inquisitorial approach. The Scottish system appears to be effective, proportionate and accessible. It resolves cases at a small fraction of the cost of equivalent court-based proceedings elsewhere in the United Kingdom. A reform to introduce a similar system in Northern Ireland has many attractions but would be a major project requiring primary legislation. If

this option is considered further, the next step should be a feasibility study to identify how such an approach might operate in Northern Ireland, with financial modelling of the potential costs and savings.

### **Family Mediation**

37 The current provision of family mediation in Northern Ireland does not reflect the value mediation can bring to the family justice system. Greater use of mediation must be encouraged and incentivised through reform of legal aid merits criteria, financial conditions and court procedures, all designed to ensure that mediation, negotiation and other forms of ADR are considered before litigation is pursued. Increased mediation should produce savings for the fund but more importantly will lead to better outcomes for the client.

38 The aim of encouraging mediation is to make it a more significant dispute resolution mechanism in the family justice system, not the sole or dominant mechanism. Mediation will only flourish alongside the continuing availability of legal support under a restructured and streamlined family legal aid scheme. Quality standards and a standard fee regime should be adopted based on those operating in other jurisdictions.

39 A joint strategy for funding family mediation should be agreed between the DOJ and DHSSPS covering all stages and types of family dispute. In time the Legal Services Agency should move to funding family mediators directly, instead of as a disbursement under other funding.

### **Family legal aid**

40 Family legal aid provides help for children and vulnerable adults who are likely to have no other effective means of securing access to justice. The family scope reductions implemented in England and Wales should not be replicated. Family legal aid in Northern Ireland should remain available for most cases, except for divorce, but should be subject to increased controls.

41 Even high priority categories like domestic violence and public law proceedings should be subject to appropriate merits criteria. In public law cases, legal aid should only be provided where it is necessary to assist the court in determining what is in the best interests of the children.

42 Long running family cases should be discouraged by a combination of remuneration rules, cost limitations and new powers to require repayment of legal aid costs where the client fails to comply with orders of the court. Ancillary relief should remain within scope only for those cases where no private funding alternatives are available.

43 Legal aid for private law family proceedings should be more about solving problems and less about following legal processes. A new system of Early Resolution Certificates should be established to encourage settlement through negotiation and mediation. Financial conditions should create incentives for clients to resolve cases at this level. Funding for representation in family court proceedings should only be available where attempts at settlement have been unsuccessful and strict criteria for prospects of success and cost benefit have been satisfied. Legal aid family lawyers should commit to constructive, non adversarial dispute resolution. If further savings are needed in the longer term, the priority should be to retain cover for early advice and settlement.

## **CIVIL NON FAMILY JUSTICE**

### **The civil courts**

44 Lord Justice Gillen's Review of Civil and Family Justice provides an opportunity to improve the efficiency of civil non family court processes in Northern Ireland, taking into account the experience of recent initiatives in other jurisdictions. Outcomes of this work could include a wider jurisdiction for the county court, better enforcement of pre-action protocols and increased support for ADR and settlement within the court process.

### **Alternatives to civil litigation**

45 The legal aid scheme has for too long been court-centred, failing to recognise the importance of complaint and ombudsman schemes and all varieties of alternative dispute resolution. Criteria for public funding should ensure that recourse to the courts is the last resort, as it would be if people had to pay for legal representation with their own money. Mediation and early neutral evaluation should be encouraged within the legal aid scheme, supported by new reporting obligations to identify cases where funding should be diverted from court resolution towards ADR. Arbitration schemes should be allowed to develop in specific areas where they are found to be a better alternative than the courts.

### **Judicial review**

46 The right of individuals to challenge the legality of decisions by the state has real constitutional significance. Legal aid must remain available for judicial review proceedings. Although such funding is a high priority, judicial review is a significant and increasing area of spend. Increased controls are needed to address high costs and poor outcomes. Research should seek to identify the underlying causes of increases in the volume of judicial review applications.

47 The reforms in England and Wales, which made legal aid payments conditional on leave being granted by the court, should not be replicated in Northern Ireland except for cases which are found to be totally without merit. Greater use should be made of protective costs orders to improve access to justice for judicial reviews with a wider public interest. Legal aid funding should be based on the likelihood of the court ordering the substantive relief sought and should take into account human rights considerations, the wider public interest and any judicial decision to grant leave. Other funding criteria should ensure that only meritorious judicial reviews are funded and that judicial review is not pursued until all reasonable alternatives to litigation have been tried. The courts should be prepared where necessary to extend time limits to facilitate this.

### **Conditional fees and self funding**

48 Despite the high volume of personal injury claims in Northern Ireland, no obvious funding mechanism is available for claimants who have less straightforward claims but are not financially eligible for legal aid. Conditional fee agreements ("CFAs") have the potential to maintain and enhance access to justice for the whole population of Northern Ireland. In order to be effective and affordable in this jurisdiction CFAs should be introduced without any additional liabilities being imposed on defendants and with success fees payable from damages recovered. Claimants must be protected from adverse costs orders by one-way cost shifting. These recommendations are all in line with the Jackson reforms in England and Wales, the Taylor report in Scotland and the recommendations of the first Access to Justice Review.

49 To safeguard client damages, success fees should not be permitted in road traffic claims and success fees should be limited in all other cases to 20% of damages recovered. Additional safeguards, including regulation of pre-issue settlements, should be considered on consultation. There is currently no case for the general introduction of self-funding systems or contingency fees in Northern Ireland.

### **The scope of civil legal aid**

50 Civil legal aid in Northern Ireland presently covers a wide range of non family cases with varying degrees of priority. Money damages claims should be removed from scope, as recommended in the first Access to Justice Review, but the timing should if possible be linked to the introduction of CFAs. Only a very limited range of money damages cases should remain in scope.

51 It is right to regard civil non family legal aid in general as a lower priority for funding than criminal or family legal aid. Significant scope reductions are needed to achieve necessary savings. The scope of civil legal aid should in future be defined by what remains in scope, not what is excluded. The categories of non family cases retained within scope should reflect priorities based on their constitutional significance, the importance of the proceedings to the client or the need to protect children or vulnerable adults.

52 Under this approach the principal non family categories within scope would be: judicial review, certain claims against public authorities, housing, mental health and capacity, community care, discrimination and claims concerning the abuse of children or vulnerable adults or sexual assault. Inquests raising article 2 issues should be brought within mainstream funding. A limited range of immigration cases and injunctions to protect the individual should also be covered. The exceptional funding procedure should be available for all excluded areas to ensure compliance with ECHR obligations.

### **Control of civil legal aid**

53 The merits criteria for non family civil legal aid should be set out in guidance and regulations, based on the policies previously proposed in the Northern Ireland Funding Code. There should be a minimum 50% prospects of success threshold except for the highest priority cases. Unless there is a wider public interest, cost benefit should be based on strict damages to costs ratios for quantifiable claims and the private client test for all others. Some cases should have a mix of public and private funding, legal aid covering only what is needed to secure access to justice.

54 Damages cases remaining within scope should be subject to an additional obligation to make a payment into the fund in successful cases, reducing or eliminating the net cost of such cases to the scheme. Investigative work should not be funded for damages claims worth less than £10,000.

55 Remuneration for non family cases acts as a form of insurance cover for those cases where costs are not recovered from the other side. In order to incentivise the selection of meritorious cases, legal aid remuneration rates should be set substantially lower than the rates recoverable between the parties.

### **A strategy for advice and assistance**

56 The Green Form scheme for advice and assistance with civil problems covers a wide range of cases at relatively low cost. Early advice is often a very cost effective form of assistance, and there is always a risk of clients having more serious and costly problems further down the line if advice services cease to be available. However, there are many other sources of advice in Northern Ireland; the Green Form scheme is only a small part of wide network of advice provision.

57 Although face to face is not necessarily the most efficient method of advice provision, alternative approaches need time to be tested and developed. Advice and assistance should continue to be available on the full range of legal problems, subject to specific exclusions. Advice on damages claims should be removed from scope because solicitors can be expected to provide initial claims advice free of charge. Advice on welfare benefits and debt should be removed from scope because expert advice on these topics is widely available from other sources. The private client test should be applied to all applications for advice and assistance.

### **Development of civil justice and legal aid**

58 There are many radical alternatives to traditional court procedures for civil litigation. In Northern Ireland there is considerable potential to build ADR processes into court procedures and to develop online dispute resolution systems.

59 The Department should make wider use of grant-making powers to develop new services or increase support for vulnerable client groups. A cash-limited Access to Justice Development and Innovation Fund should be established for this purpose, inviting bids on an annual basis.

### **Delivering the strategy**

60 The proposals put forward in this review, together with other current initiatives, must form a single coordinated programme for reform. The majority of legal aid reform proposals could be considered for implementation during 2016/17. Reforming the justice system itself will take longer but the process should be started as soon as possible with a statement of the principles and objectives of justice reform. The question of a unified family court and increased support for litigants in person should be addressed at an early stage.

61 The legal aid scheme emerging from this review will be narrower than the current scheme but access to justice will be widened in other ways. The scheme will be under greater control and far more sustainable in the longer term. Funding will cover a wide range of services, safeguarding the most vulnerable members of society. This will be a legal aid scheme that Northern Ireland can be proud of.

# Part A General Principles and Context

## 1 The Nature of Access to Justice

*“To no one will we sell, to no one will we refuse or delay right or justice”<sup>1</sup>*

### A Fundamental Right

1.1 The high level case for access to justice was set out in the Agenda in the following terms:

“ Justice and the rule of law, backed by the oversight of an independent judiciary, facilitate:- the protection and promotion of fundamental freedoms and human rights; the fair treatment and trial of those accused of criminal offences; the ability of individuals to assert or defend their rights in relation to public authorities or the economically more powerful; protection against arbitrary decision-making by public authorities; and transparent, safe and fair means of avoiding or resolving disputes. Fundamental to securing these outcomes is a commitment to equality before the law; and this can only be achieved if there is equal access to the law and the justice system. If by reason of background, economic disadvantage, lack of capacity or lack of knowledge, individuals or groups in society do not have as effective access to the justice system as others, then no matter how fair the system and its procedures, the characteristics of the rule of law outlined above will be compromised.

So, access to justice is an essential component of the justice system and the rule of law. At one level it means enabling those who cannot otherwise afford it to secure legal advice and representation through publicly funded legal services, pro bono arrangements or other mechanisms (such as conditional fees) that do not involve up-front payment. Access to justice is also about having substantive law and procedures that are easily understood, logical and predictable and that produce outcomes with a minimum of delay. It means making information and advice easily accessible to the public through a range of media from face to face, through telephone helplines to web-based material – to assist people in understanding their legal position, in resolving practical problems, in preventing disputes arising in the first place and in resolving matters without having to go to a court or tribunal. In all of this there is a role for the private sector legal profession, but also for the voluntary sector, specialist advisers, government departments, business, trade unions, law centres and academia.”<sup>2</sup>

1.2 Similar principles were put forward in Access to Justice 1.<sup>3</sup> Agenda consultation question 1 asked for comments on the high level case. It is no surprise that responses were uniformly supportive. There is clearly a wide consensus around access and its significance in a democratic society. There were some strong disagreements about the way this review should apply those principles to assessing the priorities for legal aid, so this is discussed in the next Chapter. Several responses emphasised the importance of “effective access” for the disadvantaged and

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<sup>1</sup> Magna Carta, 1215, Chapter 40; according to David Starkey, the provision was probably included by King John for public relations purposes and at the time was not genuinely intended to confer rights on the common man

<sup>2</sup> Agenda paragraphs 3.3 to 3.4

<sup>3</sup> AJ1, Chapter 2, Guiding Principles

impoverished. This echoes human rights caselaw which requires that rights must be “practical and effective, not theoretical and illusory”.<sup>4</sup>

### **Can you have too much access to justice?**

1.3 Although access to justice is a good thing, unbridled access to the court is not. Prior to the Jackson reforms<sup>5</sup> personal injury litigation in England and Wales had spiralled out of control with massively increased costs and additional liabilities. No one could argue that English personal injury claimants lacked access to justice, but the system to deliver that justice had become indefensible and disproportionate. The Agenda put it like this:

“...proportionality is also a consideration, especially where public funds are concerned; and enabling access to justice does not mean supporting vexatious litigation, enabling parties to use the courts as a means of perpetuating conflict or placing parties with access to legal aid at an advantage as against those who might not meet the financial eligibility criteria. Where legal aid is available, it should place the recipient in the position of taking decisions on the case, for example about whether to proceed or to settle, on the same basis as would a potential litigant paying for legal assistance and/or representation out of their own pocket.”<sup>6</sup>

1.4 Most people regard recourse to the courts as a last resort, even for serious problems.<sup>7</sup> Nevertheless there have been years of debate over the “compensation culture” and whether it even exists.<sup>8</sup> What matters more is the widespread belief that an overly litigious society is undesirable. If every businessman issued a writ every time an invoice was unpaid, business could not function. If every family dispute was taken to law, family life would deteriorate further. I believe most people who have worked with government would agree that, if every arguably unlawful government decision was subjected to the full scrutiny of judicial review, government would grind to a halt.

1.5 So although an effective and accessible justice system is essential, so are the mechanisms which ensure that people do not access the courts lightly. These may take the form of court fees, legal costs, potential liability to an opponent, delay, formality, uncertainty and the general scariness of the process. When designing mechanisms enabling people to resolve their problems, whether privately or publicly funded, care is needed in deciding how far these deterrents can or should be overcome.

### **The objectives for government**

1.6 Access to civil justice is therefore a difficult concept to define and a harder one to measure.<sup>9</sup> What is it that the government should be trying to deliver? Roger Smith has described the duty of government to ensure, so far as it can, that:

- i) All members of society are aware of law which is relevant to their lives and activities;

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<sup>4</sup> See *Airey v Ireland*, application no 6289/73, (1979) 2 EHRR 305

<sup>5</sup> Reforms of civil costs in England and Wales, discussed further in Chapter 22

<sup>6</sup> Agenda paragraph 3.5

<sup>7</sup> See “How People Resolve ‘Legal’ Problems”, Pascoe Pleasance and Nigel Balmer, Legal Services Board, May 2014

<sup>8</sup> See “Common sense, common safety”, Lord Young, 15<sup>th</sup> October 2010

<sup>9</sup> See “Measuring Policy on Access to Justice and Taxation in the United Kingdom”, J.Bequiraj, J.Stefanelli, N.Patel, Bingham Centre Report 2015/1, March 2015

- ii) Any dispute as to a person's position under the law is resolvable at affordable cost and minimum effort;
- iii) Anyone, regardless of their resources, can, if required, obtain enforcement of a legal duty or right.<sup>10</sup>

1.7 It seems to me that the government's responsibilities also extend to prescribing how disputes are to be resolved. For criminal justice a fair and effective court system is the primary objective; for civil justice the court system should be only a small part of the dispute resolution landscape, although it should cast a wide shadow. It is equally important to create an environment within which settlement and compromise can flourish, with appropriate safeguards for the vulnerable. Access to justice policy in this broader sense should not be a quest for perfect legal determinations. Ensuring that disputes are resolved fairly and peaceably is more important than ensuring that disputes are resolved according to legal entitlement.

### **Summary**

1.8 Access to justice is an essential and non-negotiable feature of a rights-based democratic society. Without some means of enforcement, rights become worthless. In relation to criminal justice, governments must provide a fair and effective system for the investigation and prosecution of offences, with trials presided over by an independent judiciary. Access to civil justice is a more complex concept than it first appears. It is not synonymous with access to the courts or access to lawyers. It seems to me that the responsibility of government is fourfold:

- i) To provide fair and effective civil courts, presided over by an independent judiciary;
- ii) To encourage a culture of compromise and reasonable settlement of disputes, backed up by a range of systems to facilitate the fair and early resolution of disputes without recourse to the courts;
- iii) To ensure that the public, especially the poorest and most vulnerable members of society, have reasonable access to the full range of dispute resolution systems, and are assisted towards the most effective and proportionate means of resolving their problems; and
- iv) To ensure that law and procedure are clear, unambiguous and, so far as possible, capable of being understood and followed by members of the public.

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<sup>10</sup>International Legal Aid Group, Newsletter 35, March & April 2015, page 5

## 2 The Significance of Legal Aid

***“At his best, man is the noblest of all animals; separated from law and justice, he is the worst”<sup>11</sup>***

### **The review’s approach**

2.1 There is a wide consensus, discussed in the last Chapter, that access to justice is a fundamental human right. Legal aid is one of the principal ways in which the state can make that right a reality for those with limited means. Successive legal aid acts have described the aims of the scheme as providing publicly funded legal services “with a view to helping persons who might otherwise be unable to obtain advice, assistance or representation on account of their means”.<sup>12</sup>

2.2 Legal aid is only one way of securing access. Most other countries place much less emphasis on legal aid than the United Kingdom, as described further in Chapter 8. Therefore this review is tasked with identifying the case for legal aid, based not upon the current scope of the scheme but starting from scratch. My terms of reference require the review to: “Identify and prioritise those services where publicly funded advice and/or representation should be provided in order to meet human rights obligations, safeguard the interests of the vulnerable and meet the wider public interest.”

2.3 The Law Society and Bar Council take issue with this aspect of the terms of reference. The Law Society encourage the review to be more concerned with finding the evidence base to justify any changes to existing provision. The Bar fundamentally disagree with the approach of identifying the bare minimum service and contend that:

“...services must be planned based on need, not budget. As yet, the Department has failed to accurately and appropriately profile and quantify the need for legal services in Northern Ireland.”<sup>13</sup>

2.4 I agree that this review should not proceed with the objective of reducing the legal aid scheme to its bare minimum, but that was never the intention nor is it implied by the terms of reference. Identifying the minimum level of provision is a necessary staging post on the journey towards planning an effective and sustainable legal aid scheme, but is not the destination. We first need to decide what *must* be funded to fulfil a state’s obligations and then what else *should* be funded as a priority.

2.5 In any event, defining and quantifying the need for legal services is not a realistic objective. Research in this area over many years has highlighted the complexity of the concept of legal need and the many ways in which such need may be addressed, traditional legal services being only one

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<sup>11</sup> Aristotle

<sup>12</sup> Legal Aid Act 1988, section 1

<sup>13</sup> Bar response, page 2

option.<sup>14</sup> Even if we were not in a period of austerity, the real issues for the legal aid scheme are how to make best use of the limited funds available and which services are the most important in light of completing spending priorities, as described further below.

### **Defining the irreducible minimum**

2.6 The question is what the legal aid scheme would look like if it was strictly limited to services which the government was legally required to fund. Some consultation responses identified types of case which “ought” to be regarded as an irreducible part of the legal aid scheme, but that is really an expression of priorities, not of entitlement. The issue is a legal one and of course open to argument, but I hope the following is a reasonable overview.

2.7 A range of international instruments relevant to this question were listed at paragraph 3.8 of the Agenda. Some, like the UN Convention on the Rights of the Child, are assuming increasing importance.<sup>15</sup> However, by far the most important instrument is the European Convention on Human Rights (“ECHR”), given effect in UK law under the Human Rights Act 1998 and further protected under the Northern Ireland Act 1998.<sup>16</sup> I do not think any current government proposals to repeal or reform the Human Rights Act are likely to change the substance of the obligation to provide legal aid in court proceedings – the principles of access to justice are well established in the common law of the United Kingdom.

2.8 Whilst many articles of the convention are engaged in many types of legal proceeding, the dominant provision, in terms of an obligation to provide legal aid, is article 6. This states:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and the facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

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<sup>14</sup> See 'Paths to Justice: What do People Think About Going to Law?', Hart Publishing, Oxford, Hazel Genn, 1999 and Causes of Action: Civil Law and Social Justice, Pascoe Pleasance and others, Legal Services Commission, 2004

<sup>15</sup> See Children's Law Centre Annual Lecture 2015, Children as Rights Holders, Professor Kirsten Sandberg

<sup>16</sup> See Part VII of the Act, Human Rights and Equal Opportunities

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;  
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

2.9 Article 6 therefore creates a direct entitlement to legal aid for criminal proceedings subject to a means test and the interests of justice test (see further Chapter 12). The majority of criminal legal aid must therefore be regarded as part of the irreducible minimum of provision. However it does not necessarily follow that the level of representation usually covered by legal aid is always required under article 6. One competent solicitor, without counsel, will generally be enough to satisfy 6(3)(c).<sup>17</sup> Caselaw has also established that advice at the police station may also be required to guarantee a fair trial.<sup>18</sup>

2.10 Although there is no direct entitlement to civil legal aid, it has been established since the *Airey* case<sup>19</sup> that legal aid may be required if, without it, it would not be possible to have a “fair hearing” as required by article 6(1). This is a fact-specific determination dependent upon the circumstances of the case, the relevant procedure and the capabilities of the client. Article 6 therefore leaves open the option of a state taking any category of case out of scope, provided there is an exceptional mechanism to apply for legal aid on a case by case basis to see if article 6 requires it.

2.11 The Legal Aid Agency for England and Wales has been criticised for being too restrictive in its consideration of exceptional funding applications.<sup>20</sup> In 2013/14 there were 1315 applications for non inquest exceptional funding but only 16 grants. In 2014/15 947 such applications produced 117 grants, about 12% of the total.<sup>21</sup> Whether or not the Agency has been over-zealous in applying the article 6 test, it is not surprising that few cases are granted because the test itself is very restrictive. It turns not on whether the client or court would benefit from representation but whether it would be “practically impossible” for the client to proceed without representation or its absence would lead to “obvious unfairness”.<sup>22</sup>

2.12 Consultation responses on the high level case for legal aid emphasised the concept of “equality of arms”, illustrated by the *Golder* case.<sup>23</sup> I would be reluctant to rely on this as a free-standing principle for legal aid; it suggests that public funding should be used just to match whatever legal firepower the opponent has chosen to deploy – I’m not aware of any case which has gone that far. It may be safer to see equality of arms as an illustration of when lack of representation might contribute to unfairness, rather than as a separate basis for public funding.

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<sup>17</sup> See *Artico v. Italy*, Application No. 6694/74, Judgment of May 13, 1980 and other caselaw on the effectiveness of representation

<sup>18</sup> See *Cadder (Appellant) v Her Majesty's Advocate (Respondent) (Scotland)* [2010] 1 WLR 2601

<sup>19</sup> *Airey v. Ireland*, Application No. 6289/73, Judgment of October 9, 1979

<sup>20</sup> See Justice Committee report, House of Commons, 12 March 2015, pages 14-20

<sup>21</sup> Legal aid statistics for England and Wales, Jan-March 2015, Table 8.2; almost half the grants were in the Immigration category

<sup>22</sup> See for example *R (Jarrett) v Legal Services Commission and others* [2001] EWHC Admin 389, 22 May 2001; the operation of and latest caselaw relating to exceptional funding is considered further at the end of Chapter 23

<sup>23</sup> *Golder v UK*, ECHR, Application No 4451/70, 21 February 1975

2.13 There are some situations where reliance only on a detailed exceptional funding process would be unworkable, as well as unfair or unsafe. Emergency domestic violence cases are an obvious example, as are many mental health proceedings. Care proceedings are another special case: the issues at stake are of such fundamental importance and the capabilities of the clients to participate in the adversarial process are typically so limited that one would expect the vast majority of cases to qualify under article 6. Such proceedings are surely part of the irreducible minimum, but again this does not imply that existing levels of representation are required. Whether article 6 requires legal representation for the child in such proceedings is more debateable; it can be argued that the role of the guardian in putting forward the voice of the child and in representing the child's interests will usually be sufficient. Whether the so-called "tandem model" of representation should be retained is considered further in Chapter 15.

2.14 Article 2 of ECHR, the right to life, sometimes creates an obligation to provide legal aid for the family of the deceased in order to ensure that there is an effective investigation into the death.<sup>24</sup> Although inquest funding on this basis arose as a form of exceptional funding, it has now developed into an accepted and essential feature of the legal aid scheme.

2.15 As an overview therefore, recognising that the boundaries set by the law are by no means fixed or certain, it is arguable that a legal aid scheme for Northern Ireland pared down to its legally irreducible minimum would consist of no more than:

- Representation in criminal proceedings under the interests of justice test, generally by a single lawyer and subject to a means test;
- Criminal advice at the police station;
- Civil legal aid for domestic violence proceedings, most public law children proceedings and cases before the mental health review tribunal, all means tested and again generally at a lower level of representation than currently funded;
- Representation at certain inquests engaging article 2;
- All other civil proceedings covered only by a very limited exceptional funding regime.

### **The need to look beyond the legal minimum**

2.16 A legal aid scheme reduced to this level would be a dismal prospect indeed. Not only would coverage be very limited, but the money would not necessarily be going where it could do most good. There is a tendency for ECHR obligations to concentrate funding on a limited number of exceptional and complex cases. No civil advice services would be included in a minimalist scheme because there is no general human right to advice. However, common sense suggests that a little legal help and guidance early on is likely to achieve much more, pound for pound, than funding complex litigation. Research seems to endorse the value of advice services.<sup>25</sup>

2.17 Much ECHR caselaw arises from the lack of legal aid for defamation proceedings – see for example the "McLibel" case.<sup>26</sup> It is not inconceivable that, one day, highly complex defamation proceedings will arise in the High Court in Northern Ireland and the Legal Services Agency will be required under article 6 to divert scarce legal aid funds to support one of the litigants. It might be

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<sup>24</sup> See for example *Khan v Secretary of State for Health* [2003] EWCA Civ 1129

<sup>25</sup> See "Social welfare Advice Services, a review", University of Surrey, 2014 and see paragraph 2.21 below

<sup>26</sup> *Steel and Morris v. United Kingdom*, Application No. 68416/01, Judgment of February 15, 2005

the legally correct thing to do, but it would be a dreadful waste of public money which could be far better spent elsewhere.

2.18 The case for legal aid therefore needs to look beyond ECHR and the legal minimum and set out why legal aid *matters*. In doing so it must be recognised that, outside the legal minimum, government investment in legal aid is ultimately a discretionary spend. It must justify its place alongside all other priorities for public funding.

2.19 Access to justice may be a fundamental human right but no state can ever guarantee all its citizens access for all cases. Some needs will not be met. It is uncomfortable to admit it, but all governments are in the business of rationing access to justice, just as they have to ration healthcare, policing and education. There is only so much money to go around. Even if the legal aid scheme of Northern Ireland is the most generous in the world<sup>27</sup>, it is not and will never be perfect. It is very hard to argue that people just above financial eligibility limits have satisfactory access to justice. It was ever thus.

2.20 The case for legal aid must therefore be entirely realistic and pragmatic. It must articulate what legal aid can achieve for the citizens of Northern Ireland. Reforms must then aim to make the best possible use of whatever funds are available (which will never be enough).

### **Displaced costs**

2.21 One of the most common arguments against any reduction in the provision of legal aid is that modest savings to the legal aid fund may lead to additional costs elsewhere.<sup>28</sup> There is much assertion on this point but limited firm evidence, and no easy way to verify or quantify the effect. I am told that welfare benefits advice is beneficial because increased benefit take-up boosts the local economy (although it is still an additional claim on the taxpayer). However, it is easy to understand how the provision of early legal advice might often save a client from much more serious and expensive legal or social problems further down the road. The Law Society point to several studies which support this argument.<sup>29</sup>

2.22 I am less convinced that reductions in civil legal aid for contested proceedings inherently create additional costs for government; it all depends what alternatives are available and how the client reacts. The NAO identified potential costs of £3.4 million to the family justice system caused by increased litigants in person in England and Wales.<sup>30</sup> They also identified potential costs to government further down the road from individuals not being able to resolve their legal problems early on, but understandably made no attempt to quantify this. I obtained further information about the £3.4M figure from the NAO under an FOI request. They confirmed that £370,000 of this related to actual expenditure by government on additional support for litigants in person but the balance of about £3M was a “notional cost” based on an estimate of the increased court time likely to be caused by lack of representation. However there is some contrary evidence that hearing

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<sup>27</sup> See Chapter 8 at paragraphs 8.36 to 40

<sup>28</sup> See Implementing reforms to civil legal aid, National Audit Office 20 November 2014, pages 17-19; Impact of changes to civil legal aid under LASPO, House of Commons Justice Committee, 3 March 2015, pages 60-64]

<sup>29</sup> See Towards a Business Case for Legal Aid, CAB, 2010 and Unintended Consequences: the cost of the government’s legal aid reforms, Kings College London, 2011

<sup>30</sup> The NAO report at paragraph 1.19

length may not be increased by unrepresented litigants.<sup>31</sup> Perhaps the greatest risk of lack of legal representation is that proceedings may be contested unnecessarily when good legal advice would have ensured settlement. But even if hearings or proceedings become longer, is it right to characterise this as a “cost” to the public purse? If the courts become clogged up with litigants in person it is surely a decision for government whether to invest more resources in the Court Service or to simply accept the delays and inconvenience caused.

2.23 I am therefore a little sceptical of attempts to quantify in financial terms the indirect consequences of reductions in legal aid. Such estimates may be speculative and may not be reflected in actual cost to the public purse at all. The strongest arguments in favour of preserving legal aid are not financial.

### **The positive case for legal aid**

2.24 We live in a rights-based society. Rights without any practical means of enforcement have little value. For many people with limited means, legal aid may be the only practical way of securing access to justice and realisation of rights.

2.25 As discussed in Chapter 1 there is a heartening consensus around the fundamental importance of access to justice. Although other countries seek to secure access without such heavy reliance on legal aid, we have to be realistic and work from the justice system as it exists in Northern Ireland. Certain recommendations in this review seek to make the courts more accessible to unrepresented litigants or to establish private funding alternatives or ADR. Even in the long term, none of these initiatives will wholly remove the need for an effective legal aid scheme. For many categories of case, the arguments for the importance of access to justice are equally arguments for the importance of legal aid.

2.26 When governments look for public sector savings, they will often emphasise the need to preserve “frontline services” for the public. It must be remembered that most legal aid clients involved in criminal, family or social welfare cases have not come to court as a matter of choice. Good representation for such clients contributes to the fair and effective administration of justice. Legal aid work in these areas can rightly be regarded as a frontline service.<sup>32</sup>

2.27 The circumstances and profile of the clients who have recourse to the legal aid scheme are every bit as important as the cases themselves. In most family proceedings and in a range of other categories, clients are almost inevitably going through a period of emotional trauma or crisis. Ensuring that they have some level of caring professional help to navigate an adversarial legal system designed for people with lawyers is surely a priority for government support.

2.28 With the prospect of ever decreasing levels of public funding, there is also an important “house of cards” argument; that if legal aid is scaled down beyond a certain level, funding for such services as remain in scope is undermined. This is either because no one knows what is left in scope or because it is no longer economic for firms to provide only the limited services remaining, if they

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<sup>31</sup> See comments of Lord Dyson to the Justice committee at page 40

<sup>32</sup> A point made to me very cogently by the Solicitors Family Law Association

can remain in business at all. This remains a concern in England and Wales, where the amount saved from scope changes exceeds what was predicted by some £32 million, partly because fewer people are applying for what were supposed to be the remaining high priority services.<sup>33</sup>

2.29 The mission statement of the Department of Justice is “Building a fair, just and safer community”. There must be some danger that excessive reductions in legal aid will be difficult to reconcile with this objective. I suspect the following observations of Lord Neuberger, president of the Supreme Court, may have additional resonance in Northern Ireland:

"My worry is the removal of legal aid for people to get advice about law and get representation in court will start to undermine the rule of law because people will feel like the government isn't giving them access to justice in all sorts of cases.

And that will either lead to frustration and lack of confidence in the system, or it will lead to people taking the law into their own hands."<sup>34</sup>

**2.30 I recommend that the minister prepares a paper for the Executive summarising the positive case for legal aid and the dangers if its withdrawal goes too far. Together with the other recommendations in this report for savings and greater controls within the scheme, this should be used as a baseline for future negotiations over the budget for legal aid.**

### Priorities

2.31 As described above, legal aid cannot hope to provide access to justice for all citizens for all types of case. Funds must be directed where they will do most good. With effect from 1 April 2015, the new framework under the Access to Justice Order 2003 reinforces this approach. Article 12(1) of the 2003 Order<sup>35</sup> requires the Department to “set priorities in its funding of civil legal services....”

2.32 It is important to distinguish between priorities for access to justice and priorities for legal aid. Government may decide that, for a certain type of case, it is a high priority that citizens have effective access, reflecting the significance of the subject matter either to the individual or the state. It does not follow at all that such cases should be a priority for legal aid – that would depend crucially on what alternatives to legal aid were available.

2.33 The Bar have argued that assigning priority to a category of case is unhelpful because within any category every case is different and some will be far more important than others. Whilst that is true so far as it goes, in my view a clear statement of priorities is essential because:

- There are clear and valid distinctions between types of case, especially in the issues and remedies they offer, domestic violence injunctions being an obvious example;
- The range of cases within any category can be addressed by other means, in particular by clear and category-specific merits criteria;
- Legal aid can only operate within a clear and transparent legal framework, so some degree of categorisation is unavoidable

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<sup>33</sup> See Impact of the changes to civil legal aid under Part 1 of LASPO, House of Commons Justice Committee, 12 March 2015 at pages 10-12

<sup>34</sup> Lord Neuberger, BBC, 5 March 2013

<sup>35</sup> As amended by the Legal Aid and Coroners Act (Northern Ireland) 2014

2.34 Priorities are subjective. I remember when negotiating the terms of the EU Legal Aid Directive<sup>36</sup> the delegate from France argued that defamation should be a top priority for any legal aid scheme because such cases concerned “matters of honour”! One of the advantages of justice being devolved is that the priorities for legal aid can reflect what is important to the citizens of Northern Ireland, rather than those of the United Kingdom generally. One consultation response suggested that new mechanisms to assist victims of the conflict should be a top justice priority. As an outsider I would not wish to express a view.

2.35 There is a greater consensus on treating certain types of case as a priority. A range of possible criteria to determine priorities was set out at paragraph 3.10 of the Agenda and not disputed on consultation. Some of the factors on that list relate to the circumstances of individual cases, while others reflect potential high priority categories. The latter group include:-

- Matters affecting right to life.
- Where individual liberty is potentially at issue.
- Whether an individual may be at risk of being subjected to violence or intimidation.
- Whether homelessness is an immediate risk.
- Allegations against public authorities of serious wrongdoing, abuse of power or significant breach of human rights (“Public Authority Claims” in the table below)

2.36 The merits of specific case types remaining within scope are discussed in the subject specific sections later in this report. As an overview, however, bearing in mind the above factors, the following could be suggested as an approach to relative priorities for access to justice (not legal aid) of different case types across the three main areas of business:

**Table 2 Suggested priorities for access to justice**

	Crime	Family	Civil Non Family
Top priority	Representation in criminal proceedings (interests of justice)	Domestic violence injunctions; Care proceedings	Housing possession; Mental health detention
High priority	Police station advice	Private law children disputes	Judicial review; Public Authority Claims; Serious injury claims
Medium priority	Other criminal advice; Advice on diversion	Ancillary relief	Other personal injury; Housing disrepair
Low priority		Divorce proceedings	Defamation; Boundary disputes

2.37 Turning to priorities for legal aid, there are few alternatives to legal aid for criminal and family services (for this purpose I would treat mediation as part of the legal aid scheme rather than an alternative to it – see Chapter 17). There are far more possibilities for civil non family cases,

<sup>36</sup> Directive on cross border disputes [Council Directive 2003/8/EC](#) of 27 January 2003

especially for those types of case where successful claimants can recover costs. Civil non family is therefore the area where there is most potential for savings with least harm to access to justice, as discussed further in Chapters 22 and 23.

**2.38 I recommend that the minister issues a statement of priorities both for access to justice and for legal aid. These should be used to build a consensus on the long term scope of the legal aid scheme**

#### **Summary**

2.39 Legal aid is an indispensable part of our justice system. For many vulnerable clients, legal aid may be the only practical means of enforcing basic legal rights. Legal aid lawyers provide frontline services for the public across a range of criminal and civil cases.

2.40 If the scheme were reduced to its minimum possible extent, consistent with our human rights obligations, it would cover only criminal cases and a very small range of civil proceedings, excluding almost all advice services. This would neither reflect the fundamental importance of access to justice for the most vulnerable, nor would it represent good value for money. Removing too much from scope also risks undermining the viability of what remains.

2.41 Like all areas of discretionary government expenditure, legal aid must be rationed and targeted towards the areas of greatest need. Priorities must be decided upon and reflected in a more tightly controlled future scheme. Priorities for justice are not the same as priorities for legal aid, especially if alternative means of securing access to justice are available.

2.42 The positive case for legal aid and its importance to society must be articulated so that a greater consensus can be developed around the scope of the scheme and the budget needed to sustain it for the longer term.

### 3 Control of Legal Aid Expenditure

#### *“Short cuts make long delays”<sup>37</sup>*

3.1 This Chapter considers the range of mechanisms which can be used to control the overall cost of legal aid and examines their pros and cons. The aim is to generate a more comprehensive and methodical approach to policy development when savings have to be made. Remuneration strategy is considered in the next Chapter.

#### **Scope**

3.2 Taking a category of case out of scope is probably the most effective way of achieving substantial savings for the legal aid fund. Looked at purely from the view of achieving savings, the scope reforms in England and Wales under LASPO were very effective, as was the earlier removal of personal injury from scope under the Access to Justice Act 1999. Although an exceptional funding mechanism must be put in place to ensure ECHR compliance, such a regime makes little dent in the savings realised.<sup>38</sup>

3.3 What evidence base should be put together before a decision is taken to remove a category from scope? The National Audit Office, Public Accounts Committee and House of Commons Justice Committee all expressed strong concerns at the lack of research undertaken prior to the LASPO scope changes.<sup>39</sup> Margaret Hodge, Chair of the PAC, did not hold back:

“The Ministry still does not understand what its reforms mean for people. It has little understanding of why people go to court and how and why people access legal aid in the first place, and only commissioned research into these issues in 2014 – more than a year after its reforms were implemented.

There are signs that the complexity of the justice system may be preventing people who are no longer eligible for civil legal aid from securing effective access to justice.....

The Ministry does not know, and has shown little interest in, the knock-on costs of its reforms across the wider public sector as a result of increased physical and mental health problems caused by the inability to access advice to resolve legal problems.

It therefore has no idea whether the projected £300 million spending reduction in its own budget is outweighed by additional costs elsewhere. It does not understand the link between the price it pays for legal aid and the quality of advice being given. In short, there is not a lot the Ministry does know.”<sup>40</sup>

3.4 The Ministry left itself open to this sort of criticism in part because it initially portrayed the reforms as being not just about saving money, but with a view to “discourage unnecessary and adversarial litigation” and to “target legal aid to those who need it most”. In reality the Ministry felt it had to make the changes quickly in any event. One could argue that it would have been

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<sup>37</sup> J. R. R. Tolkein

<sup>38</sup> See discussion in the last Chapter at paragraph 2.11

<sup>39</sup> Implementing reforms to civil legal aid, NAO, 20 November 2014, pages 13-15; PAC, 19 January 2015 at pages 9-11; Justice Committee report, House of Commons, 12 March 2015, pages 8-9

<sup>40</sup> See Public Accounts Committee, Chair’s Comments, 4 February 2015

hypocritical to go through the motions of research if doing so would have little prospect of affecting the intended policy.

3.5 The Law Society and Bar Council argue strongly for better research and data before consideration is given to taking a case out of scope, noting recent concerns expressed by the Master of the Rolls.<sup>41</sup> However in a smaller jurisdiction like Northern Ireland I think one has to be realistic about what degree of evidence gathering or research is feasible and what is really going to have an impact on the final decision. If a category is taken out of scope without a specific alternative, inevitably some people will simply give up on asserting their rights and some will try to muddle through as unrepresented litigants. No amount of academic research can predict with accuracy how behaviours will change in a previously unknown situation. In practice the best evidence available to the Department in Northern Ireland is likely to come from:

- Evidence of the impact of scope reductions in other jurisdictions;
- Consultation with stakeholders who will usually be in a better position to predict how their clients will react to the reform

3.6 Removing cases from scope can have a serious impact on access to justice. If any alternative means of securing access is available, this must be put in place at the earliest opportunity. **I recommend that before any category of case is removed from scope the Department should set out:**

- i) Whether or not the policy intention is for the affected cases to be pursued by some other means; and if so by what means;**
- ii) What steps have been taken to make any alternatives to legal aid available;**
- iii) What consequences are expected to flow from the scope change, including any potential for increased costs to the justice system or elsewhere;<sup>42</sup>**
- iv) What other options have been considered for controlling costs if the cases had remained in scope and why these have not been pursued instead.**

3.7 Consultation must be carried out on these issues. Further, if there are potential alternatives to legal aid these should be put in place no later than the removal from scope, unless the prevailing financial circumstances make this impossible.

### **Eligibility limits**

3.8 Almost all legal aid schemes have strict income and capital thresholds above which clients are not eligible. Originally the intention was that these should be fixed at a level such that people just above the limits could probably afford to pay for their own legal services. That may well have been accurate when the statutory schemes were first established but, over time, the limits have not kept pace with the cost of legal services. The current disposable income limit for legal advice in Northern Ireland is £234 per week, for civil legal aid it is £9,937 per year. Those just above these limits might well be able to afford to pay for some one-off advice, but not for representation in contested litigation.

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<sup>41</sup> The English Experience of Access to Justice Reform, Lord Dyson MR, 15<sup>th</sup> May 2015

<sup>42</sup> Recognising that it will usually not be possible to quantify these impacts, as discussed in the last Chapter at paragraphs 2.21 to 23

3.9 For criminal representation article 6(3)(c) of ECHR (set out in Chapter 2) requires funding, subject to the interests of justice test, if the client “...has not sufficient means to pay for legal assistance.” This test prohibits absolute income or capital limits for criminal legal aid, although it is always open to a state to be more generous than the above test. There is an argument that, because of the typical financial circumstances of most defendants in criminal proceedings, the savings from applying the means test might not justify the administrative cost.

3.10 Apart from affordability, another indicator relevant to setting eligibility levels is the proportion of the population eligible. Historically, schemes aimed to cover about half the population. This stood up surprisingly well over the years, but declined during periods of high wages growth. The following data from England and Wales a few years ago is telling:<sup>43</sup>

**Table 3.1 Proportion of population eligible for legal aid in England and Wales**

Year	Estimated proportion of the population of England and Wales eligible for civil legal aid
1998	52%
1999	51%
2000	50%
2001	46%
2005	41%
2007	29%

3.11 In March 2013 it was estimated that 43% of the population of Northern Ireland were eligible for civil legal aid compared to 28% in England and Wales.<sup>44</sup> As well as being more generous, the eligibility regime for Northern Ireland was also more complex and fragmented with several different limits for different types of legal aid. The policy options arising from this were carefully considered in Access to Justice 1 at pages 101 to 104. This led to the 2013 consultation paper which included the following recommendations:

- Uniform eligibility limits for all forms of civil funding;
- No more passporting on capital i.e. those with substantial capital would no longer be automatically eligible for legal aid just because they were in receipt of certain welfare benefits;
- Equity in the home to be taken into account if in excess of £100,000;
- Additional long stop cap based on gross income;
- Threshold disposable income limits for criminal legal aid, identify clients who require a detailed means test before being accepted as eligible.

3.12 None of these reforms were implemented owing to other reform priorities. As a result, the discrepancies remain. The following are the main figures to consider, based on April 2015 limits, converted where necessary into monthly figures for comparison:

<sup>43</sup> Maria Eagle, Hansard HC Written Answers cols 779W–780W, 20 February 2008

<sup>44</sup> See Consultation Document Proposals for the Reform of Financial Eligibility for Civil and Criminal Legal Aid, Department of Justice, March 2013 at page 8

**Table 3.2 United Kingdom legal aid eligibility limits**

	Northern Ireland	Northern Ireland (monthly equivalent)	England and Wales (monthly)	Scotland	Scotland (monthly equivalent)
Disposable income limit – advice and lower courts	£234 per week	£1,017	£733	£245 per week	£1,065
Disposable income limit – higher courts	£9,937 per year <sup>45</sup>	£828	£733	£26,239 per year	£2,187 <sup>46</sup>
Gross Income cap	None		£2,657	None	
Disposable capital - advice	£1,000		£8,000	£1,716	
Disposable capital – lower courts	£3,000		£8,000 (immigration £3,000)	£13,017	
Disposable capital – higher courts	£6,750		£8,000	£13,017	

3.13 The policy behind the 2013 proposals remains sound. **I recommend that the proposals put forward in the 2013 consultation paper to simplify, harmonise and control civil income eligibility limits and impose a gross income cap be implemented.** The separate eligibility regime for the lower courts (formerly covered by ABWOR) would cease to apply. If harmonisation is approached on a cost neutral basis, the level could be fixed somewhere between the current limits for lower and higher courts; alternatively, some savings would be generated if the current income applicable to the higher courts were applied across the board. In terms of capital limits, I think there is a stronger case for different limits for advice and for representation in light of the different cost and affordability of the service. **I recommend retaining the £1,000 limit for advice and assistance while imposing a strict £8,000 limit for representation.** The latter figure is somewhat academic in light of the obligation to pay contributions on all capital over £3,000. **I also agree that benefit receipt should only be a passport for income, not capital.** I return to criminal eligibility in Chapter 13.

3.14 Reducing eligibility limits directly impacts upon access to justice but, unlike scope changes, lower eligibility at least concentrates funding on the poorest in society. It is never going to be affordable to set eligibility limits at a level above which everyone can afford to pay for their own representation. However the strategic objective should be to aim for this, so far as financial constraints allow.

### Civil contributions

3.15 Requiring clients to make contributions before or during a case, or to make payments back to the legal aid fund at the end, can significantly reduce the net cost of the scheme. Such

<sup>45</sup>Ignoring the higher limit for personal injury claims which is likely to become academic

<sup>46</sup>A remarkably high figure but see the contribution regime below

mechanisms are often overlooked when savings options are being considered. Reasonable financial conditions need not be a barrier to access to justice. Indeed a financial contribution can encourage a client to consider carefully the importance of the case before proceeding and may give them an interest in seeing it pursued at reasonable cost.

3.16 Civil legal services in Northern Ireland have a contribution regime, with sliding scales based upon disposable income and/or capital. Unlike England and Wales however, contributions from income are also payable under advice and assistance. I see no reason to discontinue contributory Green Form. Scotland also apply contributions at the advice level.

3.17 Contributions due under civil legal aid certificates also vary across the United Kingdom:

**Table 3.3 United Kingdom civil legal aid contributions**

ENGLAND AND WALES Monthly Disposable Income limits	ENGLAND AND WALES Annual equivalent	ENGLAND AND WALES Contributions due
Below £311	Below £3,732	0%
£311-£465	£3,732-£5,580	35%
£466-£616	£5,580-£7,392	45%
£616-£733	£7,392-£8,796	70%

SCOTLAND Disposable Income limits (annual)	SCOTLAND Contributions due
Below £3,521	0%
£3,522-£11,540	33%
£11,541-£15,743	50%
£15,744-£26,239	100%

NORTHERN IRELAND Disposable Income limits (annual)	NORTHERN IRELAND Contributions due
Below £3,355	0%
£3,355-£9,937	33%

3.18 In England, Wales and Northern Ireland, capital contributions are also due for disposable capital in excess of £3,000. In Scotland contributions are only due for capital over £7,853.

3.19 The much higher income eligibility limit for Scotland in the Table 3.2 above is partly explained by the tapered contributions which claim up to 100% of income above the level shown. Not surprisingly these levels deter many clients from accepting an offer of legal aid, keeping down the overall costs of the scheme. However, research in Northern Ireland as part of the 2013 consultation concluded that introducing such a system might increase costs by over £1million. I find this a little surprising given the inevitable low take-up, but in any event I am not attracted to the idea of an artificially high eligibility level with huge contributions.

3.20 Savings from setting higher contributions derive not so much from the increased cash which such contributions bring in, but from the reduced number of cases that have to be funded because so many clients refuse to accept their offers of legal aid. The 2013 consultation rejected increased

contributions partly on the basis that savings would be modest. I think this should be looked at again. The deterrent effect is hard to predict accurately but could be significant. A simpler and less severe regime than England and Wales could involve perhaps two contributory bands set at 33% and 50%. **I recommend that the Department consult upon modest increases in the contributions due under civil legal aid.**

### **The statutory charge**

3.21 The legal aid statutory charge allows the fund to recover its costs if the client successfully gains or holds on to money or property. The charge now operates under article 17(7) of the 2003 Order. It requires repayment by the client of the net cost of the case out of any property “recovered or preserved” in the proceedings. So, if legal aid helps you to recover damages or other property, you must first repay the fund, then you can retain the rest. In successful non family cases, recovery of damages is usually accompanied by recovery of costs from the opponent; in such cases there is no net cost to the fund and no need for the statutory charge to operate, so the client will keep all their damages. The biggest impact of the charge is therefore in family proceedings because costs are usually not awarded. There is however an exemption from the charge for the first £2,500 recovered for the client.<sup>47</sup> A similar exemption was long ago abolished in England and Wales. I consider the future of this exemption in the context of proposed new structures for family legal aid in Chapter 18.

3.22 For many years the statutory charge was not effectively enforced by the legal aid authorities in Northern Ireland but I am now assured both by the Legal Services Agency and by all the suppliers I have spoken to that the system is rigorously enforced. However I understand from the Agency that land registration procedures do not always operate to give the Agency the degree of long term security it requires.

3.23 Where a home is recovered, typically in ancillary relief proceedings on divorce, it would obviously be unfair to require the home to be sold to repay the legal aid fund. Instead, enforcement of the charge is postponed; it is registered on the property like a mortgage. No repayment has to be made until the charge is ultimately redeemed when the property is sold at a later date. In England and Wales there have always been detailed regulations governing how the charge is registered, allowing it to be postponed and transferred to a new property and prescribing the charging of interest.<sup>48</sup> Simple interest<sup>49</sup>, currently charged at 8%, applies but does not have to be paid on an ongoing basis - it adds to the amount required to redeem the charge when it is eventually paid off. No such regulations apply in Northern Ireland.

3.24 In my view, toughening the financial conditions of legal aid is one of the best ways to reduce the net cost of the scheme. It does not harm access to justice and it gives clients a direct interest in the costs being incurred on their behalf. **I recommend that:**

- **The Legal Services Agency should engage with the Northern Ireland Land Registry to agree secure registration procedures and to identify any legal changes needed to guarantee the long term security and enforceability of the statutory charge;**

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<sup>47</sup> £3,000 in higher courts; my understanding is that in the original post war legal aid scheme the exemption was fixed at a level sufficient to put down a deposit on an average house! Times have changed

<sup>48</sup> See the Civil Legal Aid (Statutory Charge) Regulations 2013, regulations 22 to 25

<sup>49</sup> That is, interest is charged on the outstanding capital only, not on accrued interest

- **Procedures for registration and enforcement of the charge should be formalised and set out in regulations, along the lines of those applying in England and Wales;**
- **Regulations should provide for interest to be charged on all registered charges; the rate of interest should be subject to consultation and need not follow the rate charged in England and Wales.**

### **Legal aid as a loan**

3.25 The statutory charge therefore turns legal aid from a gift into a loan, in those cases where property is recovered or preserved. This raises an important wider policy option: why should legal aid not operate as a loan in a wider range of circumstances? There are statutory powers to fund services in this way under article 17(2) and (4) of the 2003 Order. Establishing a wider obligation to repay the legal aid fund has a number of attractions:

- It gives clients a direct interest in the case and the level of costs incurred as it progresses, putting the legally aided client in the same position as a reasonable private paying client;
- This creates a strong incentive towards early and amicable settlement of disputes, avoiding contested court proceedings where possible;
- Like contributions, the obligation to repay will deter some clients from proceeding with legal aid, producing immediate savings;
- Further savings arise for those cases which proceed as costs are ultimately repaid to the fund;
- The upfront obligation to repay costs will bypass the sometimes complex determination of whether property has been “recovered or preserved” for the purposes of the statutory charge;
- It offers a new approach to the financial eligibility of clients who own or have an interest in their home with the potential to extend eligibility (see below)

3.26 Inevitably, such as approach also has drawbacks, including:

- Increased administrative burdens in the operation of the legal aid scheme;
- Risk that the prospect of repayment will be too strong a deterrent for clients, leading them not to pursue meritorious and important cases;
- The creation of unenforceable debts against impecunious clients, leading to the writing off of many such debts and reduced recoveries

3.27 This reform, often referred to as “legal aid as a loan” was under consideration in England and Wales but was not proceeded with, in favour of proceeding with widespread reductions in scope. If it is to be introduced in Northern Ireland it needs to be structured in a way which addresses all the pros and cons described above. Careful consultation will be needed. My primary recommendation is that legal aid as a loan should apply only to clients applying for civil legal aid who own or have an interest in their own home. Such clients could complete a contractual charge as part of the process of applying for a legal aid certificate. It could simply be an additional page on the application form, although clients would need clear advice on its implications. Registration and enforcement would thereafter operate exactly like the statutory charge, including the charging of interest as for the statutory charge. The above concerns about administration, deterrence and enforceability would then be mitigated.

3.28 The client’s home is currently excluded from the assessment of capital to determine legal aid eligibility in Northern Ireland. Access to Justice 1 recommended a move to the English system under which the home is taken into account, subject to a £100,000 equity disregard. If legal aid as a loan were introduced, providing much greater security for the fund, there would be an argument for continuing to exclude the majority of homes from the assessment of eligibility.

3.29 I recommend that the Department consult upon introducing a new financial obligation to repay the costs of their case to the fund. This would generally apply only to clients who own or have an interest in their home. It would be enforced exactly like the statutory charge. I suggest how this new financial obligation should apply to particular types of family certificate in Chapter 18. Many of the above arguments can also be applied in the very different context of criminal proceedings. Recovery of costs from convicted defendants is considered further in Chapter 13.

### Merits criteria

3.30 Merits criteria are a very effective way of targeting available resources at the most deserving and important cases. For criminal cases the merits criterion will remain the interests of justice test, the operation of which is discussed in Chapter 12. My proposals on merits criteria for family cases are set out in Chapter 18 and for civil non family in Chapter 24.

3.31 In terms of general strategy however, at a time when major scope reductions are being considered, it is more important than ever that funding for those cases which remain in scope is demonstrably well controlled and going to the right cases. Historically, civil legal aid was subject only to broadly drawn criteria such as the need for “reasonable grounds” for bringing proceedings and that it was not “unreasonable” in all the circumstances of the case for legal aid to be granted. These criteria still apply in Northern Ireland under the 2003 Order and regulations.<sup>50</sup> General discretionary criteria also still apply in Scotland.<sup>51</sup>

3.32 In England and Wales these discretionary tests were replaced in April 2000 with the Funding Code. The Code defined all the different types of legal aid available and set category specific criteria on all aspects of merits including prospects of success, cost benefit, alternative funding and alternatives to litigation. Much work was undertaken to introduce a Funding Code in Northern Ireland but this was ultimately not proceeded with and the provisions of the 2003 Order dealing with the Code have been deleted. In their consultation response the Belfast Solicitors Association expressed concern at the failure to implement the Code and the guidance underpinning it which was the product of a great deal of collaborative work.<sup>52</sup> In April 2013 the Funding Code in England and Wales was replaced by the Civil Legal Aid (Merits Criteria) Regulations 2013, but the regulations broadly retained the definitions and rules previously set out in the Code.

3.33 Everything in the Code could of course be taken into account under a general “reasonableness” criterion, which gives the Director a wide discretion, but such an approach is unlikely to achieve the same degree of control, consistency or transparency. I do not recommend legislating to reinstate the full Funding Code provisions, but I believe that many of the merits criteria previously contained in the Code would be beneficial in this jurisdiction.

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<sup>50</sup> 2003 Order, article 14(2A); see also Civil Legal Services (General) Regulations (Northern Ireland) 2015, regulations 37 and 43; these regulations also allow for “trivial” cases to be refused, creating the worrying impression that anything non trivial is in with a chance

<sup>51</sup> Probable cause and reasonableness – previously they preferred to express their test in Latin: *probabilis causa*

<sup>52</sup> See pages 5-6 of the BSA response. I have to declare an interest here; I am biased in favour of the Code having had responsibility for its design and implementation in my former life

3.34 I recommend that all funded services are subject to clear and strict merits criteria which target funding towards the highest priority cases. For civil legal services these criteria should follow the underlying policy of the proposed Northern Ireland Funding Code, but in a simplified form, reflecting the revised scope of services covered and the new legislative framework. Under the 2003 Order the statutory tests can be supplemented by “guidance as to the criteria according to which any decision is to be taken”.<sup>53</sup> Regulations can also be made covering procedural issues, including “conditions which must be satisfied” by applicants for funding.<sup>54</sup> Merits reform in Northern Ireland is therefore likely to require a combination of guidance and regulation. In the longer term I think a simpler legal framework would be preferable; **I recommend that, when legislative opportunity allows, the merits provisions in the 2003 Order should be replaced by a general power to set merits criteria in regulations.** In a similar way, in England and Wales, merits criteria are now set out in regulations,<sup>55</sup> many of which are based on the policy previously contained in the Funding Code.

3.35 The recent case of *I.S.*<sup>56</sup> has cast some doubt on how far legal aid authorities can go in imposing strict merits criteria. In *I.S.*, a strict 50% merits test was held to be unreasonable, but it is unclear whether this is a general conclusion or needs to be seen in its context, which concerned exceptional funding for a disabled client in a family case raising significant human rights issues. The Ministry of Justice is appealing the judgment and, for the sake of access to justice in Northern Ireland, I hope the appeal succeeds on the issues of principle concerning merits criteria. In this report I am arguing for maintaining a wider range of services within scope, but subjecting those services to much stricter controls. If the law does not allow such controls to be applied, there may be no alternative to reducing scope.

### **Control of supply**

3.36 Legal aid expenditure can be controlled by restricting the volume of work authorised in any year or by restricting the number of outlets providing services. This form of control is unknown to legal aid in Northern Ireland although it is a central feature of civil legal aid in the Republic of Ireland. It has also existed in limited forms in England and Wales. As described in Chapter 8, in the Republic of Ireland most civil legal aid is provided only through a limited network of government funded law centres. Although this level of control is enviable from a financial viewpoint, it is hard to see how such a system could be introduced into any of the legal aid schemes currently operating in the United Kingdom. Implementation would be very difficult, there might be very significant start up costs and there would be major issues of supply and access.

3.37 It is not inconceivable however that the approach could be considered for specific, specialist or emerging areas of law. In the absence of an employed service, this would involve granting one or more suppliers the exclusive right to undertake all cases in a specific area of work for a fixed budget. I make no recommendations about applying this sort of approach in Northern Ireland, but it is an interesting option which could be considered if the need arose.

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<sup>53</sup>2003 Order, article 14(2B)

<sup>54</sup>2003 Order, article 15(b)

<sup>55</sup>See the Civil Legal Aid (Merits Criteria) Regulations 2013

<sup>56</sup>*IS and Director of Legal Aid casework and Lord Chancellor*, [2015] EWHC 1965 (Admin), Mr Justice Collins, 15<sup>th</sup> July 2015

3.38 In England and Wales, control of supply has been operated under two regimes at opposite ends of the civil spectrum: Legal Help and High Cost Cases. Under the English system, advice services are funded exclusively under contracts which specify how many Legal Help “matter starts” the supplier can undertake in each category of law. Such a system could only work in Northern Ireland if legal aid was transformed into a contract-based scheme. This option is considered (but not recommended) in the next Chapter.

3.39 For very high cost civil cases in England and Wales a cash-limited fund was established. These cases were handled and case managed by a Special Cases Unit. Controversially, the Unit was given the power to refuse or defer funding of cases on the grounds that they were not “affordable” out of the available funds (even if all other normal merits criteria were satisfied).

3.40 I do not think it would be workable to operate a separate fund within a fund in a small jurisdiction like Northern Ireland. However the budget of such a jurisdiction is particularly vulnerable to the appearance of one or more very expensive cases, such as group actions. I believe the time has come to recognise that legal aid can no longer operate as an immediate entitlement system regardless of cost. The Legal Services Agency ought to have the power to say, for non-urgent cases, ‘Sorry, we cannot afford to fund this’. Such a power should only be considered for very exceptional cases and circumstances. **I recommend that the Director of Legal Aid Casework be given a new reserve power in merits regulations to refuse or defer civil legal aid for a non urgent very high cost case on the grounds that it is not affordable.** One approach would be deny funding for very high cost cases unless the circumstances of the case required legal aid under the ECHR article 6 test.<sup>57</sup> The new system should apply both to new applications for certificates and to extensions on existing cases. The threshold and operation of this power should be the subject of further consultation.

#### **Administrative controls**

3.41 Without changing the rules of funding, savings can be achieved via tighter controls by the legal aid authorities, either by devoting increased resources and expertise to funding determinations or by applying controls on the extent of funding in individual cases. For civil cases there are at least two important control mechanisms which have been routinely operated in England and Wales for many years but which do not operate in the same way in Northern Ireland: cost limitations and scope limitations.

3.42 A cost limitation is a binding limit on the total costs which can be incurred under a legal aid certificate, covering all solicitor costs, counsel’s fees and disbursements (but usually exclusive of VAT). The court has no power to exceed a cost limitation on a detailed assessment of costs. Legal aid authorities have power to increase a cost condition by amendment to the certificate. All that matters on assessment of costs is the final limitation on the certificate, so in a sense such an amendment operates retrospectively.

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<sup>57</sup>As described in Chapter 2 – high cost and complex cases are by their nature more likely to satisfy this test, but the question could still be posed

3.43 The most important control deriving from cost limitations is that it forces the supplier to apply for an amendment as costs approach the limit and at that stage the legal aid authority can thoroughly assess the merits of the case, especially whether the cost benefit criteria is still satisfied. This prevents cases, which might have had good merit at the outset, from trundling on way past the point at which a reasonable private paying client would have cut his losses.

3.44 Setting the initial cost limit on a certificate need not be an exact science. Standard limitations can initially be applied to all certificates in a particular category, pitched at a figure somewhere above the average level of costs in that category. Lower costs limits should be set for cases with unclear prospects of success where funding is only being provided for further investigation.<sup>58</sup> Clearly a balance must be struck between the degree of control and the administrative cost of applying to amend. Cost limitations were more recently introduced in Scotland. The Scottish Legal Aid Board tell me that they pitch their costs limitations at the 90<sup>th</sup> percentile – in other words they would only expect 10% of cases to have to have to apply for an extension of the limitation during their lifetime.

3.45 Looked at from a business perspective, it is remarkable that a major purchaser of professional services should be able to commission professional services without a direct cost control from the outset of each job. **I recommend that the Legal Services Agency introduce as a matter of urgency a system of cost limitations on all new civil legal aid certificates.** The status of cost limitations and their ability to override assessed costs should be set out in regulations.

3.46 All civil certificates in England and Wales also have specific scope limitations which specify what stage in proceedings the case can be taken to, anything from counsel's opinion only to all steps up to but excluding final hearing, to covering an appeal to the Supreme Court. Northern Ireland certificates do not have the same range of staged controls. Regulations do however require a fresh certificate to cover any final appeal. It would be better if all certificates stated what stage they covered and all further work, appeal or indeed transfer to a new court level was dealt with by amendment rather than a fresh application. As well as being more convenient, this would also help in tracking total costs for the purposes of the statutory charge. Rather than requiring a new application, regulations could instead provide that appeals (other than defending an appeal brought by the opponent) were not covered unless specifically authorised by the Agency or on the certificate.

3.47 Scope limitations should be a routine part of the control of civil certificates although the importance of such limits is reduced for those cases covered by standard fees and by the effective deployment of cost limitations. **I recommend that, over time, the Legal Aid Agency introduce a comprehensive system of scope limitations on all new civil legal aid certificates.**

3.48 The other form of administrative control, which scarcely dares speak its name, is bureaucracy. If forms are long and complex and people are not paid for completing them, fewer people will apply and savings may be made. I am not encouraging bureaucracy, merely recognising the uncomfortable truth that if systems are made more efficient and accessible, it should not be

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<sup>58</sup> As described in Chapter 24, paragraph 24.15

surprising if more people access them and the overall cost increases. This consideration is most relevant to the future of the Green Form Scheme, which is covered in Chapter 25.

3.49 Where legal aid regulations and procedures give rise to additional form filling without obvious benefits to the fund, changes should be made. **I recommend that:**

- **The separate procedural rules governing representation in the “lower courts”<sup>59</sup> should be abolished so that there is a single procedural regime;**
- **A client should never have more than one certificate during a single set of proceedings;** therefore any transfer of a case to a different court level and any appeal should be dealt with by amendment, without requiring a fresh application;
- **Similarly, no client should have more than one certificate relating to private law family proceedings** – any children, finance and domestic violence aspects should all be covered under a single certificate;
- **One application form should be sufficient to apply for legal aid for multiple clients in a single set of proceedings;** this is most relevant to family proceeding involving several young children.<sup>60</sup>

### **Wider justice reform**

3.50 Many of the proposals in this report address the wider justice system rather than the details of legal aid – see the recommendations in Chapters 7, 10, 15, 16 and 19. Such changes are central to this review because they can improve access for all users, not just those funded by legal aid. However, whole system reforms are the hardest of all to implement, the slowest to deliver and the least certain in terms of the level of savings to be achieved. Even so, the effort is worthwhile if such reforms can lead to legal aid savings without any reduction in access to justice. That is why it is so important to take a longer term view and to start to turn around the oil tankers of justice reform.

3.51 One only has to look at legal aid for family proceedings in England and Wales. Damaging cuts have been made to legal aid for private law cases, but huge sums are still spent on public law cases because the underlying legal framework for care proceedings creates waste and duplication of legal work (see Chapter 16). I hope that Northern Ireland can find a better balance.

### **The approach to reducing cost**

3.52 All the methods of controlling the legal aid budget have advantages and disadvantages. In broad terms the measures which produce the greatest savings and are capable of quick implementation tend to be the measures which most reduce access to justice. In Table 3.3 I have assigned a number from 1 to 5 to assess these features for the options listed in this Chapter and Chapter 4. The numbers themselves are arbitrary and serve only to illustrate why legal aid reform in the United Kingdom has tended to go down the routes it has in recent years.

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<sup>59</sup> Previously covered by ABWOR, now governed by Part 4 of the Civil Legal Services (General) Regulations (Northern Ireland) 2015

<sup>60</sup> The Agency should consider the management information and procedural implications of this; I trust a workable solution can be found

**Table 3.3 Comparison of legal aid controls**

	Savings Potential (5 = greatest potential)	Ease of Implementation (5=easiest to implement)	Impact on Access to Justice (5=no adverse impact; 1=severe impact)
Scope	5	4	1
Eligibility limits	4	5	2
Contributions	3	3	3
Statutory charge / loan	3	2	4
Merits criteria	3	3	4
Control of supply	4	2	3
Administrative Controls	2	4	4
Remuneration levels <sup>61</sup>	4	2	3
Levels of representation	3	3	4
Wider justice reform	2	1	5

3.53 When legal aid savings have to be found quickly, the Department has little option but to consider cuts in scope and remuneration. This leads to salami slicing. A longer term strategic plan for legal aid allows for a more rational range of measures leading to a better and more sustainable scheme for the future.

### Summary

3.54 Reducing the scope of legal aid is an effective way to make savings but can severely reduce access. Before scope changes are introduced, other savings options should be considered and consulted on and alternatives to legal aid put in place where possible. Effective consultation and learning from other jurisdictions will provide the best evidence on which to base reform.

3.55 Civil eligibility limits should be simplified and harmonised as recommended in Access to Justice 1, with increased contributions from income. The operation of the statutory charge should be strengthened. Legal aid costs should be repayable in appropriate cases, so that legal aid operates as a loan rather than a gift. This should apply to clients who own or have an interest in a home and be administered just like the statutory charge.

3.56 More robust controls should be implemented on civil legal aid, including:

- Stricter, more transparent and targeted merits criteria for all case types;
- Cost limitations restricting the total spend on each certificate;
- Scope limitations;
- A reserve power to refuse or defer funding for very high cost cases on affordability grounds;
- Simplified procedures with reduced form-filling.

3.57 Although there are many ways of controlling legal aid expenditure, if short term savings are needed there may be no alternative to scope and remuneration cuts. A more strategic approach allows time for wider justice reforms to have an impact while those services still within scope are rigorously controlled. This could be the basis for a more streamlined and sustainable legal aid scheme for the longer term.

<sup>61</sup> Remuneration strategy, including levels of representation, is considered in the next Chapter

## 4 Remuneration Strategy

### *“The best is the enemy of the good”<sup>62</sup>*

4.1 This review does not cover the detail of individual fee schemes. Within the resources and timescale available I am not in a position to make recommendations as to whether any particular fee is reasonable or should be increased or decreased. This Chapter instead suggests some underlying principles and structures to inform future legal aid remuneration policy, including levels of representation. Remuneration policy is of particular significance to criminal and family work. All of the controls discussed in the last Chapter can be deployed to a greater or lesser extent to civil legal aid, but the range of options available to control the total cost of criminal legal aid is far smaller. Issues specific to remuneration in civil non family cases are considered further in Chapter 24.

### **The statutory criteria**

4.2 What considerations should determine how much is paid for legal aid services? A useful starting point should be the statutory framework under which the Minister can make remuneration orders under the 2003 Order. When making such an order he must have regard to:

- “(a) the time and skill which the provision of services of the description to which the order relates requires;
- (b) the number and general level of competence of persons providing those services;
- (c) the cost to public funds of any provision made by the regulations; and
- (d) the need to secure value for money.”<sup>63</sup>

4.3 Provisions of this type are never as helpful as one might hope, there being no rules as to how much weight to attach to each factor. At first sight a remuneration cut can always be justified on the grounds that (c) and (d) outweigh (a) and (b). In England and Wales, statutory rules of this sort were abolished under LASPO but they existed in a narrower form under the Access to Justice Act 1999. Under that Act the Lord Chancellor was required to have regard to:

- “(a) the need to secure the provision of services of the description to which the order relates by a sufficient number of competent persons and bodies,
- (b) the cost to public funds, and
- (c) the need to secure value for money.”<sup>64</sup>

4.4 The Law Society place reliance on the more detailed criteria applicable in Northern Ireland. They argue that the factors of “time and skill” and the need for a “general level of competence” should not always be outweighed by “the cost to public funds”. Recent judicial reviews have shown the importance attached by the judiciary to such factors. In the *Brownlee* case<sup>65</sup> the Supreme Court stated that the other statutory factors “complement the obligation to have regard to the time and

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<sup>62</sup>Voltaire

<sup>63</sup>Access to Justice (Northern Ireland) Order 2003, Article 47; note that for criminal cases there is a very similar provisions at Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) order 1981

<sup>64</sup>Access to Justice Act 1999, section 25(3)

<sup>65</sup>*Re Brownlee’s Application for Judicial Review* [2014] UKSC 4

skill required to undertake particular forms of work; they do not extinguish it.”<sup>66</sup> The court encouraged flexibility in the setting of fee schemes. The *Burns*<sup>67</sup> case is another example of the willingness of the courts to rely upon the statutory criteria to make findings about fee schemes in specific circumstances.

4.5 My concern is that although the statutory factors might have been helpful in a time when the legal aid scheme was expanding, they are less workable in a period of austerity. They certainly create endless scope for lawyers to challenge any reductions in their rates and make it much harder to achieve savings by reducing remuneration. When savings have to be made, reductions in scope or eligibility are easier to implement even though they are more damaging to clients than fee reductions. It is wrong that the level of lawyers’ fees has a greater degree of statutory protection than the level of services available to clients. **I recommend that, when legislative opportunity allows, the statutory factors governing remuneration in Northern Ireland are abolished.** Alternately they could be replaced by more general factors such as those in the 1999 Act above.

#### **General principles**

4.6 There are two ways of approaching remuneration levels: top down or bottom up. Governments usually work top down – looking at current fees and considering (assuming that savings have to be made) to what extent they can safely be reduced. It is much harder to work from a blank sheet and ask: what is a fair payment for the work?

4.7 At the time of writing this report there has been much concern and controversy over a proposed levy in the form of a temporary 15% reduction from all legal aid payments. But no one can say in an objective way whether current rates are the “correct” rates or whether they should be 15% less or some other figure. Perhaps all one could say is that, in the absence of evidence of unsatisfactory access or quality of legal aid services, there is no case for *increasing* current fee levels.

4.8 Northern Ireland has the advantage of being able to look not just at fees within this jurisdiction but in other jurisdictions with similar systems of justice, of which England and Wales is likely to be the closest comparator.<sup>68</sup> There is no obvious reason why a legal aid lawyer in Belfast should be paid more than a legal aid lawyer in London undertaking genuinely comparable work (although factors such as jurisdictional differences in case mix may be a relevant consideration).

4.9 If one tries to look at remuneration from first principles (as this review is required to do), deeper questions have to be asked. Firstly, for whose benefit does the scheme exist? Is maintaining the remuneration or indeed lifestyle of legal aid lawyers a consideration? My starting point is that the legal aid scheme exists solely for the clients. Maintaining a legal profession in Northern Ireland which provides good quality and accessible services is essential, but it is a means to an end, not an objective in its own right.

4.10 If that is right, to what extent should the current structure and regulatory framework of the professions influence remuneration policy? I have been told in several meetings that reform

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<sup>66</sup> Paragraph 33 of the judgment

<sup>67</sup> *Re Burns Application for Judicial Review* [2015] NIQB 24

<sup>68</sup> See the various tables of comparison between jurisdictions in Chapter 8

proposals must respond to the fact there are far more small firms in Northern Ireland than in England. I do not think that is the right approach. Surely the state should not pay a penny more than would be necessary to remunerate an efficiently organised and businesslike legal profession. I don't have any reason to believe that small firms are necessarily less efficient, but if they are they may have to change. It is for the state to specify the range and quality of services it wishes to purchase and the amount it is prepared to pay. It is for the professions to make sure they are set up and regulated to provide quality publicly and privately funded services in the most efficient way.

4.11 Should remuneration of legal aid lawyers be looked at only in the context of legal services or should one also look at earnings levels of other professionals providing vital public services, such as nurses, doctors and teachers? For example, should a barrister working full time on legal aid earn more than a teacher with a similar level of experience? I have qualified and practiced both as a barrister and as a secondary school maths teacher; for what it is worth my experience was that teaching was an even more demanding job, but with lower pay. Classroom teachers in Northern Ireland typically earn between £21-35,000<sup>69</sup>, although some head teachers might even reach salaries of just over £100,000.

4.12 I do not suggest that one can simply make direct comparisons between professions with very different working practices, conditions, costs and workload. I also recognise that it is not hard to find public sector salaries (including for legal roles) which most legal aid lawyers would envy. In my view the question is whether, in the absence of any fundamental market justification for particular payment levels, there are areas of legal aid remuneration where payment rates are so far out of line with other areas of public sector pay that they must be questioned. It must be recognised that many young barristers struggle to find regular work and as a result receive very low earnings from legal aid, but figures released by the Legal Services Commission show that the top 100 earning barristers together received a staggering £22,142,469 from the legal aid fund in 2013/14, i.e. an average payment of over £221,000 each. The next 100 barristers received on average over £78,000 each. Several of the very highest earners derived their fees from the most complex family cases. For individual barristers these figures often reflect payments received for cases completed over several years and for individuals there will be variations in income streams year on year, but similar levels of payments to the highest earners have been repeated year after year. In my view, a remuneration regime which is capable of generating this volume of such high earnings is simply not justifiable or affordable in this jurisdiction.

4.13 I recommend that the Minister adopt the following principles in future reforms of legal aid remuneration:

- **Fee levels should be set with the objective (subject to the relevant statutory framework) of paying the lowest rates possible consistent with securing access to good quality legal services from well run and efficiently structured providers;**
- **Fees should, so far as possible, not exceed those paid in other comparable jurisdictions for comparable work;**
- **Lawyers working full time on legal aid should earn fees which are broadly justifiable in comparison with other public sector professionals such as nurses, doctors and teachers;**

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<sup>69</sup>Source: Department for Education Northern Ireland Teachers Pay Scales from September 2013

- **When considering fee reductions, the categories of work undertaken by the highest legal aid earners should be targeted for the largest reductions so that overall earnings from public funds are restricted to defensible levels.**

### **Fairness and efficiency**

4.14 The Law Society argue that the overall objective when determining remuneration rates is to make fair rates of payment, commensurate with the investment of time and resources by the legal representatives involved.<sup>70</sup> I don't think anyone would disagree with that, but how can such rates be determined? In July 2006 Lord Carter of Coles published his Review of Legal Aid Procurement in England and Wales.<sup>71</sup> The reforms he proposed were all market-based, with the emphasis on best value competition based on quality, capacity and price. Many of those reforms did not proceed or are still playing out in different guises, but one of the great advantages of a genuine market is that it provides a mechanism for determining price. As will be clear from the next Chapter, I will not be recommending contracting or competitive tendering for mainstream legal aid services in Northern Ireland for the time being. The other side of that coin is that, in the absence of such a market mechanism, remuneration will continue to be fixed by regulation with continuing room for debate about the appropriate level of fees.

4.15 The context of the Carter review is reflected in the report's introduction. Although this described the legal aid market in England ten years ago, I would happily adopt the summary in the context of Northern Ireland today:

"I have been impressed by the deep dedication and integrity of the professionals involved in legal aid work, and their real commitment to the principles of legal aid. They should be proud of their hard work on behalf of their clients, and acknowledged rightly as a credit to the legal profession.

However, many in the profession tend to have a natural conservatism towards any move towards greater efficiency in the services they deliver. There must be a better understanding of the finite nature of resources, and the need for the taxpayer and government to secure better value for money from the funds it spends."<sup>72</sup>

4.16 Law firms I have talked to in London have described how they have had to look at all their office systems and staffing levels, especially in relation to secretarial and other support staff, and changed their working practices to operate much more efficiently in the increasingly tough climate of legal aid work. One firm has offered to come to Belfast to discuss with the Law Society and solicitors ways of improving business efficiency.

4.17 In their consultation responses and in meetings, the Law Society and Bar Council stress the importance of evidence-based reform. They argue that before new remuneration rates and fees are set, there should be an objective study into the work needed to undertake a legal aid case and the viability of those fees. I can see merit in this proposal, but do have some concerns:

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<sup>70</sup> Law Society response, page 12

<sup>71</sup> Legal Aid, A Market-based approach to reform, HMSO, July 2006

<sup>72</sup> Carter report, introduction, page (iii)

- Any study should look not so much into how legal aid work *is* currently undertaken, but into how it *could* be undertaken with improved business practices;
- Such a study should be open to the possibility of regulatory changes if these would facilitate more efficient ways of working;
- The project must be closely defined and time-limited, concentrating on the areas of work which generate the highest volume of cases or the highest cost to the fund.

4.18 It is of course open to either the Law Society or the Bar themselves to commission such an exercise. The Department has meanwhile undertaken substantial file reviews in preparation for criminal and family fee schemes. It seems to me that a further independent study into issues of the viability of a legal aid practice would only be of real value if government and practitioners were able to work together to set it up and had shared confidence in its outcome. I do not know if this will be possible in the current climate. **I recommend that the Department enter discussions with the Law Society and other stakeholders, with a view to commissioning an objective study into the case profile of certain types of legal aid work and their cost basis, to identify the potential for improved business efficiencies and to inform future legal aid remuneration policy.** I leave open the question whether an independent study of this sort should be sought from an academic source or from the accountancy / business community. I know practitioners would wish for a moratorium on further fee changes while such work is undertaken but I do not think it would be right or responsible to make such a recommendation when the alternative to remuneration cuts might be further reductions in scope and eligibility.

#### **A comprehensive fee regime**

4.19 The great majority of legal aid payments are governed by regulations made by the Minister. However there is still a significant area of spend where payment rates are not prescribed and quantification of costs remains in the discretion of the court on assessment. This applies primarily to the High Court, Court of Appeal and Supreme Court. Although volumes of cases at these levels may be small, the overall cost to the fund can be substantial. The cost of civil appeals alone in 2013/14 was over £5 million.<sup>73</sup> This represents a significant control gap.

4.20 Although a standard fee regime is being developed for family cases in the High Court, some complex cases in the higher courts may not lend themselves to standard fees, but all work paid for by legal aid could and should be subject to maximum hourly rates.

4.21 Barristers are traditionally paid not on hourly rates but on a lump sum basis, with a brief fee for the job and refresher fees for cases going beyond the first day. Because of the variety of cases coming before the higher and appeal courts, almost all of which will be complex, prescribing all such fees in regulation would be problematic. One option would be to set a universal hourly rate ceiling in regulations. Under such a system, fees would be subject to assessment by the court as now, but barristers would need to record their hours spent in all cases; if their assessed fee exceeded the ceiling rate for the time spent, the fee would be reduced accordingly. This would also be useful in cases where a hearing collapsed for some reason after delivery of a brief when payment is needed for preparatory work undertaken. **I recommend that the Department consult upon setting maximum prescribed hourly rates for all legal aid work not covered by existing remuneration**

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<sup>73</sup>See also breakdowns of family costs by court level in Chapter 8 at Table 8.18

**regulations. The prescribed hourly rate should also operate as a binding ceiling on any non prescribed fees payable on a brief fee or refresher basis. No exceptions or uplifts to the maximum rates should be permitted.**

### **Standard Fees**

4.22 Legal aid payments in Northern Ireland are moving away from hourly rates in favour of standard fees. This is a significant trend in legal aid schemes across the world. In Northern Ireland most criminal cases operate on a standard fee basis and work is well underway on new standard fee schemes for the majority of family work. I support this project. All forms of remuneration incentivise and change behaviour but it is generally better to pay for outputs and results than to pay for time taken. Standard fees improve financial control and create the incentive for lawyers to resolve cases early, potentially doing less work for the same pay. The ability to improve profitability through greater efficiency is an important consideration for legal aid lawyers at a time when general rises in legal aid remuneration rates are unlikely.

4.23 Even within Northern Ireland, the structure and complexity of the different standard fees schemes varies considerably. For criminal cases in the Magistrates Court the standard fee is a single fee per case, regardless of the number of hearings or their length (this applies both to solicitor fees and to counsel's fees where counsel is certified). Similarly for civil cases in the county court, scale costs specify a single fee for solicitor and for counsel dependent on the value of the case.<sup>74</sup>

4.24 Crown Court remuneration for more serious criminal cases works rather differently. There are prescribed basic trial fees dependent on the severity of the charge, combined with refresher fees for each subsequent day of the hearing and in some cases substantial extra payments triggered by the number of pages of prosecution evidence served. Remuneration is therefore determined by a formula reflecting the length, complexity and gravity of the case, often referred to as a "graduated" fee scheme.

4.25 It is a feature of many graduated fee schemes that heavy cases not only take more time to complete but command higher ongoing fees. For example, Crown Court refresher fees double for the longest cases.<sup>75</sup> Page count payments rise significantly from one bracket to another.<sup>76</sup> This approach is understandable in principle but the practical effect can give rise to remarkably high total fees. The tendency is for increased complexity of cases to drive up case costs not in a linear fashion, but exponentially.

4.26 In the last few years the Department's initiatives on criminal legal aid have rightly concentrated on remuneration issues, especially around higher cost cases in the Crown Court and those involving leading counsel. In 2011 the high cost case and exceptionality provisions were removed. New regulations took effect from 5<sup>th</sup> May 2015 designed to achieve significant savings on Crown Court fees, although these changes are now the subject of a legal challenge. Even after these

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<sup>74</sup>See the County Court (Amendment) Rules (Northern Ireland) 2013, Schedule 2

<sup>75</sup>See the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011, SI 2011 No 152, Schedule 2, Part (b) trial fees

<sup>76</sup>In the 2011 Rules, payments to Queen's Counsel could rise by over £10,000 according to page count, but this effect has been significantly reduced by the new rules applying from 5<sup>th</sup> May 2015

reforms there remains a large gap in the typical fee levels between the magistrates' court and the Crown Court, despite the fact that the magistrates' court deals with some quite serious cases.<sup>77</sup> A similar pattern applies to family fees.<sup>78</sup>

4.27 The flexibility of a graduated fee scheme should make it unnecessary to build in an "exceptionality" provision allowing some cases to escape from the fee scheme, but recent challenges have been made to the inability of the scheme to cater for genuinely exceptional cases.<sup>79</sup> All standard and graduated fee schemes are in the nature of swings and roundabouts approximations of payment for an average case. They cannot attempt to arrive at the "right" payment for every case. It is now clear that the courts are prepared to look at the suitability of the scheme to an *individual* set of circumstances, which places a high burden on those designing new schemes.

4.28 Exceptionality mechanisms are built into most standard fee schemes in England and Wales. Typically if the costs on an hourly rates basis would exceed three times the standard fee, payment may be claimed on hourly rates.<sup>80</sup> The number of cases which escape is usually lower than predicted as solicitors are unwilling to undertake work if it is uncertain whether they will reach the high escape threshold. The volume of work undertaken is of course subject to assessment and so cannot be artificially inflated to escape the standard fee.

4.29 The Law Society argue that flexibility within fee schemes is fundamental and standard fees should be restricted to what can be described as "routine" cases. I agree that some flexibility in the form of an exceptionality or escape provision is important but it seems to me vital, in order to ensure that there is effective overall cost control, that standard and graduated fees cater for the overwhelming majority of cases. Such fees need to cover more than just the routine cases.

4.30 **I recommend that when developing new or existing standard fee schemes, the Department should aim to:**

- **Achieve savings predominantly in the higher courts, narrowing the disparity which still exists between different court levels;**
- **Impose tighter controls on cases at the top end of the complexity spectrum, aiming to avoid structures which generate exponentially high total fees;**
- **Ensure that standard fees incentivise desirable behaviour, rather than simply rewarding legal activity;<sup>81</sup>**
- **Anticipate unusual cases and cater for them either through flexibility within a graduated fee approach, court powers to transfer cases to a new regime or by some form of exceptionality provision.**

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<sup>77</sup>See costs comparisons in Chapter 8 at Table 8.10; these fees obviously pre-date the 2015 changes

<sup>78</sup> See family fees per court level at Table 8.18

<sup>79</sup>The *Brownlee* and *Burns* cases discussed at paragraph 4.4 above

<sup>80</sup>See Legal Aid Agency, Standard Civil Contract 2013, Family fee schemes

<sup>81</sup>This is particularly important for private law family cases, as discussed in Chapter 18

### **Complexity of remuneration arrangements**

4.31 For a jurisdiction the size of Northern Ireland there is a remarkably large number of different rates and fees for legal aid work. When I first asked to see the rates for civil legal aid, I was shown a summary including no less than 65 tables of fees! Progress has since been made bringing all civil rates together in the regulations underpinning civil legal services from 1<sup>st</sup> April 2015.<sup>82</sup> Different areas of work also have differing definitions and rules. No doubt each set of fees was introduced for its own reasons which were valid at the time they were created, but over time all the different rates have simply been added onto the scheme, like barnacles building up on a ship's hull. The overall effect is not very attractive, and slows down the whole ship.

4.32 The introduction of standard fees for family cases and the remuneration changes proposed in this report will be major reforms. Once these changes have been introduced **I recommend that the Department, in close consultation with stakeholders, undertake a review of all remaining legal aid fees and rates with the aim of simplifying and rationalising the payment regime.** I understand that such an exercise may already be underway. From time to time the Department may need to consult on reducing fee levels to produce savings; if so it may be necessary to keep such initiatives separate from any simplification exercise. The simplification process should if possible be conducted cooperatively and on a cost neutral basis, potentially with some rates rising and others falling to harmonise levels except where there is a clear policy reason for any difference.

### **Level of representation**

4.33 As discussed in Chapter 2, even where the state is obliged to fund legal representation under article 6 of ECHR, it does not follow that the state is obliged to fund more than one lawyer. If the legal aid scheme were reduced to its irreducible minimum, as outlined at paragraph 2.15, there would be very little work for barristers. No doubt there are cases where a particular level of representation would be essential to secure a fair hearing, but such cases would be exceptional. In that context, all the rules concerning authorisation and payment to counsel need to be carefully reviewed. This area of reform can be approached in stages. The case for specialist advocacy services is strongest in the higher courts such as the Crown Court, High Court and appeal courts. The first areas to consider should be the level of representation in the lower courts and the rules on authorisation of more than one counsel.

4.34 It should always be open to any solicitor in any legal aid case to instruct any number of barristers on payment terms agreed between them, on the basis that the solicitor will be responsible for payment and the instruction will have no impact on the amount the solicitor claims from the legal aid fund. **I recommend that this principle should be more clearly set out in the legal aid regulations.**<sup>83</sup> This review is concerned with situations where the use of counsel increases the overall liability of the fund.

4.35 This policy area immediately raises issues of quality. Good quality advocacy is notoriously difficult to define but you generally know it when you see it. Many of the issues surrounding quality

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<sup>82</sup>In the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015

<sup>83</sup>Some regulations taken at face value seem inconsistent with this – see regulation 11, Civil Legal Services (General) Regulations (Northern Ireland) 2015

and sustainability of advocacy services were considered recently in the Jeffrey review.<sup>84</sup> For present purposes I have no reason to doubt that the Bar in Northern Ireland offer high quality advocacy services. The increased advocacy training, experience and vocational drive of barristers will tend to enhance the quality of the services they offer. It follows that any legal aid reform which reduces the use of barristers runs the risk of reducing the quality of service available to legal aid clients. This needs to be borne in mind alongside the financial implications of any reform.

### Counsel in the magistrates’ court

4.36 There is no payment provision for counsel in summary proceedings. For indictable cases the court has power to grant a “certificate for counsel” authorising counsel to claim a standard fee. The following test is applied:

“Free legal aid given for the purposes of any [defence] before a magistrates' court shall not include representation by counsel except in the case of an indictable offence where the court is of opinion that, because of circumstances which make the case unusually grave or difficult, representation by both solicitor and counsel would be desirable.”<sup>85</sup>

4.37 Here for example are some fees payable for offences triable either way:<sup>86</sup>

**Table 4.1 Magistrates’ court – impact of certificate for counsel**

	Solicitor’s Fee	Counsel’s Fee
Guilty Plea	£275	£275
Contest	£590	£550

4.38 The decision to grant a certificate for counsel typically doubles the cost of the case to the fund. This is an unusual structure for a standard fee regime, although it could be said to reflect the decision a private paying client might have to make in deciding whether to pay for counsel. In England and Wales there is an equivalent system under which the more complex cases can have “assigned counsel”.<sup>87</sup>

4.39 The young barristers I have spoken to in Northern Ireland believe there is considerable judicial inconsistency in decisions on certification for counsel. This is not surprising given the way the test is framed: a large proportion of indictable crimes are bound to be “grave or difficult” but whether they are “unusually” so will be widely open to interpretation. The level of inconsistency has been confirmed to me by figures provided to this review by the Legal Services Agency which record, for individual Deputy and District Judges, the proportion of legal aid orders granted which include a certificate for counsel. Even if one only looks at judges who have dealt with a high volume of cases<sup>88</sup>, the figures vary enormously on a continuous spectrum between authorising counsel in just

<sup>84</sup>Independent Criminal Advocacy in England and Wales, Sir Bill Jeffrey, Ministry of Justice, 2014

<sup>85</sup>Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, Article 28(2)

<sup>86</sup>These are serious offences which could end up in the Crown Court - see the Magistrates’ Courts and County Court Appeals (Criminal Legal Aid) (Costs) (Amendment) Rules (Northern Ireland) 2014

<sup>87</sup>Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013, regulation 16; the range of cases dealt with at the magistrates court level differs between the jurisdictions, many more serious cases remaining in the magistrates’ court in Northern Ireland – see also Chapter 8, Table 8.1

<sup>88</sup>Those with figures for more than 100 sitting days

6% of cases, right up to 51%. I do not think this level of variance can be entirely explained in terms of differing case mix.

4.40 In 2013/14 the LSC paid out a total of £4,245,670 to counsel for work in the magistrates' court. In the same year a total of £15,101,997 was paid to solicitors of which £12,622,288 related to indictable cases. For indictable cases there were 6,696 claims by counsel at an average cost of £643 each; while solicitors made 19,744 claims at an average cost of £639 each. This suggests that certificates for counsel were given in about a third of indictable cases.

4.41 Clearly there are substantial funds at stake. Reform of the system of certifying for counsel must be considered. Agenda question 6 asked whether such decisions should be justified specifically in the terms laid down by Article 28(2). Question 7 asked whether the decision should be transferred from the court to what is now the Legal Services Agency or to court-based staff acting on behalf of the Agency. The LSC themselves expressed serious concern at the consistency and accountability of the current arrangements, calling for further research to ensure that the rules laid down by Parliament were being properly applied. The Belfast Solicitors Association suggested that further guidance on the test would be beneficial.

4.42 The Bar believe that the current system is highly efficient. These decisions should remain with the judiciary and any alternative procedure would only cause delay. The Bar and the Law Society cautioned that any change should be based upon properly researched evidence rather than anecdote, bearing in mind that the judge is well placed to make such decisions, having a solid grasp of the factual matrix of the case before the court.

4.43 It seems to me that a range of reform options need to be considered. The most radical would be to abolish the system of certification at the magistrates' court level and move to one case per fee, payable to the solicitor. This would leave it to the solicitor to decide whether to instruct counsel and what to pay. From the figures above, increasing solicitors' fees for indictable cases by about 33% would be cost neutral, but if it is right that the courts are granting certificates too often, a smaller increase than this would be justified and savings could be achieved.

4.44 It is not difficult to foresee how behaviour would change under such an approach; the use of counsel in the magistrates' court would decline significantly as solicitors understandably sought to hang on to as much of their fee as possible. Use of counsel might become more dictated by the practical convenience of solicitors than by the client's need for expert advocacy services. The risk is that one would end up by transferring spend from barristers to solicitors with limited net savings and a loss in the quality of advocacy services for the most serious cases at this court level. On balance I do not recommend this approach at this time.

4.45 An alternative way forward is to change the test itself to make it more objective and restrictive. Approaches which could be explored in consultation include:

- Restrict certification to those cases where the defendant requires representation by counsel in order to guarantee an article 6 compliant fair hearing. However I fear such a test would be all but impossible to pass;

- Recast the test to require something like: “Exceptional gravity or complexity compared to the generality of indictable cases before the magistrates’ court” This would I think be an improvement on the current test as it would make the basis for comparison clearer, but still open to interpretation;
- Identify specific combinations of offence category or procedural situations (such as contested trials) which more routinely justify certification. Consultation with the young Bar might be particularly productive in defining such criteria.

4.46 **I recommend that the Department consult upon reform to the test for certification for counsel, including the three options listed above.** Whatever form the final test takes, and pending any such reform, **I recommend that the court be under a duty to record specific reasons for decision to certify,** which could be periodically reviewed on audit.

4.47 As to transferring the function from the court to the Agency this is an important option to consider, but one which raises serious practical difficulties. In Chapters 12 and 13 I consider the administration of decisions on the means and merits criteria for criminal legal aid. I conclude that there is no objection in principle to transferring these decisions to the Agency, but because of the practicalities involved, these decisions should remain with the court for the time being. There is a stronger case for transferring decisions on certification to the Agency because of the evidence of inconsistent decision making under the existing system. However, to require applications to certify counsel to come to the Agency, without a specific online procedure for this purpose, could well be a recipe for delay and confusion. **I recommend that the Agency develop proposals and a business case for a reliable and cost effective online system for criminal legal aid decision making. Until any such alternative becomes available, I recommend that decisions on certification for counsel in the magistrates’ court should remain with the court.**

4.48 I understand that an equivalent reform tightening the criteria for certifying for counsel in the Family Proceedings Court resulted in a very sharp decline in the use of counsel at that level. An expectation that applications to the LSA should be supported by a note from counsel no doubt deterred many from making the application. The practical impacts of any reform of the administration of the test in the magistrates’ court would need to be considered carefully in any future consultation. The accessibility of the court and the ability to make an oral application during or at the end of a hearing no doubt increases the likelihood of a grant.

#### **Counsel in county court**

4.49 The scale costs payable in the county court in Northern Ireland give a much greater degree of control than applies in England and Wales (where only a limited range of proceedings are subject to fixed costs). However, unlike England and Wales, counsel’s scale fees are claimed as of right in the county court in Northern Ireland. In cases where no counsel is instructed the solicitor can claim an enhanced fee of 50% of what would have been paid to counsel.<sup>89</sup> Since the county court is the lowest level of court for civil non family proceedings, it is surprising that the legal aid authorities are not required to authorise the use of counsel. The county court scale costs are simply replicated in the new remuneration regulations.<sup>90</sup>

4.50 One option would be to require a certificate for counsel for all county court work, applying a similar system to that operating in the magistrates’ court or Family Proceedings Court. Another approach would be to remunerate counsel only for individual hearings or other items of work, not to

<sup>89</sup>County Court Rules Order 55, paragraph 2A

<sup>90</sup>Civil Legal Services (Remuneration) Order (Northern Ireland) 2015, Schedule 4, Part 4

pay for representation in the case as a whole. Given that the county court scale costs for counsel are, on the face of it, not generally excessive and are on a sliding scale according to the size of the claim,<sup>91</sup> it is important not to introduce unnecessary administrative processes. I also acknowledge that scale costs, like any standard fee, operate on a swings and roundabouts basis. However I worry that one-off involvement by counsel may generate a disproportionate fee. On balance I **recommend that the current scale fees for counsel are retained but the Department consult upon a change to the system so that scale fees operate as a ceiling, not as an entitlement.** At the end of the case when counsel's fees are claimed the Legal Services Agency should reserve the right to assess those fees, including considering whether it was reasonable for counsel to be used. I would see this as a reserve power, one to be applied only exceptionally; the important issue is the principle of counsel's fees not being an entitlement at this level.

4.51 The majority of legal aid spend at the county court level is in family proceedings before the Family Care Centre. These are already governed by a range of prescribed rates which will be addressed in the new standard fee regime for family cases. In my view the existing policy under which representation by both solicitor and counsel is expected at this level should be reconsidered. All the options considered above in relation to the magistrates' court or county court could be considered. However, the policy on level of representation needs to be developed alongside the new fee schemes; any reduction in the use of counsel at this level would alter the case mix on which new fees are calculated. **I recommend that, as part of developing the new family fee schemes, the Department consult on options for the authorisation of counsel in family proceedings before the Family Care Centre or county court.**

#### **Leading counsel**

4.52 There are presently 96 Queen's Counsel (otherwise known as Senior Counsel, leading counsel or more often "QCs") in Northern Ireland, somewhat higher per head of the population than in England and Wales.<sup>92</sup> They have a prominent role in the most complex civil and criminal cases. Senior Counsel status is reflected in remuneration arrangements for civil and criminal legal aid. In England and Wales it is common for QCs to appear as sole counsel in a case and there are specific regulatory powers to authorise this, but in Northern Ireland the traditional two counsel model of a QC leading junior counsel is predominant. The regulatory framework protects this model of representation.<sup>93</sup>

4.53 Authority must be granted before two counsel can be instructed in a legal aid case; in criminal cases authorisation is given by the court; in civil cases it is granted by the Legal Services Agency. Similar principles apply across different courts. For the Crown Court the test is as follows:

"(6) Where the charge is one of murder, or the case appears to present exceptional difficulties, the certifying authority may certify that in its opinion the interests of justice require that the assisted person shall have the services of two counsel.

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<sup>91</sup>From £180 up to £1,060 for claims up to £30,000

<sup>92</sup>See detailed breakdown in Chapter 9

<sup>93</sup>See *A's Application* [2015] NIQB 4, 19<sup>th</sup> January 2015, discussed further in Chapter 9

(7) For the purposes of paragraph (6), the term “exceptional” means that the case for or against the assisted person involves substantial novel or complex issues of law or fact, such that it could not be adequately presented by one counsel...

(11) Without prejudice to paragraphs (6) and (7), where a judge of the court before which the assisted person is to be tried is of the opinion that in the interests of justice a criminal aid certificate in respect of two counsel must be granted in order to protect the assisted person’s rights under the Human Rights Act 1998, the judge shall grant such a certificate.”<sup>94</sup>

4.54 Although it is logical to have power to certify for two counsel if this is necessary to protect the assisted person’s rights under ECHR, it is far from clear when, if ever, this will arise. There is no direct ECHR obligation to fund a team of at least two lawyers, let alone three; other European countries without a split profession have no such hierarchy. As discussed in Chapter 2, I do not think the principle of equality of arms should be assumed to oblige the taxpayer to fund an unnecessary level of representation just because another party to the case has chosen to do so.

4.55 The cost impact of funding two counsel can be significant, especially in High Court and Appeal cases where rates are not prescribed. Table 4.2 shows a selection of prescribed rates for counsel, comparing the cost of junior counsel alone with the cost of a senior and junior:<sup>95</sup>

**Table 4.2 Increased cost of instructing senior counsel**

	Junior Counsel	Senior Counsel	Senior plus led junior	Increased cost of allowing two counsel	% increase of allowing two counsel
Children Order Brief fee	£2,000	£3,000	£5,000	£3,000	250%
Contested adoption Brief fee	£2,500	£3,750	£6,250	£3,750	250%
Mental Health Composite fee	£2,666	£4,000	£6,666	£4,000	250%
Inquest – Hearing hourly rate	£149.25	£386.25	£535.50	£386.25	359%
Crown Court Trial fee 1, Class A	£3,900	£6,000	£6,000 + 3600 = £9,600	£5,700	246%
Crown Court Trial fee 1, Class I	£1,216	£1,871	£1,871 +935 = £2,806	£1,590	231%

<sup>94</sup>Criminal Aid Certificate Rules (Northern Ireland) 2012, Rule 4 (6), (7) and (11)

<sup>95</sup>Rates taken from the Civil legal Services (Remuneration) Order (Northern Ireland) 2015 and the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015

Crown Court Refresher fee 1	£260	£400	£400 + 200 = £600	£340	231%
Crown Court Guilty Plea Class D	£1,285	£1,976	£1,976 + 988 = £2,964	£1,679	231%

4.56 In consultation responses and discussions, concerns have been expressed to me that leading counsel is authorised too often in legal aid cases. The PPS report that, whilst they typically instruct a QC in 6 or 7 % of Crown Court prosecutions, defendants are represented by QCs in about 20% of cases. In a trial with multiple defendants, the PPS tell me it is not uncommon for a single prosecuting counsel to face several defence teams, each with two counsel. I accept that the responsibilities of prosecution and defence teams are different and the relative burdens will vary from case to case, but I do not accept that, in general, the defence is entitled to a higher level of representation than the prosecution.

4.57 I have no concerns about the quality of advocacy offered by senior counsel in Northern Ireland. One argument put to me is that senior counsel often have the skills to settle major cases or negotiate “cracked” criminal trials, thereby saving the much higher costs of lengthy contested hearings. I am sure this is true, although I would not accept that such skills are unique to those with QC status.

4.58 In my view the service offered by this additional level of representation is neither required by ECHR (expect perhaps in very exceptional cases) nor is it affordable by the legal aid scheme of Northern Ireland. Compared to other priorities, in particular preserving a reasonable level of support for family cases, we should not be investing in this Rolls Royce service for the minority of most serious cases. The best is indeed the enemy of the good. **I recommend a radical reform of the rules concerning funding two counsel under the legal aid scheme.** I propose consultation on the following approach:

- It is essential that all decisions to authorise two counsel should be taken by the Legal Services Agency, who are of course accountable for the budget, not by the court; I do not think it is realistic to expect the court to exercise this discretion in a way which ensures consistency and budgetary control;
- The test must be redrawn to make authorisation far more exceptional; in criminal cases it could remain routine for murder trials and consultation might identify other very serious Class A or D offences where two counsel might be expected;
- The remaining discretion on the part of the Agency, which should be the same for civil and criminal cases, should be along the lines of whether two counsel are necessary to ensure a fair hearing, but in practice authorisations should normally be considered only when the other side / prosecution have a similar level of representation and the additional costs are reasonable and proportionate to the case;
- There should be no right of appeal against a refusal of an authorisation of two counsel; this reflects what should in future be seen as a discretionary rather than entitlement system;<sup>96</sup>
- There should also be wider powers to authorise the funding of a QC without a junior;

<sup>96</sup> Amendment to the Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015 will be required, see regulation 4 and the Schedule

- Although it is a professional conduct matter for the Bar Council, nothing should prevent QCs being able to compete for and accept briefs as sole counsel at sole junior rates.

4.59 In any consultation, other alternative approaches could be put forward, which could include:

- Removing separate payment bands for QCs and applying the rates for leading junior counsel;
- Abolishing separate payments for led junior counsel, requiring junior counsel to be paid by agreement out of the fees payable to leading counsel; this would no doubt greatly reduce payments for being led but would encourage seniors to manage their work efficiently and might increase the opportunities for the young Bar to participate in these grave and complex cases.

### Expert fees

4.60 Access to Justice 1 recognised the significant cost of expert reports to the legal aid scheme and recommended a review of the use and cost of experts.<sup>97</sup> The Bar also rightly highlight this as an area where there may be potential for savings for the scheme. Because of competing reform priorities this work has not proceeded, although data collection is underway. It has not been possible within this review to analyse this area specifically, nor will it be possible to progress the work until more comprehensive data is available. On a more optimistic note I make two observations:

- Much of the use of experts is driven more by the courts than the legal aid authorities, especially in family cases; greater control over experts should be a key objective of the pilot of public law proceedings described in Chapter 15 and will no doubt be considered within Lord Justice Gillen’s Review of Civil and Family Justice;
- Northern Ireland can make good use of progress made in this area of spend in other jurisdictions; in particular, there are maximum prescribed hourly rates for all manner of experts in England and Wales;<sup>98</sup> **I recommend that in assessing expert fees, the Legal Services Agency take into account the prescribed rates for non London experts.**

### Summary

4.61 When setting remuneration levels, the objective should be to pay the lowest rates possible consistent with securing good access to high quality legal services from well run and efficiently structured providers. Payment levels in other jurisdictions and for other public sector professional services should be taken into account. Reductions should be targeted on the highest earners and the higher court levels. Further research should be considered to inform future remuneration rates for typical legal aid cases.

4.62 Steps should be taken to regulate and simplify legal aid payment rates for all levels of court. Legal aid payments should continue the move towards standard fees per case, instead of hourly rates. Standard fees give better control and reward supplier efficiency.

4.63 Levels of representation in legal aid cases must be reviewed. Representation by a solicitor and a barrister may secure good quality advocacy services, but is not part of the irreducible minimum of legal aid provision. Reform of the rules for payment of counsel in the magistrates’ court should be considered; legal aid should not automatically cover representation by counsel in the

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<sup>97</sup>See Aj1 at pages 99 to 101

<sup>98</sup>See the Civil Legal Aid (Remuneration) Regulations 2013, regulation 16 and Schedule 5

county court and Family Care Centre. The priority for achieving savings should be a radical reduction in the use of two counsel in legal aid cases. Funding Queen's Counsel and junior counsel together in complex cases is no longer affordable in light of higher priorities, especially the need to maintain a reasonable level of support for family cases.

## 5 Delivery Models

***“The universe never did make sense: I suspect it was built on government contract.”<sup>99</sup>***

5.1 This Chapter looks at different ways legal services might be delivered either as part of the legal aid scheme or outside it. Some delivery models specific to criminal legal aid are covered in Chapter 14. The important question of whether conditional fee agreements should be introduced in Northern Ireland as a way of funding civil non family cases is covered in Chapter 22.

### **Legal aid contracting**

5.2 In England and Wales all legal provision is administered through contracts between the legal aid authority and the law firm or other provider of services. The contract sets quality standards, governs remuneration, describes how the work is to be undertaken and may place limits on the volume of work undertaken in each category of law. Contracts are the principal strategic mechanism seeking to ensure that services are delivered where they are needed. Contracts are awarded by sophisticated tendering processes which may be highly competitive and lead to radical reshaping of the provider base. Firms who lose out in a tender for a category of work are likely to be prohibited from undertaking publicly funded work in that category.

5.3 Would the introduction of contracting as the sole or dominant means by which legal aid is delivered be beneficial in Northern Ireland? This issue was raised in consultation question 36 of the Agenda. Those providers of services who responded to this question were opposed to the idea.

5.4 The Law Society remained unconvinced, as they were in their response to AJ1<sup>100</sup>, of the case for contracting. The Belfast Solicitors Association similarly argued that contracting would not be beneficial in a jurisdiction the size of Northern Ireland. It would directly reduce the number of suppliers and be unlikely to provide the geographical coverage which currently exists from the network of solicitors in the Province. They also believed that quality would suffer as soon as price became a factor in the awarding of contracts. More fundamentally, however, client choice of solicitor should be preserved where possible. There were far better ways to manage the costs of the scheme than contracts. The Bar referred to the Bain review’s endorsement of existing structures for the provision of legal services.<sup>101</sup>

5.5 The LSC were far more positive about the benefits of contracts. Ultimately, delivery models must be found which give clients and funders best value for money with assured quality and adequate level of representation. The LSC proposed that contracting should be piloted in specific subject areas both at the high volume/low cost end of the spectrum, such as criminal representation in the magistrates’ courts, and in more specialist areas to see what lessons can be learned. Such tenders should be based on both quality and price. Meanwhile a close watch should be kept on developments in England and Wales.

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<sup>99</sup>Robert A. Heilein

<sup>100</sup>See Law Society AJ1 response at 5.12 to 5.17 which nevertheless saw that contracts could have a role for “specialist areas of work or those areas where a specific client need has been identified.”

<sup>101</sup>Legal Services in Northern Ireland: Complaints, Regulation, Competition; 23<sup>rd</sup> November 2006; Chapter 6, paragraph 43

5.6 In terms of my own experience having worked for many years in the legal aid scheme of England and Wales, I saw both the benefits and drawbacks of tender exercises and contracts. The statutory framework of the Access to Justice Act 1999 required the LSC to inform itself of legal need and plan pro-actively to meet that need. Contracts were the essential vehicle to achieve this. On the other hand, the sheer amount of work needed to maintain the contractual regime was daunting. At times it seemed to be the dominant activity of the whole organisation. The burden of tendering on providers was also considerable.

5.7 Complex tendering exercises also have a preternatural ability to go horribly wrong. When they do, remembering that you are dealing with lawyers with a strong financial interest in the outcome, epic legal challenges tend to follow. Many tenders were successfully delivered but, for example, in 2010 the tender for family contracts would have almost halved the number of providers even though there was no policy intent to do so. The latest crime tenders have greatly reduced the number of firms providing criminal legal aid services. There can be advantages in this of course, with increased volumes bringing economies of scale for those remaining within the system. This is part of the rationale for a phased 17.5% reduction in criminal fees in England and Wales. I agree with the view of the Law Society of England and Wales that these arguments are more persuasive in urban than rural areas. In more rural areas, typical in Northern Ireland, it is much harder for firms to expand to cover new courts or police stations without substantial additional cost.

5.8 It seems to me that defining legal services, capacity and quality standards is extremely complex in itself and when you add the competitive element, with a backdrop of European procurement law and domestic judicial review, the problems increase exponentially. Overall, if I was advising with hindsight on whether contracting has been beneficial in England and Wales, it would be a close run thing. In Northern Ireland the situation is very different. Without the economies of scale of a larger jurisdiction and with a differently structured supplier base, the arguments against the introduction of contracting for mainstream legal aid services are in my view very strong. **I recommend that no steps be taken for the time being to introduce contracting or tendering for the general provision of legal aid services in Northern Ireland.** The considerations here are more practical than philosophical. Whilst it is tempting to consider the LSC's suggestion of piloting, given the difficulties and the amount of work needed to get pilots up and running, I do not think this should be a priority avenue of work.<sup>102</sup> So long as a good range of legal services remain available in this jurisdiction I cannot foresee circumstances where the balance would tip in favour of a comprehensive contracting regime, but one should never say never. A major withdrawal or collapse in supply might cause this debate to be reopened.

5.9 If the majority of legal aid services proceed without contracts, we need to recognise the consequences:

- Alternative mechanisms must be found to enable the Department to fulfil its statutory obligations to identify legal needs and plan to meet those needs;<sup>103</sup>

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<sup>102</sup>However grant funding, which is a form of contracting, could have an important role for specialist services as described later in this Chapter

<sup>103</sup>See the 2003 Order, Article 6; this provision is closely modelled on the Access to Justice Act 1999 which was drafted very much with contracting in mind

- Without the framework and volume controls contracting would bring, it will be difficult to develop the Green Form scheme to deliver advice and assistance in a strategically planned manner;
- Without a market to determine price, legal aid remuneration must continue to be imposed by regulation.

### **The registration scheme**

5.10 One of the strongest arguments for contracting is that it allows a funder to set and drive up quality standards. However contracts are not the only way to guarantee quality. Access to Justice 1 recommended the establishment of a statutory registration scheme with the objective that only registered solicitors and barristers should be able to undertake publicly funded work. A consultation paper was issued in July 2014.<sup>104</sup> Article 36 of the 2003 Order provides the necessary statutory framework.

5.11 Progress towards implementation has slowed recently. An important project like the registration scheme needs to maintain a certain momentum which only derives from a clear timetable. No one apart from the Minister should have a veto over such a reform once it is underway. I hope that cooperative working on the details of the scheme resumes, but whether it does or not **I recommend that the Department announce a definite but realistic timetable for the project, including the date after which registration will be compulsory.** I tentatively suggest that 1<sup>st</sup> January 2017 might be a suitable date to work towards.

5.12 When new quality standards were introduced in England and Wales during the 1990s under what was called legal aid franchising, there was apprehension on the part of representative bodies that this was a stepping stone or Trojan horse towards contracting and competition. Such concerns should not arise in Northern Ireland where wholesale contracting is much less likely to be a viable option. I would hope that the registration scheme could be developed so that new and specific quality standards could be introduced over time. The nature of a registration scheme is that all those who satisfy the relevant criteria should be able to carry out publicly funded work. By contrast, in England and Wales a firm that satisfies all quality criteria is not guaranteed either a contract or the ability to do work.

### **Grant funding**

5.13 Grant funding in this context refers to one-off or block payments for legal aid services in a way which is separate from or additional to mainstream legal aid provision.<sup>105</sup> Consultation question 37 of the agenda asked what type of services would be suited to grant provision, including situations where grants might facilitate partnership working in the community in the provision of advice and assistance, and perhaps in establishing arrangements for alternative dispute resolution, thus diverting people away from the courts. Question 38 drew attention to the arrangements under which the Housing Rights Service (“HRS”) provide expert advice and, where necessary, representation in court. What other areas might be amenable to this type of funding?

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<sup>104</sup>Introduction of Statutory Registration Scheme for all Providers of Publicly Funded Legal Services in Northern Ireland, Department of Justice, July 2014

<sup>105</sup>Technically a grant with conditions is just another form of contract but for present purposes it is best not to call it a contract to distinguish it from the more general issues of contracting discussed above

5.14 Consultation responses were strongly positive towards the principle of grant funding and offered a range of possible applications. The HRS themselves were understandably pleased to see the positive description of their service in the Agenda, which was echoed in other consultation responses. They emphasised the importance of a coordinated approach via the Community Housing Advice Partnership which has referral arrangements to a range of agencies. They suggest that grant funding could have wider applications and pointed to the Scottish Legal Aid Board which specifically allocated funds to target increased legal needs flowing from the recession.

5.15 Citizens Advice Northern Ireland (“CANI”) recommended grant funding for supporting litigants in person at courts and tribunals and for ADR; NIACRO and STEP suggested grants to the voluntary sector covering a range of social welfare law areas as well as immigration/asylum, including support for social security and employment tribunal cases. STEP suggested that, in areas where the voluntary sector had real expertise, better value for money could be secured through grant funding than under the current Green Form scheme.

5.16 The CANI proposal for support for litigants in person has similarities with what the House of Commons Justice Committee has called the “Californian Model” involving dedicated facilities at court to support all unrepresented litigants.<sup>106</sup> Support for litigants in person is considered further in Chapter 7.

5.17 The Belfast Solicitors Association saw a role for grant funding, for example for ADR services, but were more concerned at the risks of replacing expert advice from solicitors. The LSC felt that the existing approach to grants was not as effective as it could be and that greater coordination was required with other departments, such as the DHSSPS in relation to family mediation or the Department for Education in relation to Special Educational Needs cases.

5.18 Overall my concern is that grant funding can too easily be viewed as a vehicle for general expansion of legal aid into new areas, which is unrealistic in the current financial climate. Having said that, many of the specific proposals put forward under this heading are in my view very worthwhile. They might well, pound for pound, do more for access to justice than some services within the normal scope of legal aid. I believe grant funding should remain within the legal aid scheme but what is needed is a much more structured and coordinated approach. There should be a single process under which all grant applications are considered out of the dedicated but strictly limited funds available. This proposal is fleshed out further in Chapter 26.

### **Legal expenses insurance**

5.19 Insurance policies covering legal costs come in two distinct forms. Before the event insurance (“BTE”) is a standard insurance product often attached to household or motor policies. It can be used to cover your legal costs in certain circumstances if a need for advice or representation arises after the policy has been taken out. After the event insurance (“ATE”) is a more peculiar creature in that it is taken out after the need for litigation has arisen and is used primarily to protect

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<sup>106</sup>See Impact of the changes to civil legal aid under Part 1 of LASPO, Justice Committee, 12 March 2015 at pages 50-51

the client from the consequences of losing. ATE is closely associated with conditional fee agreements and is considered further in Chapter 22.

5.20 Consultation question 39 asked how insurance could play a greater role in supporting access to justice. Responses were generally supportive of the role that BTE could play but sceptical about how significant its impact could be in Northern Ireland. The LSC reported that BTE was becoming more widely available while Zurich said that the existence of BTE was not always fully investigated by claimants. The Belfast Solicitors Association suggested that a question on BTE should be built into the standard legal aid application form. NIACRO and STEP argued that insurance was fine for those able to get it but unlikely to reach many legal aid clients, such as those on low incomes or with a criminal background. The Bar cautioned that BTE might act to restrict the client's choice of legal representative.

5.21 The Ulster University Law Clinic and STEP raised the question whether some form of compulsory legal expenses regime might be introduced, recognising that this would be a major reform. Although the idea was interesting they were unsure of its potential benefits in Northern Ireland.

5.22 Overall I agree that BTE could be a significant funding option and its potential in Northern Ireland should be further investigated and expanded. Legal aid should not be used for cases where insurance already exists. However I also agree that its potential is limited and it is unlikely ever to make major inroads into the main areas covered by legal aid in Northern Ireland. BTE policies of course vary in what they cover but almost invariably exclude criminal and family law. **I recommend that the Department engage with the insurance industry to ascertain the extent of legal insurance coverage in Northern Ireland and its potential to expand. I also recommend that the civil non family legal aid application form should require clients to declare whether any BTE exists.**

5.23 I do acknowledge that insurance plays a much more significant access to justice role in other jurisdictions. In Germany, taking out legal expenses insurance (often as a free-standing policy) is much more common and a far greater level of coverage is obtained. In the past when I have tried to ask why this is so and how such an approach could be developed in the United Kingdom, the usual reply is simply that "it's a cultural thing".

### **Pro bono**

5.24 It is easy to forget that, before modern statutory legal aid schemes were established, the poor were almost entirely dependent on those lawyers prepared to give their services voluntarily and free of charge for the public good ("Pro bono publico"). Part of the deal leading to the original legislation involved the taxpayer agreeing to assume this burden, in response to which the legal professions agreed to accept a 15% reduction from their normal fees.<sup>107</sup>

5.25 Consultation question 40 asked how pro bono work could be further supported and enhanced. What sources of funds can be accessed from the private, public and charitable sectors to support organisations delivering free legal assistance and representation for vulnerable clients outside the legal aid system?

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<sup>107</sup>Legal Aid and Advice Act 1949, Third Schedule, paragraph 2

5.26 Many consultees drew attention to the strong tradition of pro bono services in Northern Ireland. Examples included:

- The Bar of Northern Ireland which operates a dedicated Pro Bono Unit offering, for free, advice and representation to clients in public interest, deserving cases where legal aid is not available or where the applicant is unable to afford legal assistance;
- The PILS Project (Public Interest Litigation Support Project) which exists to advance human rights and equality in Northern Ireland and runs a register of practitioners interested in undertaking legal work on a pro bono basis;
- The University of Ulster Law Clinic which provides free legal advice and representation on social security and employment law;
- The Legal Support Project, set up by Law Centre (NI) providing advice and assistance on social security and employment;
- The voluntary sector generally whose contribution to advice services is extensive.

5.27 The Bar confirmed that pro bono legal work has always been an integral part of membership of the Bar of Northern Ireland. Operation of the Bar's Pro Bono Unit has recently been enhanced by a system of referrals from accredited advice agencies and pro bono solicitors. However, such services can only be an adjunct to, not a substitute for, publicly funded legal services.

5.28 The University of Ulster Law Clinic described their LLM in Clinical Legal Education with support from an annual Access to Justice Scholarship from the Department of Justice. Their students provided 600 hours of free advice under supervision. Larger law firms could be approached to support these education and access to justice objectives. The Belfast Solicitors Association agreed that larger law firms could do more while smaller firms are less able to help, facing declining income from other sources. They also suggested that an initial amount of free advice could be built into the Green Form Scheme. Citizens Advice Northern Ireland suggested that grant funding for the voluntary sector would help to facilitate additional pro bono services.

5.29 The Northern Ireland Human Rights Commission and the Ulster University Law Clinic called for pro bono costs orders. These are a form of funding which operates in England and Wales allowing for costs to be recovered in successful cases even if the case is brought on a pro bono basis; the costs do not go to the lawyers but form a fund to support future public interest cases.

5.30 The Lord Chancellor recently encouraged a greater commitment to pro bono from commercial firms:

"Many of our leading law firms have committed to give 25 hours pro bono on average per fee earner each year. That is welcome, but much more needs to be done.

Last year, according to a survey by the Law Society, 16% of solicitors in commerce and industry provided an hour or more pro bono work. When it comes to investing in access to justice then it is clear to me that it is fairer to ask our most successful legal professionals to contribute a little more rather than taking more in tax from someone on the minimum wage."<sup>108</sup>

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<sup>108</sup>Michael Gove, 'What does a one nation justice policy look like?', Legatum Institute, 23<sup>rd</sup> June 2015

5.31 I have been impressed by the level of commitment shown to pro bono services in Northern Ireland. I hope these services continue and flourish, recognising that they can never be a substitute for the legal aid scheme. **I recommend that the Law Society of Northern Ireland consider publishing a revised pro bono policy encouraging a greater commitment from larger firms. I recommend that the Department makes the necessary regulations to allow pro bono costs orders to be made in Northern Ireland.**

### **Self help tools for legal problems**

5.32 Consultation question 41 asked what role in supporting access to justice could be played by the development of accessible information and self-help tools that would assist those with potentially justiciable problems but who are unable to access professional legal advice and representation?

5.33 The LSC were supportive of the development of such tools which might require some inter-departmental cooperation. NI Direct could host such a service. They cited the Rechtwijzer project<sup>109</sup> in the Netherlands which makes extensive use of interactive web-based systems to diagnose and help to resolve legal problems. Citizens Advice Northern Ireland said that there was already a lot of help available on line, including their own fact sheets and self help guides.

5.34 The Belfast Solicitors Association, HRS and NIACRO sounded a note of caution: interactive tools would be very useful for some clients but for many of the poorest clients, clients with disabilities or special needs and those with complex cases, there was no substitute for tailored legal advice.

5.35 I agree with the views expressed that self help tools could have an important role to play in helping some clients resolve their problems but will never be a complete solution. The Universities could have a key role in developing such innovative approaches to access to justice. Grant funding could also be used to support such initiatives by application to the fund I propose in Chapter 26.

### **Legal aid administration**

5.36 With effect from 1 April 2015 the Legal Services Agency took over responsibility for legal aid administration from the LSC. Under the previous legislation there had been a highly problematic division of policy responsibility between the Department and the LSC, as there was in England and Wales under the Access to Justice Act 1999. I agree that it was right to legislate so that policy responsibility now rests clearly with the Minister.

5.37 If I had been advising prior to the latest legislation, bearing in mind the considerable proportion of legal aid cases concerning disputes between the individual and the state, I would probably have favoured legal aid decision making on individual cases remaining in the hands of an arms-length body. However that ship has sailed and it is good to see that there is a clear legal framework separating policy from determination of individual cases, even in cases of exceptional funding. I am entirely satisfied that decisions will continue to be made with objectivity and independence.

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<sup>109</sup> Described further in Chapter 26

5.38 The Bar identify legal aid administration as an area where greater efficiencies and savings could be achieved. The running costs of the legal aid system in Northern Ireland are proportionately higher than England and Wales<sup>110</sup> as might be expected in a smaller jurisdiction. The Bar also suggest that legal aid was more efficiently run in the days of the Law Society. I am told that in the last year of Law Society operation, running costs were 7.4% of total spend whilst in the last year of the LSC the equivalent figure was 6.4%. Further efficiencies will flow from the establishment of the Agency as part of the Department and all government departments are currently under pressure to reduce costs. However, such economies can only have a very limited impact on the overall costs of the scheme.

### **Summary**

5.39 Most legal aid services in Northern Ireland should continue to be provided without contracts for the foreseeable future. In the absence of a contractual regime a more structured system of grant funding can be deployed to respond to identified priority legal needs. The registration scheme should proceed with a set timetable for implementation.

5.40 Legal expenses insurance, pro bono provision and self help tools should all be supported and can have a role in enhancing access to justice. However, none of these is likely to have a significant impact on the majority of services currently funded by the legal aid scheme.

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<sup>110</sup>See Chapter 8, Tables 8.7 and 8.8

## 6 The Budget for Legal Aid

*“The problem is not the problem; the problem is your attitude about the problem.”<sup>111</sup>*

6.1 Overshadowing this review is a fundamental difference of view about the budget for legal aid. The Department on behalf of the Minister faces a decreasing budget and is taking urgent and necessarily unpopular steps to reduce the cost of the scheme. The Law Society, Bar Council and many other stakeholders do not regard the budget as correct and see no reason why the scheme should not broadly carry on in its current form. This Chapter looks at the way the budget has operated in the past, the current financial circumstances affecting the legal aid scheme and the financial constraints that a future legal aid scheme emerging after this review may need to operate under in the longer term. The resources made available for legal aid must of course be considered in the context of all the other pressures facing the Northern Ireland Executive.

### Setting the budget

6.2 In the years prior to devolution there was a tendency for the budget for legal aid in Northern Ireland to be substantially below the likely cost of the scheme. The shortfall would then be made up by the Treasury in year. The following table shows the recent history of budgets in place at the start of each financial year, the actual spend in £millions, the percentage change in spend year on year and the shortfall:

**Table 6 History of legal aid budgets<sup>112</sup>**

	05/06	06/07	07/08	08/09	09/10	10/11	11/12	12/13	13/14	14/15	15/16
Budget	40.0	65.0	65.0	65.0	103.9	83.9	83.6	83.1	74.9	74.7	82.5
Spend	63.1	74.7	77.7	89.8	104.2	98.0	107.3	107.1	107.3	111.4	103.1
Change		18%	4%	16%	16%	-6%	9%	0%	0%	4%	-7%
Shortfall	(23.1)	(9.7)	(12.7)	(24.8)	(0.3)	(17.7)	(23.7)	(24.0)	(32.4)	(36.7)	(20.6)

6.3 The budget figures for 09/10 and 10/11 include £20M added to the baseline each year as part of the devolution settlement and an additional £18.9 and £20M respectively from the devolution funding package. In 2011 Access to Justice 1 recommended that the LSC should enter each year with a budget which reflected a reasonable assessment of spend in the light of projected volumes.

6.4 The Law Society point out the relative stability of spend in recent years and attribute the latest increase to a higher throughput of Crown Court work owing to additional judicial resources. This counters the misconception that legal aid spend is “growing inexorably” or “spiralling out of control”. That is a fair point. The increased cost of legal aid in 2014/15 does not appear to be the start of a rising trend, now that reforms to Crown Court remuneration are in place. However, the

<sup>111</sup>The wisdom of Captain Jack Sparrow

<sup>112</sup>Source Department of Justice; includes running costs – see also comparisons with other jurisdictions in Chapter 8, Table 8.9; budgets can be affected by one-off factors such as backdated pay; the budget for 2015/16 excludes £1.8M ring fenced for pension costs and £1M ring fenced for criminal appeals; predicted spend for 2015/16 based upon latest estimate

problem is not that the cost of legal aid is rising sharply at the moment; the problem is that the cost of the scheme is simply too high both in relation to the budget and by comparison with the rest of the United Kingdom.<sup>113</sup>

### **Managing the budget since devolution**

6.5 The Department of Justice, in common with all other Departments, is now funded through the Block Grant which is managed by the NI Executive. The Department's budget was ring-fenced by the Executive for a four financial year period from 2011-12 to 2014-15. These budgets were approved by the NI Executive and the Assembly in March 2011

6.6 DFP's 'In-year monitoring' process provides a formal system for reviewing spending plans and priorities for each financial year in light of the most up to date position. The process is not intended to facilitate the re-opening of the agreed budget position and departments must treat all allocations set in the course of the budget process as ceilings, seeking to manage their activities to contain spending within those ceilings, unless and until any increase is agreed by the Executive.

6.7 In every year since devolution, the Department of Justice has utilised the In-year Monitoring process to reallocate Departmental resources to alleviate legal aid pressures. This has involved the Minister making cuts to other spending areas within the Department in order to provide additional resources to meet the legal aid pressure. The Department provided additional resources of £23.7m in 2011/12; £24m in 2012/13; £32.4m in 2013/14; and £23.5m in 2014/15. In addition, in 2014/15 the Executive provided additional funding to the Department, allowing the Department to allocate a further £13.2m to legal aid.

### **The budget for 2015/16**

6.8 2015/16 gave rise to a limited 'one year' spending review. The 2015/16 budget was agreed by the assembly in January.<sup>114</sup> Across Northern Ireland, the 2015/16 resource budget was reduced by 1.6 % in real terms.<sup>115</sup> The final budget saw additional funding for health, education and enterprise, but significant reductions for most other areas.

6.9 The starting point for the Department of Justice was a reduction of 15.1% from the 2014/15 opening baselines. Applying this to the Legal Services Agency baseline, the available funding would have been £64m, about £40m short of the forecast legal aid requirement. Therefore the Department had to increase the baseline by using some of the Executive's additional funding allocation and deepening the scale of the cuts elsewhere. This increased the legal aid budget by 29% to £82.5m. Despite this, there remains a significant legal aid pressure for 2015/16.

6.10 I remain concerned that the recommendation in AJ1 for realistic budget-setting has not yet been fulfilled. By starting from the baseline budget for 2014/15 rather than the predicted cost of the scheme in that year<sup>116</sup> the process was never likely to produce a legal aid budget for 2015/16 that could realistically be achieved, despite the Department's best efforts. I realise that public

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<sup>113</sup>See Chapter 8, Table 8.8

<sup>114</sup>See Northern Ireland Executive Budget 2015/16, 19<sup>th</sup> January 2015

<sup>115</sup>Simon Hamilton's statement to the Assembly on the 2015/16 budget, 19<sup>th</sup> January 2015

<sup>116</sup>A baseline of only £74.7m following previous year's spend of £111.4m

finances tend to work in this way, but once there is a history of under-allocation, it becomes an impossible cycle to break. The budget of £82.5m for 2015/16 represents a 26% reduction from spend in the previous year, only a fraction of which can be accounted for by the working through of recent remuneration reforms. The radical cuts in England and Wales under LASPO implemented in April 2013 only led to a 9% reduction in the cost of the scheme in the first year and a further 13% reduction in the following year.<sup>117</sup> Most legal aid payment systems work in arrears, so the inevitable time lag between implementing a reform and realising savings makes it next to impossible to deliver savings at a faster rate than this. **I recommend that the legal aid budget for 2016/17 is based on the predicted cost of the scheme, taking into account all the planned reforms, not on earlier baseline budgets.** This may require adjustments to other areas of public spending, but it is surely better for this to be done at the start of the process rather than by urgent in-year adjustments.

### Forecasting expenditure

6.11 Access to Justice 1 identified some weaknesses in the process for forecasting spend within the justice system. These were addressed in two projects<sup>118</sup> under which new methodologies were designed and introduced in July 2014. Agenda noted how vulnerable a small jurisdiction is to changes in law or policy which can have an impact on legal aid spend. Consultation question 45 asked whether the legal aid impact assessment system was working satisfactorily.

6.12 Responses on this point were understandably limited. NIACRO believed all parties needed to develop a better understanding of the impact of legal aid and its absence, as problems in England and Wales illustrated. The Belfast Solicitors Association noted that it was often not so much the legal changes but the procedures underlying the law which had the greatest impacts. The LSC agreed that the legal aid impact assessment system was not working effectively and had been “more honoured in the breach”.

6.13 The Department have confirmed that, as part of the new methodology applying from 2014, the Legal Aid Impact Assessment process was reviewed. A legal aid impact assessment register is now in place and is maintained within the Public Legal Services Division to assess the actual and potential impacts of changes on legal aid expenditure and to establish a baseline for Access to Justice projects and savings plans. This register is further utilised by Legal Services Agency staff to inform the legal aid forecasting process. A fundamental part of this process is to seek inputs from other Departments to highlight steps that they are taking which might have an impact on legal aid. As part of the policy making process, each policy area is required to make an assessment of the impact on legal aid and, if there is a net cost, to make provision for this as part of the policy implementation. The Permanent Secretary at the Department of Justice regularly writes to colleagues to remind them of this requirement.

6.14 The Bar and the Law Society remain sceptical about the Department’s forecasting and impact assessment systems. In my view the problem in recent years has not been inaccuracy of forecasting; the problem has been the setting of budgets based on historical baselines rather than forecasts. In any event, new procedures are in place which should address any concerns. It is in the

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<sup>117</sup>Year on year reductions - see Chapter 8, Table 8.9

<sup>118</sup>Projects 33 and 36 of AJ1 as set out in Annex 1

interests of both the Department and practitioners to have effective forecasting systems. I am sure the new procedures will be carefully maintained and enforced.

### **The future budget for legal aid**

6.15 At this stage budgets have not been set beyond 2015/16. It remains to be seen whether there will be a one year budget or a longer review period and what this might mean for legal aid.

6.16 That makes this review timely. Nothing in this review can impact upon the current financial year 2015/16. Most of the reforms relating directly to legal aid could start to have an impact in 2016/17 but as discussed above it can take years for legal aid reforms to realise their full savings potential. Wider justice reforms are likely to take longer to bear fruit. If the majority of recommendations in this review are accepted, the streamlined legal aid scheme I propose, combined with other current initiatives, could be used as the basis for bidding for a future budget for legal aid that is reasonable and achievable. Once there is a clear vision for the new scheme, the Minister will be in a stronger position to seek the approval of the Executive and Assembly to vote the funding needed to sustain it.

6.17 But what level of savings, if any, should this review be seeking to deliver? I have not been tasked with making the scheme fit any specific budget. The Law Society and Bar argue that the cost of legal aid is now stable and represents good value for money. They say the scheme has never been able to live within budget because the budgets have never been realistic, but this does not matter because the money will always be found from elsewhere.

6.18 I can understand that way of thinking to some extent. The past practice of regular yearly top-ups to the budget, and one-off injections of funds over the devolution period, created a feeling amongst providers that there was no need for the scheme to live within its budget. I think there was also a belief that if savings measures are resisted strongly enough, the likelihood is that the political will and/or political ability to drive home savings will be lacking. Past initiatives like financial eligibility reform, the Funding Code and NIALAS<sup>119</sup> progressed to a certain stage but were not delivered. Money damages cases have against all odds remained within scope.

6.19 Those days have now surely passed. For me the remarkable thing about the cost of legal aid in Northern Ireland is not that it exceeds its budget, but that it has remained stubbornly high throughout the current period of austerity, almost as if it was protected to the same extent as health. There is always a possibility that some future political development will arise to take the financial pressure off legal aid, but to march along regardless in the expectation that the cavalry will arrive in the final reel is reckless in the extreme. Even if a budget is unrealistic, you should still try to get as close to it as you can.

6.20 There is also an important democratic issue at stake: if Northern Ireland wants a legal aid scheme which is better and more expensive than the rest of the United Kingdom (after making allowances for differing levels of wealth and deprivation) the cost of that must be borne within this

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<sup>119</sup>See Chapter 22, paragraph 22.50

jurisdiction. That is what has happened to a considerable extent in recent years but there is no sign that it can continue indefinitely.

6.21 Therefore in my view there is no sensible alternative to planning on the basis that:

- The cost of the legal aid scheme in Northern Ireland will have to reduce substantially over the next financial cycle from 2016/17 onwards;
- The level of reduction may need to be comparable to that being implemented in England and Wales<sup>120</sup>, although it can be achieved in different ways;
- Rather than simply making successive cuts to existing provision, the best approach to delivering savings is to identify what must be funded and make the positive case for what needs to be funded beyond that, which is of course exactly what this review has been tasked to do.

### **Summary**

6.22 The cost of legal aid in Northern Ireland has remained stubbornly high in recent years despite a period of austerity which has seen substantial reductions in most other areas of public spending. The past practice of setting unrealistic budgets for legal aid and topping up funds in year must not be allowed to disguise the fact that current levels of spend are not sustainable.

6.23 Budgets will soon need to be planned for 2016/17 onwards. This review provides the opportunity to deliver a lower cost and sustainable legal aid scheme that is better targeted and controlled. Such a scheme could form the basis on which budgets are determined for the next financial cycle.

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<sup>120</sup>Remembering Scotland has a significantly lower cost scheme - see Chapter 8

## 7 Justice Reform – some common themes

***“Trials by the adversarial contest must in time go the way of the ancient trial by battle and blood”<sup>121</sup>***

7.1 This Chapter looks at reform issues which have general relevance to the justice system. Justice reforms which are specific to crime, family or civil non family are covered in Chapters 10, 15 and 19 respectively. England and Wales has the most similar justice system to Northern Ireland and has also seen the most radical reforms in recent years, which often makes it the most useful point of comparison.

### **An appetite for reform?**

7.2 Although there have been many reforms of justice and legal aid in Northern Ireland in recent years, most of the really significant reforms seen in England and Wales have not been implemented here. The justice and legal aid schemes in Northern Ireland are very similar to those in England and Wales when I joined the Legal Aid Board in London in 1991. Northern Ireland has no Unified Family Court, no conditional fees, retains committal proceedings in criminal cases and has an unreformed legal profession. The merits of many of these reforms will be considered later in this report but looking at the overall picture I think there is evidence of a strand of conservatism and resistance to change.

7.3 This is not meant as a criticism. At the risk of understatement, not all English reforms have been successful. Sometimes it is best as a smaller jurisdiction to watch from the wings as a reform program unfolds like a long Greek tragedy. However there have been so many changes in England, Scotland and Ireland that it is time to take stock and decide objectively what would work for Northern Ireland and what would not. When I have suggested reform options in Northern Ireland, very often the response is: “There is no need for change; our system works perfectly well”. That is all understandable, but it begs the further question: “Could it be made to work better?”

7.4 So many aspects of our systems of justice in the United Kingdom have ancient origins that it is time to ask, objectively, whether they are fit for purpose for the 21<sup>st</sup> century. That will involve: challenging any practice which is there just because “it has always been done that way”; questioning for whose benefit a way of working operates; investigating whether our practices are the most proportionate and cost effective.

7.5 One of the key messages of this review is that the best way to reduce the legal aid budget without damaging access to justice is to tackle inefficiencies in the underlying justice system. If that challenge is not taken up, future reductions in the scope of legal aid become all the more likely.

### **The adversarial tradition**

7.6 Justice in the United Kingdom is based on the adversarial model. In its purest form the role of an adversarial judge is passive, relying on the parties to present all the evidence in person through oral advocacy. This contrasts with the inquisitorial system of justice, more usual on the continent

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<sup>121</sup>Warren E Burger

but also evident in our coronial jurisdictions and in some aspects of Scottish justice, where the judge investigates and takes the lead in determining what evidence is relevant.

7.7 The adversarial tradition leads to crowded courtrooms for both criminal and civil lists, often with between twenty and thirty lawyers waiting in court at the start of the day hoping to get their case heard. My worry is not just that this way of doing business predates email and the internet; it predates the telephone too, and by a considerable period. If Cicero himself were to wander, Tardis-assisted, out of the courts of Imperial Rome and into the Laganside Courts of the 21<sup>st</sup> Century, he would feel immediately at home.

7.8 The fact that a practice is ancient does not mean that it is wrong. However we have to ask: if we were designing our courts from scratch, with the communications systems now at our disposal, would we really operate this way? I am not going to recommend in this report that we scrap the adversarial model and move wholesale to a continental inquisitorial model: that would require a huge upheaval, massive investment in some parts of the system and savings in others, but no guarantee that we would end up with either a cheaper or better system than before. Instead I will be recommending a deliberate but evolutionary move away from those aspects of the adversarial model which create inefficiency or poor customer service.

7.9 Adversarial practices have been questioned with increasing frequency in recent years, especially in the context of making the courts accessible to litigants in person. In England, the Lord Chief Justice and Mr Justice Ryder, the judge in charge of the modernisation of family justice, have indicated support for the principle:

“In addition we hope to publish a statement of inquisitorial principle. We aim to demonstrate and assist everyone to understand that save in relation to adversarial fact finding sufficient to make the ultimate decision before the court, the judge’s function is inquisitorial. The judge is in control and the judge decides what is to be determined, what is the evidence that is necessary for that decision to be made and how it is to be tested before the court.”<sup>122</sup>

“I now hold to the firm belief that the time has come in private law proceedings to develop an inquisitorial process: one that is fair, proportionate to the issues but directed by the court to meet the needs of the litigants we most regularly see.”<sup>123</sup>

“We have to keep an open mind even on radical options. For example, to some a change to a more inquisitorial procedure seems like the obvious or the only solution to the present situation we find ourselves in with the increase in litigants-in-person and the need to both secure a fair trial for all whilst doing so within limited and reducing resources that have to be distributed equitably amongst all those who need to resort to the courts.”<sup>124</sup>

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<sup>122</sup>Ryder LJ, Talking About Reform, Public Law Child Care Conference, London, 26 June 2012

<sup>123</sup>Ryder LJ, Family Justice redefined? Family Justice After Reform, Family Law, May 2014

<sup>124</sup>Lord Chief Justice, “Reshaping Justice”, speech to Justice, 3<sup>rd</sup> March 2014

7.10 Academic studies seem generally supportive of this reform direction, including the study by Professor Liz Trinder and others on litigants in person in the family courts, recently published by the Ministry of Justice of England and Wales:

“The view of the research team, based on the observations and interviews and the earlier discussion.....is that even with the level of [litigants in person] observed (quite apart from any anticipated growth in numbers), the traditional neutral arbiter role of the judge is not sustainable. At the same time, it is vital that there is some degree of consistency of approach between judges in a more activist role.”<sup>125</sup>

Politicians are also taking an interest in the issue, including former justice minister Simon Hughes:

“..there is a big question for civil justice – how it could be less adversarial and ....much more inquisitorial.”<sup>126</sup>

7.11 I accept that judges across the United Kingdom, including Northern Ireland, are already becoming more inquisitorial in the way they manage their cases. However, progress is uneven and varies considerably from judge to judge. Although this issue needs to play out differently for different types of court, I believe it would be beneficial to have a clear steer from the top. **I therefore recommend that the Minister indicates his support for moving towards a more inquisitorial court system, especially in cases where one or both parties is unrepresented, with more active case management. I hope the Lord Chief Justice will also lend his support to this direction of travel.** A policy statement could also cover areas like conducting more business by email and improved listing policy, which are discussed below and are essentially symptoms of the adversarial tradition.

#### **Ineffective hearings and business by phone and email**

7.12 When observing both criminal and civil courts in Belfast, it is striking how many hearings are ineffective. I would estimate that over half the cases I saw resulted in adjournments, often accompanied by a limited exchange of information over matters such as the number of witnesses that would be needed at the next hearing. This could have been dealt with by a quick email exchange. Having clients and lawyers for all parties attend court and wait around, often for several hours, is a grossly inefficient way to do business. I accept that a great many listed cases might have expected to be effective but then collapse on the day for a whole range of reasons. What I do not accept is that all the cases in a typical list, or even a majority of them, need to be there. It is the adversarial tradition again, proceeding on the basis that the only way a court can do business or progress a case is by listing an oral hearing before the court with the attendance of all parties. The Lord Chancellor has recently expressed similar concerns:

“In our criminal courts barristers, judges, clerks and ushers all must be present – indeed must be physically convened together – for a preliminary hearing – perhaps often delayed – and then a plea and case management hearing – perhaps also further delayed – before the case

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<sup>125</sup> Litigants in person in private family law cases, Trinder and others, Ministry of Justice Analytical Series, 2014

<sup>126</sup> Simon Hughes, Law Society Gazette, 30 March 2015

itself has any chance to be heard. Along the way it is not uncommon that papers or other evidence that should have been served by the Crown Prosecution Service (CPS) will be late, or missing. Interviews may not have been transcribed. Arrangements to call witnesses may be uncertain.”<sup>127</sup>

7.13 I believe there are two strands to improved efficiency: communication and flexible working. Firstly there needs to be more structured communication before any hearing, both between the parties and between the parties and the court. The aim should be to identify the main issues, clarify what each party is seeking to achieve and identify what exactly the court needs to determine. These considerations apply, in different ways, to both criminal and civil proceedings. One of the most significant recommendations of the Leveson report<sup>128</sup> was to propose a duty of direct engagement between prosecution and defence representatives – this is discussed further in Chapter 10. **I recommend that a general duty of engagement and pre hearing communication should apply to all proceedings.**

7.14 Secondly, courts need to be much more flexible in how they do business. Although it will doubtless take a long time to turn around this particular oil tanker, the destination should not be controversial:

- i) anything which can be done by email should be done by email; most interim / interlocutory hearings should be dealt with in this way;
- ii) telephone conferencing should be used whenever it is cost effective;
- iii) oral hearings should be fixed only for final hearings and for important hearings where oral advocacy is appropriate.

7.15 There are already tentative moves in this direction including court procedures for telephone hearings. However I am told this is not being widely used and the courts are generally proceeding with oral hearings if any party wishes it. Therefore little experience is in fact being gained of this method of working which is now quite commonplace in England. Again, I think a clear steer from the top is needed. **I recommend that the Minister, I hope with the support of the Lord Chief Justice, supports the principle for the courts conducting far more business by email and telephone, reserving oral hearings for the most significant hearings where oral advocacy is needed.**

### **Listing**

7.16 It is common for both criminal and civil courts in Northern Ireland to have long lists, sometimes as many as 50 or 60 cases listed to be heard by a single court in a single day. Typically all cases will be listed for the start of the court day, 10 or 10.30 a.m., so that all parties and their lawyers will need to attend from that time and wait around until their cases are called on. I have been impressed at the speed and efficiency with which judges rattle through their heavy lists.

7.17 Agenda consultation question 44 asked for suggestions to improve the efficiencies of Northern Ireland’s justice system. Many responses specified the waste and delay occasioned by listing policy. The Bar called for improved throughput and timing in court lists. The Legal Services

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<sup>127</sup> Lord Chancellor Michael Gove, ‘What does a one nation justice policy look like?’, Legatum Institute, 23<sup>rd</sup> June 2015

<sup>128</sup> Review of Efficiency in Criminal Proceedings, Sir Brian Leveson, January 2015, see page 10

Commission talked of the inefficiencies resulting from the lack of an appointment system. The Belfast Solicitors Association referred to the “wholly unnecessary waste” of lawyers’ time and inordinate delays resulting from the listing of all family cases at the start of the day. I was told of individual courts operating an effective appointments system, but practice was not uniform.

7.18 I suspect the public might have little sympathy for lawyers being kept waiting, but many of those lawyers are kept waiting at public expense. More importantly still, it is not just lawyers but clients, experts, witnesses, police and victims of crime who are also kept hanging around. If I book a plumber and am told that I can only be given a whole day appointment and need to wait in all day, I will immediately look for another plumber. It is a customer service issue and the present approach to listing before the courts represents poor customer service. **I recommend that all courts stop listing all their cases for the start of the day and instead operate time slots. This could even be as simple as dividing the list into three chunks with 10a.m., 11.30a.m. and 2p.m. start times.**

7.19 The related problem is over-listing i.e. putting more business before the court than can realistically be dealt with in the day. This is a particular problem for contested final hearings. Ultimately, listing policy is a balance between making best use of judge time and the court estate and the needs of the parties. Listing is technically a judicial function although in reality it is administrative in nature. I accept that some multiple listing is necessary because despite all efforts to resolve things at earlier stages, many cases listed for final determination will settle, plead guilty or need to be adjourned. However, delaying a case to another day because the court has no time to hear it is incredibly wasteful and can lead to late change of legal representation or the collapse of a serious criminal trial.

7.20 I have seen too many courts where a contested hearing is taking place and others are waiting around at the back of the court to believe that the current balance is right. My general recommendation is in identical terms to that of Sir Brian Leveson in his review of criminal justice in England and Wales:

“The present approach to multiple listing, while it provides an immediate solution to the twin problems of optimum court utilisation and timely hearings, is also an inefficient means of organising the court’s work and it frequently leads to dissatisfaction on the part of victims, witnesses, the general public and the professions. **I therefore recommend that steps are taken to enable the courts to move towards single/fixed listing**”.<sup>129</sup>

#### **Maximising the use of judicial resources**

7.21 The combination of listing policy and the adversarial tradition that court business is only conducted at oral hearings can be extremely wasteful of judicial resources. Some court lists regularly finish early, at which point the judge may go home. In 2014 the average sitting time of magistrates’ courts in Northern Ireland was 3 hours 29 minutes. There were significant variations between different courts, ranging from an average of 2 hours 40 minutes in Omagh to 4 hours 41 minutes in Enniskillen. At other court levels, much work is done outside sitting times, but this is less true of criminal proceedings before the magistrates’ court. Across all levels of court, the average sitting time for sittings where Children Order business was heard was just 2 hours 56 minutes.

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<sup>129</sup>Review of Efficiency in Criminal Proceedings, Sir Brian Leveson, January 2015, paragraph 144

7.22 In some of these examples the system is only making use of judicial resources for half the working day. **I recommend that judicial responsibilities be redefined so that, when lists and other work have been completed, judges at all levels should be engaged in active case management for the remainder of the working day.** This is already the case in most court levels but the approach could be made more uniform. This might allow more judicial time for tasks such as issuing directions by email, telephone conferencing, ringing to check the readiness of each party for future hearings or facilitating ADR. Criminal work in the magistrates' court is the area where significant changes in working practice are most likely to be needed.

### **Resolving problems outside the courts**

7.23 Access to Justice 1 discussed the principles and benefits of Alternative Dispute Resolution ("ADR") in detail at pages 60 to 69 so I will not repeat the arguments here. For present purposes I use ADR in its broadest sense, including all methods of diversion of people from criminal proceedings. In Chapter 1 I suggested that effective access to justice requires not just that a range of systems for resolving disputes outside the court system exists, but that poor and socially disadvantaged people have effective access to them. One could argue that this is every bit as important as ensuring access to the courts, although historically the structures and incentives of legal aid have tended to push people exclusively towards court resolution.

7.24 ADR remains central to this report because it offers the tantalising prospect of combining better outcomes for the client with cheaper processes. Whether this win-win scenario can be realised in practice is considered later in this report – see Chapters 11 on Criminal Diversion, 17 on Family Mediation and 20 on non family ADR. There are however two further general policy considerations which should be flagged up.

7.25 Many legal issues arise out of underlying relationships. Almost all family law deals with the consequences of troubled or broken relationships. All housing and employment disputes arise from previous contractual or less formal arrangements. Even in the criminal sphere a significant proportion of violent crime concerns perpetrators and victims with a pre-existing relationship. At the level of generalisation, the formal court process is good at dealing with the instant issue before it, but is less adept at tackling the underlying relationship. The symptom may be treated while the disease rages on. At best, many forms of ADR have greater potential to get at the underlying causes of problems and thereby get the heart of what is most important about the case to the client. If a divorcing couple can't stand each other, can't communicate and can't agree on contact arrangements, why is anyone surprised when court imposed contact arrangements break down? The emphasis should be on trying to resolve the underlying communication issues.

7.26 Proportionality and value for money are also key considerations for non court resolution. If the state provides two equally effective methods to address a problem, it is illogical to give the client or their lawyer the option of choosing the more expensive method. The onus should be on the client to persuade the funder that the more expensive option is justified in the individual case. Similar considerations apply if the state for some reason provides two different levels of court with overlapping jurisdiction – use of the higher court (at least in civil cases) must not be left to the choice of the parties if the case is publicly funded.

## Plain English

7.27 It is hard to express how difficult it must be for an outsider to understand legal structures and proceedings. It often appears that judges and lawyers speak a different language from the rest of the public – in the past this was literally the case with the widespread use of Latin expressions in the law. Much has changed however and I have been very impressed with the clear and informal way judges have communicated with clients in the courtrooms I have observed. However the way we approach the drafting of new legislation seems to have become more and more complex and impenetrable. For example, the rules on the scope of legal aid in England and Wales used to be set out in a couple of paragraphs as a schedule to the Access to Justice Act 1999. Under LASPO the relevant schedule<sup>130</sup> runs to a demoralising twenty pages of interminable statutory provisions. This is not just a drafting issue; there is a real problem with the public understanding of what legal aid is still available for.<sup>131</sup> Also, the more legalistic legislation becomes in the quest for precision, the greater the risk that it fails to reflect intended policy: priorities within a legal aid scheme flow from what cases are about and how important they are, not on their legislative definitions. **I recommend that for all legal changes and guidance arising out of this review, every effort is made to draft them in plain English.**

## The “problem” of litigants in person

7.28 As discussed throughout this report, there is great concern in England and Wales over the rise in litigants in person arising from the reduction in the scope of legal aid under LASPO. The changes have also attracted judicial criticism, for example from the Court of Appeal in the *Lindner* case:

“The task that would normally have been fulfilled by the parties’ legal representatives, of finding relevant documents amongst the material presented, and researching the law and its application to the facts of the case, had to be done by the judges of the Court of Appeal instead. This is not a satisfactory state of affairs as the time taken to attend to this is considerable and cannot be spared in what is already a very busy court.”<sup>132</sup>

7.29 I regret I have little sympathy for the judges in that case. Legal representation never has been and never should be compulsory in the courts of the United Kingdom. The fact that cases run more smoothly with good lawyers does not mean that clients without lawyers are a “problem”, any more than particularly ill patients are a problem for a hospital. There are certainly examples of cases being pursued unreasonably by vexatious litigants in person, but the principle issue in those cases is what powers the court should have to control unreasonable behaviour, whether or not the party is represented. Increasingly, litigants in person are not unrepresented as matter of choice. Lord Woolf put the issue very clearly in his 1995 report:

“Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of justice exists. The true problem is the

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<sup>130</sup>Legal Aid, Sentencing and Punishment of Offenders Act 2012, schedule 1

<sup>131</sup>See Impact of the changes to civil legal aid under Part 1 of LASPO, House of Commons Justice Committee, 12 March 2015 at pages 10-12

<sup>132</sup>*Lindner v Rawlins*, 2010 EWCA Civ 61, 10.2.15 at paragraph 32

court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people.”<sup>133</sup>

7.30 A lot has changed since that time and much good work has already been done. For example, anyone attending the High Court in Belfast will find a detailed “Guide to proceedings in the High Court for people without a legal representative”<sup>134</sup> This gives a very handy and clearly written guide to the procedures and terminology used in that court. The Lord Chief Justice has also encouraged a system of lawyers providing pro bono assistance for unrepresented litigants at court<sup>135</sup> although the idea has sadly not been implemented. Regardless of what happens to legal aid, the court system must continue to take all reasonable steps to be accessible by litigants in person.

7.31 In deciding how the courts might improve access to justice for litigants in person there have been many recent publications, three of which I will highlight. In 2011 the Civil Justice Council of England and Wales published a report and recommendations on litigants in person (they suggested that the term “self-represented litigants” was a more helpful description although this has yet to catch on).<sup>136</sup> This report (“the CJC Report”) starts from the premise that our court system was designed from the outset with lawyers in mind and emphasises the importance of sources of advice and clear information to support those without representation.

7.32 In 2014 the Ministry of Justice, England and Wales published research by Professor Liz Trinder and others into litigants in person in family proceedings (“the Trinder Research”).<sup>137</sup> This is a wide-ranging study which also makes a range of recommendations concerning the information needs, emotional support and practical support needed by litigants in person.<sup>138</sup>

7.33 The Justice Committee of the House of Commons, in its report on the impacts of LASPO, considered the position of litigants in person in the civil justice system in some detail (“the Justice Committee Report”).<sup>139</sup> It is wrong to think of litigants in person as stereotypes – eccentric men stalking the Royal Courts with shopping bags of papers. Increasingly, most unrepresented litigants are not in court through their own choice. Although perceived as a cause of delay by talking too much, the opposite may be true; many litigants in person are simply overawed and fail to get their argument across.<sup>140</sup>

**7.34 I recommend that the Northern Ireland Courts and Tribunals Service, in close consultation with the judiciary, draw up a statement and action plan setting out how all levels of court will seek to further facilitate access to justice for litigants in person. This statement should take into**

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<sup>133</sup>“Access to Justice” Interim Report to the Lord Chancellor on the Civil Justice System in England & Wales (1995), page 119

<sup>134</sup>Published by the Northern Ireland Courts and Tribunals Service, September 2012

<sup>135</sup>Lord Chief Justice, Opening of the Legal Year, 2013

<sup>136</sup>Access to Justice for Litigants in Person or Self-represented Litigants, Civil Justice Council, November 2011

<sup>137</sup>Litigants in person in private family law cases, Trinder and others, Ministry of Justice Analytical Series, 2014 – see also paragraph 7.10 above

<sup>138</sup>The Trinder Research at pages 101 to 124

<sup>139</sup>Impact of the changes to civil legal aid under Part 1 of LASPO, Justice Committee, 12 March 2015 at pages 38 to 52

<sup>140</sup>Justice Committee Report at page 40

## **account the various recommendations of the CJC Report, the Trinder Research and the Justice Committee Report.**

7.35 One problematic issue which should be highlighted, and is discussed in all three of the above reports, is informal assistance given to a litigant in person by a person usually referred to as a “McKenzie Friend”. This is anyone helping the litigant in court who is not a qualified solicitor or barrister formally acting on the court record. There is a wide range of views about whether such persons are a help or a hindrance to access. Clearly they are capable of either, although there is particular concern about paid McKenzie friends acting “as quasi-legal advisors without qualifications, regulation or insurance”.<sup>141</sup> Ultimately it can only be for the discretion of the trial judge to decide what role a proposed McKenzie friend should play in proceedings, taking into account the issues in the case and the capabilities of the litigant and his or her friend.

7.36 My concern is that the legal framework for authorising a McKenzie friend is too restrictive and legalistic. Northern Ireland Practice Note 3 of 2012 talks of McKenzie friends being allowed to give quiet advice to the client, but not to address the court except in “exceptional circumstances”. I think it would be better to start from the basic principles of access to justice articulated by Lord Woolf<sup>142</sup> that all litigants should have an equal opportunity to state their case and assert their rights. The simple question for the judge should be: “Is the assistance of this McKenzie friend, whatever form it takes, going to help this litigant is getting his or her case across to the court?” If the answer to that is “yes”, the assistance should be authorised. It might be that this more flexible approach could be achieved via a revised Practice Note, or consideration could be given to implementing sections 27 and 28 of the Courts and Legal Services Act 1990 in Northern Ireland. In any event the issue should be approached as one of policy, not legal definition. **I recommend that the courts take a more flexible approach to their discretion to authorise a McKenzie friend to assist a litigant in person and should allow such assistance whenever it will help the litigant to get their case across to the court.**

### **The role of the judiciary**

7.37 For sound historical reasons, the constitutional division between the judiciary and the executive is perhaps even more closely guarded in Northern Ireland than in other parts of the United Kingdom. Judicial independence is regarded as of paramount importance and rightly so. I perceive a greater reluctance on the part of the judiciary of Northern Ireland to become involved with or to contribute to matters of “policy”. But what is policy? The content of every rule or practice direction in the justice system is to some extent a policy issue (as is the practice of listing, as discussed above). Beneath the more political headline reform options, there is a great range of policy issues that judges could contribute to with unrivalled insight and authority.

7.38 In England and Wales there has been a strong tradition of successful judge-led reforms: the Woolf reforms of civil procedure; the Jackson reforms of civil costs; the Leveson report on criminal efficiency. This is policy work, but in no case can it seriously be suggested that the great judges behind the reforms ever compromised their judicial independence. There are also examples of

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<sup>141</sup>The Trinder Research at page 117 and see also the Legal Services Consumer Panel report, 2014

<sup>142</sup>Access to Justice, Interim Report, 1995, Chapter 1

judicial involvement in Northern Ireland reforms but these have tended to be in more technical areas. **I recommend that the judiciary of Northern Ireland should play an active role in the reform of criminal and civil justice. Judges should either lead or participate in any working parties arising out of this review which are tasked with improving the efficiency of the justice system.** On the civil side this process is already well underway with the announcement of Lord Justice Gillen’s Review of Civil and Family Justice.<sup>143</sup>

## Summary

7.39 Some aspects of the justice system of Northern Ireland have been remarkably resistant to change. Targeted reforms should now be considered to tackle inefficiencies in criminal and civil justice, both on their own merits and because such improvements may help to safeguard the legal aid budget for the longer term.

7.40 Many barriers to access to justice are a product of the adversarial tradition of justice. The move towards more inquisitorial court procedures and active case management should be strengthened and encouraged. Much court business currently conducted at oral hearings should in future take place by email or phone. Ineffective and wasteful court hearings should be reduced with improved communications between the court and all parties before a hearing. The way cases are listed for hearing before the courts needs significant reform. The current practice of over-listing and failing to give timed appointments is wasteful of public funds and represents poor customer service.

7.41 Developing effective alternatives to the courts, through diversion or alternative dispute resolution, is just as important as court reform. Such approaches will often be more effective at addressing the underlying issues behind a legal dispute.

7.42 Whatever happens to legal aid, the courts need to continue to adapt to become more accessible to unrepresented litigants, who should no longer be seen as a “problem” for the justice system. A more flexible approach should be adopted to informal assistance for litigants in person from “McKenzie friends”.

7.43 Plain English should be used in all justice communications and reforms. The judiciary of Northern Ireland should continue to play an active role in delivering the reform of criminal and civil court procedures.

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<sup>143</sup> Announced by the Lord Chief Justice at the Opening of the Legal Year, September 2015

## 8 Comparisons with other jurisdictions

*“The past is a foreign country: they do things differently there”<sup>144</sup>*

### The courts

8.1 The courts of England and Wales are a useful point of comparison with Northern Ireland. Both jurisdictions share the same hierarchy of criminal and civil courts. Over recent years systems have diverged, either for specific historical reasons or as a result of increasing devolution. These differences raise potential reform options for the courts in Northern Ireland as discussed later in this report. Examples include the abolition of criminal committal proceedings and the establishment of a Unified Family Court in England and Wales.

8.2 On the other hand there are features of justice in Northern Ireland which have been identified in meetings and consultation responses as advantageous. I agree that any reform options should recognise and build upon these, for example:

- The greater efficiency of professional magistrates in Northern Ireland compared to the lay benches which still operate in England and Wales;
- The greater proportion of criminal cases which are dealt with at the magistrates’ court level rather than the Crown Court;
- The greater control and predictability of civil costs through the county court scale fees.

8.3 Scotland has its own unique and ancient court system, preserved under the Acts of Union in 1707. This sometimes makes direct comparison of court and legal aid statistics difficult. Criminal proceedings are divided between summary and solemn cases. However, not all solemn cases involve juries. Since devolution, an ambitious programme of justice reform has been taking place in Scotland, under the title “Making Justice Work”.

8.4 The Republic of Ireland is also a common law jurisdiction. There are District and Circuit Courts (both of which have civil and criminal jurisdictions) with a High Court and Central Criminal Court for the most serious cases. This court structure has some similarities with the courts of Northern Ireland. However, the delivery of legal aid in Ireland is very different from the United Kingdom as discussed below.

### Court statistics

8.5 The following table compares the volumes of criminal cases disposed of in 2013/14 by the courts of England and Wales and Northern Ireland, overall and per 1,000 of the population:

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<sup>144</sup> L. P. Hartley; the Go-Between

**Table 8.1 Criminal proceedings volumes<sup>145</sup>**

	England and Wales total	England and Wales per 1,000	Northern Ireland total	Northern Ireland per 1,000
Magistrates	1,607,109	28.2	48,200	26.3
Crown Court	131,298	2.3	1,953	1.1
Total	1,738,407	30.5	50,153	27.4

8.6 I am told that there was a drive to clear criminal backlogs in the Crown Court in Northern Ireland in 2013/14 which may have increased Crown Court volumes in that year. Despite this, these figures confirm the greater proportion of criminal cases dealt with in Northern Ireland at the magistrates' court level.<sup>146</sup>

8.7 Is civil litigation more common in Northern Ireland than in England and Wales? The following table gives volumes of civil proceedings disposed of in 2013/14 for certain broad categories and levels of court, both overall and per 1,000 of the population:

**Table 8.2 Civil litigation volumes<sup>147</sup>**

	England and Wales total	England and Wales per 1,000	Northern Ireland total	Northern Ireland per 1,000
All Family proceedings	244,773	4.3	13,061	7.1
All Civil Non Family	1,512,424	26.6	40,629	22.2
Personal Injury Proceedings	126,000 <sup>148</sup>	2.21	1,724	0.94
Judicial review Applications	14,595 (non imm– 2,464) <sup>149</sup>	0.26 (0.04)	345	0.24

8.8 Not a great deal can be deduced from non family volumes because the majority of cases end up as undefended debt actions. There seems to be a greater tendency for citizens in Northern Ireland to resort to the courts for family cases than is the case in England and Wales, but this will have been affected by legal aid reductions under LASPO. The volume of judicial reviews seems comparable between the jurisdictions at first sight, but when immigration and asylum judicial reviews are removed, these cases are much more common in Northern Ireland. Judicial review trends are discussed further in Chapter 21.

8.9 Reliable figures on the volume of personal injury cases issued are hard to come by, as these often fall within the category of “unspecified damages claims”. I am doubtful of the Northern Ireland figure looks surprisingly low. A safer guide may be the volume of claims registered with the Compensation Recovery Unit in each jurisdiction:

<sup>145</sup> Sources: E&W Court statistics 2013/14; NI Judicial Statistics 2013

<sup>146</sup> 3.9% of cases disposed of in Crown Court in NI compared to 7.6% in England and Wales

<sup>147</sup> Sources: E&W Court statistics 2013/14; NI Judicial Statistics 2013 and data request

<sup>148</sup> Estimate based on file survey indicating that 83% of unspecified county court claims were for personal injury

<sup>149</sup> 84% of England and Wales judicial reviews related to immigration and asylum, which is much less of an issue in Northern Ireland, although no breakdown of Northern Ireland judicial reviews by category is available

**Table 8.3 Injury claims registered with compensation recovery unit**

CRU Claims 2013/14	Northern Ireland		England, Wales and Scotland	
	Total	Per 1,000	Total	Per 1,000
Road traffic	19,846	10.85	772,843	12.41
Other injuries	10,201	5.58	243,958	3.92
Total	30,047	16.42	1,016,801	16.33

8.10 I return to the CRU figures in the context of Conditional Fee agreements in Chapter 22.<sup>150</sup> Note that for comparisons per head of the population, I have used the following population figures throughout this report:

**Table 8.4 Population figures for comparative purposes**<sup>151</sup>

			% Great Britain Population
Northern Ireland		1,829,700	2.85%
England		53,865,800	84.03%
Wales		3,082,400	4.81%
England and Wales	56,948,200		88.84%
Scotland		5,327,700	8.31%
England, Wales and Scotland	62,275,900		97.15%
Great Britain		64,105,600	100%
Republic of Ireland		4,832,765	

### Legal aid schemes

8.11 Today's statutory legal aid schemes in the United Kingdom have their origins in the welfare state reforms following the Second World War. Legal services for the poor have been funded under what is known as the "judicare" system. This is a form of privatised model in that services are provided by independent lawyers in private practice. This is still the dominant delivery model for legal aid although Scotland and, to a lesser extent, England and Wales have developed employed public defender services for criminal representation.<sup>152</sup> Legal aid almost from the outset covered both representation in court and advice and assistance under the "Green Form" scheme, which now exists as such uniquely in Northern Ireland.

8.12 Traditionally these schemes tended to equate access to justice with access to the courts and/or access to lawyers. There was no place for ADR. Judicare systems operated on an entitlement system for all cases meeting the relevant criteria, with no obvious mechanisms to control either case volumes or the total cost of the scheme. It is not surprising that the cost of legal aid rose exponentially across the United Kingdom for many years although as the Law Society point out, the overall cost of legal aid in Northern Ireland has stabilised in recent years.

<sup>150</sup> See paragraphs 22.34 and 22.40

<sup>151</sup> Source: Office for National Statistics, population estimates for mid 2013

<sup>152</sup> See further Chapter 14

8.13 The Republic of Ireland operates a judicare system for most criminal legal aid but most civil legal aid is provided only by staff employed in a limited network of government law centres. This limits access and builds delay, with services rationed by queuing, but obviously allows for much greater control of cost. In non urgent cases, waiting times of four to six months are not uncommon.<sup>153</sup> Recent initiatives have included investment in family mediation – see Chapter 17.

8.14 Scotland has managed to maintain a comprehensive judicare legal aid system supported by a public defender service for certain criminal services. The comparatively low spend in Scotland on family cases helps to resist the financial pressures which have led to significant scope reductions elsewhere.

8.15 In England and Wales the most significant reforms took place in April 2000 with the implementation of the Access to Justice Act 1999. This built on major reforms developed during the 1990s, in particular:

- Almost all legal aid came to be delivered through contracts with solicitors and advice agencies; these contracts specified quality standards, remuneration and volumes of advice cases by area of law;
- A pro-active role was developed to identify unmet legal need and let contracts to meet that need;
- Much more emphasis was placed on out of court resolution, with contracts for the provision of Family Mediation;
- Most personal injury cases were no longer funded by legal aid, relying instead on private funding arrangements (Conditional Fee Agreements - see further Chapter 22);
- All civil legal aid became subject to stricter but prioritised merits criteria set out in a set of rules called the Funding Code.

8.16 More recently legal aid in England and Wales has seen major reductions in scope and remuneration under LASPO, as discussed further in Chapters 18 and 23.

8.17 The Access to Justice (Northern Ireland) Order 2003<sup>154</sup> very closely mirrored the provisions of the Access to Justice Act 1999. However the 2003 Order was only brought in for civil cases and with considerable amendments, most notably in the recent Legal Aid and Coroners' Courts Act (Northern Ireland) 2014. Much of the broad philosophy of the 2003 Order remains in place but with new provisions to set up the Legal Services Agency as part of the Department of Justice, new provisions on appeals and exceptional funding and regulations to govern funding decisions in place of the Funding Code. The most striking feature of the legislation now applying to Northern Ireland remains the much wider scope of family and civil legal aid and the fact that the provisions on CFAs and other funding options, contained in Part III of the Order, have not yet been brought into force.

### **Legal aid statistics**

8.18 Comparing legal aid volumes and spend between jurisdictions is problematic, even within the United Kingdom. Each jurisdiction varies in terms of underlying legal processes, definitions of

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<sup>153</sup> Legal Aid Board, Annual Report 2013, page 20

<sup>154</sup> 2003 No435 (NI 10)

legal aid services and (most significantly) recording systems, especially in relation to appeals. Differing appeal routes and ancillary proceedings (such as bail applications) complicate the picture. The tables presented in the remainder of this Chapter are based on information provided by the relevant legal aid authorities, including under FOI requests. Whilst every effort has been made to present the information in a way which allows meaningful comparisons to be drawn, figures concerning the division of spend between sub categories of case should be regarded as illustrative. Figures relating to overall cost are more definite.

8.19 The tables below show legal aid volumes in the year 2013/14 across the United Kingdom. For criminal, advice and mediation services these are based upon claims submitted; for civil legal aid the volumes relate to certificates issued or the equivalent (the England and Wales figures therefore reflect the April 2013 scope changes. The second table relates these figures to population size:

**Table 8.5 Legal Aid Volumes 2013/14**

	Northern Ireland	England & Wales	Scotland
Criminal advice (includes Police Station)	27,604	748,909	29,051
Criminal representation	35,190	650,332	114,991
Family advice	2,102	116,655	31,926
Family mediation	n/a	9,673	220
Family representation	13,865	89,638	13,595
Civil non family advice	8,234	107,405	40,417
Civil non family representation	3,044	18,306	5,039

**Table 8.6 Legal Aid Volumes 2013/14 per 1,000 of the population**

	Northern Ireland	England & Wales	Scotland
Criminal advice (includes Police Station)	15.1	13.2	5.5
Criminal representation	19.2	11.4	21.6
Family advice	1.1	2.0	6.0
Family mediation	n/a	0.2	0.04
Family representation	7.6	1.6	2.6
Civil non family advice	4.5	1.9	7.6
Civil non family representation	1.7	0.3	0.9

8.20 Comparable figures for the Republic of Ireland are not available because of the different structure of civil legal aid in that jurisdiction. There were 46,092 criminal legal aid certificates in Ireland in 2013, equivalent to 9.5 cases per 1,000 people, somewhat below the United Kingdom averages. Turning to the net cost of legal aid, the tables below show the total cost of each of the main elements of legal aid for each jurisdiction, based on cases closed during 2013/14:

**Table 8.7 Legal Aid Costs 2013/14 (shown in £000)**

	Northern Ireland	England & Wales	Scotland
Criminal advice (includes Police Station)	3,513	165,934	1,256
Criminal representation	51,982	762,968	92,792
Family advice	159	26,303	7,008
Family mediation	n/a	4,313	80
Family representation	36,552	742,795	26,987
Civil non family advice	856	30,379	8,928
Civil non family representation	12,329	50,326	14,729
Administration	6,500	97,377	12,313
Grand total	111,891	1,880,124	164,093

**Table 8.8 Legal Aid Costs 2013/14 per head of the population**

	Northern Ireland	England & Wales	Scotland
Criminal advice (includes Police Station)	£1.92	£2.91	£0.24
Criminal representation	£28.41	£13.40	£17.42
Family advice	£0.09	£0.46	£1.32
Family mediation	Zero	£0.08	£0.02
Family representation	£19.96	£13.04	£5.07
Civil non family advice	£0.47	£0.53	£1.68
Civil non family representation	£6.74	£0.88	£2.76
Administration	£3.55	£1.71	£2.31
Grand total	£61.15	£33.01	£30.80

8.21 The next table looks at the recent trend in total legal aid expenditure, comparing Northern Ireland to England and Wales and Scotland, showing the year on year changes. Note that these figures relate to the overall net cost of the scheme year by year, which is different from those in Table 8.7 above which were based on the cost of cases closed during the year.

**Table 8.9 Legal aid spend trends shown in £millions**

	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Northern Ireland	104.2	98.0	107.3	107.1	107.3	111.4
NI % change year on year		-6%	9%	0%	0%	4%
England and Wales	2,269	2,399	2,285	2,139	1,940	1,695
E&W % year on year		6%	-5%	-6%	-9%	-13%
Scotland	163.9	174.6	170.1	162.3	162.8	n/a
Scotland % year on year		7%	-3%	-5%	0%	n/a

8.22 Overall it is clear that the legal aid scheme in Northern Ireland is more expensive per head of the population than the rest of the United Kingdom and shows little sign so far of decreasing, although as seen in Chapter 6 recent reforms to Crown Court remuneration are now working through. The vast majority of spend is on representation in proceedings. It is surprising how much more Northern Ireland spends than England and Wales on representation in criminal and family proceedings, so these areas are now broken down in more detail.

### **Representation in criminal proceedings**

8.23 The next table breaks down criminal representation between magistrates, Crown Court and other courts and compares provision between Northern Ireland and England and Wales in 2013/14. Note that expenditure on criminal representation and ABWOR in criminal proceedings are combined for this purpose. "Other courts" includes a mixture of appeals and bail applications in the High Court or county court. In Northern Ireland criminal appeals to the Court of Appeal were subject to separate funding arrangements prior to April 2015 and are not included in these figures. The cost of Northern Ireland criminal appeals to the Court of Appeal in 2014/15 was £5.39 million:

**Table 8.10 Cost of representation in criminal proceedings**

TOTAL COSTS	Court level	Total Spend (£000)	Number of cases	Average cost (£)
England and Wales	Magistrates' Courts	190,167	418,448	454
	Crown Court	515,754	231,884	2,224
	Other Courts	7,685	5,175	1,485
	England and Wales total	713,607	655,507	1,089
Northern Ireland	Magistrates' Courts	19,367	31,960	606
	Crown Court	30,930	6,468	4,782
	Other Courts	1,685	3,431	493
	Northern Ireland total	51,982	41,859	1,242

8.24 These figures can be broken down into payment to solicitors and payments to counsel. In some cases the number of cases may include significant numbers of cases where no payment was made to counsel, in which case the average cost does not reflect the typical fee.

**Table 8.11 Payments to solicitors in criminal proceedings**

SOLICITORS	Court level	Total Spend (£000)	Number of cases	Average cost
England and Wales	Magistrates' Courts	189,347	418,129	453
	Crown Court	289,931	111,927	2,590
	Other Courts	2,370	1,486	1,595
	England and Wales total	481,648	531,542	906
Northern Ireland	Magistrates' Courts	15,120	25,253	599
	Crown Court	16,358	2,809	5,823
	Other Courts	966	2,365	408
	Northern Ireland total	32,444	30,427	1,066

**Table 8.12 Payments to counsel in criminal proceedings**

COUNSEL	Court level	Total Spend (£000)	Number of cases	Average cost (£)
England and Wales	Magistrates' Courts	820	319	2,571
	Crown Court	225,824	119,957	1,883
	Other Courts	5,315	3,689	1,441
	England and Wales total	231,959	123,965	1,871
Northern Ireland	Magistrates' Courts	4,247	6,707	633
	Crown Court	14,572	3,659	3,982
	Other Courts	719	1,063	676
	Northern Ireland total	19,538	11,429	1,710

8.25 The most striking feature of these figures is the level of payments to solicitors and to counsel for Crown Court work, which is hard to explain purely in terms of any differences in average complexity between the two jurisdictions. It is not surprising that this area of work has been the subject of recent remuneration reforms.

#### **Civil legal aid for family proceedings**

8.26 Table 8.8 showed significant variation in spend between the jurisdictions on representation in family proceedings. Table 8.13 shows the volume of family certificates issued in 2013/14 broken down into the main types of family case. Tables 8.14 and 8.15 present a similar breakdown of the cost of cases closed in that year. ABWOR is included in all these tables along with other forms of civil legal aid. Again, the volume figures (and to a lesser extent the cost figures) reflect the removal of many private law family cases from scope in England and Wales under LASPO. Figures for 2014/15 have become available for England and Wales and are shown separately:

**Table 8.13 Family civil legal aid volumes**

Certificates Issued 2013/14	Northern Ireland	England & Wales (2014/15 figures shown separately)	Scotland
Public law proceedings (incl spec child act)	2,501	13/14: 53,529 14/15: 53,889	5,225
Domestic violence proceedings	3,135	13/14: 15,231 14/15: 13,854	407
Private law children proceedings	7,035	13/14: 16,662 14/15: 8,199	4,705
Finance and other family	1,194	13/14: 4,216 14/15: 599	3,258
Family total	13,865	13/14: 89,638 14/15: 76,541	13,595

**Table 8.14 Family civil legal aid spend (£M)**

Spend on cases closed in 2013/14	Northern Ireland	England & Wales (2014/15 figures shown separately)	Scotland
Public law proceedings (incl spec child act)	12.8	13/14: 511 14/15: 453	4.28
Domestic violence proceedings	1.57	13/14: 42 14/15: 41	1.08
Private law children proceedings	11.7	13/14: 158 14/15: 125	15.26
Finance and other family	10.5	13/14: 31 14/15: 22.5	6.37
Family total	36.6	13/14: 743 14/15: 642	26.99

8.27 This breaks down into spend per 1,000 in the population as follows:

**Table 8.15 Family civil legal aid spend per head of the population**

	Northern Ireland	England & Wales (2014/15 figures shown separately)	Scotland
Public law proceedings (incl spec child act)	£7.01	13/14: £8.97 14/15: £7.95	£0.83
Domestic violence proceedings	£0.86	13/14: £0.74 14/15: £0.73	£0.20
Private law children proceedings	£6.39	13/14: £2.74 14/15: £2.20	£2.86
Finance and other family	£5.72	13/14: £0.54 14/15: £0.40	£1.20
Family total	£19.96	13/14: £13.04 14/15: £11.27	£5.07

8.28 The following table shows a breakdown of family bills paid by the Legal Aid Agency in England and Wales in 2013/14 broken down by cost type. Note that the average figure spent per case on counsel's fees (similarly disbursements) is not a measure of a typical fee to counsel since the average will include many cases where counsel was not instructed:

**Table 8.16 England and Wales family spend by cost type**

ENGLAND & WALES	Volume	Solicitor Spend £	Solicitor Average	Counsel Spend£	Counsel Average	Disburse Spend	Disburse Average	All Spend	All Average
Public law	62,648	329M	5,250	103M	1,639	79M	1,267	511M	8,156
Domestic Violence	14,211	32M	2,245	6M	409	5M	324	42M	2,978
Private law	44,238	111M	2,499	28M	644	19M	433	158M	3,576
Finance Etc	8,064	22M	2,686	6M	785	3M	386	31M	3,858
Family total	129,161	493M	3,817	143M	1,110	106M	823	743M	5,749

8.29 A similar breakdown for Northern Ireland is as follows:

**Table 8.17 Northern Ireland family spend by cost type £**

	Volume	Solicitor Spend £	Solicitor Average	Counsel Spend£	Counsel Average	Disburse Spend	Disburse Average	All Spend	All Average
Public law	2,012	6.5M	3,232	4.8M	2,374	1.5M	767	12.8M	6,373
Domestic Violence	2,669	1.5M	550	0.046M	17	0.052M	20	1.6M	587
Private law	5,130	7.3M	1,433	3.3M	635	1.1M	212	11.7M	2,279
Finance Etc	1,903	5.8M	3,039	2.3M	1,197	2.4M	1,267	10.5M	5,503
Family total	11,714	21.1M	1,801	10.4M	884	5.1M	435	36.6M	3,120

8.30 Family bills in Northern Ireland can also be broken down according the level of court. A similar breakdown in England and Wales is not feasible now that there is a Unified Family Court.

**Table 8.18 Northern Ireland family spend by level of court**

NORTHERN IRELAND	Volume	Solicitor Spend £	Solicitor Average	Counsel Spend£	Counsel Average	Disburse Spend	Disburse Average	All Spend	All Average
Appeal Courts	36	0.34M	9,529	0.36M	10,129	0.08M	2,139	0.78M	21,797
High Court	1,629	8.4M	5,136	5.9M	3,624	3.1M	1,904	17.4M	10,664
County Court/FCC	7,332	11.0M	1,499	4.1M	554	1.9M	255	16.9M	2,308
Family Proceedings Court	2,717	1.4M	516	0.025M	9	0.04M	16	1.5M	542
Total	11,714	21.1M	1,801	10.4M	884	5.1M	435	36.5M	3,120

8.31 The level of spend on representation in family cases in Northern Ireland is looking increasingly anomalous. The differences are primarily down to the scope reductions in England and Wales, which are only now fully working through, and more efficient underlying procedures in Scotland. The increases in cost according to level of court, as shown in Table 8.18, are striking. The average High Court cases costs 4.6 times as much than the average County Court/Family Care Centre case, which in turn costs 4.25 times as much as the average Family Proceedings Court case. Family court structures, legal aid remuneration strategy and the family legal aid controls need to be considered for reform as discussed later in this report.

### Economic indicators

8.32 To what extent are the differences in spend between the jurisdictions attributable to different economic conditions and levels of poverty and deprivation? There are particular and

unique aspects of Northern Ireland society which may contribute to the higher average spend on legal aid. The proportion of children in relative low income households in Northern Ireland is 23%, compared to 18% in England. Based on a three year average ending in 2011/12, 16% of individuals in England were living in relative low income, before housing costs. The equivalent figures were 19% in Wales, 15% in Scotland and 21% in Northern Ireland. Disposable income in Northern Ireland is £13,902 per annum against £16,791 in the UK as a whole. For January to March 2014, the UK employment rate for those aged from 16 to 64 was 72.7%; the equivalent figure for Northern Ireland is 67.8%.

8.33 Legal aid expenditure in Northern Ireland is generally in line with other areas of public expenditure, as noted by the first Access to Justice review.<sup>155</sup> The Law Society similarly draw attention to a recent study which places Northern Ireland spending levels at 23% above the national average.<sup>156</sup> These features result in a higher eligibility for legal aid amongst the Northern Ireland population than in England and Wales and, therefore, the likelihood of a greater number of legally aided cases with a consequential impact on costs per head of the population.

8.34 If expenditure in England and Wales were to be broken down on a regional basis, I expect this would reveal significant variations, with the more economically deprived regions producing figures much closer to Northern Ireland. Although legal aid figures are not readily available by region, some other statistics are illustrative. A Ministry of Justice Statistics Release in September 2013 listed legal representation (by phone and in person) at police stations by English County for 1012-13.<sup>157</sup> Two counties of similar size (population approx. 1.1m), Lancashire and Surrey, recorded 21,108 and 6,655 representations respectively. These two counties had wildly different levels of prosperity as recorded by the government's Index of Multiple Deprivation<sup>158</sup>; Lancashire has an IMD of 22.48, and Surrey only 8.08.<sup>159</sup>

8.35 Overall I do not think there is any reason to believe that historically higher volumes of legal aid in Northern Ireland are attributable to anything other than differing economic conditions. Of course, higher spend is in some cases caused by higher costs per case which cannot directly be attributed to the economy and may need to be addressed by remuneration reform. Meanwhile as the cost of legal aid in England and Wales continues to decline through reductions in the scope of services, the question remains why the same should not apply to Northern Ireland.

### **Wider international comparisons**

8.36 Is it true that Northern Ireland has the most expensive legal aid scheme in the world? Comparing legal aid volumes and spend between countries with very different legal systems is particularly difficult. It's comparing apples and oranges. Periodic comparisons are however made by the European Commission for the Efficiency of Justice ("CEPEJ"). Their most recent study –

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<sup>155</sup> See AJ1 pages 24-25

<sup>156</sup> House of Commons briefing paper, Public Expenditure by county and region, 19 May 2015

<sup>157</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/238115/legal-aid-statistics-090913.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238115/legal-aid-statistics-090913.pdf)

<sup>158</sup> The IMD is the average level of deprivation in the local authority relative to other local authorities in England. The higher the score, the higher the average level of deprivation.

<sup>159</sup> <http://www.apho.org.uk/resource/item.aspx?RID=111280>

running to some 546 pages – was published in 2014 based on 2012 figures. Here are some figures from that report:

**Table 8.19 European legal aid comparisons**

	2012 Budget for legal aid per inhabitant (Euros) <sup>160</sup>	2012 Budget for legal aid as a % of GDP per inhabitant <sup>161</sup>
UK – Northern Ireland	50.59	0.26
UK - England	41.55	0.14
UK - Scotland	33.69	0.11
Netherlands	28.79	0.08
Norway	53.55	0.07
Republic of Ireland	18.11	0.051
France	5.60	0.018
Germany	4.29	0.013
Italy	2.57	0.010
Spain	0.80	0.003

8.37 At first glance, these figures are extraordinary. Whilst Norway comes top in terms of the legal aid spend per head, the UK outspends many other major European countries by a factor of about ten. It’s comparing apples and melons! There is less of a difference between Northern Ireland and England than was shown in table 8.8 above, but since the CEPEJ figures relate to 2012 they do not take into account reductions in spend under LASPO. When looked at as a percentage of Gross Domestic Product, i.e. the total wealth each country generates, Northern Ireland has by far the most generous legal aid scheme in the Europe.

8.38 In my earlier work on international funding systems with the Civil Justice Council<sup>162</sup>, it seemed that the only non European country offering a really significant level of investment in legal aid was Canada, in particular the provinces of Quebec and Ontario. However my calculations on the legal aid spend per head in those jurisdictions come to £11.26 and £14.48 respectively, generous by international standards but well below the United Kingdom.

8.39 As the Law Society also point out, spending on legal aid is not the full story.<sup>163</sup> Countries that spend comparatively little on legal aid often spend much more than the UK on their courts and judiciary. Countries with a more inquisitorial tradition provide courts which offer advice and assistance to the public and perform many of the duties which would here be undertaken by a lawyer or CAB. If you look at national spend on the justice system as a whole, the UK is not especially generous:

<sup>160</sup> Table 2.15

<sup>161</sup> Table 2.2

<sup>162</sup> See Funding Options and Proportionate Costs, Paper 2, Civil Justice Council, June 2007

<sup>163</sup> See also Richard Moorhead, analysis of international spends, 23<sup>rd</sup> October, 2014

**Table 8.20 European justice comparisons**

	2012 Budget for the courts per inhabitant (Euros) <sup>164</sup>	2012 % of national spend allocated to whole justice system <sup>165</sup>
UK – Northern Ireland	40.5	5.7 (but see below)
UK - England	42.2	1.8
UK - Scotland	25.6	Not available
Netherlands	58.6	2.0
Norway	46.3	3.2
Republic of Ireland	23.3	3.4
France	Not available	1.9
Germany	103.5	1.5
Italy	50.0	1.5
Spain	27.0	0.9

8.40 These figures need to be treated with even more caution as comparisons between different justice systems are so problematic. The extraordinary 5.7% figure published for Northern Ireland can probably be attributed to the erroneous inclusion of the costs of policing, which falls within the remit of the Department of Justice but would not feature in the justice costs of other jurisdictions. At the relevant time the Police Service of Northern Ireland accounted for about 65% of the Department’s budget, which suggests that the correct figure for Northern Ireland should be reduced to a rather more modest 2.0%.

### Summary

8.41 With the possible exception of Norway, Northern Ireland has the most expensive legal aid scheme in the world. In the past, the higher spend per head in Northern Ireland compared to England and Wales could largely be attributed to differing economic conditions, but there is now a growing divergence between the scope and cost of the two schemes. In a period of austerity it is very hard to argue that current levels of expenditure can be maintained.

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<sup>164</sup> Table 2.5

<sup>165</sup> Table 2.2

## 9 Structure of the Legal Profession

*“If there were no bad people, there would be no good lawyers”<sup>166</sup>*

9.1 The United Kingdom has a split legal profession dating back centuries. Traditionally solicitors had the exclusive right to be instructed by the public while barristers retained exclusive rights of audience in the higher courts. Much has been reformed in recent years but the pace of change has been far slower in Northern Ireland than in the rest of the United Kingdom. Whilst the Clementi review paved the way for Alternative Business Structures (“ABSs”) for lawyers in England and Wales, the Bain Review<sup>167</sup> in 2006 proposed no such radical changes in Northern Ireland. Even the modest Bain reforms have not yet been fully implemented although the legislation to do so is now before the Assembly.<sup>168</sup> The issues raised by these contrasting approaches were discussed in Access to Justice 1 at pages 108 to 119.

9.2 It is important to look at access to justice issues in light of the way legal service providers are organised in Northern Ireland. The most significant features in comparison to England and Wales are the predominance of small law firms and the size and centralisation of the independent Bar. The following table looks at the number of solicitors and barristers across the United Kingdom, both overall and per 10,000 of the population:<sup>169</sup>

**Table 9 Lawyers in the United Kingdom**

	Northern Ireland	England and Wales	Scotland
Total solicitors	2,300	130,382 <sup>170</sup>	11,000
Solicitors per 10,000	12.6	22.9	20.7
Total barristers /advocates	700	15,716	432
Bar per 10,000	3.8	2.8	0.8
Total Queen’s Counsel	96	1,625	108
QCs per 10,000	0.5	0.3	0.2

9.3 The proportion of small non specialist law firms is bound to increase the need for barristers offering specialist advice and advocacy, but it is unclear whether this alone can support a Bar of this size. Indeed I have heard several accounts of young barristers being unable to attract sufficient work to continue in practice. This comes at a time when the volume of work generally is decreasing. The number of cases disposed of in the magistrates’ court in Northern Ireland decreased by 10% in 2013/14 and the Crown Court by 11%, civil volumes falling by a similar amount.<sup>171</sup> To this must be added ongoing reductions in legal aid scope and remuneration.

<sup>166</sup> Charles Dickens

<sup>167</sup> Legal Services in Northern Ireland: Complaints, Regulation, Competition; 23<sup>rd</sup> November 2006

<sup>168</sup> See the Legal Complaints and Regulation Bill, available on Northern Ireland assembly website

<sup>169</sup> All data obtained from the relevant professional bodies

<sup>170</sup> There is a high concentration of English solicitors in Greater London, just under 40% of the total, many specialising in the commercial and financial sectors; the pattern in rural areas is much more similar to the rest of the United Kingdom

<sup>171</sup> Northern Ireland Courts and Tribunals Service, Annual Report and Accounts 2013-14

9.4 Similar trends in England and Wales prompted the Jeffrey review of Criminal Advocacy<sup>172</sup>. The Jeffrey review identified serious concerns over the sustainability and quality of advocacy services and made a number of recommendations concerning the structure and future training of both branches of the profession. My impression is that the general analysis and recommendations of the Jeffrey review are equally applicable to advocacy services in Northern Ireland. No doubt the Bar Council, Law Society and Departments of Justice and Finance and Personnel in Northern Ireland will be carefully considering the implications.

9.5 Question 35 of the Agenda consultation asked for views on the extent to which the regulatory framework of the legal professions and the permitted business models for legal practices facilitate the delivery of the most efficient and effective legal services. Did they support a mixed model of service delivery in which the private, voluntary and public sectors can play a part? In this context was the Law Society's waiver system<sup>173</sup> working satisfactorily?

9.6 Responses on this topic were varied. The Bar strongly defended the existing structures, as approved by the Bain Review, as these had served Northern Ireland well. The Belfast Solicitors Association also defended the existing systems and highlighted how flexible and effective private provision was in reacting to market changes. No real benefits had arisen from ABSs in England. The voluntary sector had a role but lacked robust regulation.

9.7 The Law Society and the Belfast Solicitors Association believed the waiver system worked well. The Law Society argue that it is not a protectionist measure but is a proportionate regulatory control over lawyers who do not provide their legal services from a traditional law firm.

9.8 Other responses raised some concerns about the current market. From a defendant's perspective, Zurich argued that there was far too much use of counsel, both junior counsel in simple cases and senior counsel in complex ones, which greatly increased costs. One solicitor specialising in Special Educational Needs work highlighted the very high cost of professional indemnity insurance in Northern Ireland, presumably in part a symptom of the number of small firms. The LSC believed that the best way forward was the proposed registration scheme to ensure high quality publicly funded legal services.

9.9 Several responses, including the LSC, HRS and STEP, supported the concept of a mixed model of service provision, including both law firms and the voluntary sector. In meetings, some concerns were expressed about the operation of the Law Society waiver; it was often given on limited or conditional terms, forcing agencies to transfer clients to private law firms if a case fell outside the authority given.

9.10 Given the terms of reference of this review, I do not think it would be appropriate at this stage to make any recommendations for major changes to the way legal services are delivered in Northern Ireland. If there was clear evidence that ABSs had enhanced access to justice in England and Wales I might have reached a different conclusion, but perhaps it is still too early to judge the

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<sup>172</sup>Independent Criminal Advocacy in England and Wales, Sir Bill Jeffrey, Ministry of Justice, 2014

<sup>173</sup>This is the practice rule under which organisations who wish to employ a solicitor to provide legal services to the public must obtain permission from the Law Society of Northern Ireland

impacts of those reforms. This topic should be kept under review. I do however believe that when formulating policy on access to justice, the Department should not feel constrained by the way the legal profession chooses to structure itself.<sup>174</sup> The onus is on the legal profession over time to adapt to provide high quality services in a changing landscape.

9.11 I support the development of a mixed model of service provision and in that context I do have serious concerns about the existence and operation of the Law Society waiver. The power to prevent or restrict a qualified and regulated lawyer providing services to the public is a barrier to access and I see no clear regulatory or other public policy arguments to justify the current practice.

9.12 This is not the only example of protectionism in the legal services market. In the case of *A's Application*<sup>175</sup>, a criminal defendant was facing a retrial and understandably wished to re-instruct the experienced junior barrister who had represented him in the first trial. The Bar Council successfully intervened to argue that, because authority had been given for leading counsel, the defendant must instruct a QC and a junior. The result is that the taxpayer became obliged to fund this extra level of representation, which the client neither wanted nor needed.

9.13 Regulation of the legal professions comes within the responsibility of the Department of Finance and Personnel. **I recommend that the DFP review the Law Society waiver and any other rules which allow professional bodies to override the choices of the client seeking legal advice or representation, with a view to liberalising or abolishing those rules.**

### Summary

9.14 The structure of the legal profession in Northern Ireland is distinctive but I make no recommendation in this review for its structural reform, except in relation to those rules which appear to be protectionist in nature. However, the way lawyers are organised in Northern Ireland should not act as a constraint in the development of wider policy on access to justice.

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<sup>174</sup>This is discussed in the context of remuneration policy in Chapter 4

<sup>175</sup>[2015] NIQB, 19<sup>th</sup> January 2015

# Part B Criminal Justice

## 10 Criminal Justice Reform

***“It is also undeniable that our courts are trapped in antiquated ways of working that leave individuals at the mercy of grotesque inefficiencies and reinforce indefensible inequalities”<sup>176</sup>***

10.1 This chapter summarises some interesting criminal justice reform initiatives in the United Kingdom and addresses the potential for reform of criminal justice procedures in Northern Ireland. One commentator observed that: “When it comes to criminal justice, we live in an increasingly disunited kingdom.”<sup>177</sup> Nevertheless there remains much each jurisdiction can learn from the others.

### **The Leveson review**

10.2 On 23 January 2015 Sir Brian Leveson, President of the Queen’s Bench Division of England and Wales, published a wide-ranging Review of Efficiency in Criminal Proceedings. The report built on a number of earlier reviews and initiatives designed to improve criminal justice, including:

- i) Lord Justice Auld’s Review of the Criminal Courts of England and Wales;<sup>178</sup>
- ii) The Ministry of Justice’s Strategy and Action Plan to Reform the Criminal Justice System;<sup>179</sup>
- iii) Recent reviews of specific aspects of criminal justice, for example Gross LJ’s recommendations in relation to disclosure in the magistrates’ court;<sup>180</sup>
- iv) Sir Bill Jeffery’s Review of Independent Advocacy in England and Wales.<sup>181</sup>

10.3 Sir Brian’s comments at the launch of the report seem to me to be directly relevant to the issues being considered in this Review, so are worth setting out in full:

“The changes I have recommended are all designed to streamline the way the investigation and prosecution of crime is approached without ever losing sight of the interests of justice. Our conduct of criminal trials was designed in the 19th century with many changes and reforms bolted on, especially over the last 30 years. The result is that it has become inefficient, time consuming and, as a result, very expensive.

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<sup>176</sup> Lord Chancellor Michael Gove, ‘What does a one nation justice policy look like?’, Legatum Institute, 23<sup>rd</sup> June 2015

<sup>177</sup> Richard Garside, Centre for Crime and Justice Studies, 23 March 2015; see *The Coalition Years: Criminal Justice in the United Kingdom: 2010-2015*

<sup>178</sup> HMSO October 2001

<sup>179</sup> *Transforming the Criminal Justice System*, Ministry of Justice, June 2013

<sup>180</sup> *Review of Disclosure in Criminal Proceedings*, Judiciary of England and Wales, September 2011

<sup>181</sup> Ministry of Justice, May 2014

It is clear that all aspects of the system are going to have to live with diminished resources for years to come. Quite apart from questions of necessary reform, therefore, it is vital that we find ways to make best use of those resources by greater efficiency.

As a society, it remains essential that we retain high quality lawyers to carry out publicly funded work. A more efficient system overall will allow all those involved in criminal justice to use their time productively with fewer hours wasted dealing with bureaucracy and less time lost through unnecessary delay.”<sup>182</sup>

10.4 The proposals in the Leveson review which attracted most publicity were those recommending increased use of technology, including facilitating remote hearings by video link. Whilst such reforms might well be beneficial in Northern Ireland, in my view it is a higher priority to consider those recommendations in the report which would not require substantial investment in IT. These include (with references to paragraphs in the Leveson report):

- i) Imposing a new duty of direct engagement between the parties prior to the first hearing (paragraph 34);
- ii) A presumption that interlocutory matters should be dealt with by written submissions without a formal hearing in court (paragraph 37);
- iii) A new approach to listing (paragraph 144 but see further below);
- iv) Effective and consistent judicial case management with streamlined procedures at all stages.<sup>183</sup>

10.5 In relation to the perennial problem of listing, Sir Brian said:

“It is my firm view that we need to reduce to an absolute minimum the number of occasions on which the parties and the participants – including defendants in custody – are required to attend at court. The present system is wasteful and inefficient, in that it requires a wide variety of individuals to be available or present at court when there is a real risk that the case will be ineffective. The present arrangements often lead to duplication of work because fresh advocates are instructed for the adjourned hearing and (in the Crown Court) a different Judge may well have to read the papers.”<sup>184</sup>

10.6 Overall, the Leveson review represents a highly cogent and up to date set of criminal efficiency reforms for England and Wales, the great majority of which would in my view also be of benefit in Northern Ireland. In general the Leveson proposals have been welcomed, although there has been some criticism.<sup>185</sup> The Leveson review also lists some more fundamental reform options, some of which are considered in Table 10 below.

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<sup>182</sup>Sir Brian Leveson, Review of Efficiency in Criminal Proceedings, Judiciary of England and Wales, January 2015

<sup>183</sup>See paragraphs 63 to 82 for Allocation issues, 86 to 122 for the Magistrates’ Court and 183 to 222 for the Crown Court

<sup>184</sup>Leveson report, para 134; see also his recommendation on listing copied at paragraph 7.20 of this report

<sup>185</sup>See ‘The Other Leveson Report – The Review of Efficiency in Criminal Proceedings’, Anthony Edwards, 2015 Criminal Law Review, Issue 6

### **Making criminal justice work in Scotland**

10.7 Making Justice Work is a wide ranging reform program to improve the efficiency of the justice system in Scotland. It aims share some common ground with the potential justice reforms discussed in Chapter 7 of this report. In relation to criminal justice, the Criminal Justice (Scotland) Bill before the Scottish Parliament contains a range of measures aimed at improved efficiency, communication and speed of disposal, while improving the experience of victims, witnesses and jurors. The reforms follow an independent review of jury trial procedures in Scotland.<sup>186</sup> The reforms include:

- a requirement on the prosecution and defence to communicate after the indictment is served and to jointly prepare, and lodge, a written record of their state of preparation of the case;
- a review process enabling the court to ensure that a trial is fixed only when the court is satisfied the case is ready;
- facilitation of hearings by video link.

### **Criminal justice efficiency in Northern Ireland**

10.8 Much work has been carried out to improve the efficiency and effectiveness of criminal justice in Northern Ireland since the original Criminal Justice Review<sup>187</sup>. The Youth Justice System was reviewed in 2011.<sup>188</sup> Criminal Justice Inspection Northern Ireland (“CJINI”) regularly reviews all aspects of the criminal justice system. The Justice Act (Northern Ireland) 2105, which received Royal Assent in July 2015, includes measures to enhance diversionary interventions, improve case management and to streamline committal procedures.

10.9 Delays in Crown Court procedures have been an area of concern for many years. The Lord Chief Justice commissioned a report from CJINI on the topic. As a result of this work, a pilot was launched at the Ards Crown Court with the objective of designing new procedures to reduce delay, especially in the investigation and preparation stages. The pilot began on 2<sup>nd</sup> January 2015 and will run for a year. It aims to develop:

- improved investigative pathways with more structured file preparation;
- clearer file standards and effective management and supervision of processes;
- a sentencing statement at police interview stage highlighting the benefits of entering a plea at the earliest opportunity;
- pre-interview disclosure to the defence by the police, with early advice from the prosecution to the police on charging;
- the provision by the police of a case outline (summarising evidence likely to become available) to facilitate early contact with the defence to discuss the plea; and
- more timely and proportionate engagement with the Forensic Science Agency.

10.10 Agenda consultation question 10 asked what changes to the criminal justice system in Northern Ireland would enable publicly funded defence services to be delivered at lower cost and more efficiently while sustaining quality. Were there particular priorities for attention?

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<sup>186</sup>Independent Review of Sheriff and Jury Procedure, Sheriff Principal Bowen, Scottish Government, June 2010

<sup>187</sup>Review of the Criminal Justice System in Northern Ireland, March 2000

<sup>188</sup>Report on the Review of the Youth Justice System in Northern Ireland, Department of Justice, 26<sup>th</sup> September 2011

10.11 The LSC noted that much progress had been made in this area in England and Scotland, often judicially driven. The joined up approach across departments to justice reforms in Scotland was praised. NIACRO also took encouragement from Scotland where Statutory Time Limits had helped to reduce delay: however the limits should be formally reviewed to ensure that they work effectively. NIACRO also called for improved communications by the court with defendants and victims and an increased role for restorative justice.<sup>189</sup>

10.12 Several consultees emphasised how reducing delay and inefficiency would have a positive effect on the cost of criminal legal aid. The Bar expressed strong concern at current fee levels. The Law Society expressed concern at the delays sometimes caused when disclosure of documentation was not properly coordinated by the police and the prosecution.<sup>190</sup> The Belfast Solicitors Association believed cooperation was required from a range of agencies including the Public Prosecution Service, the Police Service of Northern Ireland and the Forensic Science Agency. Improved provision for early disclosure would promote early guilty pleas in appropriate cases. Late disclosure from the prosecution was reported to me as the most common cause of delay and ineffective hearings.

### **Delivering increased efficiency in criminal proceedings**

10.13 In summary there is a good deal of consensus that there remains much to be done to improve efficiency in the criminal justice system in Northern Ireland. I believe there is also a good measure of agreement with many of the principles that might underpin reform as discussed in this Chapter and in Chapter 7. The Lord Chancellor recently summarised the challenge as follows:

“We urgently need to reform our criminal courts. We need to make sure prosecutions are brought more efficiently, unnecessary procedures are stripped out, information is exchanged by e-mail or conference call rather than in a series of hearings and evidence is served in a timely and effective way. Then we can make sure that more time can be spent on ensuring the court hears high quality advocacy rather than excuses for failure.

The case for reform is overwhelming”<sup>191</sup>

10.14 In Northern Ireland, much work is already underway in relation to the Crown Court, but more needs to be done at the magistrates’ court level. This jurisdiction is fortunate in having access to recent reviews suggesting what is likely to work in similar jurisdictions. The devil is in the detail of course and those details must be worked out by the users of the system. **I recommend that a working party be established to propose the specific changes necessary to deliver improved efficiency to criminal proceedings before the magistrates’ courts in Northern Ireland. This working party should be tasked with producing:**

- **revised criminal processes with process maps for the most common forms of procedure;**
- **practical proposals to address the issues of communications between the parties and with the court, encouraging business by email, avoiding unnecessary hearings and better listing arrangements (in line with the recommendations set out in Chapter 7);**

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<sup>189</sup>See further Probation Board, Restorative Practice Strategy 2014-2017

<sup>190</sup>See ‘Judge in Ping-pong blast at police and PPS over trial delays’, Belfast Telegraph, 10<sup>th</sup> December 2014

<sup>191</sup>Michael Gove, ‘What does a one nation justice policy look like?’, Legatum Institute, 23<sup>rd</sup> June 2015

- **outlines or drafts of the Rule changes, Practice Directions or guidance needed to bring the changes about.**

10.15 The Terms of Reference for this working group should be the subject of further consultation. The Leveson review is a good starting point but the working group should not feel constrained by the reform proposals made in other jurisdictions if solutions more suited to the courts of Northern Ireland can be found. Close liaison will be required with those working on the Ards pilot or other Crown Court initiatives. I suggest that the group concentrate on changes that can be introduced relatively quickly; this probably means concentrating on issues which do not require primary legislation or significant development of IT.

10.16 All members of the working group need to be signed up to the principles of the reform and not wedded to the old way of doing business. A reform-minded judge would be an ideal chair for the group, which I suggest could also contain members nominated after discussion with the Law Society, Bar Council and NIACRO on behalf of users of the system. A Department of Justice lawyer with responsibility for Rules of Court would also be a useful member of the group.

10.17 For work covered by criminal legal aid standard fees, increased efficiency of court process will not directly benefit the legal aid fund, unless those standard fees are reduced to reflect any decrease in workload. I believe the best approach is for the benefits of efficiency to be shared between funder and provider; if the work needed to conclude a case reduces on average by a certain percentage, the standard fee should be reduced by a lesser percentage.

#### **Further potential criminal justice reforms**

10.18 My terms of reference ask me to consider whether there are aspects of the justice system where efficiencies might contribute towards reducing the cost of publicly funded legal services, while sustaining the quality of service provision. There are several reform options which fit this description but which would require primary legislation and raise sensitive issues where the policy must ultimately be a matter for political judgment. At a time of severe pressure on public finances I believe these are options which ought to be considered, even if they can only be delivered (if at all) under a longer timescale.

10.19 Table 10 lists three such options (there are no doubt many more) which **I recommend could be considered** if future legislative opportunity allows:

**Table 10 Longer term criminal reform options**

Abolition of committal proceedings	Committal proceedings historically had an important role in reviewing cases at the magistrates’ court level before they were permitted to proceed to the Crown Court. Such processes caused significant duplication of work at the two court levels and have now been abolished in England and Wales in favour of a simplified Allocation Procedure before cases are sent to the Crown Court. Some streamlining of committal proceedings in Northern Ireland is provided in the recent Justice Act. I suggest this could go further. I recognise that to follow the English approach might place some additional burden on the Crown Court in dealing with remand cases, but I question if that issue could not be addressed by phasing in the reform over a period, rather than by retaining what should now be regarded as an obsolete and unnecessary additional process
Reducing the range of offences triable either way	Any change to the rules on the right to trial by jury is highly sensitive, but it should be possible to debate changes to the existing procedures for some lower level indictable offences without it being seen as a challenge to the constitutional significance of jury trials. Access to Justice 1 noted (at page 39) that relatively few defendants in Northern Ireland elect jury trial but some cases do proceed to the expense of a Crown Court trial for what the public might regard as a very minor offence such as shoplifting. For theft and dishonesty charges below a certain value, the decision on mode of trial could instead be made a matter for the court, not the defendant. That would still allow the court to let the matter proceed to a jury trial if a conviction might have life-changing consequences for the individual defendant.
Giving defendants the option of judge only trials	Crown Court trials without a jury have a particular resonance in Northern Ireland because of the history of judge-only “Diplock Courts” during the troubles, now only used very exceptionally. Judge only trials are still an option to consider for complex fraud cases but a more intriguing reform option mentioned in the Leveson report <sup>192</sup> is to give defendants the option of a judge only trial if they would prefer it. This might be attractive for a defendant facing a very technical charge or one who would wish to know that full reasons would be given for any verdict. A more difficult issue is whether such an option should also be available for a defendant who fears community bias or intimidation in a jury.

**Summary**

10.20 There remains considerable scope for improvement of the efficiency of criminal proceedings in the United Kingdom. The Leveson report in England and Wales gives a useful steer towards the reforms which should be considered, especially in relation to improved communications and listing. A judicial working group should be established to devise the procedures and rule changes necessary to deliver improved efficiency for criminal proceedings before the magistrates’ court.

10.21 There are wider criminal procedure reform options which could be considered but require primary legislation and may raise sensitive political issues.

<sup>192</sup>Leveson at pages 88-89

## 11 Criminal Advice Services

***“Punishment is not for revenge, but to lessen crime and reform the criminal”<sup>193</sup>***

11.1 This chapter looks at options for reform of police station advice, advice on diversionary options and the general provision of criminal advice and assistance.

### **Police station advice schemes**

11.2 The Agenda document noted how the arrangements for the provision of police station advice, which is a vital part of criminal defence services, varied across the province, lacking any centralised organisation. This contrasts sharply with the highly competitive tendering arrangements currently underway in England and Wales. Question 8 of the Agenda asked how the legal aid authorities could ensure that the necessary network of solicitors is available wherever and whenever required in Northern Ireland to deliver police station advice and support. Was there a role for contractual arrangements (including accreditation requirements) in this context?

11.3 The Police Service of Northern Ireland said they wanted to see a good professional service at the police station. The Northern Ireland Human Rights Commission emphasised the vital part police station advice plays as an essential component of ECHR Article 6 and as a safeguard against mistreatment.<sup>194</sup> The Human Rights Commission expressed some concern at the lack of transparency of arrangements outside Belfast and Antrim, particularly if there was any danger of arresting officers having any discretion over the client’s choice of solicitor.

11.4 The Belfast Solicitors Association encouraged the Law Society of Northern Ireland along with its member groups to provide a duty solicitor infrastructure to include specific accreditation and training requirements for solicitors carrying out this important role. The LSC also believed that it should be primarily the responsibility of the Law Society rather than the legal aid authorities to ensure that a suitably robust rota of duty solicitors was in place to cover the whole of Northern Ireland. An accreditation scheme could be developed for duty solicitors, as part of the overall Registration Scheme, but contracting could be considered in the longer term. Protocols could be developed to allow for advice by telephone or video link.

11.5 The Law Society confirmed that it is actively working on the development of a duty solicitors’ rota which will be capable of comprehensively managing demand across Northern Ireland. This will build on the Belfast duty rota and seek to ensure that there is a fair distribution of work among solicitors with the necessary resources and experience to undertake this work. The Law Society oppose contracting for these services, citing unhappy recent developments in England and Wales, but look forward to working collaboratively with the Department in developing the new scheme. The Bar feared that contracting would lead to a scheme driven more by cost than quality.

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<sup>193</sup>Elizabeth Fry (1780-1845), journal entry

<sup>194</sup>See *Cadder v Her Majesty’s Advocate (Scotland)* [2010] 1 WLR 2601

11.6 Police station advice is a vital part of the criminal justice system and so needs to be on a secure footing. It seems to me that there is a stronger case for contracting for police station advice than for legal aid services generally, because of the state's obligation to ensure that a satisfactory service exists at all locations. Historically, most legal aid contracts have been "license" contracts which authorise suppliers to undertake legal aid work but do not require them to do so. The latest criminal legal aid contracts in England and Wales require suppliers to guarantee the service with only limited opportunity to escape during the life of the contract. The contracts are not awarded on the basis of price competition but the increased security and volumes arising in the tender process are part of the rationale for regulatory fee reductions.

11.7 On the other hand the work needed to develop and impose a contractual structure on police station work in Northern Ireland would be very substantial. As mentioned in Chapter 5, the potential financial benefits of contracting are less easy to realise in a rural environment.<sup>195</sup> Whatever the imperfections of current arrangements, nothing has emerged in this review to suggest that there is a current problem with the provision of police station advice which needs to be addressed by a major reform of the way the service is delivered. On balance I do not recommend that police station advice moves to a contractual basis for the time being, although the option should be kept under review. The question would need to be revisited if in the future there were to be a serious breakdown in the provision of the service.

11.8 Meanwhile, I support the aims and the collaborative approach described by the Law Society in establishing their new scheme. When the scheme is established **I recommend that the Law Society publish details of the scheme together with guidance to ensure that there is transparency and fairness in how individual solicitors are allocated to clients and how new firms might join existing schemes. I also recommend that specific quality standards are developed for duty solicitors and brought into effect as part of the Registration Scheme.**

#### **Advice on diversionary options**

11.9 Access to Justice 1 recommended a range of diversionary measures as an alternative to formal criminal proceedings. Much progress has been made in this reform area with the introduction of police issued fixed penalties for low level offences and further measures such as prosecutorial fines included in the Justice Act (Northern Ireland) 2015. Consultation question 3 of the Agenda asked whether legal aid to support the provision of legal advice to adults offered diversionary interventions should be regarded as of a relatively lower priority, provided that information is provided by the authorities on the implications of accepting such interventions and on the option of taking the issue concerned to court?

11.10 The LSC agreed that such advice was not a high priority for the scheme provided proper information and guidance is available for clients as part of the process. However, safeguards would be needed against the risk that a client might accept a caution or fixed penalty for an offence that was not in reality made out.

11.11 Other consultees disagreed. The Law Society, Belfast Solicitors Association and NIACRO viewed such advice as a high priority. Acceptance of certain diversionary options might be available

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<sup>195</sup>Because it is less easy for firms to expand to cover new locations; see paragraph 5.7

on enhanced criminal record checks and have significant impacts on future job prospects. The BSA saw the diversion process as effectively part of a trial process triggering fair trial obligations. They believed that the PPS should do more to publish information on the new system of prosecutorial fines. The Law Society drew attention to the concerns over police practice in this area highlighted by the Criminal Justice Inspection Northern Ireland.<sup>196</sup> The Bar saw dangers in diversionary measures being applied too widely or in inappropriate cases.

11.12 The Police Service Northern Ireland suggested that this area may become increasingly important as they intended to develop Restorative Justice options as a means of disposal of cases and legal support would be needed for suspects undergoing such a process.

### **Advice on youth diversion**

11.13 Agenda consultation question 4 asked to what extent current arrangements, including youth engagement clinics, ensured that children and young people fully understood the implications of diversionary options that may be offered and enabled them to take informed decisions?

11.14 All responses saw an important need for legal advice for young people faced with diversionary options. NIACRO argued that diversionary systems were still widely misunderstood, especially their impact on a young person's criminal record. Families were often confused by the jargon used by police or solicitors and needed ongoing advice and assistance throughout the process. NIACRO recommended that a model akin to the Guardian ad Litem should be present at all youth engagement clinics to provide independent advice and support.

11.15 The Law Society supported the views of the Children's Law Centre on the importance of independent legal advice at youth engagement clinics. The Law Society argued that police Youth Diversion Officers or Youth Justice Agency staff were not able to act as impartial advisers to the child, so it was regrettable that legal representatives were only present at a minority of clinics.

### **The costs of criminal advice and assistance**

11.16 In 2013/14 the LSC spent just over £3.5 million on advice and assistance in criminal matters. This is a far greater sum than the £1 million spent on all civil areas combined, including family; crime therefore accounts for just under 78% of total spend on advice and assistance. There were 30,786 claims of criminal advice and assistance at an average cost of £114 each.

11.17 Police station advice accounts for most of the criminal advice and assistance budget. There were 22,104 claims costing a total of £3,015,520. The remaining 8,682 criminal claims, costing £493,613 cover a variety of criminal topics but in 2013/14 there were only 7 claims relating to youth engagement clinics, costing a total of just £586.

11.18 The cost of criminal advice and assistance rose sharply last year. The volume of cases increased by 27% compared to 2012/13 (average cost per case remained unchanged). This is surprising at a time when the volume of criminal proceedings started in the magistrates' courts

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<sup>196</sup> CJINI Police Use of Discretion Incorporating Penalty Notices, January 2015

decreased by 10% over the same period.<sup>197</sup> Claim processing patterns and criminal diversion may be part of the story behind these figures but further investigation is required.

### **Priorities for criminal advice and assistance**

11.19 Except for advice at the police station, criminal advice generally is not part of the irreducible minimum of legal aid provision. It is a substantial area of spend subject to few financial controls. Information is sorely lacking as to the situations in which advice is being funded and how useful or important it is to clients. I suspect that advice on criminal matters is given in a wide range of circumstances: sometimes no doubt it will be of great importance to the client, or might produce savings for the fund if criminal proceedings can be avoided; at other times advice may be sought or given on trivial or speculative issues. It is important for there to be clarity as to whether advice and assistance is being applied for in cases subsequently covered by criminal legal aid, or if multiple applications for payment are being made inappropriately for a single client.

11.20 It is difficult to reflect variable priorities within an advice and assistance scheme. I do not recommend any immediate changes to the scope of criminal advice and assistance. It should therefore remain available in principle for advice on any aspects of the criminal law or procedure of Northern Ireland, including advice on diversionary options. More should be done to ensure that advice is available at youth engagement clinics. **I recommend that all criminal advice and assistance, other than advice at the police station or a youth engagement clinic, is subject to merits criteria.** I think the “private client test” is the best approach.<sup>198</sup> **I recommend that regulations provide that:**

**“Advice and assistance may only be provided where the issues are of such significance to the client that a reasonable client would be prepared to pay privately for legal advice, if they could afford to do so”**

11.21 This test has a similar role to the “Sufficient Benefit test” which applies to advice and assistance in England and Wales. Applications for advice and assistance should still be made to the solicitor, who would be responsible for applying the new test. I would not want to see a bureaucratic system under which the Legal Services Agency second guesses individual decisions to grant advice and assistance, but in principle the Agency should be entitled not to pay for Green Form advice if the issues are clearly trivial.

11.22 As from 1<sup>st</sup> April 2015, criminal advice and assistance operates under a different statutory framework from criminal representation.<sup>199</sup> **I recommend that the Department reviews the procedural regulations governing advice and assistance<sup>200</sup> to ensure that work cannot be duplicated between the two schemes.** Regulations should also make clear that multiple applications for criminal advice and assistance for one client should not be permitted unless they

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<sup>197</sup> Northern Ireland Courts and Tribunals Service, Annual Report and Accounts 2013/14, page 7

<sup>198</sup> This should apply both to criminal and to civil advice – see further Chapter 25

<sup>199</sup> Advice and assistance operates under the 2003 Order while representation continues under the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981

<sup>200</sup> Primarily the Civil Legal Aid (General) Regulations (Northern Ireland) 2015, Part 3

relate to genuinely separate matters, such as those likely to give rise to entirely separate criminal proceedings.

### **Summary**

11.23 Advice and assistance at the police station is a vital part of the criminal justice system. The Law Society are developing duty solicitor rotas covering all Northern Ireland. Guidance on the operation of this scheme should be transparent and allow for new entrants. Quality criteria for solicitors providing this service should be developed with the Law Society and introduced as part of the new Registration Scheme. There is no necessity to introduce contracting at this time but the option should be kept under review.

11.24 Criminal advice and assistance other than at a police station, including on diversionary measures, should remain in the scope of the legal aid scheme but be subject to stricter controls. Free standing advice on criminal matters should only be funded on issues which are of real significance to the client, such that a reasonable client would pay for the advice privately if they could afford it.

## 12 The Interests of Justice Test

*“Peace and justice are two sides of the same coin”<sup>201</sup>*

### The Widgery Criteria

12.1 The interests of justice test is the merits test for criminal legal aid contained in article 6(3)(c) of ECHR.<sup>202</sup> Interpretation of this broad test has for many years been governed by the criteria originally laid down by Mr Justice Widgery in 1966. The criteria were first given statutory force in England and Wales under the Legal Aid Act 1988 and are contained in article 29 of the 2003 Order in the following terms:

“In deciding what the interests of justice consist of in relation to any individual, the following factors must be taken into account –

- (a) whether the individual would, if any matter arising in the proceedings is decided against him, be likely to lose his liberty or livelihood or suffer serious damage to his reputation,
- (b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law,
- (c) whether the individual may be unable to understand the proceedings or to state his own case,
- (d) whether the proceedings may involve the tracing, interviewing or expert cross examination of witnesses on behalf of the individual, and
- (e) whether it is in the interests of another person that the individual be represented.”<sup>203</sup>

12.2 Article 29 has not yet been brought into force in Northern Ireland but when it is Ministers are given a general power under 29(3) to amend the criteria. Consultation question 2 of the Agenda asks whether the Widgery criteria should be retained as the basis for determining whether it is in the interests of justice that criminal legal aid should be granted. Should the criteria be amended in any way?

12.3 On consultation there was strong support for the criteria as set out in article 29. The Widgery criteria had stood the test of time and should be retained. The Bar argue that there is no evidence of a magistrate ever having granted legal aid under the Widgery criteria in a case where they felt it was otherwise not merited. The Law Society drew attention to research into the application of the test which suggested that some additional factors could be considered. These included:

- Whether the defendant is so disruptive that only a grant of representation will permit the judicial function of the court to continue;
- The fact that the prosecution is legally represented;
- The youth of the defendant;
- The need for careful examination of defence witnesses;
- The need to retain an expert defence witness;

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<sup>201</sup>Dwight D Eisenhower

<sup>202</sup>The full provision is set out in Chapter 2, paragraph 2.8

<sup>203</sup>2003 Order article 29(2)

- The fact that the interests of justice can encompass considerations of saving time and money.<sup>204</sup>

12.4 I would not be in favour of adding such a list of factors to the established criteria. The five factors listed in article 29 are not expressed to be exhaustive so additional considerations, such as the first bullet point above, could already be taken into account in the court’s discretion under the test. I fear the other suggested additions are too widely drawn and might lead to an unjustified expansion of the range of cases currently satisfying the test. Whilst we cannot afford to broaden the test, I suspect that the existing criteria are so well established that any attempt to make the test more restrictive would be open to legal challenge. **I therefore recommend that the Widgery criteria as set out in article 29 should be retained as the basis for the interests of justice test.** The Northern Ireland Human Rights Commission argue that the Widgery criteria should also be considered in applications for civil legal aid – I cannot agree with this, given the clear differentiation in article 6 of ECHR between civil and criminal proceedings.

#### **Justifying decisions under the interests of justice test**

12.5 Agenda consultation question 6 asked whether further research into the way the Widgery criteria are applied would be worthwhile? Should all applications and grants of criminal legal aid have to make specific reference to the criterion or criteria relevant to the case in hand? Would such an approach provide reassurance as to the rigorous and fair application of the relevant criteria?

12.6 The LSC, as the body responsible for criminal legal aid spend, was strongly in favour of further research into grants of criminal legal aid by the court to ensure that decisions were consistent and appropriate. These are decisions to commit significant public funds according to rules set down by Parliament. The decision maker should also give reasons for its decisions.

12.7 The Law Society also welcomed the idea of further research and cautioned that any reforms in the way the test is applied should be evidence based. The Northern Ireland Human Rights Commission drew attention to the obligation on the state to have clear and fair procedures for such decisions with appropriate safeguards against arbitrariness – see the case of *del Sol v France*.<sup>205</sup> The state should provide reasons for these decisions and a review or appeal mechanism in the event of refusal. The Belfast Solicitors Association suggested that further guidance on the application of the criteria might assist to promote consistency. The Bar feared that a new obligation on the court to provide reasons would only lead to delay.

12.8 Concern about the application of the test was discussed in Access to Justice 1 at pages 26-30. However research published in 2010, based on fieldwork that took place between 2005 and 2007, indicated that decision making was fairly stable and consistent between courts.<sup>206</sup> At that time, no clear evidence was found of undue generosity in the application of the test, often referred to as “Widgery drift”.

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<sup>204</sup>Richard Young and Aidan Wilcox ‘The merits of legal aid in the magistrates’ court revisited’ 2007 Criminal Law Review, 109 at 124

<sup>205</sup>ECHR no 46800/99, paragraph 26

<sup>206</sup>A Review of the Arrangements for the Assessment of the Interests of Justice Test for Access to Criminal Aid, Professor Richard Young and others, University of Bristol, 18th May 2010

12.9 I remain anxious about the current system for grants of criminal legal aid. The human elements of the decision should not be overlooked. A judge, faced with a lawyer who is being polite and helpful to the court, but who may well not get paid if legal aid is refused, is bound to lean towards a grant, possibly more so than the strict test requires. In my court observations, decisions on legal aid are made surprisingly quickly and informally, although not inappropriately in the cases I witnessed. I have been told anecdotally of cases where the court has unnecessarily encouraged defendants to seek representation even when they were perfectly capable of explaining themselves to the court. There is now evidence of judicial inconsistency in decisions made as to certification for counsel,<sup>207</sup> which must cast some doubt on the consistency of the application of the interests of justice test.

12.10 Overall, I do not think a major research project is called for at this stage. Any such study would immediately be hampered by the lack of reasoned decisions in court files. In my view the first step should be to require a greater degree of structure and accountability for decisions to grant legal aid. **I recommend that regulations should require a court, when granting or refusing criminal legal aid, to give and record reasons for its decision by reference to the Widgery criteria.** This must be done in a way which minimises the administrative burden on the court. At present the application form for legal aid contains little information other than the applicant's finances. I suggest that additional sections are included in the form for legal aid covering merits, with a section to be completed by the court. This should list the Widgery criteria so that the court can identify which of them apply to the case and provide brief reasons for the decision. This information should be retained either on the court file or preferably online to provide a database for future research or auditing by the LSA.

#### **Administration of the test**

12.11 Consultation question 7 asked whether all, or some, aspects of decision-making on the grant of criminal legal aid should be transferred to the legal aid authority or to court-based staff acting on their behalf.

12.12 In England and Wales all decisions on granting legal aid are now made by the Legal Aid Agency. All applications are made and responded to online. According to data provided to the Leveson review,<sup>208</sup> 95% of correctly completed applications are dealt with within 48 hours of receipt. The system has only recently been rolled out nationally but, according to my discussions with the Agency, it is operating well. Early indications are that the rate of grant may be slightly lower than was the case when decisions were made by the court, but it is too early to draw firm conclusions. Similarly, in Scotland the Scottish Legal Aid Board determines grants of criminal legal aid using an online process and the system works well.

12.13 On consultation the Bar, the Law Society and the Belfast Solicitors Association argued in favour of these decisions remaining in the hands of the judge responsible for the case, who would be able to assess the capabilities of the defendant and would have a solid grasp of the factual matrix of the case. The legal aid authorities were not resourced or equipped to make such determinations in

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<sup>207</sup>See Chapter 4, paragraph 4.39

<sup>208</sup>Leveson report, page 30

a fair and just manner. Any such process would cause significant delay. The Bar and the Belfast Solicitors Association argued that decisions on grant or refusal were and should remain judicial determinations by the court and the legal aid authorities would have a conflict of interest in trying to save money in such a process

12.14 The LSC saw no objection in principle to taking on this role but were cautious as to the practicalities. Research should be undertaken into the costs and consistency of the current approach before a transfer could be considered.

12.15 My conclusion is that there is no reason in principle why determinations of entitlement to criminal legal aid should necessarily remain with the courts. There are numerous examples of public bodies being responsible for making determinations of entitlement under legal rules, both within the legal aid scheme and more widely. The experience from the rest of the United Kingdom shows that it is possible for criminal legal aid applications to be determined by the legal aid authorities with efficiency and minimal delay. In the longer term, administration of the test by the legal aid authority offers the best prospect of achieving consistent decisions.

12.16 It is all a question of what is practical. Transferring responsibility for grant to the Legal Services Agency should only be considered if:

- i) A reliable online process can be set up to administer the decisions with a rapid turnaround;
- ii) The Agency establish and train a team capable of dealing with the anticipated volumes;
- iii) The Agency could also take over the means test and decisions on certification for counsel<sup>209</sup>

12.17 In Chapter 4, in the context of certificates for counsel, I recommended that the Legal Services Agency develop proposals and a business case for a reliable and cost effective online system for criminal legal aid decision making. The more structured information available on decisions to grant proposed at paragraph 12.10 above may help to contribute to the evidence base for any future change. **Until any new online process becomes available, I recommend that decision making on grant of criminal legal aid should remain with the court.**

### Summary

12.18 The Widgery criteria should remain the basis for grants of criminal legal aid under the interests of justice test. The Legal Services Agency should investigate the cost and practicalities of an online process to administer the test. Pending any such reform, decisions on the grant of criminal legal aid should remain with the courts, but the courts should be required to record and give reasons for their decisions by reference to the Widgery criteria.

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<sup>209</sup>See Chapter 4, paragraph 4.47

## 13 The Financial Conditions of Criminal Legal Aid

*“One thing, however, is sure - that in all cases the effort should be to impose all the cost of repairing the wrong upon the doer of the wrong. This alone is real justice, and of course such justice is necessarily free.”<sup>210</sup>*

### Financial eligibility for criminal legal aid

13.1 Absolute financial eligibility limits are not permissible for criminal representation. Where it is in the interests of justice, article 6(3)(c) requires criminal legal aid to be provided for a client who “has not sufficient means to pay for legal assistance”. It is always open to a state to be more generous than this test of course: in England and Wales means testing was abolished for criminal cases from 2001 under the Access to Justice Act 1999, before being reintroduced for the Magistrate’s Court in 2006 and the Crown Court in 2010. The majority of defendants in criminal proceedings have low incomes. Criminal means testing is always a balance between the desire to exclude those defendants who really could afford their own representation and the need to keep any system administratively workable and to avoid delay.

13.2 The system now used in England and Wales consists of initial screening based on the client’s gross income, adjusted according to the number of dependants. This places the client into one of three bands: eligible; not eligible (but with right of appeal on affordability grounds) or in a middle band where a more detailed means assessment must be carried out. Interestingly the English system is based on income (gross or disposable), but does not take capital into account. In Scotland a screening approach also applies, based on disposable income. For both the English and Scottish systems, determinations are made by the legal aid authorities using an online procedure.

13.3 Northern Ireland has never had a system of fixed eligibility limits for criminal legal aid. Eligibility is determined by the court. The application form for legal aid requires disclosure of financial circumstances but the court has a wide discretion on means and in practice the defendant’s finances are seldom considered in detail. In part this is because the underlying legislation requires the court to give the defendant the benefit of any doubt:

“ If, on a question of granting a person free [criminal legal aid], there is a doubt whether his means are sufficient to enable him to obtain legal aid or whether it is desirable in the interests of justice that he should have free legal aid, the doubt shall be resolved in favour of granting him free legal aid.”<sup>211</sup>

13.4 Access to Justice 1 considered the issues and recommended that more structured means testing be introduced along the lines operated in England and Wales or in Scotland. The Department of Justice consulted on such changes in 2013 but did not proceed with the reforms at that stage accepting that more detailed work would be required to identify acceptable thresholds. It also noted that considerable work would be necessary to develop and introduce robust systems to administer a new means test in to the magistrates’ court. Agenda consultation question 5 asked

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<sup>210</sup>Benjamin Tucker

<sup>211</sup>Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, article 31

whether consideration should be given to an upper limit of income and/or capital beyond which legal aid is not available (but with provision for payment of costs at the legal aid rate in the event of acquittal)?

13.5 The LSC recommended that a detailed financial eligibility form be completed early on to enable the court to determine whether the defendant could fund the case in whole or part. The LSC queried if affordability would have to look at the likely cost at private market rates if a client was prevented from proceeding under legal aid. NIACRO support a system of upper, lower and middle income limits as operates in England. The LSC and the Belfast Solicitors Association agreed that absolute cut-off limits are not possible for criminal legal aid. The Law Society favoured identification of those defendants who could afford to repay their legal aid costs on conviction, instead of imposing income or capital limits at the outset. The Bar believed unfairness could result if certain defendants were refused legal aid but were unable or unwilling to pay for the appropriate level of legal representation.

13.6 In my view it is also instructive to look at the rules on civil court fee exemptions in the different jurisdictions. Fee exemptions are similarly designed to quickly identify litigants for whom the fee would otherwise present a barrier to access to justice. In England and Wales fee exemptions are based primarily on:

- A disposable capital test: there is a sliding scale of disposable capital limits, depending on the level of the fee being charged; for example, if the fee is less than £1,000 you cannot claim an exemption if your disposable capital is over £3,000; if the fee is £4,000, the capital limit is £8,000;<sup>212</sup>
- A gross income test: a single person with gross monthly income under £1,085 is entitled to a full fee remission (subject to capital) but there are further allowances for couples and dependent children; a single person with a gross monthly income of up to £5,085 may still qualify for a partial fee exemption;<sup>213</sup>
- Those in receipt of income-based jobseekers allowance and certain other benefits automatically qualify on income but still need to pass the capital test.<sup>214</sup>

13.7 In Scotland fee exemption is governed by proof of certain welfare benefits.<sup>215</sup> In Northern Ireland full fee exemption is based upon benefit receipt but there is a discretion to apply for full or partial fee remission on hardship grounds.<sup>216</sup> There is a similar emphasis on gross income and disposable capital in the rules on Recovery of Defence Costs Orders.<sup>217</sup>

13.8 Criminal means testing raises difficult policy and practical issues. There is an argument that, because courts run more smoothly with legal representation, there should be no means test, relying instead on a power to order defendants to repay the legal aid fund on conviction. However such an

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<sup>212</sup> Court and Tribunal Fees – Do I have to pay them?, HM Courts and Tribunals Service, EX 160A (2015), pages 11-12

<sup>213</sup> See pages 14-15

<sup>214</sup> Page 13

<sup>215</sup> Scottish Courts and Tribunals website, fee exemptions

<sup>216</sup> 'Do I have to pay fees?', Northern Ireland Courts and Tribunals Service,

<sup>217</sup> The Criminal Legal Aid (Recovery of Defence Costs Orders) Rules (Northern Ireland) 2012, see also paragraph 13.16 below

approach was tried and was not found to be cost effective in England and Wales. In a period of austerity, criminal legal aid in Northern Ireland should be subject to an effective means test. The challenge is to find a procedure which is fair, easy to administer and is fully compliant with article 6.

13.9 As discussed in the last Chapter, until a reliable online process can be developed by the Legal Services Agency, determinations of eligibility for criminal legal aid should remain with the court. It is obviously sensible for means and merits to be administered by the same body. However, the court should administer the means test in a more structured and evidence-based way. Disposable income is the most complex thing to determine; it is far easier for clients to disclose and be assessed on their gross income, available capital and benefit status. I do not favour adopting the three tier England and Wales system. **I recommend that the Department of Justice carries out further consultation on the following approach:**

- **The court should consider both income and capital, but capital should focus only on readily available assets (such as bank savings) i.e. capital which could reasonably be expected to be used to cover legal expenses;**<sup>218</sup>
- **A gross income figure should be set, with allowances for couples and dependent children, below which the defendant would be deemed eligible on income;**
- **A capital savings limit could be set at £3,000, consistent with the free limit for civil legal aid;**
- **As for civil legal aid, those on passported benefits should qualify automatically on income, but not on capital (see Chapter 3 at paragraph 3.11);**
- **Defendants qualifying on both income and capital would be deemed to have passed the means test;**
- **Defendants above the limit on either income or capital would be required to explain to the court why they could not afford to fund their defence privately; the court would retain the final discretion and should record brief reasons for the decision;**
- **The thresholds and approach described above should be set out in regulations;**
- **The application form for criminal legal aid should be redesigned to address the test in a more structured manner.**

13.10 There is no reason in principle why this approach should not apply in the Crown Court as well as the magistrates' court. However the average legal aid bill in the Crown Court in Northern Ireland is over £4,000, compared to less than £600 in the magistrates' court<sup>219</sup> Clearly far fewer people could afford to pay for their own representation at the higher level. This could be taken into account in the court's discretion under article 6 but it might be preferable to set higher disposable capital and/or gross income limits for the Crown Court. These options can be considered further on consultation.

13.11 I am conscious that this more structured approach would create a new administrative burden on the court. However most of the work could be undertaken by court staff under supervision. An initial analysis should be carried out by the Northern Ireland Courts and Tribunals

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<sup>218</sup> The approach adopted to capital in relation to fee exemption would be a good starting point (see form EX160A at pages 9 to 10)

<sup>219</sup> See Chapter 8, Table 8.10

Service to identify and cost the most effective administrative arrangements. Once introduced, refusal rates should be closely monitored to ensure that the savings achieved justify the costs.

13.12 If the criminal provisions of the 2003 Order are brought into force in Northern Ireland, it is not clear whether these would allow for any form of means test for criminal legal aid. The 2003 Order closely mirrors the Access to Justice Act 1999 which abolished criminal means testing in England and Wales. If more structured means testing is introduced under the existing 1981 Order, the “resolve doubt in favour of the applicant” approach set out at paragraph 13.3 above will apply. When the court is considering affordability for a client above the prescribed thresholds, I think it would be better for the court simply to apply the test under article 6 (see paragraph 13.1 above), without the need for such a provision. **I recommend that article 31 of the 1981 Order is not replicated in the reformed eligibility regime.**

13.13 For defendants who are not financially eligible for legal aid and who proceed privately, a mechanism to enable those costs to be repaid in the event of an acquittal is required. Costs may be recoverable from central funds under the Prosecution of Offences Act 1985, section 16. However, regulations seeking to restrict the level of costs payable to legal aid rates have been held to be unlawful.<sup>220</sup> New provisions under schedule 7 of LASPO restored the right to recovery at legal aid rates in England and Wales. Care would be needed to establish the legal basis for any similar change in Northern Ireland.

#### **Contributions in criminal cases**

13.14 Clients in receipt of criminal legal aid in Northern Ireland are under no obligation to pay contributions towards the cost of their case (except for any contributions payable by clients advised under the Green Form scheme). Criminal legal aid in other parts of the United Kingdom is also non contributory. However, legislation has been passed by the Scottish Parliament to introduce criminal legal aid contributions.<sup>221</sup> Implementation is expected during 2015. When enacted, the Scottish Legal Aid Board will manage contributions through their online systems.

13.15 I do not recommend that contributions are introduced for criminal cases in Northern Ireland at this stage; administration of such a scheme would be problematic. The most practical option would be to make contributions payable to the solicitor and taken off final bills, as for the Green Form scheme. The options should be kept under review and if the reforms in Scotland go ahead and are effective in reducing the net cost of the system, a similar approach should be considered in this jurisdiction.

#### **Recovery of costs from convicted defendants**

13.16 Making defendants repay the legal aid costs incurred on their behalf is, on the face of it, an attractive mechanism for reducing the net cost of criminal legal aid. Rules made under the 1981 Order<sup>222</sup> provide for a Recovery of Defence Costs Order (“RDCO”) under which the court, at the

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<sup>220</sup>See *R(on application of Law Society) v Lord Chancellor* [2010] EWHC 1406 (Admin)

<sup>221</sup>Scottish Civil Justice Council and Criminal Legal Assistance Act 2013

<sup>222</sup>Legal Aid, Advice and Assistance (Northern Ireland) Order 1981; see *The Criminal Legal Aid (Recovery of Defence Costs Orders) Rules (Northern Ireland) 2012*; similar provisions exist in the 2003 Order, article 31(2) (not yet in force)

request of the legal aid authority, may order a convicted defendant to repay some or all of the costs incurred on his behalf. This is in addition to any fine or compensation order which may be imposed on conviction.

13.17 Agenda consultation question 5 asked what more should be done to enable costs to be recovered from convicted defendants who have the necessary means; in particular what could be done to identify those who have the means and prevent them from transferring or concealing their assets?

13.18 Responses on this issue were limited. However the Law Society and NIACRO supported in principle the recovery of defence costs from convicted defendants who have the necessary means to pay for them.

13.19 In England and Wales a very different fees regime has recently been established under the Criminal Justice and Courts Act 2015. Mandatory rules require criminal courts to impose financial penalties on all adult defendants on conviction. These fees are intended to reflect the cost of the court system rather than prosecution or defence costs. They are not dependent on ability to pay or the seriousness of the offence. The sums imposed are as follows:

**Table 13 Financial penalties on conviction in England and Wales**

Fees Imposed	Guilty Plea	Conviction at Trial
Magistrates' court – summary offence	£150	£520
Magistrates' court – either way offence	£180	£1,000
Crown Court	£900	£1,200

13.20 Justice Secretary Chris Grayling explained the changes:

“From my first day in this job I have been clear that people must have confidence in our justice system. We’re on the side of people who work hard and want to get on, and that is why these reforms will make sure that those who commit crime pay their way and contribute towards the cost of their court cases.”

13.21 In Northern Ireland there are already additional liabilities on conviction in the form of the rather more modestly priced Offender Levy. This charges £5 on a penalty notice, £15 on a fine and £25 or £50 on a prison sentence.

13.22 Overall, my view is that any obligation imposed on a defendant to repay legal aid costs should be considered not in isolation but alongside the range of financial penalties which a court can or must impose on conviction. I do not recommend any automatic new imposition of a substantial fee (however described), although it will be interesting to see how the new regime in England and Wales develops. It is unclear whether the RDCO system is working as effectively as it could; perhaps a more structured approach to means declaration on conviction should be considered. However, if the stricter approach to means testing proposed in this Chapter is implemented, there should be very few convicted defendants who can afford to repay their legal aid costs.

13.23 I therefore do not recommend any immediate changes but I suggest that the question of a convicted defendant's liability to repay legal aid costs is revisited after implementation of the stricter means test. Also, if the proposal for "legal aid as a loan" is implemented for civil cases as described in Chapter 3, extension of the principle to criminal legal aid should be considered, recognising that this would raise further issues.

### **Summary**

13.24 Criminal legal aid in Northern Ireland should be subject to a structured means test. Regulations should require eligibility to be determined initially by an assessment of gross income, disposable capital and benefit receipt, subject to a determination of whether the defendant can afford to pay for his or her own defence.

13.25 There should be no immediate change to criminal contributions or the obligation to repay costs on conviction, but these areas should be kept under review.

## 14 Delivery of Criminal Legal Aid

***“The quality of advocacy in our criminal justice system is a precious national asset, in which the public has as much of a stake as the legal profession”<sup>223</sup>***

14.1 Chapter 5 considered delivery models for legal aid, recommending against a system of tendering and contracting for the majority of legal aid services, but supporting a Registration Scheme. Chapter 11 explained how the Registration Scheme might play an important role in the administration of police station advice. This Chapter is concerned with two further policy options which are specific to the delivery of criminal legal aid.

### **A panel of advocates for Crown Court work**

14.2 The Jeffrey review<sup>224</sup> considered the challenges facing criminal advocacy in England and Wales, at a time of diminishing volumes of work and fees. As mentioned in Chapter 9, these pressures are if anything even more acute in Northern Ireland where the work is spread out across a proportionately larger population of barristers. The Jeffrey review suggested there might be merit in the Legal Aid Agency establishing a panel of advocates for Crown Court work:

“An alternative approach to addressing the problems of quality and fair competition would be for the [Agency] to take a more assertive role in the advocacy services market than they do at the moment. The Agency acts as customer for the “end to end” contracts for defence representation, and through the award of the contracts exercises a measure of quality control; but it has little direct involvement in advocacy quality. An option which the Government could consider would be for the [Agency] to maintain a list of approved advocates, on the model of the [Crown Prosecution Service’s] panel of barristers briefed to represent the prosecution. This would not be straightforward. The analogy with the prosecution does not completely hold. In particular, a list of defence advocates approved for legal aid purposes would need to include employed solicitor advocates as well as barristers. An acceptable means of assessing quality would need to be found, although the CPS appears to have done so. But if a workable system could be devised, it would bring a degree of quality control, and could also deal with the problem of over-supply. In doing the latter, it would, of course, reduce the choice of advocates available to legally aided defendants; but in a publicly funded system client choice has, in my view at least, to be tempered with a recognition of the taxpayer’s interest in value for money.”<sup>225</sup>

14.3 The PPS in Northern Ireland also see some merit in this proposal. The PPS maintain a panel of about 30 counsel who are able to cover prosecution work in the Crown Court across the entire Province. Defence work is of course far more widely spread across the Bar. There is an argument that legal aid rates for defence work are being set too high in order to compensate for lower volumes of work. The PPS find that they need to nearly match legal aid rates in order to retain the

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<sup>223</sup>Sir Bill Jeffery, Independent Criminal Advocacy in England and Wales, Ministry of Justice, May 2014, Conclusion, page 68

<sup>224</sup>Above – see also Chapter 9

<sup>225</sup>Paragraph 5.30

most able counsel for prosecution work. An alternative future delivery model would involve limited panels of advocates for prosecution and defence work with lower fees but a guaranteed flow of work and increasing expertise.

14.4 Agenda consultation question 9 asked for views on this approach. Responses were generally negative. The Bar fundamentally disagreed with the concept of a restricted panel of advocates for defence work, which they believe would be more bureaucratic and less efficient than the current model of open competition promoted by the Bar Library. The Bar and the Law Society argued that there was no evidence base to support such a change and a research exercise would be needed to justify consultation on such a reform. Further, the Bar and Law Society re-iterated the importance of clients having freedom of choice of legal representation, which right should not be interfered with lightly. The Belfast Solicitors Association similarly saw no need for restricted panels.

14.5 The LSC and NIACRO saw value in accreditation for those undertaking publicly funded Crown Court advocacy. This could be developed under the new Registration Scheme.

14.6 On balance, I see some attraction in the exclusive panel concept but I believe the practical problems with implementing such a reform would outweigh any benefits, for similar reasons to those considered in Chapter 5 for contracting as a whole. I agree with the Bar and the Law Society that client choice of representative should not be reduced unless there is a strong case for doing so and this factor makes a limited panel much more difficult to introduce for defence than prosecution work. I do however see an important role for the Registration Scheme in developing and implementing quality standards for this work. This could extend to specific standards for areas of criminal work which require particular expertise and sensitivity, such as rape and sexual abuse cases.<sup>226</sup>

14.7 In Chapter 4 I suggested that when determining legal aid remuneration rates, the Department should only pay what is a fair rate for well run and efficiently structured providers.<sup>227</sup> Similarly, remuneration rules should be designed to provide a reasonable return for a reasonably busy advocate and should not be increased to compensate for low volumes of work caused by an over-supply of lawyers.

#### **A Public Defender Service for Northern Ireland**

14.8 Legal aid lawyers who are employed by the state rather than selected from the private sector are another important delivery option to consider. This raises many issues, especially concerning independence of advice, but these have been addressed both in Scotland and in England and Wales where public defenders are an established part of the scheme. Access to Justice 1 did not specifically recommend a public defender service for Northern Ireland but did conclude that the Department should undertake contingency planning against market failures, part of which could be a consideration of employing public defenders to address gaps in supply.<sup>228</sup> The Agenda (at paragraph 4.18 and consultation question 9) asked whether the time had come for the proposal to be revisited. Agenda drew attention to the potential for public defenders to act as a benchmark of

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<sup>226</sup>See similar proposals in the Jeffrey Review, at paragraph 4.11

<sup>227</sup>See Chapter 4 at paragraphs 4.9 to 4.13

<sup>228</sup>See AJI paragraphs 4.65 to 4.56

quality and their use in Scotland to provide services in rural areas where the private sector might struggle to provide access.

14.9 Consultation responses were again generally opposed to the introduction of public defenders in Northern Ireland, for a mix of principled and practical reasons. The Bar and Law Society pointed out that little had changed on these issues since AJ1 and far more comparative research would be needed to justify the reform. They believed that public defenders offered poorer value for money than private practice. The Northern Ireland Human Rights Commission emphasised the importance of the independence of the legal profession as confirmed by United Nations Human Rights organisations.<sup>229</sup> The Belfast Solicitors Association objected to public defenders on the basis of principle, quality and cost.

14.10 In my view the principled arguments against public defenders on the grounds of lack of independence should not be given much weight in the light of the experience in the rest of the United Kingdom. You only have to talk to public defenders to know that they are every bit as passionate about giving independent advice and doing their best for their clients as their colleagues in private practice. A regular salary simply avoids the bureaucracy of needing to apply for fees on a case by case basis. A clear statutory framework is available under the 2003 Order for a Code of Conduct to guarantee operational independence of public defenders if they were ever established in Northern Ireland.<sup>230</sup> I recognise the historical significance of these issues in this jurisdiction but I do not think these alone would justify a different policy in Northern Ireland.

14.11 Having said that, would the creation of a public defender system in Northern Ireland be a solution to a problem which does not currently exist? The set up costs and work needed to establish public defenders would be substantial. On the assumption that there remains a secure supply of high quality defence services from the private sector, I do not think there could be any business case to introduce public defenders in Northern Ireland. However, even during the course of this review, there have been withdrawals of defence services by both solicitors and barristers opposed to the latest fee reductions. There will be even tougher times ahead. The Department will need to form a view as to whether the private sector is a reliable provider of defence services or not. **I do not recommend that a public defender service is established at the present time, but do recommend that the Department engage in contingency planning in the event of a serious failure of supply.** In such planning, employed services are an important option to consider.

## Summary

14.12 There should be no objection in principle to the introduction of panels of advocates or public defenders in Northern Ireland. However, there is no business case for introducing such reforms as long as there remains a reliable supply of criminal defence services from the private sector. The Department should plan for the possibility of future failure of supply.

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<sup>229</sup>See UN Basic Principles on the Role of Lawyers, UN Congress on the Prevention of Crime and the Treatment of Offenders; UN Human Rights Committee; Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, August 11<sup>th</sup>, 2011

<sup>230</sup>See 2003 Order, Article 22

# Part C Family Justice

## 15 Family Justice Reform

***“Every day in this job I feel less and less like a family judge and more and more like Jeremy Kyle.”***

15.1 This Chapter considers recent reforms and proposals for reform of family justice in the United Kingdom (other than inquisitorial panels which are covered in the next Chapter) and a range of family justice reform options for Northern Ireland.

### **Divided responsibilities**

15.2 Responsibility for family justice in Northern Ireland is split between at least three different Departments. Whilst the Department of Justice has general responsibility for the courts and legal aid, the Department of Health, Social Services and Public Safety (DHSSPS) is responsible for the public law relating to children (e.g. care orders, emergency protection orders etc) and the Department for Finance and Personnel (DFP) is responsible for legal services, civil law reform and the private law relating to children and families (e.g. child contact, parental responsibility, divorce and financial provision). The issues considered in this review inevitably concern all three Departments.

15.3 Although the Departments communicate and cooperate on a wide range of issues, the division of functions gives rise to a lack of clear leadership and management of the family justice system as a whole. This was of concern to the first Access to Justice Review and is in my view an underlying cause of the lack of progress seen on some of that review’s family justice proposals.

15.4 I realise that any renegotiation of departmental responsibilities is fraught with difficulty. Nevertheless **I recommend that all Departments responsible for family justice should meet to review the existing division of responsibilities and agree clear leadership for any reforms arising out of this review.**

### **The Family Justice Review in England and Wales**

15.5 This review, chaired by David Norgrove, took a fundamental look at the systems and operation of family justice in England and Wales. It concluded that major reform was needed for a number of reasons including:<sup>231</sup>

- Excessive delay – care cases taking on average 56 weeks and private law proceedings 32 weeks;
- Excessive cost of the system to both the taxpayer and the individual;
- Complex procedures, confusing and inaccessible to adults and children;
- Lack of leadership and accountability for the system as a whole;
- Fragmented and overlapping processes and structures;

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<sup>231</sup>See Family Justice Review, Final Report, November 2011, pages 41-45

- Lack of effective joint working between individuals and organisations within the system.

15.6 The government agreed to implement the principal recommendations of the review. Some of the significant reforms to emerge have included:

- Creation of a unified family court for England and Wales on 22<sup>nd</sup> April 2014 under the Crime and Courts Act 2013;
- Introduction of a 26 week time limit for care proceedings;
- Re-focussing the role of the court in public law proceedings, to concentrate on the principles rather than the detail of future care arrangements;
- Improved control over the use of expert witnesses;
- A Tri-Borough Pilot to investigate and minimise delay in care proceedings.

15.7 Access to Justice 1, which was published shortly before the final report of the Family Justice Review, recommended a similar review of the operation of the family justice system in Northern Ireland. This has not proceeded in the form envisaged, although a pilot of care proceedings, similar to the Tri-Borough pilot in England, will shortly be underway. However, many of the issues which gave rise to the need for a Family Justice Review in England and Wales (as summarised at paragraph 15.5 above) are in my view still present in Northern Ireland. Has the time now come for a similar fundamental review of family justice in Northern Ireland?

15.8 On balance I do not think so. Embarking upon such a project now, even if it could be got underway, would delay progress on more targeted initiatives such as those discussed later in this Chapter. A new fundamental review would be bound to duplicate much of the thinking which has already been developed both here and in other jurisdictions. Some of the latest research and reports are described below. There are clearly important issues to decide, especially the question of a unified family court in this jurisdiction<sup>232</sup>, but outstanding issues can be addressed via consultation without needing a more general review. I think the emphasis from now on should be less on the theory and more on the practical steps needed to deliver a more effective family justice system, which Lord Justice Gillen's Review of Civil and Family Justice will be well placed to consider.

### **Mapping Paths to Family justice**

15.9 This was a three year academic study by the Universities of Exeter and Kent looking at the ways in which clients come to the family justice system and their use and awareness of out of court options such as negotiation, mediation and collaborative law.<sup>233</sup> It also looked at the role of the family courts before and after the cuts to family legal aid in England and Wales following LASPO. The research findings help to inform reform options for family justice, family mediation and legal aid. Some of the findings of most interest to this review are:

- The role of the court is very varied in family cases; not all cases are lengthy and expensive; indeed, many lawyers issue proceedings as an aid to settlement, not as an alternative to negotiation;

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<sup>232</sup>See paragraph 15.26 onwards

<sup>233</sup>See Mapping Paths to Family Justice, University of Exeter, June 2014

- The role of solicitor negotiation is undervalued in the promotion of dispute resolution; sometimes it will be more effective than mediation; a vehicle should be found for this within the legal aid scheme;
- The government should do more to promote and raise awareness of the positive benefits of family mediation;
- Mediation Information and Assessment Meetings, which many clients are required to attend before their court application proceeds<sup>234</sup>, have a valuable role but should be a source of information not just about mediation, but about the full range of dispute resolution options;
- The requirement to cite fault in the grounds for divorce was a source of upset which could disturb the equilibrium of the dispute resolution process.<sup>235</sup>

### **A Manifesto for Family Law**

15.10 In the run-up to the election a series of “Manifestos” for justice were produced in England and Wales by a range of organisations.<sup>236</sup> In the context of family justice a Manifesto for Family Law was produced by Resolution, the body representing family lawyers in England and Wales. This is a cogent set of six proposals for improvements in family justice, beyond those achieved under the Family Justice Review.<sup>237</sup>

- 1) Protection for vulnerable people going through separation, through a system of initial advice from a family lawyer, signposting clients towards mediation and other forms of dispute resolution or self help;
- 2) Help for separating people to reach agreements out of court, through reform of Mediation Information and Assessment Meetings to cover other forms of resolution and making legal aid available for solicitor negotiation;
- 3) Introducing a Parenting Charter setting out the rights and responsibilities of separating parents and what they need to do in the interests of their children;
- 4) Allowing people to divorce without blame, removing the need to specify grounds of fault in the divorce petition;<sup>238</sup>
- 5) Helping people to understand how divorce will affect their finances, through greater clarity and certainty in the principles of financial provision on divorce and by making pre-nuptial agreements enforceable with suitable safeguards;
- 6) Providing basic legal rights for couples who live together to enable applications for financial provision on separation.

15.11 Many of these reforms would require primary legislation and some raise contentious political or religious issues. What is most interesting to me is that at least the first five of the six proposals all have potential to reduce costs and conflict in family proceedings. Family justice reform should be informed by an awareness of these cost drivers within substantive family law.

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<sup>234</sup> See discussion on MIAMs in Chapter 17

<sup>235</sup> Report on Key Findings, Policy Implications, page 32

<sup>236</sup> See in particular those produced by the Bar Council of England and Wales and others, March 2015, the Law Society Manifesto 2015, and the Manifesto for Legal Aid prepared by the Legal Aid Practitioners Group, March 2015

<sup>237</sup> Manifesto for Family Law, Resolution, 23 February 2015

<sup>238</sup> No blame divorce was previously provided for in the Family Law Act 1996 but never enacted

## **The voice of the child**

15.12 In December 1991 the United Kingdom ratified the UN Convention on the Rights of the Child. Although not formally incorporated into domestic law, it is receiving increasing judicial attention.<sup>239</sup> Article 12 of the Convention provides that:

‘1. State Parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’

15.13 In public law proceedings in Northern Ireland (as in England and Wales) the child is usually represented by a guardian and a solicitor under what is known as the “tandem model” discussed below. In private law proceedings the child is unlikely to be separately represented but a range of other services may be available. Agenda consultation question 17 asked how the interests of children should best be represented in private law proceedings and how their views should be taken into account.

15.14 The Family Law Solicitors Association believed that children’s interests were best protected by a competent and compassionate judiciary and lawyers, without the need for a guardian. This protection would be jeopardised if legal aid was no longer available for most family cases. The Belfast Solicitors Association and Family Mediation Northern Ireland applauded the work of Court Children’s Officers in the Family Proceedings Court and Family Care Centre, or the Official Solicitor in the High Court. However the service was not uniform across Northern Ireland and needed proper funding. The LSC were also concerned at the lack of a uniform approach across different courts.

15.15 The Bar recognised the important role of Court Children’s Officers but believed that to fulfil the state’s obligations in private law proceedings a guardian or if possible separate legal representation for the child would be needed. This would of course require additional funding. Family Mediation Northern Ireland believed the participation of children would be facilitated by implementation of sections 11 and 12 of the Children and Families Act 2014 into the Northern Ireland Children Order; this would create a starting presumption of involvement by both parents when the court is considering what is in the best interests of children. I am sympathetic to that but would not wish to make a recommendation without further consultation.

15.16 Otherwise, consultees felt that the existing mechanisms to protect the interests of children in private law proceedings, not least the overriding legal principle that the interests of the child were paramount, worked well. The emphasis should be on support for existing services rather than fundamental reform on this issue. I agree with this approach but I also hope that moving towards a

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<sup>239</sup>See comments of Munby J in *R(Howard League for Penal Reform)v Secretary of State for the Home Department* [2002] EWHC 2497 Admin, paragraph 51

unified set of procedures for different court levels may help to achieve a more consistent approach to hearing and protecting children involved in private law proceedings.

15.17 I have a slight worry that there is a danger in placing too much emphasis on the voice of the child, as if children's views and best interests were the same. I have seen many examples of acrimonious contact disputes where children are under the sway of and will naturally side with the resident parent against the parent seeking contact. The voice of the child is a contribution to, not a substitute for, the determination of what is in the child's best interests.

### **The tandem model**

15.18 In public law proceedings in Northern Ireland, England and Wales two professionals, a guardian and a solicitor, will typically represent the interests of the child. Responsibilities of the guardian and solicitor inevitably overlap and it is not easy to define the respective roles with precision. I believe it is now right to consider whether the tandem model is still appropriate and affordable. The topic was addressed at the Interim stage of the Family Justice Review in England and Wales in the following terms:

"A cornerstone of the public law system in England and Wales is the provision of a guardian and legal representative for the child in the court process, known as the tandem model. This is generally held in high regard. It is, however, under severe pressure due to rising workloads and ever longer cases. Some have challenged whether it can be sustained.

The tandem model should be retained but a more proportionate approach is needed. The core role of the guardian should be to represent and act as the child's voice in support of the court's welfare decision on whether a care order is in the child's best interests. There should be less focus on quality assuring the local authority's plans. The guardian should assist active judicial case management to deepen the court's understanding of how best to help a child within the shortest possible timescale. The core role of the solicitor should be to act as advocate for the child in court and to advise the court on legal matters. With the solicitor taking the lead in court hearings, a guardian need not always be present at court."<sup>240</sup>

15.19 The Bar, in their response to question 17 above, emphasise the different roles of the guardian *informing* the court of what is in the interests of the child and the lawyer *advocating* that interest. The Northern Ireland Guardian ad Litem Agency also supports the tandem model while recognising the need for efficiencies. In their consultation response they report that the role of Guardian is being refined such that the Guardian should not routinely have to attend court. Work has also been undertaken on revising the format of Guardian reports to make them more succinct and analytical.

15.20 Whilst the tandem approach is deeply ingrained and well respected in the jurisdictions which operate it, the system is not widely followed elsewhere. In Scotland, where many of the underlying systems are different as discussed in the next Chapter, a Safeguarder may be appointed to protect the interests of the child when a case is before the court, but it is rare for the child to have

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<sup>240</sup> Family Justice Review, Interim Report, page 18 paragraphs 93-94

separate legal representation. In the Republic of Ireland the Child Care Act 1991 gives the court the power *either* to join the child as a party *or* to appoint a guardian ad litem for the child – the court cannot do both.<sup>241</sup> If the child is joined as a party an application for legal aid may be considered, although such applications are rare. There is however an increasing tendency for guardians to appoint their own lawyers and then expect the bill for this to be paid by the Child and Family Agency, who have no mechanism for controlling such costs.

15.21 In my view, the tandem model is not a requirement of either ECHR or the UN Convention on the Rights of the Child. If it was, all the other countries who do not adopt that model would be in breach of those conventions. It follows that maintaining the tandem model is not part of the irreducible minimum of legal aid provision in Northern Ireland. In that context, the question is what priority should be attached to maintaining the dual funding approach.

15.22 It must be remembered that care proceedings often concern babies or very young children; instructions to the child’s solicitor come from the guardian. So who is the child’s solicitor actually representing? The guardian is a professional person, capable of articulating his or her position to the judge. The guardian ought not to require representation under an article 6 test.<sup>242</sup> Ultimately the guardian and the child’s solicitor have different skills and tasks, but the same objective: ensuring that the interests of the child are taken into account in the proceedings. Because of the power and simplicity of the legal framework, in which the interests of the child are paramount, they share this aim with the judge and all the other professionals involved. The real dispute is usually between the parents and the authorities as to whether or not it is in the interests of the child to remain with the family. We have to question how many lawyers need to be present to enable the judge to decide this question in the best interests of the child.

15.23 The separation of budgetary responsibility between the lawyer and the guardian is also problematic. The guardian has no incentive to control the costs of representation for the child as these will all be met from the legal aid fund. It is not surprising that in times of austerity the first reaction is to reduce the responsibilities of the guardian in terms of attendance at court. It would be preferable if the combined budget of guardian and lawyer were considered in one exercise to decide how it was best deployed. It may be that, in general, for younger children the role of the guardian is more significant than the lawyer but for children more able to articulate their wishes, the importance of legal representation increases. In England, responsibility for CAFCASS has been transferred to the Ministry of Justice, which is also responsible for legal aid, making it easier to consider budgets in the round. In Northern Ireland, separate Departments are involved.

15.24 Subject to the more fundamental reforms considered in the next Chapter, **I recommend that the Department should consult on the future funding of representation for children in public law proceedings. I recommend that the responsibility and budget for such legal representation should be transferred from the legal aid fund to the Guardian ad Litem Agency.** Whether the whole budget should be transferred or only a part will depend on the extent to which it is thought appropriate to retain the tandem model. My preferred approach would be to end the tandem

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<sup>241</sup>Child Care Act 1991 sections 25 and 26; so there is a choice of bicycles in Ireland, but no tandem.

<sup>242</sup>As discussed in Chapter 2

model, allowing the Guardian ad Litem Agency to decide case by case whether their core responsibility requires legal representation. The Legal Services Agency should retain a residual power to fund representation for the child on article 6 grounds in cases of irreconcilable conflict between guardian and child, but this must not be allowed to become anything other than highly exceptional.

15.25 I anticipate that strong views would be expressed on consultation. I believe the onus should be on those who wish to preserve the tandem model to articulate why it should be a priority for funding compared to, say, maintaining a reasonable level of support for advice services and civil legal aid for private law cases. It is right to point out that nothing should be a higher priority than protecting the interests of the vulnerable children who are the subject of care proceedings. What must be questioned is whether adding more lawyers to the public law process is really advancing those interests. Indeed there is an argument that the more professionals there are with overlapping responsibilities, the greater the danger of issues falling through the cracks.

### **A Unified Family Court in Northern Ireland**

15.26 As described in paragraph 15.6 above, the most significant product of the Norgrove review in England and Wales was the creation of a Unified Family Court, sweeping away the procedural differences between the previous three levels of court involved: the Family Proceedings Court, the County Court and the High Court. As Northern Ireland has a similar division of court levels for family cases, there is much logic in pursuing a similar reform. Agenda consultation question 19 asked how the introduction of a unified family court in Northern Ireland might affect the quality and efficiency of service to court users.

15.27 Responses on this point were mixed. The Bar saw some potential advantages in terms of speed of allocation but much depended on skill and training of the staff undertaking that function. The Bar were also concerned about the geographical implications of such a reform in Northern Ireland, especially if this would lead to a concentration of hearings at locations distant from the client. The LSC saw many advantages in a unified court, especially through improved and uniform case management and commissioning of experts. The Belfast Solicitors Association believed there might be merit in the idea in terms of reducing delay and judicial continuity, but it was still too early to tell how successful the reforms had been in England and Wales. There might also be major implications for judicial training as expertise in all areas of family law was not currently evenly spread across the different court levels.

15.28 The Family Law Solicitors Association believed that the courts in Northern Ireland already operated on the ground as a unified court as cases were often transferred between court levels to meet their needs. The vast majority of cases are dealt with in the Family Proceedings Court where the District Judge acts as a gatekeeper assessing the gravity and complexity of each case. Setting up a unified court would add to delay and costs without realising any benefits over the flexibilities of the current system.

15.29 During this review I have had the opportunity to discuss the merits of a unified court with many stakeholders, including the judiciary. There was a clear and consistent view that there were undesirable inconsistencies between the powers and procedures of different court levels – for

example the lack of effective powers to enforce orders made in the Family Proceedings Court. In terms of a unified court, the majority of judges I spoke to were in favour, although I also heard concern at the implications of how such a change would work with the different levels of judiciary in the current system. There are currently different levels of judicial expertise across the different court levels and a range of different practices. For example the High Court Masters are greatly valued for the guidance they provide at Financial Dispute Resolution (“FDR”) hearings on the likely outcomes of ancillary relief proceedings. I was told this was a significant factor in the decision to issue divorce proceedings in the High Court. It would be much more logical for this service to be available more generally according to the needs of the case, not governed by the tactical decision of the petitioner when issuing proceedings. There is also scope for settlement-oriented procedures, akin to FDR hearings, to be applied to resolve children issues.

15.30 The majority of practitioners and representative bodies I have spoken to in England and Wales believed that the unified court was a positive reform, although overall experience of the family courts has been negative since the increase in litigants in person caused by LASPO. The government are not surprisingly very positive about the changes and published an update last year.<sup>243</sup> I believe the following summary of some of the benefits of a unified court is valid and in most respects is applicable to this jurisdiction:

“The Review made it clear that the existence of different tiers of courts for family matters was confusing for the families who needed to use the courts. In response to this need to simplify the jurisdiction and its supporting systems and processes, the single Family Court was established on 22 April 2014. The Family Court replaced the three tier system of family proceedings courts, county courts and the High Court. All levels of judge can sit in the Family Court, from magistrates to High Court judges and above. As recommended in the Review the Family Court provides designated points of entry for all applicants, removing the confusing process that they previously faced.

Applications are now allocated to the most appropriate level of judge. Allocation by a gate keeping team is based on an assessment of a number of factors, such as case complexity, judicial continuity, the need to minimise delay and a suitable location for hearings. As all levels of judge can sit in the Family Court, there is no longer a need to transfer cases between different courts. This will reduce delay and improve continuity for families involved in court proceedings. The Family Court can sit anywhere, but for the most part family proceedings are still heard in magistrates’ courts and the County Court buildings.

In setting up the single Family Court, the Government legislated to align the powers of District Judges as recommended by the Review. All types of District Judges sit at District Judge level in the Family Court as long as they have the appropriate authorisation and should be allocated work of the same level whether they are a District Judge of the Principal Registry of the Family Division, a District Judge who also sits in the County Court or a District Judge (magistrates’ courts).

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<sup>243</sup> A brighter future for Family Justice, Ministry of Justice, 20<sup>th</sup> August 2014

Although the Family Court has the powers of the High Court and the County Court, the High Court will still hear cases which are the exclusive jurisdiction of the High Court. Cases that become complex and require a High Court judge to hear them but are not reserved to the High Court will no longer need to be transferred to the High Court. They will remain in the Family Court but be heard by a High Court judge. This should reduce delay.”<sup>244</sup>

15.31 Everyone agrees that anomalies between the three court levels should be addressed, but rather than amending different sets of rules to make them the same, would it not be more sensible to create one unified set of rules? I feel that some of the arguments against a unified court are not so much objections to the principle as examples of what is currently working well in this jurisdiction. I agree that any reform should not be about copying what has happened in England and Wales, but should recognise the best features of the current system in Northern Ireland and either hang on to them or make them better. I do not think the status quo should be preserved merely to maintain or justify current judicial structures. I also believe that the current three level court system is a major cost driver for legal aid, as shown by the striking disparity in average costs between the levels.<sup>245</sup> If there were currently a unified family court in Northern Ireland surely no one would argue that it should be divided in three. **I recommend that the Department consult on the establishment of a unified family court in Northern Ireland.**

15.32 The consultation should concentrate on the issues of principle and invite views on the problems to be addressed. Once the decision of principle is taken after consultation, there will be much work to do, including:

- Identifying in more details the key issues, steps, legislative changes and timescale needed to establish the unified court;
- Identifying inconsistencies and anomalies between the existing sets of court rules governing family cases and proposing a uniform approach.

15.33 It remains to be seen how the question of a unified family court will be addressed within Lord Justice Gillen’s Review of Civil and Family Justice. **I recommend that the Gillen Review consider the options proposed in Chapter 7 and in this Chapter relevant to family justice.** This should include consideration of the inquisitorial approach, business by email and listing, recommending how such principles could best be reflected within the family justice system.

15.34 Any proposals for family justice reform would of course be substantially impacted by any decision to proceed with the more radical options for public law cases discussed in Chapter 16. These might significantly reduce and change the underlying jurisdiction of the court in such cases. I think a feasibility study into the more radical reform<sup>246</sup> could run in parallel with the consultation and reform work described above. A coordinated timetable should be established so that the key policy decisions can be taken together, taking into account the outputs of both work streams.

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<sup>244</sup>Pages 13 to 14, paragraphs 45 to 48

<sup>245</sup>See the detailed breakdown in Chapter 8 at Table 8.18

<sup>246</sup>Chapter 16 at paragraph 16.22

### **Streamlining public law proceedings**

15.35 As previously discussed, procedures for state involvement in protecting the interests of vulnerable children are a top priority for the justice system and part of the irreducible minimum of legal aid.<sup>247</sup> Subject to the more radical reform options for public law cases discussed in Chapter 16 and this Chapter, the priority is to ensure that these vital cases operate as efficiently and effectively as possible. Agenda consultation question 11 asked what legislative or procedural issues should be addressed in any consideration of how to improve efficiency and timeliness in processing these cases without compromising on quality; what can be learnt from the experience of England and Wales in implementing the Norgrove recommendations; what is the best and most efficient way of establishing when expert evidence is necessary and, when it is, of securing and funding such evidence?

15.36 The Bar analysed in detail many of the alleged causes of cost and delay in public law proceedings. Many areas of concern were already being addressed by COAC guidance and by careful and proportionate judicial control, for example via the use of “administrative renewals” of Interim Care Orders which make it unnecessary for the parties to return to court on each occasion (this practice could be extended to the Family Proceedings Court). The Bar warned against reducing the role of the court in approving care arrangements and commissioning of expert evidence; it could also be highly damaging to impose artificial time limits on the progression of these cases.

15.37 The LSC proposed a range of areas where improvements could be made:

- Improved guidance on case management, through regular updating and more consistent application of the Children Order Advisory Committee (“COAC”) guidance;
- Improved quality of social work via a system of peer review;
- Greater control over the number of experts used (a review of experts remains outstanding from AJ1);
- Avoiding judges becoming bogged down in the detail of care plans by redefining the extent of judicial involvement;
- The requirement to review Interim Care Orders after 8 weeks and thereafter every 4 weeks, especially when delays result in Interim Orders remaining in operation longer than necessary;
- Cases taking too long to resolve, as addressed by the Tri-Borough Pilot in England.

15.38 The Belfast Solicitors Association believed that the reforms in England had been well received and similar reforms should be considered for Northern Ireland if that view was confirmed in light of experience of the pilot in this jurisdiction. The Family Law Solicitors Association were more cautious about any proposals to limit the role of the judge who is best placed to decide on the use of experts and to keep the proceedings on track. Delay was a problem but should not be blamed on judges or lawyers as the most common causes of delay were the availability of resources for parenting assessments and the availability of experts. Better resource planning by the authorities at the time of initiating proceedings with early parental assessments would assist.

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<sup>247</sup> Chapter 2, paragraphs 2.15 and 2.35 to 36

15.39 All these issues can now be addressed in the forthcoming pilot to minimise delay in care proceedings in Northern Ireland. **I recommend that the issues raised by the consultation responses to Agenda question 11 are taken into account in establishing the pilot and are evaluated during its operation.** The responses may also be of interest to other initiatives in this area such as the “Home in Time” Concurrent Planning Project<sup>248</sup> which provides carers to assist in securing permanence for young children in care, where possible with their birth family.

#### **Lay magistrates in the Family Proceedings Court**

15.40 In the lowest tier of family court in Northern Ireland, the judge sits with two lay magistrates. All decisions are made by a majority vote of this panel. When I asked family judges in Belfast for their proposals for greater efficiencies and savings in the system, one of their first suggestions was to abolish lay magistrates so that the judge sits alone. This would undoubtedly save costs and speed up proceedings. There is always an argument that three heads are better than one<sup>249</sup> but when one of those heads is a judge it is worth asking how necessary the other two are, bearing in mind that single judges sit alone in the higher courts. I realise that lay magistrates are seen as having an important role in demonstrating community involvement in the justice system, but is the role primarily symbolic or does it add real value to judicial determinations at this level?<sup>250</sup> **I recommend that the Department consults upon the future of lay magistrates in the Family Proceedings Court,** perhaps as part of wider consultation on the creation of a Unified Family Court.

#### **The divorce process**

15.41 Agenda consultation question 12 asked about legal aid for divorce but several consultees drew attention to the court process itself and its potential to drive up costs or encourage adversarial behaviour, including the requirement in Northern Ireland for petitioners to attend court in person.

15.42 The LSC proposed that the divorce process itself should be dealt with administratively rather than in court. All divorce petitions should be started at the county court level, leaving the court to decide when complex cases should be transferred up to the High Court. The Belfast Solicitors Association drew attention to the court practice of delaying hearing contested divorce cases until divorce was available on the more straightforward ground of two years’ separation. I think this is a very sensible and pragmatic approach by the court but it does highlight the absurdity of using a legal arena to establish fault and blame as the basis of divorce.

15.43 The Bar point out the high importance, whether deriving from religious or cultural reasons, attached to marriage and the significance of its dissolution in Northern Ireland. I do recognise that, but in an increasingly diverse society I firmly believe that the state should be cautious about imposing a singular view about the nature of marriage and divorce. Sir James Munby, who is president of the Family Division of the High Court of England and Wales, has spoken of no fault having the potential to bring “some intellectual honesty to the system”.<sup>251</sup>

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<sup>248</sup>For further details of ‘Home in Time’ contact British Association for Adoption and Fostering (BAAF) NI

<sup>249</sup>As recognised in the next Chapter – see paragraph 16.19

<sup>250</sup>One could apply the same argument to lay magistrates in Youth Courts, but there is a different legislative and political background to that jurisdiction and a stronger argument for community involvement in criminal proceedings

<sup>251</sup>BBC 29 April 2014

15.44 I realise that we are unlikely to see reform of substantive divorce law in the near future and even procedural change will be strongly defended on religious and other grounds, but in my view consideration should be given to making the process more administrative in nature. This is happening in England and Wales; from July 2015 divorce petitions will be processed in 11 regional divorce centres rather than by the court.<sup>252</sup> There must be a better way to support the institution of marriage than to impose bureaucracy and expensive legal processes on divorce, especially when much of the burden will fall on the public purse. **I recommend that the responsible Department should take steps to make the operation of the divorce process in Northern Ireland more administrative and less court based.** Subject to that, **I also recommend that there should be a single point of entry at county court level for all divorce proceedings in Northern Ireland.** Cases may be transferred between levels by the court but it should not be left open to the petitioner to impose a costs burden on the taxpayer by choosing a more expensive forum.

#### **Long running contact disputes**

15.45 Turning to private law proceedings, the most common problem brought to the attention of AJ1 and to this review is the control of proceedings for child contact. Contact orders are often being made but not being adhered to and cases are returning to court on numerous occasions each time the arrangements break down. Two depressing scenarios I have often encountered are:

- Non resident parents, sometimes with a background of violence, seeking to push the boundaries or conditions of orders for limited or supervised contact;
- Resident parents doing everything they can to prevent or frustrate contact between their children and their former partner (often having little respect for court orders because they unsurprisingly feel they have a better understanding of their child's needs than the court).

15.46 Agenda consultation question 16 asked whether further measures could be taken to reduce the propensity for contact cases to return to court. Should there be more effective enforcement measures in the event of breaches of contact orders?

15.47 The Bar and the Family Law Solicitors Association did not accept that returning to court was necessarily a sign of vexatious or unreasonable behaviour; it was often needed to address changing circumstances or other unavoidable factors; nor should lawyers be blamed for prolonging cases. The Bar felt that the circumstances behind contact disputes varied greatly and the court already had a wide range of options available. The FLSA believed that further court powers could be considered such as those applying in England and Wales under the Children and Adoption Act 2006. This gives the court the power to impose a penalty of unpaid work in the community on a party who breaches a contact order without good excuse.<sup>253</sup>

15.48 The Belfast Solicitors Association believed that the key was for the court to be better at enforcing orders made; in general, fines were a more effective sanction than threats of prison (which are extremely unlikely to be enforced, especially against a parent with childcare responsibilities). The threat of withdrawal of legal aid could also encourage compliance with orders. Ultimately it was

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<sup>252</sup>See 'Divorce centres make splitting up as simple as getting a TV licence', Times, 19<sup>th</sup> June 2015

<sup>253</sup>See section 11J of the Children Act 1989 as inserted by the 2006 Act

a question of judicial willingness – a protocol or practice direction on this area might help. The LSC and Family Mediation Northern Ireland agreed that financial sanctions, such as repayment of legal aid costs, might assist. The LSC suggested that clients might be asked to place a deposit with the court which would be forfeit in the event of unreasonable behaviour.

15.49 In October 2014 the Department of Finance and Personnel issued a consultation paper on a range of substantive family law issues, including enforcement of contact orders.<sup>254</sup> The paper considered a range of increased powers for the court, including the option of community orders, also mentioned at paragraph 15.45 above. It also noted reform proposals in the Republic of Ireland for fines or community orders which have now been brought into force under the Children and Family Relationships Act 2015.

15.50 Clearly this is a problem which needs to be addressed by a combination of court powers, court procedures and legal aid; all three are part of the problem but potentially also part of the solution. The legal aid position is covered in Chapter 18. I agree that a more consistent and robust approach to enforcement of contact orders is required. **I recommend that:**

- **A practice direction is issued, applicable to all court levels, setting out a firm and consistent approach to enforcement.** This could include some common scenarios with a recommended response by the court. The practice direction could either be issued as a separate initiative, overseen by COAC, or could be an early product of the work on a unified court proposed at paragraph 15.32 above;
- As part of the new approach **the court should be more prepared to impose financial penalties**, which may well be more effective than threats of prison. Whilst it should remain the case that family courts should not routinely order costs against parties, when it comes to the credibility and enforcement of court orders, the court should be far more willing to order costs against a party who has not respected an order made;
- **The options available to a court should include imposition of community orders**, along the lines provided for in the Children and Adoption Act 2006;
- Legal aid reforms should remove any incentive for clients to keep returning to court while supporting the court in penalising legally aided clients who fail to comply with orders made.<sup>255</sup>

## Summary

15.51 There needs to be clearer leadership and responsibility for the reform of family law and procedure in Northern Ireland, which is currently split between three different Departments. This would make it easier to identify and address underlying cost drivers within family law, including divorce procedures.

15.52 The principles underpinning the Family Justice Review in England and Wales are largely applicable to this jurisdiction. Consultation should take place on the establishment of a unified family court in Northern Ireland, addressing the inconsistencies and anomalies between the three

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<sup>254</sup>Parental responsibility for Unmarried Fathers and Contact with Children Post Separation, DFP, 13<sup>th</sup> October 2014

<sup>255</sup>Chapter 18, see paragraphs 18.26 to 30

levels of family court while identifying and preserving those aspects of the system which are currently working well.

15.53 In public law proceedings it should not be assumed that the voice and interests of the child can only be protected by preserving the “tandem model” under which the child is represented by both a guardian and a lawyer. Separate legal representation for the child should not be regarded as part of the irreducible minimum provision of legal aid. Other issues relating to the streamlining of public law proceedings should be addressed in the forthcoming pilot.

15.54 In private law proceedings, the court needs greater powers and a more consistent approach to controlling long running contact disputes. To encourage compliance with court orders for contact, there should be a greater use of financial sanctions, including costs orders, and the power to impose community orders.

## 16 Public Law Proceedings – Different Worlds

*“We look to Scotland for all our ideas of civilisation.”<sup>256</sup>*

16.1 Most of the reforms considered in this report could be implemented in an evolutionary way, building on the existing structures of justice and legal aid in Northern Ireland. By contrast, the way public law children proceedings are dealt with in Scotland is radically different from the rest of the United Kingdom. This Chapter looks at whether such a revolutionary reform for Northern Ireland should be explored further by the relevant Departments.<sup>257</sup>

### **The Children’s Hearing system in Scotland**

16.2 Cases involving the protection of children, such as compulsory measures of supervision, are dealt with through Scotland’s system of Children’s Hearings. The Children’s Hearings system is not court based. It is non-adversarial. Decisions are reached by a lay panel of three volunteers from the local community. The aim is to reach decisions in a consultative way. Costs are not awarded and lawyers are usually not involved. If the parents/carers or child dispute the facts underlying the referral to the hearing, the case is referred to the courts<sup>258</sup> to make a finding on the facts and then referred back to the hearing to make the most appropriate disposal for the child. The courts may also be involved if any party wishes to appeal the disposal made by the panel.

16.3 Most Public law decisions are taken in the Children’s Hearing system. However some matters do remain within the exclusive jurisdiction of the civil court system, for example orders sought by Local Authorities to regulate the position of looked after children in their area and perhaps pave the way for adoption. Around 300 such cases are dealt with by the courts each year.

16.4 Decisions about whether to refer children to the hearings system are taken by the Scottish Children’s Reporter Administration (SCRA) . Children are referred to the Reporter from a number of sources and for a variety of reasons. SCRA has over 200 Children’s Reporters who are located throughout Scotland in each local authority area. The Reporter investigates each referral to decide if action is needed to protect the child and/or address their behaviour. If these measures are necessary, and if evidence is available, the child is then referred to a Children’s Hearing. Each Hearing is made up of three Panel Members, who are all trained volunteers from the local community. Children’s Reporters work in close partnership with other professionals in service areas such as social work, education, the police, the health service and the courts system.

16.5 The welfare of the child remains at the centre of all decision making. One of the fundamental principles of the hearing system, established since its inception in 1964, is that children who offend and children who are in need of care and protection are dealt with in the same system. Children’s Hearings Scotland (CHS) is responsible for the appointment and training of panel members and providing advice to the Hearings.

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<sup>256</sup>Voltaire again. An alternative quote comes from Winston Churchill: “Of all the small nations of this earth, perhaps only the ancient Greeks surpass the Scots in their contribution to mankind”

<sup>257</sup>In this case the DHSSPS and the Department of Justice

<sup>258</sup>The Sheriff, who has similar seniority to a Crown Court or county court judge

16.6 I was able to observe several Children's Hearings during my visit to Edinburgh. The contrast with the formality of a court hearing could scarcely be greater. Hearings take place in a normal meeting room with a children's play area at one side. All interested parties, including the child if they are old enough, sit around a table and talk through the latest situation and the issues in the case. At the end of each case the panel did not retire but discussed and gave their decision with reasons in the presence of the parties. No lawyers attended in the cases I observed. One panel member told me:

"Lawyers are a mixed blessing at this kind of hearing: some are marvellous at calming their clients down; some are incredibly adversarial."

### **Legal aid for Children's Hearings**

16.7 Following legal challenges there have been significant recent reforms to the Children's Hearings system and the availability of legal aid. The Children's Hearings (Scotland) Act 2011, which was commenced in June 2013, provides legal assistance for representation to be made available to children and relevant persons in connection with Children's Hearings. Prior to June 2013 solicitors were unable to apply to the Scottish Legal Aid Board ("SLAB") for any form of legal assistance to represent a child or parent/carer at hearings. Solicitors could use Civil Advice & Assistance to advise a child or parent/carer about the hearing but could not use that funding to provide representation. Some funding was available from local authorities for representation in limited circumstances, but this was subject to local variations in availability. Civil legal aid has always been available for referral to a court to make a finding on the facts and for appeals.

16.8 The 2011 Act transferred the responsibility for granting legal aid in respect of court proceedings in connection with Children's Hearings from the courts to SLAB. In addition, it provided for the registration, monitoring and quality assurance of solicitors providing children's legal assistance. Around 800 solicitors have registered with SLAB to provide children's legal assistance. SLAB has developed a Code of Practice for all solicitors who deliver children's legal assistance. This was developed in consultation with the Law Society of Scotland, SCRA, CHS and others involved in the hearings system and will inform a quality assurance scheme for children's legal assistance which is expected to begin during 2016.

16.9 SLAB also operates a Duty Scheme for Children's Hearings. There are thirty-three duty plans to cover all Scotland. A solicitor acting on behalf of the child is required before certain proceedings can take place. In those circumstances the duty solicitor can be appointed to act for the child if the child does not have a solicitor. In addition, when a panel consider that a person would benefit from legal representation, they can make a referral to SLAB who will contact a solicitor to try to facilitate representation for the individual. Around 400 solicitors are taking part in the duty scheme.

16.10 Although the new legal aid arrangements only came into operation in 2013, the system seems to be working well. Prior concerns that the increased scope of legal aid involvement would lead to delays in cases has not so far been seen. The fears from some quarters that the new arrangements for legal aid would lead to a 'swamping' of lawyers in children's hearings which are intended to be child-centred and comparatively informal have also not been realised. SLAB apply merits criteria in the form of an "effective participation" test, considering whether legal

representation is required to ensure that the applicant can take an effective part in the hearing.<sup>259</sup> This considers similar factors to those relevant to determinations of whether civil legal aid is required for a fair hearing under article 6 of ECHR.<sup>260</sup> There are around 30,000 Children’s Hearings a year but legal aid is only applied for and granted in a small minority of cases, as shown below.

### Volumes and Expenditure

16.11 Legal aid for Children’s Hearings in Scotland is spread between Advice and assistance (equivalent to Green Form in Northern Ireland) and, for representation at a hearing, ABWOR.<sup>261</sup> Civil legal aid is available to cover court referral and appeals to the Sheriff. The following table shows the volume of cases granted in recent years:

**Table 16.1 Children’s Hearing volumes**

	2011-12	2012-13	2013-14
<b>Advice and Assistance</b>	<b>4,548</b>	<b>4,782</b>	<b>4,911</b>
<b>ABWOR</b>	-	-	<b>1,662</b>
<b>Civil Legal Aid</b>	<b>4,934</b>	<b>5,006</b>	<b>3,581</b>

16.12 Because ABWOR was only introduced in June 2013 and started slowly, the annual volume has increased and is now running at about 3,200 per year. Expenditure in £’000 has been as follows:

**Table 16.2 Children’s Hearings legal aid costs**

	2011-12	2012-13	2013-14
<b>Advice and Assistance</b>	<b>413</b>	<b>503</b>	<b>606</b>
<b>ABWOR</b>	-	-	<b>114</b>
<b>Civil Legal Aid</b>	<b>4,497</b>	<b>4,913</b>	<b>4,168</b>

16.13 The average cost of a legally aided Children’s Hearings case in 2013-14 was around £350. The average cost of a legally aided appeal of a decision of a Children’s Hearing was around £700. Solicitors are able to apply to SLAB to sanction the use of an expert as they do for other forms of legal assistance. The total cost of disbursements for children’s legal assistance (which includes the costs of expert reports) was around £400k in 2013-14. If the children’s panel request a report then the cost of this is covered by SCRA.

<sup>259</sup> Advice and assistance (ABWOR) (Scotland) Regulations 2003, regulation 14

<sup>260</sup> Described in Chapter 2 at paragraph 2.10

<sup>261</sup> Assistance by Way of Representation, a more informal form of civil legal which also existed in Northern Ireland prior to April 2015

## Criticism and comparison

16.14 There can be few more important decisions taken by any state than the decision to remove a child from a family. In any analysis of priorities for the justice system or legal aid, public law proceedings must be accorded the highest priority. It is remarkable that two such different systems for dealing with these cases exist within the United Kingdom. It is equally remarkable that there seems to have been relatively little comparative analysis or academic research into the merits of the two approaches and no sign of political will to consider radical change for either system. The wide-ranging Family Justice Review in England and Wales, considered in the last Chapter, looked at the Scottish system at the time of their Interim Report but rejected the option:

“Such an approach has advantages in terms of speed and flexibility but offers children perhaps less sense of permanence. We also noted issues around consistency of panel decision making in Scotland (recent and planned reforms are intended to help address these). We have concluded that to introduce a panel system in England and Wales on the required scale would be disruptive and would not offer sufficient advantage over our current court led process. We reject suggestions for a tribunal system on similar grounds.”<sup>262</sup>

16.15 In Northern Ireland, England and Wales public law proceedings still operate within the adversarial court system. All important decisions are taken by judges following hearings at which all key parties are legally represented, usually by solicitor and counsel. A significant feature of these cases is the number of parties typically involved: the local authority, the child, both parents (usually separately represented as they will seldom have identical interests) and sometimes other relatives. The child’s interests will be represented by a guardian appointed by the relevant board or local authority.<sup>263</sup> The guardian will instruct a lawyer on behalf of the child, the costs of which will fall to the legal aid fund. Sometimes the guardian and an older child will have separate legal representation. It follows that every hearing will involve a judge, at least four teams of lawyers and various other professionals. Hearings often need to be held on a regular basis as the court reviews the content and operation of care plans. Everyone in the courtroom will be tasked with helping the judge decide what is in the best interests of the child, which is the paramount consideration.<sup>264</sup>

16.16 The difference in legal aid costs of the two systems is extraordinary. Spend per head of the population on public law cases is over 8 times higher in Northern Ireland than Scotland.<sup>265</sup> As set out in Chapter 8, the average cost of a public law legal aid certificate in Northern Ireland is £6,373.<sup>266</sup> The total legal aid cost of a set of proceedings may well be three times this because typically both parents and the child will be supported from the fund. In Scotland, as shown above, an average bill is £350<sup>267</sup>, although this may cover only representation where needed at a particular hearing, rather

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<sup>262</sup>Family Justice Review, Interim Report, March 2011, paragraph 4.143; consultation responses were also negative - see Final Report, November 2011, paragraph 3.12

<sup>263</sup>NIGALA in Northern Ireland, CAF/CASS in England and CAF/CASS Cymru in Wales

<sup>264</sup>Children (Northern Ireland) Order 1995, article 3

<sup>265</sup>£7.01 compared to £0.83; Chapter 8, Table 8.15

<sup>266</sup>Chapter 8, Table 8.17

<sup>267</sup>A note of caution on all these figures: because family cases are differently categorised in Scotland, there is room for debate as to which Scottish cases should be regarded as “public law” for this purpose, but the difference is genuine because spend on private law family is also lower in Scotland

than providing ongoing representation throughout a case. The merits test applied by SLAB<sup>268</sup> helps to restrict funding to a small minority of cases. By contrast, in Northern Ireland, England and Wales, representation of the child and the parents is automatic without a merits test. Legal aid costs are of course only part of the full costs of the system, but whilst I have no data on the relative costs of the judicial and guardianship systems across the jurisdictions, I strongly suspect that the court processes are far more expensive.

16.17 Will the Scottish system inevitably evolve into a more formal and lawyer-driven process? The 2013 changes and the increasing impact of ECHR might tend to lead the system in this direction. Having discussed this topic with SLAB, CHS and SCRA, volumes have been increasing but are currently stable; it would not be surprising if they generally increased over the next few years. However, because of the limited role of lawyers in the inquisitorial system, combined with the merits criteria applied by SLAB, I do not believe there is a real risk that the average cost of cases will rise to anything like the levels seen in the rest of the United Kingdom. Although a thorough financial analysis of the different approaches may be needed, especially of the non legal aid costs of each system, I am confident that the overall cost of the Scottish system will remain substantially lower than the rest of the United Kingdom in the longer term.

16.18 How would the interface between a Children’s Hearing and the court work if a similar regime were introduced in Northern Ireland? How this is managed would be crucial to the success of any reform. One might well expect the great majority of public law cases to throw up major factual disputes, especially where there are allegations of drug or alcohol abuse or domestic violence. In Scotland only a small minority of cases are passed to the court to resolve factual disputes. I am told that this is probably a consequence of the inquisitorial approach of the panel. Even when the statement of facts on which the referral to the panel was based is disputed, negotiations can often take place leading to an amended statement and avoiding the need for court involvement. It seems unlikely that this flexible approach would operate to the same extent if the system were introduced into a jurisdiction with a stronger culture in favour of court resolution.

16.19 Is the quality of decision making by a lay Children’s Hearing in Scotland inferior to a judicial determination? No reforms should proceed if they would put the safety and welfare of vulnerable children at risk. This is the fundamental issue on which no amount of research is likely to produce a definitive answer. In my observation of Children’s Hearings I was impressed by the standard of decision making. My starting point is that the Scots are obviously no less anxious to protect the interests of children than anywhere else. They operate the system they do because they are convinced that it is the most effective way to reach the best decision for the child, not because the system is cheaper than using the courts. It seems to me that decisions on what is in the best interests of a child do not necessarily need to be taken by individuals with legal expertise. What is needed is decision-takers who are intelligent, caring, have good judgment and have a good understanding of the issues faced by children with troubled family backgrounds. The judiciary of Northern Ireland no doubt tick all these boxes, but it would be wrong to assume that no one else does so. Further, there is one respect in which decisions by a panel at a Children’s Hearing are superior to a judicial decision: three heads are better than one.

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<sup>268</sup> A test of “effective participation”, described above at paragraph 16.10

16.20 Overall, my view is that the way public law children cases are managed in Scotland is more effective, proportionate and accessible than equivalent court processes elsewhere in the United Kingdom. If I was tasked with creating a new system from scratch, I'm sure it would resemble the Scottish model much more closely than the system in Northern Ireland, England or Wales. It is an entirely different question whether it is feasible or desirable to introduce such a reform in a jurisdiction which already has a well established court-centred system. The implementation issues would be daunting. Primary legislation would be required, probably in the face of opposition from both branches of the legal profession. I suspect the forces of opposition would try not merely to block the reform but to modify the proposal to make the panel resemble a court so far as possible.

16.21 Nevertheless, replacing the adversarial public law court process in Northern Ireland with an inquisitorial panel along the lines of the Scottish model is in my view worthy of further consideration. The inherent inefficiencies and inflexibility of a court based model is particularly ill suited to the complex and multi-party nature of many public law proceedings. In the long term there may also be potential for really substantial legal aid savings, and savings to the wider justice system. It might be seen as a bold reform to proceed in Northern Ireland in the absence of similar moves in England, but there may be advantages for a smaller jurisdiction and in any event the policy should be considered on its merits in a local context.

16.22 I do not suggest that the relevant Ministers are in a position to make a decision now to implement such a major reform or even to consult on the issue. It seems to me that there are two options: one is to decide that, in light of the implementation challenges and the heavy programme of work which such a reform would involve, it cannot be considered a priority to undertake further work on this option for the time being; the alternative is to commission further analysis to inform a later policy decision. I suggest the latter course. **I recommend that the DHSSPS and the DOJ jointly commission a feasibility study into establishing an inquisitorial panel with jurisdiction over certain public law children issues in Northern Ireland.** Such a study would consider not so much whether the reform would be a good idea, but at *how* it might work in the context of Northern Ireland. If the study produced proposals which appeared promising, further public consultation could ensue. I suggest that a feasibility study could consider the following issues, amongst others:

- Identifying the appropriate jurisdiction of a panel, and which family cases should remain within the jurisdiction of the court;
- Defining the relationship between the panel and court, in relation to referral of issues and appeals, and the appropriate level of court or judge for such referrals to take place;
- Identify differences in the underlying law and procedure governing referrals, care and supervision as between Northern Ireland and Scotland and how to address these;
- Identify what practical steps would be needed to set up a panel in Northern Ireland, including how members of the panel would be recruited and trained;
- Consider what role legal aid would play in the new arrangements and whether a form of duty scheme should be established;
- Undertake financial modelling of the reform, both set up costs and potential longer term savings;
- Identify the legislative changes which would be needed to deliver the reform;
- Propose an outline implementation plan describing how the current system could be reformed, including how transitional cases should be dealt with.

16.23 I would encourage Ministers to consider this reform option separately on its merits, rather than as part of any more general review of family law or procedure in Northern Ireland. It is very difficult in one exercise to investigate both ways of improving court functions and options for replacing them entirely. It may be for this reason that the Family Justice Review in England and Wales did not appear to consider the Scottish model in any great depth.

### **Summary**

16.24 In Scotland, many public law family proceedings are dealt with outside the court system, by a lay panel with an inquisitorial approach. The Scottish system appears to be effective, proportionate and accessible. It resolves cases at a small fraction of the cost of equivalent court-based proceedings elsewhere in the United Kingdom. A reform to introduce a similar system in Northern Ireland has many attractions but would be a major project requiring primary legislation. If this option is considered further, the next step should be a feasibility study to identify how such an approach might operate in Northern Ireland, with financial modelling of the potential costs and savings.

## 17 Family Mediation

***“If you want to bring an end to long-standing conflict, you have to be prepared to compromise”<sup>269</sup>***

17.1 This Chapter considers the potential role of mediation in the family justice system and whether and in what ways its use might be developed in Northern Ireland.

### **The key issues**

17.2 The first Access to Justice Review considered the principles of mediation and other forms of ADR at some length.<sup>270</sup> I will not therefore cover the underlying philosophy of mediation in this report, especially as there appears to be a good deal of consensus on the general principles. There is far less agreement on the practical issues concerning how great a role mediation should have and what mechanisms should be used to support it. The Agenda summarised the main issues in the following terms:

“A key question for this review is whether there is a case for adopting an approach similar to that of England and Wales and focusing on mediation rather than legal representation at court. It is argued that mediation, where it works, supports early resolution of issues to the benefit of all including children, avoids the potential acrimony of legal proceedings, has a greater chance of securing buy-in as it is the parties’ agreement and is more cost-effective. The DHSSPS already fund mediation in cases involving children that have not gone to court under the ‘Family Matters’ strategy and are leading on the development of a cross-departmental approach to alternative dispute resolution in the family justice system. Another form of pre-court ADR is collaborative law where the parties’ legal representatives engage in a 4-way co-operative dialogue with the parties with a view to resolving any differences and incorporating the outcome in a legally binding agreement. We will engage with the Ministry of Justice and the Legal Services Agency in England and Wales to learn from their (early) experience of the new arrangements. However, some key issues for consideration in relation to family ADR and mediation if they are to be funded out of legal aid on a similar basis to England and Wales are as follows:-

- Financial modelling to assess the potential costs of mediation sessions (would there be a limit to the number of sessions to be funded?), advice to participants and converting agreements into enforceable orders.
- The danger that providing a comprehensive ADR service supported by public funds and in parallel with legal aid for court proceedings could increase costs overall, especially if sufficient cases are not resolved out of court.
- Securing geographical coverage of properly accredited mediators.

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<sup>269</sup> Aung San Suu Kyi

<sup>270</sup> See AJ1 pages 60 to 69

- Whether there should be a prescribed methodology for mediation and whether other forms of ADR might be applicable.
- Accreditation arrangements which, in addition to mediation capabilities, would ensure that mediators were qualified to take full account of the wishes and interests of children.
- Delivery models and the applicability of contractual arrangements or a panel of accredited mediators.
- Arrangements for Mediation Information and Assessment Meetings (MIAMS) which in England and Wales are a mandatory requirement before a case reaches court.
- The status of mediated agreements and their enforceability in the courts.
- The policy in respect of those cases judged unsuitable for mediation – should they be legally aided and what would this mean for overall costs?
- The lead-in time for the introduction of comprehensive arrangements of this sort.<sup>271</sup>

17.3 Agenda consultation question 15 asked for views on these issues and whether, for the generality of private family law cases, the focus for publicly funded support should be for ADR and mediation, as in England and Wales. What steps need to be taken to ensure that mediation and ADR does not simply become an additional cost driver?

17.4 Responses were generally supportive of greater funding for mediation in family cases. The Belfast Solicitors Association supported the provision of legal aid for mediation. It would be beneficial for the parties to have to attend one session to explore ADR after proceedings were issued. Court Children’s Officers already do much to promote and provide mediation. Mediation had much potential for resolving children’s issues but was less likely to be useful in ancillary relief cases. The Southern Health and Social Care Trust agreed that the emphasis going forward should be on mediation, except in cases where there are violence or safety issues. The “Guide to Case Management in Private Law Proceedings”<sup>272</sup> had a similar presumption in favour of ADR for children disputes.

17.5 The Bar and Family Law Solicitors Association were more cautious: mediation was not a magic bullet, as had been shown by the experience in England and Wales. It would be a mistake to make mediation the only available option. FLSA believed mediation had a role especially for “high functioning” parties who are able to work past the emotional fall-out of relationship breakdown, but was not appropriate for the vast majority of cases before the courts of Northern Ireland. The Bar believed that other methods of dispute resolution, including lawyer negotiation, also had a valuable role. It was also important for mediators (including Court Children’s Officers) to have the right skills, especially to identify imbalances of power and cases with a background of abuse.

17.6 The LSC was optimistic about the potential for ADR but warned that there was currently no proper infrastructure for mediation in Northern Ireland. Quality standards were important and should be self-financing; mediations should be time and cost limited.

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<sup>271</sup>Agenda paragraph 5.15

<sup>272</sup>Northern Ireland Courts and Tribunals Service, 24<sup>th</sup> January 2013

17.7 Family Mediation Northern Ireland (“FMNI”) is the dominant provider of family mediation services in this jurisdiction, working to the quality standards established in England and Wales under the Family Mediation Council, the documentation for which was provided to this review. FMNI point out the major benefits of mediation: its cost and effectiveness; the ability to address non-legal issues; the potential for lasting agreements compared to those imposed by a court. They estimated that about 70% of contact/residence disputes would benefit from mediated solutions. FMNI advocated a longitudinal research study into the benefits of mediation as compared to court resolution.

17.8 FMNI felt that Northern Ireland was lagging behind the rest of the United Kingdom in developing and supporting ADR services. The expertise was already building up; robust quality standards were available and could be subject to regular auditing and accreditation; mediation models based on a limited number of sessions were available; further ADR approaches such as Collaborative Law should also be available (likely to be suitable for those with more substantial assets). All that was needed now was more secure long term funding.

### **Family mediation in England and Wales**

17.9 Family mediation has been a feature of the legal aid scheme in England and Wales since 1997.<sup>273</sup> Funding for this service was offset by powers (later set out in the Funding Code) to refuse civil legal aid in cases where mediation was more suitable. This approach was strengthened under the statutory framework of the Access to Justice Act 1999 which encouraged swift resolution of disputes outside court where possible.<sup>274</sup> Mediations could cover private law disputes concerning children, financial disputes or both.

17.10 Mediators are funded directly under contracts with the Legal Aid Agency based on quality standards overseen by the Family Mediation Council, who are responsible for accreditation. Funding developed into a Standard Fee regime with two stages: the initial meeting where potential for mediation was assessed (this is now known as a Mediation Information and Assessment Meeting or “MIAM”); then substantive mediation for those cases deemed suitable. The current fee for a MIAM is £87; fees for substantive mediations range from £230 for a single session child case up to £756 for a multi session mediation dealing with all issues, with additional fees of £126 and £252 respectively if the mediation produced a concluded settlement.

17.11 In 2007 the National Audit Office reviewed the operation of family mediation and reported positively. The NAO recommended that mediation should be more actively promoted and if used more widely would generate even greater savings:

“One in three in our survey told us that they had not been made aware that mediation was an option. The Legal Services Commission needs to publicise the advantages of mediation and remove the financial disincentives to solicitors of recommending this option to their clients. Mediation can provide a less adversarial route than the courts for many families involved in family breakdown and result in savings in legal aid of over ten million pounds a year.

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<sup>273</sup>Mediation was imported into the Legal Aid Act 1988 by Part III of the Family Law Act 1996

<sup>274</sup>1999 Act section 4(4)

The average cost of legal aid in non-mediated cases is estimated at £1,682, compared with £752 for mediated cases, representing an additional annual cost to the taxpayer of some £74 million. Not all cases are suitable for mediation, however, for example, where there has been a history of domestic abuse. Nevertheless, if 14 per cent of the cases that proceeded to court had been resolved through mediation, there would have been resulting savings equivalent to some £10 million a year.

Mediated cases are quicker to resolve, taking on average 110 days, compared with 435 days for non-mediated cases<sup>275</sup>

17.12 Table 17.1 shows the cost in England and Wales of family mediation assessments and full mediations, compared to the cost of civil legal aid for private law family cases (excluding domestic violence).<sup>276</sup> It is not possible to deduce any causative connection between the two from these figures but it is clear to see that, despite the push to develop mediation over many years, its cost remains a small percentage of the total legal aid spend on these cases:

**Table 17.1 Legal aid mediation and civil legal aid costs, England and Wales**

Cost of Private Law Cases to Legal Aid (all figures in £millions)	Cost of mediation assessments	Cost of substantive mediations	Cost of civil legal aid for private law family (excluding DV)	Combined total costs of mediations and civil legal aid	Cost of mediation (including assessments) as % of total
2008/2009	5.433	6.698	222.235	234.366	5.2%
2009/2010	6.152	7.235	209.751	223.138	6.0%
2010/2011	6.277	6.998	214.206	227.481	5.5%
2011/2012	7.796	6.918	228.389	243.103	6.1%
2012/2013	8.053	6.308	209.525	223.886	6.4%
2013/2014	3.183	4.297	189.230	196.710	3.8%
2014/2015	3.666	3.115	147,634	154.415	4.4%

17.13 In April 2013, under the provisions of LASPO, civil legal aid was removed from most family cases but funding for mediation was retained. It was expected that mediations would rise sharply as they became the only game in town, but the opposite happened. MIAMs fell from 30,667 in 2012/13 to 13,431 in 2013/14, a fall of 56%. Similarly, substantive mediation starts fell from 13,609 in 2012/13 to 8,438 in 2013/14, a reduction of 38%. Clearly legal aid lawyers had previously been having a positive role in generating referrals to mediation.

17.14 In 2014 a Family Mediation Task Force, chaired by David Norgrove, made a range of recommendations aimed at boosting mediation uptake.<sup>277</sup> The Legal Aid Agency now has power to fund MIAMs for both sides even if one party is not financially eligible. Volumes should also have increased sharply in 2014/15 as MIAMs became a requirement under civil procedure rules from April 2014. However there were only 15,021 MIAMs in 2014/15, 12% up on the previous year but still less than half the pre-LASPO volume. Substantive mediation starts were actually down in 2014/15 (8,035

<sup>275</sup> Legal aid and mediation for people involved in family breakdown, Summary of findings, NAO, 2007

<sup>276</sup> Figures based on cases closed during the year

<sup>277</sup> Report of the Family Mediation Task Force, Ministry of Justice, June 2014

compared to 8,438 in the 2013/14).<sup>278</sup> Mediation shows no clear sign of recovering from the impact of the legal aid scope cuts.

17.15 Looking at mediation outcomes, the proportion of MIAMs which have proceeded to substantive mediations has varied in recent years between 44% and 63%. The proportion of concluded substantive mediations which resulted in agreements has remained steady in the range of 65 to 68% and was 66% in 2014/15.<sup>279</sup>

### **ADR initiatives in Scotland**

17.16 In Scotland, mediation is funded under the legal aid scheme but only as a disbursement on the solicitor's bill. Unless mediation is mandated by the court, approval is required from the Scottish Legal Aid Board. Family mediators are provided by Relationship Scotland or Comprehensive Accredited Lawyer Mediators ("CALM") at an hourly rate of £86. Total spend is £80,000, a very small proportion of the budget. The Scottish Government also provides support for the Scottish Mediation Network who operate a telephone helpline to help people locate mediators.

17.17 There are plans to develop ADR in Scotland as part of the Making Justice Work programme. An Access to Justice project is currently scoping the current range of ADR services and researching international experiences with a view to making recommendations for reform.

### **ADR in the Republic of Ireland**

17.18 Mediations services are well established in Ireland. Training is provided by the Mediators' Institute of Ireland. The Legal Aid Board in Ireland has taken an active role in promoting family mediation. In 2011 the Board took over the state run Family Mediation Service. This is an employed service, as with Law Centres in Ireland, so waiting times can be lengthy, but the volume of mediations is growing. There were 710 mediated agreements in 2013. The Board is working to develop a clearer strategy for the future of family mediation and to coordinate the service more closely with its delivery of legal services.

17.19 Local initiatives have taken place to divert litigants away from the family courts into mediation. These have included requiring separating couples to attend mediation information sessions before going to court. The most successful scheme has been the Dolphin House Mediation Initiative, a collaboration between the Courts Service, Family Mediation Service and Legal Aid Board in which parties proposing court proceedings are contacted by the mediation service and encouraged to mediate. A cost benefit analysis of the initiative has concluded that substantial savings have been generated. One always has to be cautious about costings of this type because it cannot be assumed that the typical profile of cases which do mediate is the same as for those who proceed through the courts.<sup>280</sup> Nevertheless the overall results of the scheme are very encouraging:

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<sup>278</sup>Legal Aid Statistics, January to March 2015, Main tables 7.1 and 7.2

<sup>279</sup>Beware comparison of *concluded* agreements against mediation *starts* which gives an unduly rosy picture of mediation success rates: see Legal Aid Statistics in England and Wales, Legal Aid Agency, 2013-2014, page 21

<sup>280</sup>The suspicion being that mediation is only diverting the "easiest" cases

**Table 17.2 Dolphin House summary costs and savings (given in Euros)**

	2012	2013
Number of concluded mediations	293	408
Estimated saving to the Court Service	113,808	138,284
Estimated saving to the Legal Aid Board	219,910	306,222
Cost of the Mediation Service	230,976	230,976
Net saving	102,742	213,530

### **Family mediation in Northern Ireland**

17.20 As is clear from the consultation responses, family mediation services are developing in Northern Ireland but are less well established than in the rest of the United Kingdom and Ireland. The Minister, when setting out his priorities in 2010, called for greater emphasis on resolving cases outside the court.<sup>281</sup> This has of course been reflected in the terms of reference of both Access to Justice reviews.

17.21 With effect from 1<sup>st</sup> April 2015 the new Legal Services Agency operates under a strongly pro-ADR statutory framework. Anyone exercising functions relating to civil legal services is required to have regard to the desirability of exercising them, so far as is reasonably practicable, so as to:

“achieve the swift and fair resolution of disputes without unnecessary or unduly protracted proceedings in court”<sup>282</sup>

17.22 As is common in Northern Ireland, funding for family mediation is not the sole responsibility of one department. Health and Social Care Boards, on behalf of the DHSSPS, provide funding for mediation services for separating or separated couples who have not yet commenced court proceedings. This service is available free of charge and is provided primarily by Family Mediation Northern Ireland. It does not extend to financial disputes, nor to cases which are before the courts. Family mediators have told me that judges have been known to order the dismissal of legal proceedings, just so that the parties can take advantage of the mediation service.

17.23 Where proceedings are ongoing, mediations can be funded as a disbursement under a legal aid certificate, typically where mediation is directed by the family court. When granted, authorities typically cover up to 20 hours at £80 per hour (which potentially generates higher fees than those applying in England and Wales, described at paragraph 17.10 above). I think there is scope for more tightly controlled funding based on shorter mediations – see paragraph 17.35 below.

### **Is family mediation a cost driver?**

17.24 There is anxiety that greater support for family mediation from the legal aid fund will increase costs overall, which cannot be risked in the current financial situation. At the level of principle, deciding to fund an individual family mediation will produce one of two outcomes:

i) An increase in cost, if the mediation fails so that the mediation costs are additional to the subsequent costs of court resolution;

<sup>281</sup>David Ford, Key Priorities as Minister of Justice, 6<sup>th</sup> June 2010

<sup>282</sup>2003 Order, Article 10(5)(c), mirroring a similar provision in the Access to Justice Act 1999, section

ii) A saving, if the mediation succeeds at a lower cost than would have arisen if the dispute had continued.

17.25 Individual cases will of course sometimes produce good outcomes and sometimes bad outcomes for the legal aid fund. What matters is whether, over a population of cases, (i) outweighs (ii) or vice versa. I do not think the onus should necessarily be on the pro-mediation lobby to prove that savings will exceed costs. Like any policy decision it has to be a leap of faith, but it need not be a leap in the dark. The evidence is generally supportive of increased mediation as more of a cost saver than a cost driver:

- The costs of a mediation will tend to be significantly less than the costs of a court contest, which is likely to make mediation cost effective provided that a good proportion of mediations are successful;
- Most mediation schemes have success rates well in excess of 50% - between 60 and 70% is typical (see paragraph 17.13 above);
- The NAO in 2007 were satisfied that the financial case for mediation supported its expansion (paragraph 17.11 above);
- There is no evidence that the consistent promotion of family mediation in England and Wales since 1997 has led to an overall increase in the net cost of the system (although the contrary cannot be proved either – paragraph 17.12);
- Despite years of promotion, the cost of mediation services in England and Wales remains small compared to the cost of civil legal aid – mediation would pay for itself even if it only gave rise to a 6% reduction in the cost of civil legal aid (Table 17.1);
- Evaluations of mediation initiatives in Ireland have concluded that they have led to significant savings (paragraph 17.19);
- Internationally there is an almost universal trend towards the greater use of ADR in other jurisdictions – can they all be wrong?

17.26 Even so, I do not think the proposition that increased mediation will produce savings is capable of definitive proof. It is a much more complex question than first appears, for a number of reasons:

- The most acrimonious cases are less likely to agree to mediation and less likely to settle if they do; if mediations tend to concentrate on the easiest cases leaving the intractable ones to go through the court, then comparisons of average costs between the two processes are not comparing like with like;
- It is wrong to assume that unsuccessful mediations are a waste of costs; it is commonly reported (for both family and non family cases) that even mediations which do not result in agreement at the mediation meeting will nevertheless serve to narrow the issues; this often leads to earlier settlement or cheaper resolution than if mediation had not been attempted;
- Comparisons between mediations and contested court proceedings do not necessarily recognise the value of other dispute resolution methods, in particular lawyer negotiation or collaborative law.

17.27 Taking all the above into account, it is tempting to recommend that the Department should commission further research on the cost effectiveness of mediation. I do not recommend this for

several reasons. Firstly, there is already a great deal of research out there<sup>283</sup> and evidence from other jurisdictions to provide reassurance on the benefits of developing ADR further. Secondly, I do not believe that research is likely to provide a definitive answer to the complex issues described above in the particular context of Northern Ireland – there is no substitute for simply doing it with careful monitoring. Thirdly, I find it hard to reconcile an overcautious approach to ADR with the new statutory framework (paragraph 17.21 above) which creates a clear presumption in favour of non court resolutions.

17.28 In all the circumstances I think the time has come for a major expansion of the provision of family mediation in Northern Ireland. If sensibly structured in light of experience in other jurisdictions, the responsible Departments can work on the assumption that doing so will produce net savings. My opinion is that those savings will probably be fairly modest and are unlikely to make major inroads into the legal aid budget deficit. For me, the dominant policy reason for promoting more ADR is that it produces better outcomes for clients. Savings will be a bonus.

### **Developing the family mediation service**

17.29 If mediation services are grown in Northern Ireland, what is their potential and what is the long term objective? If considered two years ago, this would be an interesting debate; but in light of developments in England and Wales some things are now clear beyond reasonable doubt:

- If civil legal aid is withdrawn from private law proceedings, mediation cannot be expected to expand to fill the access to justice void; mediation is not a complete alternative to legal services;
- Family lawyers are not the enemies of mediation; in fact mediators depend on lawyers to generate referrals; mediation will only flourish in a “mixed economy” where it exists alongside other means of dispute resolution including lawyer negotiation and court determination.

17.30 It follows that the aim of developing mediation services should not be to make it the sole dispute resolution mechanism available or even the dominant mechanism. Once this is recognised, some of the anxieties reflected in paragraph 5.15 of the Agenda diminish. It is not necessary to introduce mediation in a big bang approach or to predicate reforms on the pre-existence of a network of quality assured family mediators covering every corner of Northern Ireland. With suitable nurturing the service can evolve gradually from its current level of provision.

17.31 Having said that, it is equally clear that the current low incidence of mediation in Northern Ireland is not a proper reflection of the value it can add to the family justice system. We can see from experience in other jurisdictions that pro-active reforms are needed to expand mediation to become a really significant player. **I recommend three main mechanisms to encourage this:**

- **A new merits criterion** should be introduced for civil legal aid in private law proceedings allowing a certificate to be refused if mediation has not been attempted; this should be a discretion, not an absolute rule. The discretion would allow for civil legal aid to continue both for cases that were inherently unsuitable to mediation and cases where there were

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<sup>283</sup>See in particular Mapping Paths to Family Justice, Barlow and others, University of Exeter, June 2014 – considered further in Chapter 15, paragraph 15.9

simply no mediators available to see the client in a reasonable time; a similar approach applied for many years under the Funding Code. Guidance would help to identify cases unsuitable for mediation, typically because of domestic violence<sup>284</sup> but other examples might include finance disputes where there were serious issues of non-disclosure. In the next Chapter I explain how this might operate in a revised structure for family legal aid;

- **The costs of mediation should be made exempt from the statutory charge** or any wider obligation to repay.<sup>285</sup> A similar exemption applies in England and Wales. To incentivise settlement I would apply this exemption only for cases which settle at the mediation or within, say, 14 days thereafter;
- **Court procedures should be amended to require applicants to attend a meeting to learn of alternatives to the court** and consider the suitability of mediation. This could operate in a similar way to Mediation Information and Assessment Meetings which have operated in England and Wales since April 2014.<sup>286</sup> Exemptions would apply to cover domestic violence cases. This reform might need to be introduced at a later stage than the legal aid changes to give time for practical arrangements to be put in place. I agree with the views of researchers and practitioners<sup>287</sup> that, even if the meeting is conducted by a mediator, the meeting should not be exclusively directed at mediation and should be a broader assessment and signposting of the most appropriate means of dispute resolution.

### **Delivery of family mediation**

17.32 The current division of responsibilities between support for mediation pre and post the issues of proceedings is far from ideal. **I recommend that the DOJ and DHSSPS liaise with a view to agreeing a unified strategy for funding family mediation.** One option to explore is whether it would be beneficial to transfer responsibility for funding family mediation to a single Department. There should in any event be a common approach to training and quality standards. The aim should be for a seamless service where mediation is available as an option both before and during proceedings, for both children and financial issues.

17.33 Assuming that the Legal Services Agency retains some responsibility for funding family mediators, the Agency should in time establish direct payment arrangements for providers of this service. Nothing in the 2003 Order requires the Agency only to do business with lawyers. I do not think contractual arrangements are needed with mediators, but once agreed quality standards are in place and operating effectively, mediators could register with the Agency and be recognised under the new Registration Scheme.

17.34 In terms of quality standards there is no need to reinvent the wheel as good quality mediation training is available throughout the United Kingdom and Ireland. It is however important that there is training and experience relevant to family mediation, rather than mediation in general. As a starting point for consultation, **I recommend that public funding should be available only for family mediators who are trained to standards approved by Family Mediation Northern Ireland,**

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<sup>284</sup> I would not however follow the England and Wales approach of requiring documentary evidence in support of this – see further Chapter 18

<sup>285</sup> See proposal for legal aid as a loan – Chapter 3, paragraphs 3.25 to 30

<sup>286</sup> Introduced under section 10(1) Children and Families Act 2014, see Rule 3.8 Family Procedure Rules

<sup>287</sup> See Chapter 15 at paragraphs 15.9 to 11

**the Family Mediation Council of England and Wales or the Mediators' Institute of Ireland.**<sup>288</sup>  
Quality standards should be self financing.

17.35 In the shorter term family mediation will continue to be funded as a disbursement under either advice and assistance or civil legal aid. In funding mediation, **I recommend that:**

- **A distinction should be drawn between assessments for mediation and substantive mediations;** a smaller standard fee should be payable for the former;
- **No prior authority should be required to incur mediation costs** - if you are funded to litigate you are funded to mediate; indeed it might be perverse to prohibit parties from negotiating or mediating if they wished to; authority would of course be required to exceed the overall cost limitation on the certificate;
- **Standard fees** for substantive mediations should also be fixed after consultation to ensure that mediators are incentivised to resolve cases in the minimum number of sessions; in that context I would caution against simply adopting the England and Wales fees which seem to unduly reward multi-session mediations;
- An **additional fee** should be proposed for those cases which settle at or within 14 days of the mediation;<sup>289</sup>
- The system of **Early Resolution Certificates** which I propose in the next Chapter should facilitate legal advice in support of the mediation process and assist with finalising agreements reached at mediation to ensure that they are legally binding.

### Summary

17.36 The current provision of family mediation in Northern Ireland does not reflect the value mediation can bring to the family justice system. Greater use of mediation must be encouraged and incentivised through reform of legal aid merits criteria, financial conditions and court procedures, all designed to ensure that mediation, negotiation and other forms of ADR are considered before litigation is pursued. Increased mediation should produce savings for the fund but more importantly will lead to better outcomes for the client.

17.37 The aim of encouraging mediation is to make it a more significant dispute resolution mechanism in the family justice system, not the sole or dominant mechanism. Mediation will only flourish alongside the continuing availability of legal support under a restructured and streamlined family legal aid scheme. Quality standards and a standard fee regime should be adopted based on those operating in other jurisdictions.

17.38 A joint strategy for funding family mediation should be agreed between the DOJ and DHSSPS covering all stages and types of family dispute. In time the Legal Services Agency should move to funding family mediators directly, instead of as a disbursement under other funding.

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<sup>288</sup>The Institute has a specific training route for Family Mediation

<sup>289</sup>I have to admit that the mediators I have suggested this to were rather aghast at the idea of a success fee; but I believe in incentivising good outcomes and such payments are well established in England and Wales

## 18 Family Legal Aid

***“My vision for public legal services in Northern Ireland is...one...which puts much greater emphasis on finding solutions to problems outside court and much less emphasis on fighting cases in court – with all the expense and stress this gives rise to”<sup>290</sup>***

18.1 This Chapter considers the scope and conditions of publicly funded representation in family cases and proposes some new structures for family legal aid.

### **The priority of family legal aid**

18.2 The review has to some extent been overshadowed by growing evidence of the consequences of the scope cuts in England and Wales, where the impact on the family courts has generated by far the most concern. In some meetings, I have encountered a certain fatalism in the belief that sooner or later Northern Ireland will be going the same way. I do not believe this is inevitable. The financial pressures on legal aid in this jurisdiction are just as great, but one of my primary objectives in this review has been to explore ways to make other savings (in some respects going further than England and Wales) sufficient to justify retaining most family legal aid in scope.

18.3 The situation in England and Wales is well documented<sup>291</sup> and has been highlighted earlier in this report.<sup>292</sup> We know with reasonable certainty what would happen if legal aid was removed from most family cases in Northern Ireland. Neither mediation nor any other form of dispute resolution will emerge to fill the gap. The family courts will become full of litigants in person muddling through as best they can.

18.4 Nevertheless we have to ask why private law family cases (other than domestic violence which is an obvious top priority) should be a higher priority than most areas of non family litigation. Agenda consultation question 13 asked how important it was for private family law court proceedings to remain in scope.

18.5 Unsurprisingly, responses were strongly in favour of maintaining the scope of family legal aid. The Bar referred to the “drastic consequences” for families left without funding and the “family legal advice deserts” being seen in certain parts of England and Wales. The Family Law Solicitors Association saw private law as no less a priority than public law. Many consultees emphasised the need to protect the interests of vulnerable participants, especially children (Belfast Solicitors Association, NIHRC), women (NIHRC) or non resident fathers (Family Mediation Northern Ireland). The Housing Rights Service identified the synergy with housing, in that family breakdown without support can lead to homelessness. In general, increased controls of legal aid were seen as a far better approach than removal from scope. I return to the question of greater controls over long running cases at paragraph 18.27 below.

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<sup>290</sup>David Ford, Key Priorities as Minister of Justice, 6<sup>th</sup> June 2010

<sup>291</sup>See ‘Implementing reforms to civil legal aid’, NAO, 20 November 2014; Public Accounts Committee, 19 January 2015; Justice Committee report, House of Commons, 12 March 2015

<sup>292</sup>See in particular Chapters 3 (control of legal aid) and 7 (litigants in person) – see paragraphs 7.28 to 36

18.6 As discussed in Chapter 2, priorities for legal aid are subjective and discussion of whole categories of law risks penalising individual deserving cases within what is perceived as a low priority category. Nevertheless, scope rules can only be addressed on a category basis. Taking into account all the issues raised in consultation I believe there are cogent reasons for regarding family law as, in general, a higher priority for the legal aid scheme than most areas of civil non family:

- Almost all family cases arise from relationship breakdown; family clients will typically be in an emotionally vulnerable position needing caring professional support to separate their legal rights from their feelings of hurt and injustice;
- At the heart of the great majority of family cases lie the interests of innocent children;
- Family breakdowns can lead directly to wider social problems including crime, mental health issues and homelessness;
- Many legal aid clients are not before the family courts though choice; without representation they would have to manage alone;
- There are fewer alternative funding options for family cases; costs are not recoverable and conditional fees are not possible.

18.7 **For these reasons, supplemented by the powerful arguments put forward by the Law Society, Bar and others on consultation, I recommend that legal aid remains available for the majority of family cases, subject to increased controls.** The considerations above apply differently across different types of family case so are addressed in more detail below.

#### **Family advice and assistance**

18.8 In 2013/14 the LSC funded just over 2,000 cases of family advice and assistance under the Green Form scheme. The total cost was just under £157,000, an average cost per case of about £78. The volume and cost of family advice and assistance fell significantly compared to 2012/13, probably due to the LSC processing bills and addressing backlogs at different times of the year. The practice is to use advice and assistance for minor and one-off family disputes, proceeding to civil legal aid at the earliest opportunity for more serious cases.

18.9 Chapter 25 considers the future of advice and assistance generally. I am supportive of the continuation of the advice and assistance scheme for a wide range of civil problems, including family. The logic is that a little help early on can avoid far more costly problems further down the road. Advice services often represent better value, pound for pound, than representation in proceedings. There is a particularly strong case for retention of family advice and assistance because solicitors are traditionally the most common source of support for these problems and it is unclear that alternative sources of advice in family matters are available. I look at possible technological developments in this area in Chapter 26.

18.10 Family advice and assistance is also used in certain public law cases to provide advice at pre-proceedings meetings with the relevant Health and Social Care Trust.<sup>293</sup> These meetings seek to discuss a way forward which may make legal proceedings unnecessary. Work associated with the meetings is currently covered under advice and assistance with a form of standard fee (just under £500). It seems to me that there are clear parallels between this funding and the approach to early resolution of private law cases which I propose later in this Chapter. **I recommend that pre**

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<sup>293</sup>See Guide to Case Management in Public Law Proceedings, DHSSPS; in England and Wales these are often referred to as meetings under the Public Law Outline

**proceedings meetings with a view to finding alternatives to care proceedings should in future be funded under a public law Early Resolution Certificate.**

18.11 Looking ahead, there is a difficult issue around defining the boundary between advice and assistance and civil legal aid. At present legal aid certificates only cover representation before specified courts; for anything other than representation in court only the Green Form advice and assistance scheme is available.<sup>294</sup> Later in this Chapter I propose a new type of family legal aid certificate which is a kind of half way house between the two existing forms of legal aid. We need to guard against the risk of this new form of certificate being issued for matters which are more appropriately covered by Green Form; we also need to ensure that, under the new regime (in which certificates for contested proceedings will be harder to come by) Green Form extensions are not granted too freely to become an extra cost on top of the standard fee under a new style certificate.

18.12 These issues can be subject to further consultation. One option is to introduce a standard fee for family advice and assistance. On balance, my preferred approach at the outset would be to keep the structure of the Green Form scheme as it is but to deal with the boundary in guidance concerning applications for Green Form extensions and on the new merits criteria for certificates. The general approach should be:

- Advice and assistance under a family Green Form covers one off advice and tasks (such as preparation of a divorce petition) and helping to sort out minor disputes which would not ordinarily need to come to court;
- Certificated legal aid would be available only for serious family legal disputes which would currently satisfy the merits criteria for court resolution under civil legal aid.

**Legal aid for public law proceedings**

18.13 In Chapters 15 and 16 I suggest that consideration is given to some radical reforms of public law proceedings in Northern Ireland. If these proceedings were placed in the hands of an inquisitorial tribunal along the Scottish model, legal aid would not be needed in the majority of cases except for those aspects of the case before the court. An approach to legal aid similar to that currently adopted by the Scottish Legal Aid Board could be considered. In Chapter 15 I question whether the tandem model should be preserved. If it is not, responsibility for funding representation for the child would be removed from the legal aid scheme (except in exceptional cases) and would be a matter for the guardian.

18.14 Pending any such substantive reforms, legal aid must remain for public law proceedings but we need to consider the extent of funding and which parties need to be covered. Agenda consultation question 11 recognised that public law children cases should be regarded as part of the irreducible minimum of service provision, but asked whether this should apply to parties other than the child and the parents? It is increasingly common, for example, for grandparents to be joined in care proceedings.

18.15 Most responses did not comment on this issue directly but concentrated on the question of improvement of the underlying procedure. The Belfast Solicitors Association believed that legal aid should be automatic for all parents and those with parental responsibility but accepted that legal aid

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<sup>294</sup>Guide to Case Management in Public Law Proceedings

should be means and merits tested for any other parties. The Bar and the Family Law Solicitors Association did not accept that there should be a limit on the parties supported by legal aid; many cases have complex family dynamics where members of the extended family may be extensively involved in the care of the child. Participation of such parties in the proceedings should be a matter for the court. Legal aid should follow the court's decision.

18.16 The Northern Ireland Children Order 1995 made legal aid automatic in care proceedings for the child, parent and those with parental responsibility.<sup>295</sup> These parties are also exempt from means testing.<sup>296</sup> Similarly in England and Wales such parties have always been specifically exempted from merits testing.<sup>297</sup> For parties other than the child, parents or those with parental responsibility, means and merits tests apply. In Northern Ireland these are the standard tests of "reasonable grounds" and "reasonableness".<sup>298</sup> In England and Wales such parties have a specific merits criterion which asks whether it is "reasonable for [legal aid] to be provided, having regard to the importance of the case to the individual".<sup>299</sup>

18.17 In this review I am required to question and challenge all aspects of current legal aid provision. I do not doubt that legal aid should always be granted to parents who are contesting the state taking their children away from their home. There can be no more serious case or higher priority. But I do question whether that is true of *all* parents in *all* care proceedings regardless of circumstances. What about an estranged parent who has hitherto shown little interest in the children or the proceedings? Sometimes parents will have similar but not identical interests to each other, which may not require separate representation throughout. I remember some public law cases in private practice where the clients were nowhere to be seen, the eventual outcome was never in doubt and one felt the court and the lawyers were just "going through the motions".<sup>300</sup>

18.18 In my view, even in this top priority area, not every party in every case should be funded; all applications for legal aid should be merits tested. The test should be specific to public law proceedings but should not include prospects of success criteria, except in relation to any appeal. The aim of the merits test should be to exclude the minority of cases where representation for the applicant will not add real value to the determination of the issues before the court. **I recommend that legal aid should only be granted where the Legal Services Agency is satisfied that:**

**"It is necessary for the applicant to be represented to ensure that the court is able to determine the proceedings in the best interests of the children, taking into account the issues in the case, the importance of the case to the applicant, the case they wish to advance and the representation of other parties to the proceedings; OR**

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<sup>295</sup> 1995 Order, article 172; although the 1981 Legal Aid Order which this provision amended is not longer in force, the Legal Services Agency continue to apply the same policy under the 2003 Order

<sup>296</sup> Civil Legal Services (Financial) Regulations (Northern Ireland) 2015, regulation 4(1)(d)

<sup>297</sup> Originally this was on the face of the Legal Aid Act 1988, subsequently the Funding Code and now in merits regulations; the Civil Legal Aid (Merits Criteria) Regulations 2013, regulation 65

<sup>298</sup> Civil Legal Services (General) Regulations (Northern Ireland) 2015, regulation 43

<sup>299</sup> Civil Legal Aid (Merits Criteria) Regulations 2013, regulation 66

<sup>300</sup> I even recall one case which arose because the father was in prison for murdering the mother

## **Refusal of legal aid would result in a breach of the applicant's right to a fair hearing under article 6"**

18.19 One advantage of such a test is that it could apply not just to parents or those with parental responsibility, but to all parties to public law proceedings. Any appeals in public law proceedings should also be subject to a prospects of success test. I do not recommend any change in the current financial eligibility rules: legal aid should remain non means tested for the child, parent and those with parental responsibility, but means tested for any other party.

### **Divorce proceedings**

18.20 In Chapter 15 I recommended that the courts should deal with the process of divorce in a more administrative way. In terms of legal aid, Agenda consultation question 12 asked how important legal aid was for uncontested divorces or where a no fault ground is available to the parties. What about the minority of divorce cases that are contested?

18.21 The Bar, Belfast Solicitors Association and Family Law Solicitors Association favoured retaining divorce work within scope. The Bar emphasised how hard practitioners worked to prevent contested divorces but sometimes these were unavoidable. Sometimes allegations in a divorce petition needed to be challenged. The BSA and FLSA believed clients needed advice and support because of the requirement for the petitioner to attend court. Advice on divorce was inextricably linked with ancillary relief. Poorly prepared divorce petitions by unrepresented parties wasted time and court resources and increased acrimony. Unreasonable cases could be controlled by merits criteria. The LSC and Family Mediation Northern Ireland were less convinced and argued that uncontested divorce at least should not be in scope.

18.22 I agree that under the current law many clients may need help in drafting a relevant and non inflammatory divorce petition and related advice. Clients may also need advice not to waste time on contested grounds for divorce and instead to await a no fault ground. The courts may well steer the parties down that route in any event. However, all this work should be at the advice and assistance level. For clients insisting on pursuing a contested divorce, which seems to be more common in Northern Ireland than in England and Wales, I do not think representation can be regarded as a priority; challenging the contents of a divorce petition should in my view have no higher priority than defamation proceedings. **I recommend that advice and assistance should remain available for general advice and for help with drafting a petition, but anything to do with process of obtaining or contesting a divorce should be removed from the scope of civil legal aid.**

### **Domestic violence**

18.23 Proceedings to protect clients from violence and abuse are an obvious priority for the legal aid scheme. Merits criteria should still apply to these cases as described below but should be more generous than other areas of family law. Domestic violence is also a crime and one of the difficult issues which should be addressed in guidance is whether involvement of the police should be the normal response instead of an application for a civil injunction. One of the aims of such guidance should be to reduce the likelihood of victims having to go through both criminal and civil procedures.

18.24 Agenda consultation 14 asked what priority should be given to legal aid in other family proceedings where there is a background of domestic violence or child abuse. If such cases were the only type of private law family case staying in scope, how could the funding authority ensure that those high risk cases that genuinely fell within this category were identified and that there was no incentive to make unfounded allegations?

18.25 Most consultees strongly objected to the premise of this question, arguing that scope should not be restricted in this way. The Law Society, Bar, NIHR and others criticised the approach adopted in England and Wales where precisely defined evidence is needed to establish a background of domestic violence. This has come in for much criticism and been subject to judicial review although it was held that the Minister had acted within his powers.<sup>301</sup> The Law Society feared that if the evidential approach is adopted, some two fifths of domestic violence victims would not have access to this essential funding. In 2013/14, the first year of the scope restrictions, the Legal Aid Agency issued 16,662 certificates for private law children cases. This was 34% of the previous year's total, which could be taken to indicate that domestic violence was previously a background factor in about a third of private law family cases.<sup>302</sup>

18.26 For the reasons given at paragraph 18.6 above and on consultation I am not recommending that family legal aid should be restricted to cases with a domestic violence background. Nor should legal aid for domestic violence proceedings themselves be restricted to clients who satisfy strict evidential requirements. Therefore the worry about defining these cases and the danger of false allegations being made to secure funding does not arise in that context. However, the issue is relevant for other purposes, in particular the requirement to explore mediation before litigation. A background of domestic violence is an accepted justification for not proceeding to mediate.<sup>303</sup> I do not favour defining this domestic violence exemption in terms of precise types of evidence; it is a matter to be covered in guidance and kept under review. If it appeared that a significant number of cases were simply "ticking the domestic violence box" to avoid mediation, stricter rules would need to be considered.

### **The problem of multiple hearings**

18.27 Agenda consultation question 13 asked whether private law family cases remaining in scope should be circumscribed in some way, for example by limiting the number of hearings that will be supported or limiting the amount of funding available for each case. Agenda question 16 asked whether further measures could be taken to reduce the propensity for contact cases to return to court. Should there be more effective enforcement measures in the event of breaches of contact orders? In Chapter 15 I considered what the courts could do in these cases and recommended increased powers of enforcement to ensure that contact orders were complied with.<sup>304</sup> However it is also a legal aid issue.

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<sup>301</sup>See *Rights of Women v Lord Chancellor* [2015] EWHC 35 (Admin) 22<sup>nd</sup> January 2015

<sup>302</sup>But note much smaller fall in volume of ancillary relief, 61% of previous total, where funding is similarly only available in cases with a domestic violence background

<sup>303</sup>See Chapter 17, paragraphs 17.31 and 35

<sup>304</sup>See paragraph 15.50

18.28 As noted at paragraph 18.5 above, the majority of consultation responses argued that family cases were a high priority to remain in scope, but there was considerable support for introducing stronger controls over the extent of legal aid, especially in relation to the number of hearings covered (LSC, Family Mediation Northern Ireland, Belfast Solicitors Association, Southern Health and Social Care Trust). This is a particular concern in long running contact disputes. The Bar were opposed to any artificial restriction on the number of hearings covered. The Belfast Solicitors Association recognised that the legal aid authorities should be notified and be prepared to withdraw funding where cases are pursued unreasonably. The BSA were disappointed that a great deal of good work had gone into the Northern Ireland Funding Code – Children and Family Guidance (1<sup>st</sup> August 2013); the tougher approach to merits criteria could have improved controls and generated significant savings, but the initiative had not proceeded.

18.29 The LSC and Family Mediation Northern Ireland pointed out the unfairness which can arise where one party is legally aided and the other is unrepresented. Family Mediation Northern Ireland talked of the need to end what is often perceived by unrepresented parties as an “open cheque book” approach to support for legally aided parties. Should a legally aided party in breach of an order be required to pay back their legal aid costs?

18.30 I think it is significant that two of the three individual members of the public who responded to this review did so from the standpoint of having faced opponents in family cases who they believed were pursuing family cases unreasonably with the backing of legal aid. I am convinced this is a serious problem which needs to be addressed. There is a significant minority of cases where the existence of legal aid actually does more harm than good.

18.31 One option is to tackle the underlying incentives in legal aid remuneration. I believe fee structures always influence behaviour to some extent: if the lawyers are paid extra each time the case returns to court, cases will tend to return to court more often. Most family work in Northern Ireland has to date been paid on an hourly rate or brief fee basis but the current fee proposals proposed by the Department would create a new range of standard fees. The new scheme has the potential to incentivise a less adversarial approach to contact disputes and to reward early settlement.

18.32 Financial incentives are about trying to influence behaviour, not about allocating blame. Some parties have to keep returning to court simply because the other side is being unreasonable. It may seem unfair for such a party to lose out if they had no control over the length of the case, but that sort of outcome is inevitable in the swings and roundabouts of a new fee scheme. I **recommend that when finalising the fee structure for private law children cases (at all court levels) the Department should aim to make remuneration for long running cases, particularly contact disputes, significantly less generous than for cases which resolve early.**

18.33 I believe other measures are needed. I considered whether a specific limit should be placed on the number of hearings which could be covered by each certificate, but I doubt this would be effective. There would need to be a power to extend any such limit. The danger is that it would send a signal that anything up to the specified number was reasonable. Instead I **recommend a range of complementary controls:**

- All certificates should be subject to **binding costs limits** (as recommended in Chapter 3 – see paragraph 3.45); in relation to contact disputes, the standard cost limit should be pitched at a level which requires the solicitor to report to the Agency and seek authorisation to continue before the case proceeds to multiple hearings;
- Decisions on certificate extensions should expressly consider **the interests of the opponent** if they are unrepresented (but not sufficiently wealthy to afford their own lawyer); there should be a presumption against extension if continuation of legal aid would risk creating an imbalance of power and unfairness to the other side; this would be a novel approach in legal aid terms but one which I believe is essential to mitigate the unfairness which one-sided funding can sometimes create; the new approach would need to be set out in regulations;
- **Legal aid cost protection should be abolished for all family cases**; costs are not routinely awarded in family cases, but in the rare cases where a court wishes to make an order because a legally aided party has caused proceedings to be conducted unreasonably<sup>305</sup> the court’s intention should not be frustrated by the impossibility of enforcing the order. A similar exclusion applies in England and Wales;<sup>306</sup>
- **A new power should be introduced to revoke a legal aid certificate** where a legally aided party has failed to comply with a court order made during the life of that certificate. Revocation is a serious sanction which does not just bring funding to an end but requires the client to repay all the costs incurred under their certificate. Revocation is currently only considered in situations such as dishonesty in the application for funding. The proposed wider power would hopefully not need to be applied often but could act as a significant deterrent against a client who refuses to comply with contact arrangements ordered by the court or who fails to turn up to explain their conduct. The time afforded by the “show cause” and appeals procedure (in which the client has a chance to explain why revocation should not take place) would give the client a further opportunity to cooperate over contact arrangements, which might result in the revocation being replaced with a discharge.

### Ancillary relief

18.34 Disputes over the division of finances on divorce are rightly regarded as a lower priority for legal aid than disputes over child residence and contact. The Department is currently proposing to remove ancillary relief from scope along with a range of non family areas. **I recommend that ancillary relief remains in scope (at least for cases where children are affected)**, but on a much more restrictive basis, for the following reasons:

- Looking at the general case for the priority of family legal aid, many of the arguments are relevant to ancillary relief: these include the emotional vulnerability of the client, the impact on children, the risks of homelessness and wider social problems for the family;
- Clients involved in ancillary relief disputes may have a greater need for legal assistance than is the case for children disputes, especially if the case raises complex issues such as pension law;
- I am recommending below a new system of Early Resolution Certificates as a vehicle for resolving disputes through negotiation or mediation. It is likely to be cost effective to give solicitors the possibilities of resolving all issues at an early stage, possibly as part of one mediation or structured negotiation. Excluding the chance to resolve financial issues at limited cost might be counter-productive;

<sup>305</sup>See Chapter 15, paragraph 15.50

<sup>306</sup>See Civil legal Aid (Costs) Regulations 2013, regulation 6(b); a similar change in Northern Ireland would require the affirmative regulation procedure (see Chapter 28)

- The statutory charge and the new system of “legal aid as a loan” (described in Chapter 3) would apply to all ancillary relief funding so that the long term net cost of retaining this area within scope should be minimal, except in cash flow terms;
- The strongest argument for removal from scope is the availability of alternative funding by using the matrimonial assets to fund the legal costs as discussed below; however this will not be true in all cases. I favour dealing with this issue by means of a merits criterion aimed at ensuring that legal aid is only provided when no other alternative exists;
- Defining the scope of this category is not straightforward; it is also important to make sure that married couples are not put in a worse position than unmarried couples who might pursue equivalent property disputes on a different legal basis.

18.35 Agenda consultation question 18 asked how the assets at issue in ancillary relief cases could be used to fund legal representation at the point of delivery rather than in the future (as is the case with the statutory charge)?

18.36 The Belfast Solicitors Association and Family Law Solicitors Association pointed out that the courts already had the power to make lump sum orders for financial provision - see Article 25 of the Matrimonial Causes (Northern Ireland) Order 1978; maintenance orders paid by the wealthier party could also help to cover legal costs. All the necessary powers existed but the courts in Northern Ireland in general did not make provision for legal costs in financial orders. There was potential for a practice direction on this topic to encourage a clear and consistent approach. The Bar argued that because the statutory charge now operated to recoup legal aid costs, all that was needed was patience to allow time for it to take effect. Several consultees emphasised that the charge was being properly enforced by the legal aid authorities, reducing the net cost of these cases.

18.37 The LSC suggested that the court should be able to look at all the assets in the case, even assets excluded from the calculation of financial eligibility, and release sufficient assets to pay for legal representation.

18.38 A further consideration on this issue is whether the parties are able to make private financial arrangements to secure funding for legal costs on the security of the matrimonial assets. One day a solicitor was on holiday on Italy’s gorgeous Amalfi coast when he hit upon the idea of a banking product designed to support clients through the divorce process. He developed Alternative Matrimonial and Litigation Funding Ideas (“AMALFI”). A range of financial products is now available in England and Wales for this purpose although they are primarily targeted at cases with substantial assets, where clients are likely to be outside legal aid eligibility limits.

18.39 In assessing financial eligibility in Northern Ireland, all assets which are in dispute are excluded from the assessment.<sup>307</sup> This can lead to legal aid being available to couples who are fighting over very substantial assets. A sensible control, which has applied for many years in England and Wales, is to place a ceiling on the total amount which can be disregarded under this rule. The principle should be that if there are sufficient funds in the mix, the parties, if necessary with the assistance of the court, should be able to find a way to fund legal costs without reliance on legal aid.

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<sup>307</sup>See Regulations 24 and 35 Civil Legal Services (Financial) Regulations (Northern Ireland) 2015

18.40 My conclusion is that in the majority of cases it should no longer be necessary for the legal aid scheme to support contested ancillary relief proceedings in court. However there are some cases where this will still be necessary – for example where there is no prospect of alternative funding or if the only issue in ancillary relief proceedings is transfer of a public sector tenancy.

Instead of removing these cases entirely from scope, I recommend the following changes:

- Early settlement of ancillary relief disputes should be facilitated under Early Resolution Certificates; if an Early Resolution Certificate covers finance, the client must agree to eventual repayment of the costs;
- **A new merits criterion** should apply to any certificate covering ancillary relief (beyond an Early Resolution Certificate); this will provide for legal aid to be refused if it is reasonable for the proceedings to be funded privately or from the assets in dispute, having regard to the nature and value of those assets;
- Regulations on financial eligibility should be amended to provide that **the maximum amount which can be disregarded under the “subject matter of the dispute” rule is £100,000;**
- **A Practice Direction** should be issued encouraging the courts to use their existing statutory powers to make provision for the payment of legal costs out of the assets in dispute.

### **The role of the family lawyer**

18.41 To achieve the best outcomes for clients and to reduce costs, lawyers in family proceedings need to see themselves less as warriors in the battleground of the courtroom and more as facilitators of compromise and, where possible, amicable resolution. When I was in private practice in England many years ago, it was common to find solicitors and barristers adopting a highly adversarial approach to family cases. Sometimes my role as a barrister became more akin to a mediator trying to bring together solicitors who were adopting the same entrenched and uncompromising attitudes as their clients. Much has changed over the years in the approach to family law; in all cases I observed in the Belfast family courts, all lawyers behaved in a professional and constructive manner. Best Practice Guidance issued by Children’s Order Advisory Committee, which was strongly supported by practitioners, encourages this positive approach, as do the relevant pre action protocols.<sup>308</sup>

18.42 Resolution, the body which represents family lawyers in England and Wales, expects all its members to comply with a Code of Practice, which includes the following terms:

“Membership of Resolution commits family lawyers to resolving disputes in a non-confrontational way.

We believe that family law disputes should be dealt with in a constructive way designed to preserve people’s dignity and to encourage agreements.

Members of Resolution are required to:

- Conduct matters in a constructive and non-confrontational way
- Avoid use of inflammatory language both written and spoken
- Retain professional objectivity and respect for everyone involved
- Take into account the long term consequences of actions and communications as well as the short term implications

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<sup>308</sup>See for example Ancillary Relief Pre Action Protocol, Northern Ireland Courts and Tribunals Service, paragraph 3.1

- Encourage clients to put the best interests of the children first
- Emphasise to clients the importance of being open and honest in all dealings
- Make clients aware of the benefits of behaving in a civilised way
- Keep financial and children issues separate
- Ensure that consideration is given to balancing the benefits of any steps against the likely costs – financial or emotional
- Inform clients of the options e.g. counselling, family therapy, round table negotiations, mediation, collaborative law and court proceedings”<sup>309</sup>

18.43 Even if the great majority of lawyers would comply with such principles in any event, I think it would be helpful, especially in the refocused family legal aid scheme proposed in this report, to have a clear statement of the standards expected of publicly funded family lawyers in Northern Ireland.<sup>310</sup> The proposed Registration Scheme seems the appropriate vehicle to achieve this. **I recommend that when the Registration Scheme is introduced, all lawyers who wish to undertake family work under the legal aid scheme, should be required to sign up to the Resolution Code of Practice (or similar principles arrived at after consultation) and to comply with Best Practice Guidance issued from time to time by the Children Order Advisory Committee.**

#### **Early Resolution Certificates**

18.44 On 1<sup>st</sup> April 2015 a quiet revolution took place in civil legal aid in Northern Ireland. The 2003 Order was brought into force. Whilst most attention was focussed on the replacement of the LSC with the Legal Services Agency, the changes to the statutory framework for civil legal services were far more significant. Under previous primary legislation the definition of civil legal aid was representation in proceedings; every legal aid certificate therefore had to specify actual or contemplated court proceedings. The 2003 Order still refers to “advice, assistance and representation” and defines “representation” as “representation for the purposes of proceedings”, but leaves the scope of these services to secondary legislation and includes a power to authorise the funding services which fall outside the scope of advice, assistance and representation.<sup>311</sup>

18.45 In my view there is presently an unhelpful gulf between advice and assistance under the Green Form scheme (which only covers work up to £88, subject to extensions) and certificates for representation in family proceedings which can cover £1,000s of legal services. The effect is that a legal aid lawyer cannot carry out a significant amount of work to resolve a client’s family problems without securing a form of legal aid which is specifically designed to approach those problems by means of court resolution. This makes representation in court the default method of dispute resolution which runs directly contrary to the objectives of the 2003 Order, one of which is to “achieve the swift and fair resolution of disputes without unnecessary or unduly protracted proceedings in court”.<sup>312</sup>

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<sup>309</sup>See [www.resolution.org.uk](http://www.resolution.org.uk)

<sup>310</sup>Such an approach is also endorsed by research findings: see Mapping Paths to Family Justice, University of Exeter, June 2014, Briefing Paper page 32

<sup>311</sup>2003 Order, article 10(2)

<sup>312</sup>2003 Order, Article 10(5)(c) – see also Chapter 17, paragraph 17.21

18.46 The ‘Mapping Paths to Family Justice’ research, discussed in Chapter 15, highlighted the importance of solicitor negotiation in dispute resolution. Concluding a case by negotiation may take a significant amount of work, especially if one or more settlement meetings are needed. Issuing proceedings may also be a necessary part of the process in order to bring the other side to the table or to secure proper disclosure on finances. Collaborative Law, which involves all parties committing to find a negotiated settlement without proceedings, may require structured ongoing engagement with the other side. Provided it is delivered cost effectively, Collaborative Law could have a significant role in Northern Ireland. Cases concluded through family mediation may still require legal advice (especially on finance issues) and work in finalising the agreement. The legal aid scheme needs a suitable and proportionate vehicle to cover all these approaches.

18.47 **I therefore recommend that a new form of family legal aid be established, which I am tentatively calling ‘Early Resolution Certificates’. All new non urgent certificates for private law family disputes should initially be issued in this form.** The solicitor would use this funding to try to resolve the dispute by any means, primarily negotiation or mediation. The work should be covered by a standard fee set below the level of the fee payable for representation in court.<sup>313</sup> It would be permissible to issue proceedings (at the lowest available court level) under an Early Resolution Certificate to protect the client’s position or as an aid to settlement, but the certificate would not need to stipulate or identify the proceedings.

18.48 I considered whether this new form of legal aid should operate simply as a form of extension to advice and assistance, but I believe that a new form of funding requires the additional control and discipline afforded by a legal aid certificate, including a detailed means assessment and merits criteria. The new approach can only work if it is not allowed to become a costs driver; hence the total volume of certificates granted should be no more than are granted under the existing scheme. Savings will arise from the proportion of cases which can be resolved at the new level at lower cost, without needing to be extended to cover contested proceedings. The merits criteria for Early Resolution Certificates need not be very different in practical operation from the current merits tests for civil legal aid. **I propose that the main criteria for an Early Resolution Certificate would be:**

- There must be a **Serious Family Dispute**, in other words there must exist children or finance issues sufficiently serious that they would justify the grant of a certificate under the current regime;
- A cost benefit test, expressed in private client terms, namely that a **reasonable private paying client** would be prepared to pay for the work to be undertaken if they could afford to do so.

18.49 For cases which cannot be resolved under an Early Resolution Certificate, an application can be made to extend the certificate to cover more traditional representation in proceedings. Stricter merits criteria would apply at this level so that extensions would only be granted where:

- Prospects of success and cost benefit criteria were satisfied (see further below);
- All reasonable attempts had been made to achieve a settlement;
- Mediation had either been attempted or was unsuitable to the case, typically because of domestic violence issues.

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<sup>313</sup>See paragraph 18.51 below

18.50 If an Early Resolution Certificate was extended to cover representation, the standard fee for Early Resolution could not be claimed and only the fee for representation under the new fee schemes would be payable. The Early Resolution fee would therefore never be an additional cost. The work covered by an Early Resolution Certificate should not be regarded as “additional work”; pursuing settlement should always have been an important part of providing representation in proceedings. For cases resolved under an Early Resolution Certificate the only costs which could be claimed in addition to the standard fee would be any mediator’s fees incurred.<sup>314</sup> I suggest that Early Resolution fees should consist of one fee for cases concerning only children issues, one for finance only, and a higher fee for resolving all issues at that level.<sup>315</sup>

18.51 The proposed new standard fee regime for family cases will need to be coordinated with the Early Resolution structure. I do not think this in itself would require major changes to the fee schemes. However, I have seen certain proposed draft fees which include a low standard fee for cases which do not proceed beyond one hearing.<sup>316</sup> This would not be compatible with an Early Resolution fee which needs to be pitched slightly below the lowest standard fee for litigation. **I recommend that in the new fee schemes, there should not be a separate standard fee covering only those cases which generate the lowest costs under the current system; such cases should be taken into account in setting the main standard litigation fee.** Other details of the operation of the Early Resolution system would need to be worked out in consultation, including determination of fees payable where some aspects of a case are resolved under Early Resolution and other aspects proceed to contested proceedings.

18.52 The Early Resolution Certificate system is intended to mark a significant change in the nature of public funding, away from funding to pursue legal processes and towards funding to resolve problems. The stricter merits criteria proposed at paragraph 18.49 and in Table 18 below will prevent some cases from moving on to contested proceedings but I believe that clients should also be incentivised to resolve the case at the earliest opportunity:

- **I recommend that the statutory charge exemption covering the first £2,500 of property recovered<sup>317</sup> should be abolished for all cases except those resolved under an Early Resolution Certificate;**
- **I recommend that the wider obligation to repay costs under “legal aid as a loan”<sup>318</sup> should not apply to cases resolved under a children only Early Resolution Certificate.**

### **Merits criteria for family legal aid**

18.53 In Chapter 3 I recommended that all legal aid certificates should be subject to objective merits criteria which reflect the nature and priority of the case. The policy behind these would reflect the approach previously proposed in the Northern Ireland Funding Code, consulted upon in 2013, but simplified and adjusted to the new statutory framework. In family cases there is less scope for precisely defined cost benefit criteria, therefore the private client test is the appropriate

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<sup>314</sup> Court fees could also be covered if the fees were incurred as an aid to settlement, but I suggest that this would require approval from the Legal Services Agency

<sup>315</sup> There should also be a separate fee for public law cases as discussed at paragraph 18.10 above

<sup>316</sup> I am also concerned that this creates an undesirable incentive to proceed to a second hearing

<sup>317</sup> See the Civil Legal Services (Statutory Charge) Regulations 2015, regulation 4(1)(c); the exemption is currently £3,000 in the higher courts; I favour £2,500 for Early Resolution Certificates

<sup>318</sup> Described in Chapter 3 at paragraphs 3.25 to 30; see also summary of financial conditions below.

approach (see paragraph 18.48 above). Family cases are not about “winning and losing” but prospects of success criteria are still essential to ensure that funding is targeted on cases which are likely to be of real benefit to the client. Guidance can specify what constitutes a successful outcome; for private law children cases this might be described as anything which the client would regard as a material improvement in arrangements for the children. When moving from Early Resolution to representation in proceedings, prospects of success needs to be measured against any proposals put forward by the other side: how likely is it that the client will improve upon what is on offer by going to court and would a reasonable private paying client be prepared to incur the costs of doing so?

18.54 Merits criteria must also reflect priorities so that it is easier to secure funding for the most important cases. For high priority areas where a prospects of success test applies, the minimum threshold should be “borderline” prospects of success, broadly equivalent to a prima facie or good arguable case. For other areas, prospects of success should be at least 50%. In England and Wales, cases in the borderline category have been removed from scope but I believe they should be retained for high priority areas. Domestic violence injunctions are clearly a high priority area within family, as are cases which will determine where a child should live or the principle (as opposed to the details) of contact. I would propose a minimum 50% prospects merits threshold for representation in all other private law proceedings. However, the final policy on this will need to await the outcome of the appeal in the *J.S.* case.<sup>319</sup>

18.55 **Table 18 summarises the principle merits criteria I recommend for family legal aid:**

**Table 18 Merits criteria in family cases**

Type of Funding	Key Merits Criteria
Advice and Assistance	Private Client Test – see Chapter 25
Representation in Public Law Proceedings (other than appeals)	Representation necessary to help court determine interests of the children (see paragraph 18.18)
Representation in Public Law Proceedings (appeals)	Representation necessary to help court determine interests of the children Prospects of Success – minimum Borderline
Domestic Violence Proceedings	Prospects of Success – minimum Borderline Private Client Test
Early Resolution Certificate	Serious Family Dispute (see paragraph 18.48) Private Client Test
Representation in Private Law Children Proceedings	Prospects of Success – minimum either Borderline or 50% (see paragraph 18.54) Private Client Test Reasonable attempts have been made to settle Mediation has been tried or is not suitable

<sup>319</sup>*J.S. and Director of Legal Aid casework and Lord Chancellor*, [2015] EWHC 1965 (Admin), Mr Justice Collins, 15<sup>th</sup> July 2015; see Chapter 3, paragraph 3.35

Representation in Ancillary Relief and any other family proceedings	Prospects of Success – minimum 50% Private Client Test Reasonable attempts have been made to settle Mediation has been tried or is not suitable Not reasonable for proceedings to be funded privately or from the assets in dispute (paragraph 18.40)
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### Financial conditions for family legal aid

18.56 The general approach to financial conditions of civil legal aid, including contributions, was described in Chapter 3. This regime should apply to family cases including the new Early Resolution Certificates. I do not recommend any change to the exemption from means testing for children, parents and those with parental responsibility in care proceedings. The power to increase the upper financial eligibility limit for domestic violence cases should also be retained.<sup>320</sup>

18.57 Subject to consultation, the proposed application of legal aid as a loan to family cases can be summarised as follows:

- Any certificate which is granted or extended to cover ancillary relief or other financial matters (including at the Early Resolution level) should only be issued subject to the client agreeing that all costs incurred will ultimately be repayable, usually by a charge on the client’s home;
- Any certificate which is extended to cover representation in private law children cases (beyond an Early Resolution Certificate) should be subject to the obligation to repay if the client owns a home or an interest in a home;
- If a certificate is concluded covering only public law proceedings, domestic violence proceedings or Early Resolution of children only matters, no obligation to repay should arise.

### Future developments

18.58 If the family legal aid scheme is reformed along the lines suggested in this Chapter, it will need to be kept under careful review. As an area of legal aid where the provision of help in Northern Ireland will be much more extensive and effective than England and Wales, it is important to be able to demonstrate that the revised scheme is under tight control and that savings have been achieved where they can.

18.59 The three most important aspects to monitor will be:

- The operation of the new fee schemes;
- The control of long running contact disputes;
- The proportion of cases which are resolved at the new Early Resolution level.

The Department should be prepared to tweak the regulations governing remuneration, merits criteria and financial conditions to ensure all projected savings are realised.

18.60 If in the future it becomes necessary to make further substantive savings, there may be no option but to remove further areas of family from scope. If this becomes necessary I believe the priority should be to retain cover for Early Resolution work even if funding for representation in proceedings becomes exceptional. Legal support at an early stage in the process can be invaluable

<sup>320</sup>Civil Legal Services (Financial) Regulations (Northern Ireland) 2015, regulation 10

either if it produces a settlement or if the client can at least be helped and steered to better survive the court process as a litigant in person.

### **Summary**

18.61 Family legal aid provides help for children and vulnerable adults who are likely to have no other effective means of securing access to justice. The family scope reductions implemented in England and Wales should not be replicated. Family legal aid in Northern Ireland should remain available for most cases, except for divorce, but should be subject to increased controls.

18.62 Even high priority categories like domestic violence and public law proceedings should be subject to appropriate merits criteria. In public law cases, legal aid should only be provided where it is necessary to assist the court in determining what is in the best interests of the children.

18.63 Long running family cases should be discouraged by a combination of remuneration rules, cost limitations and new powers to require repayment of legal aid costs where the client fails to comply with orders of the court. Ancillary relief should remain within scope only for those cases where no private funding alternatives are available.

18.64 Legal aid for private law family proceedings should be more about solving problems and less about following legal processes. A new system of Early Resolution Certificates should be established to encourage settlement through negotiation and mediation. Financial conditions should create incentives for clients to resolve cases at this level. Funding for representation in family court proceedings should only be available where attempts at settlement have been unsuccessful and strict criteria for prospects of success and cost benefit have been satisfied. Legal aid family lawyers should commit to constructive, non adversarial dispute resolution. If further savings are needed in the longer term, the priority should be to retain cover for early advice and settlement.

# Part D Civil Non Family Justice

## 19 The Civil Courts

***“The civil justice system in this country urgently needs reform. The time is right for change... I have been given a unique opportunity to help achieve the change which is needed.”<sup>321</sup>***

19.1 This Chapter looks at civil justice reform in the United Kingdom and options for improved efficiency in the civil courts in Northern Ireland.

### **The civil courts in England and Wales**

19.2 In April 1999 new Civil Procedure Rules came into operation in England and Wales, bringing into effect the proposals in Lord Woolf’s Access to Justice report.<sup>322</sup> These were the most important procedural reforms in England of modern times. They were intended to address a civil justice system that was too slow, too expensive, too complex and too inaccessible. The overriding objective of the reform was to enable the court to deal with cases justly by:

- ensuring that the parties are on an equal footing;
- saving expense;
- dealing with a case in ways which are proportionate to the nature of the case;
- ensuring that a case is dealt with expeditiously and fairly; and
- allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.<sup>323</sup>

19.3 Some of the most significant reforms introduced were:

- judicial case management, transferring responsibility for progressing litigation from the parties to the court;
- pre-action protocols requiring engagement and disclosure from the parties before the issue of proceedings, with cost sanctions for non compliance;
- encouragement for out of court settlement and alternative dispute resolution;
- allocation of all civil cases, according to value and complexity, to one of three procedural routes: small claims track; fast track; multi-track;
- a settlement regime under Part 36 of the rules, creating cost penalties for proceeding and failing to do better than the opponent’s offer, and giving claimants the ability to make “offers to settle”;
- clearer and simpler rules and procedures, using plain English in place of Latin.

19.4 The Woolf reforms are widely regarded as successful in most respects, except in relation to the overall control of costs. This gave rise to the Jackson review of civil costs in 2009, considered in

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<sup>321</sup> Lord Woolf, Access to Justice, Final Report, Overview, paragraph 20

<sup>322</sup> Access to Justice, Final Report, 26 July 1996, DCA Archive

<sup>323</sup> Overriding objective, Civil Procedure Rules, Part 1

Chapter 22. Even pre-action protocols are sometimes regarded as a mixed blessing because they resulted (like so many reforms) in significant front loading of costs.

19.5 The Woolf reforms were not brought into effect as a whole in Northern Ireland, although many of the aspects of reforms, including pre action protocols, have been introduced over time. Some reforms, particularly in relation to control of costs, are generally seen as answers to problems which arose in England but did not exist to the same extent in Northern Ireland, especially with the greater control afforded by scale costs in the county court. Whether there remain further reforms which would be beneficial in Northern Ireland is considered further at paragraph 19.17 below.

### **Making Justice Work in the Scottish courts**

19.6 There has been an ambitious programme of reform of the civil courts in Scotland. As part of the Making Justice Work initiative a review of the civil courts was undertaken by Lord Gill in 2009. Lord Gill concluded that radical structural reform was needed to court structures designed in the Victorian era: “the practitioners of 100 years ago would have little difficulty picking up the threads of today’s system”.<sup>324</sup> The majority of the recommendations are to be implemented during 2015 under the Courts Reform (Scotland) Act 2014. Some of the key reform themes are:

- reform and creation of new tiers of civil court to ensure that cases are dealt with at the most proportionate level;
- cases worth up to £100,000 to be dealt with by Sheriff’s courts (previously dealt with at high court level, the Court of Session);
- greater use of specialist judiciary, including creation of a national personal injury court;
- creation of new judicial tier of sheriffs with summary jurisdiction.

19.7 Further reform of civil costs and legal aid is under consideration in the draft Expenses and Funding of Civil Litigation Bill, recently consulted upon by the Scottish government. This is discussed further in Chapter 22.

### **Civil court fees**

19.8 As discussed in Chapter 1, court fees have an important role in deterring unnecessary litigation and generating revenue for the court service, but can act as a significant barrier to access to justice. With effect from 9<sup>th</sup> March 2015 there was a substantial increase in court fees for claims worth over £10,000 in England and Wales. These are now fixed at 5% of the value of the claim; for example for a claim worth £150,000 the fee was previously £1,315 but has now risen to £7,500, almost a five-fold increase. Fee remissions are however available based upon disposable capital and gross monthly income.

19.9 In Northern Ireland the level of fees is much lower. Although a great range of fees are applicable for particular steps in proceedings, these are generally in a range not exceeding £200. Even in the High Court fees seldom exceed £300.<sup>325</sup>

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<sup>324</sup>Report of the Scottish Civil Courts Review, Introduction, page (iii)

<sup>325</sup>See Supreme Court Fees (Amendment) Order (Northern Ireland) 2007

19.10 Practitioners I have spoken to in London are particularly concerned about the new higher fees in relation to clinical negligence and other personal injury claims (for which legal aid is no longer available). The removal of legal aid for clinical negligence under LASPO was relatively uncontroversial because alternative funding through conditional fee agreements was well established. The biggest problem for privately funded clinical negligence cases is the funding of disbursements, so the substantial jump in court fees is worrying.

19.11 I make no specific recommendation for court fees policy in Northern Ireland except to say that it is essential that this issue is considered not in isolation but alongside decisions on the scope of legal aid. As money damages in Northern Ireland move from public to private funding it is important that court fees are kept affordable, either by retaining them at modest levels or by ensuring that means tested fee exemptions operate fairly and effectively. There may however be scope for an increase, so long as fees are not so high as to deter meritorious cases. It must also be remembered that any increase in court fees would be an added pressure on the legal aid fund, even if the money is only moving from one part of the Department's budget to another.

### **Jurisdiction limits**

19.12 In February 2013 the county court in Northern Ireland was given jurisdiction to deal with civil claims worth up to £30,000.<sup>326</sup> Claims in the county court under £10,000 can be dealt with by the District Judge. The Small Claims Court limit is £3,000. In England and Wales the county court covers a wider range of cases. It has unlimited jurisdiction and claims worth no more than £50,000 must be started at the county court level. Claims under £25,000 are generally allocated to the more streamlined Fast Track procedure.

19.13 Agenda consultation question 22 asked what benefits might accrue from further increases in county court and small claims jurisdictional limits in Northern Ireland.

19.14 Responses on this issue were mixed. The LSC and Housing Executive supported raising the limits and believed that county court scale costs worked well for most personal injury claims. Some solicitor firms were also content with this, suggesting that High Court judges could be seconded to the county court to aid the transition, but others opposed any change. The Bar believed the new county court limits were just bedding in and did not see any further benefits to raising the jurisdictional limits. The Belfast Solicitors Association objected to any increase in the absence of clear evidence to justify the change. There was no support on consultation for changing the threshold for small claims; many believed an increase in this limit would disadvantage claimants as against defendants with legal representation.

### **Civil procedure reform in Northern Ireland**

19.15 Agenda consultation question 22 also asked about the merits of creating a single point of entry into the county court for all but the most complex cases. What further improvements could be made to processes, especially at the pre-action stage, that would facilitate timely resolution of money damages cases? Question 44 asked more generally about the potential for greater

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<sup>326</sup>The County Courts (Financial Limits) Order (Northern Ireland) 2013

efficiencies in Northern Ireland's justice system. I set out some common themes of justice reform in Chapter 7, including hearings by email, listing issues and delay.

19.16 In terms of consultation responses specific to civil non family cases, there was quite wide support for creating a single point of entry at county court level into the system for most cases, both from the point of view of claimants and defendants (APIL and Zurich). However, the Bar strongly opposed a single point of entry. APIL and Zurich agreed on greater use of specialist judges, although APIL were also keen that cases continued to be heard locally. Zurich believed much could be learned from the direction of reform in Scotland (summarised at paragraph 19.6 above).

19.17 There was general support for the pre-action protocols which operate in Northern Ireland but concerns were expressed that they were not always complied with by the parties and not always effectively enforced by the court.<sup>327</sup> A clearer regime of costs penalties might be beneficial as operates in England and Wales. Zurich suggested that the county court should have similar powers to the High Court to penalise parties by orders for wasted costs.<sup>328</sup>

19.18 In England and Wales road traffic claims are usually issued under an online process known as the "online portal". There was very little support for such a system in Northern Ireland. APIL believed that an online portal should not be introduced without careful piloting. The Belfast Solicitors Association believed there was no case for portals; the cost would be prohibitive and the benefits unclear; in general the BSA felt that the courts of Northern Ireland were not in need of fundamental reform, although efficiencies could be achieved in the current system. In any event, procedural reforms often gave rise to satellite litigation to determine how strictly procedural rules must be enforced.<sup>329</sup>

19.19 Several consultees argued for greater use of ADR for non family cases, including arbitration schemes. These are considered in the next Chapter. There were also calls for more web-based support within the civil justice system; this is covered in Chapter 26.

## Conclusions

19.20 Looking first at jurisdiction limits, at first sight it would be desirable to raise the county court jurisdiction because costs in the county court are lower and more controlled than those in the High Court. High costs are generally perceived as a barrier to access to justice. However, for more complex civil non family cases, higher costs may be needed for the case to be viable for the claimant solicitor; in that sense, high costs can sometimes be an enabler of access to justice. The desirability of change all depends on what funding mechanisms are in place and who is ultimately paying the bills, whether Defendant, legal aid fund, insurer or some other source.

19.21 I am sympathetic to raising the county court limit, probably to £50,000. After all, size of claim is not always a reliable proxy for complexity. However I do not think a final decision on the

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<sup>327</sup> Although see criticism and costs penalties for non-complying Defendants in *Monaghan v Graham* [2013] NIQB 53

<sup>328</sup> See The Rules of the Court of Judicature (NI) 1980, Order 62

<sup>329</sup> See *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1526 concerning the consequence of missing a deadline for filing a costs budget

financial limit should be made until consultation is complete on the private funding options proposed in Chapter 22. Whenever the financial limits are set **I recommend that the county court is made the compulsory entry point for a much greater range of cases.** I think the onus should primarily be on practitioners to demonstrate why larger damages claims could not be pursued within the county court scale costs regime (bearing in mind the power to transfer unusually grave or complex individual cases to the High Court if necessary). Pending any such reform, the Legal Services Agency should encourage publicly funded cases to be pursued in the county court unless there is a compelling reason to do otherwise.<sup>330</sup>

19.22 Lord Justice Gillen's Review of Civil and Family Justice provides an excellent opportunity to consider the non family justice reform options suggested in this report. **I recommend that the Gillen Review addresses the matters identified in Chapter 7 and in this Chapter relating to non family justice.** Reforms which I suggest would be beneficial in Northern Ireland might include:

- enhancing the jurisdiction of the county court to make it the entry point for the vast majority of civil litigation, leaving it to the court rather than the parties to decide whether a case should be transferred to the High Court;
- developing the role of specialist judges;
- establishing a more uniform and strict approach to enforcement of pre-action protocols;
- building in a procedural requirement for parties to have explored ADR at key stages before trial, with costs consequences for unreasonable refusal;
- establishing a strict costs regime to incentivise settlement, including giving claimants the power to make offers to settle with cost consequences, as applies in England and Wales.<sup>331</sup>

### Summary

19.23 Lord Justice Gillen's Review of Civil and Family Justice provides an opportunity to improve the efficiency of civil non family court processes in Northern Ireland, taking into account the experience of recent initiatives in other jurisdictions. Outcomes of this work could include a wider jurisdiction for the county court, better enforcement of pre-action protocols and increased support for ADR and settlement within the court process.

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<sup>330</sup>Guidance from the Department under section 3 of the 2014 Act might assist

<sup>331</sup>Civil Procedure Rules, Part 36

## 20 Alternatives to Civil Litigation

***“...insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible.”<sup>332</sup>***

### **Complaint and Ombudsman schemes**

20.1 Far more problems are resolved in Northern Ireland by pursuing complaint schemes than are dealt with in the courts. Although these will typically deal with minor and non-justiciable problems, complaint and ombudsman schemes deal with many serious issues, an unknown number of which might otherwise have ended in civil litigation. The question for this review, raised in Agenda consultation question 24, is whether these systems can be enhanced to resolve problems early and effectively, taking pressure off the courts and legal aid.

20.2 All responses recognised that complaint and ombudsman schemes had an important role. The LSC and Housing Rights Service emphasised the need for the service to be properly resourced to avoid delays. The LSC suggested that a single website could be established to provide links to all the individual Ombudsman schemes, an approach which has been adopted in New Zealand. The Belfast Solicitors Association cautioned that Ombudsmen needed to take care not to exceed their powers, as this can in itself give rise to litigation.<sup>333</sup> The Bar emphasised the importance of the legal framework defining the powers and procedure of each scheme.

20.3 The powers and effectiveness of the Prisoner Ombudsman were highlighted in the first Access to Justice Review<sup>334</sup> and on consultation. The Northern Ireland Human Rights Commission noted the recent consultation to place this scheme on a statutory footing, which was now being taken forward.<sup>335</sup> The Prisoner Ombudsman’s consultation response supported the recommendation in AJ1 that apologies and offers of redress ought not to be taken into account as admissions of negligence in subsequent proceedings. The BSA also supported this proposal.

20.4 NIACRO reported that many prisoners had little confidence in the Ombudsman scheme because of the need to go through the prison complaints system first – many preferred to resort to judicial review to avoid this process. Niacro proposed that public confidence in the scheme would be enhanced if the Ombudsman published more details of the range of complaints covered. The Prison Ombudsmen reported that, in 2013/14, 46% of complaints were upheld and 90% of recommendations were accepted. The service needed to be seen to be effective so that judicial review is only used as the last resort. The recent case of *Gifford* supported the principle of exhausting other remedies before resorting to litigation.<sup>336</sup>

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<sup>332</sup> Lord Woolf in *Cowl and Others v Plymouth City Council* [2001] EWCA Civ 1935X

<sup>333</sup> See *JR55 v Northern Ireland Commissioner for Complaints* [2014] NICA 11 where a consolatory payment was quashed

<sup>334</sup> See AJ1 pages 91-93

<sup>335</sup> See *Placing the office of the Northern Ireland Prisoner Ombudsman on a statutory footing: Summary of Responses and Way Forward*, Department of Justice, 12 June 2014

<sup>336</sup> *Gifford v Governor of HMP Bure and another* [2014] EWHC 911 (Admin), [2014] All ER (D) 43 (Apr)

20.5 I agree with consultees about the importance of complaint and ombudsman schemes operating effectively, especially for those cases which might otherwise generate court proceedings. Dealing with issues in a timely manner is an essential part of this. Much helpful information is already available, including the excellent guide to “Alternatives to Court in Northern Ireland”.<sup>337</sup> I do not make any specific recommendations for particular schemes, noting that the powers of the Prisoner Ombudsman were recently the subject of consultation by the Department. I do however **recommend that the principle of the courts being the last resort is set out in a specific merits criterion for civil legal aid.** I propose that this should be in the form previously contained in the Northern Ireland Funding Code and should be supported by guidance dealing with specific areas and schemes operating in Northern Ireland:

“An application [for civil legal aid] may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued.”<sup>338</sup>

20.6 The issue to consider under such a criterion is not whether the complaint system can deliver the same remedies as the court (which will seldom be the case); it is whether pursuing the complaint is the most sensible and proportionate step to take – would a private paying client invest in expensive litigation if there was a free alternative which might resolve or at least clarify some of the issues in the case? The application of this principle to judicial review proceedings and the question of delay and time limits within such proceedings are considered in the next Chapter.

### **Non Family Mediation**

20.7 A series of leading cases in England and Wales have emphasised the importance of mediation. Where a party unreasonably refuses an offer of mediation, they may be deprived of their costs even if they go on to be successful in the litigation.<sup>339</sup> As mentioned in the last Chapter (at paragraph 19.21) **I recommend that the courts in Northern Ireland should take the same approach, imposing costs penalties for unreasonable refusal of ADR.** The arguments in favour of mediation, in terms of saving costs and producing better outcomes for clients, are by no means restricted to family cases.

20.8 The Housing Rights Service state in their consultation response that they believe ADR techniques such as mediation could be particularly beneficial in a range of landlord/tenant disputes, though would not be relevant in homelessness cases. I agree about this potential in housing cases; it is an example of mediation having an important role in cases where the parties have an underlying relationship. The mediator may help the parties to resolve their future relationship, looking beyond the immediate dispute which would have been before the court. This consideration also helps to explain why mediation has been slow to take off in personal injury and other money damages cases where there is typically no pre-existing relationship between the parties. I have however seen impressive demonstrations of mediation in clinical negligence disputes.

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<sup>337</sup>Published by Northern Ireland Ombudsman, Law Centre (NI) and Queen’s University Belfast

<sup>338</sup>The Northern Ireland Funding Code, LSC, Standard Criterion 5.4.3

<sup>339</sup>See *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002; *Cowl and Others v Plymouth City Council* [2001] EWCA Civ 1935X

20.9 Like family mediation, there are no centralised or official quality standards for non family mediation in Northern Ireland, but a range of training courses are available. The Law Society have for many years run a Mediation Training Course and offer a Dispute Resolution Service provided by solicitor and barrister mediators.<sup>340</sup> The Bar of Northern Ireland run a Barrister Mediation Service; this covers a range of non family areas including Banking, Commercial law, Debt, Employment, Landlord and tenant, Neighbour disputes and Professional negligence. To become accredited as a Barrister Mediator, the barrister must have completed a training course from a professional body providing at least 40 hours of tuition and role play. The Bar are however sceptical of the value of mediation in money damages cases, where negotiation is likely to be more cost effective, and are opposed to compulsory mediation. Mediators do not have to be lawyers of course. Some mediators in Northern Ireland have benefited from training from leading mediation organisations in England, such as CEDR.

20.10 I believe mediation should become a more common feature of the legal aid scheme for non family cases in Northern Ireland, although I do not think it would be beneficial to require it to be addressed in all cases. Under the 2003 Order, mediation fees are in my view a legitimate disbursement under either advice and assistance or civil legal aid. For the reasons given in Chapter 17 (which discussed the cost effectiveness of family mediation) mediation should no longer be regarded as a cost driver: the alternative is almost always going to cost more. Although not compulsory, it would always be sensible to seek a prior authority from the Legal Services Agency before incurring mediation fees, otherwise such fees might be disallowed on assessment. The main issues for the Agency to consider would be:

- The proposed mediator's training and qualifications; in time, specific quality standards should be established for non family mediation (as for family), although for the time being the Agency need not be too prescriptive of specific qualifications while the service develops;
- The reasonableness of the proposed fees and overall cost of mediation; guideline rates should be established for non family mediation; the recommended fees for Mediators NI and for the Barrister Mediation Service are published on the relevant websites.<sup>341</sup>

20.11 The general criterion proposed at paragraph 20.5 above would allow the Agency to refuse a certificate for a case where mediation should be tried and proceedings were not necessary, but the question of mediation is more likely to become an issue in practice once a certificate is in force. This may well arise when the Agency receives representations from an opponent who is proposing mediation. The normal response of the Agency in that situation should be to limit the certificate to prohibit any further steps in the litigation until the legally aided client has pursued mediation.<sup>342</sup> Although reaching agreement at mediation is a voluntary decision, mechanisms are needed (as in family) to require the client to give the process a try. The principle that "You can lead a horse to water but you cannot make him drink" applies here.

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<sup>340</sup>See [www.mediatorsni.com](http://www.mediatorsni.com)

<sup>341</sup>As above and [ww.barofni.com](http://ww.barofni.com); the Bar starting fee of £65 covering one hour preparation and a one hour mediation, looks very competitive

<sup>342</sup>This would not however be appropriate if, for example, the offer of mediation did not appear genuine or was a tactical ploy to delay trial

20.12 The potential for mediation to resolve cases which would otherwise proceed to a contested hearing will be tested in a pilot planned for Small Claims in Belfast from September 2015. The pilot is expected to run for six months and will involve telephone based mediation in claims where a defence has been filed. This should provide a useful insight into whether it would be cost effective to build mediation options more widely into the litigation process, a topic considered further in Chapter 26.

20.13 To further encourage mediation in non family civil legal aid **I recommend that regulations should place an obligation on a legal aid solicitor to report to the Agency if an opponent is offering to mediate but the legally aided client does not agree to do so;** this will give the Agency the opportunity to decide whether to limit the certificate to require mediation to be tried as described above.

20.14 Community mediation is a form of non family mediation specialising in resolving disputes between neighbours and communities. There are many providers of such services in England, Wales and Scotland but, despite its potential, the service appears to be less widely available in Northern Ireland. The possibility of developing such a service by grant funding is mentioned in Chapter 26.

#### **Early Neutral Evaluation (“ENE”)**

20.15 ENE tends to be the least highly regarded form of ADR, but it has much to offer. ENE is a process under which the parties to a dispute agree to obtain an independent and non binding evaluation of their dispute, as a spur to settlement. ENE is usually sought from an experienced lawyer or judge, although suitably qualified experts can also perform this role. ENE is often provided judicially within the court system, the best example in Northern Ireland being the Masters of the High Court who regularly provide evaluations of ancillary relief disputes. More informally, some judges give “indications” to counsel at interim stages – often giving rise to a prompt settlement. There are currently proposals to build ENE into the procedures before employment tribunals in Northern Ireland.<sup>343</sup>

20.16 There is no reason why ENE should not be considered at an early stage in the process. This could save considerable time and cost. Even if one or both parties choose not to accept the outcome of the ENE, the process may help to identify and narrow the issues, in a similar way to mediation. ENE is most often carried out on the papers and is particularly suited to disputes of law or matters of discretion, but less suited to cases which turn on disputes of fact. Barristers are well suited to providing ENE, especially if both firms of solicitors involved in a case have confidence in an experienced barrister with expertise in the subject area.

20.17 My comments above encouraging a greater role for mediation in legal aid cases are equally applicable to ENE. In line with the recommendation at paragraph 20.13 **I recommend that a legal aid solicitor should be under an obligation to report to the Agency if an opponent makes an offer of ENE which the legally aided party does not accept.** I also believe that more needs to be done to promote ENE generally and to make it a more recognised part of the toolkit of civil dispute resolution. **I recommend that the Bar and Law Society of Northern Ireland cooperate to promote**

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<sup>343</sup>See ‘Don’t leave me this way – diverging employment laws’, The Writ, June 2014

**the use and provision of ENE by their members and consider the merits of establishing panels of experienced lawyers to provide an ENE service and a protocol for their instruction.** This could include guideline fees for the service.

### **Arbitration**

20.18 Arbitration is a process by which parties to a dispute agree to appoint someone to make a binding determination of their dispute. It is intended to operate as a complete alternative to the court. Many commercial and building contracts have arbitration clauses under which parties agree in advance to deal with disputes by arbitration rather than litigation. Arbitration processes can be very sophisticated, replicating many of the features of court resolution.

20.19 Arbitration is less well established for everyday claims, but there are signs of an increasing willingness to see if simpler and more cost effective processes can be designed for specific types of case. Before the election Charlie Elphicke MP fought an almost heroic campaign to introduce a system of compulsory mediation and arbitration by surveyors to resolve boundary disputes.<sup>344</sup> The government rejected the idea, preferring to try to improve the court system. I think Mr Elphicke was right. The courts have always struggled to resolve boundary and neighbour disputes in a proportionate manner, although in Northern Ireland the county court scale costs would be a significant advantage in this regard. Costs in these cases can sometimes get ridiculously out of hand.<sup>345</sup>

20.20 In response to the Agenda's call for more efficient ways to resolve cases inside or outside court, JMK Solicitors (a large and specialist personal injury firm) proposed establishing an arbitration scheme for personal injury claims. The idea would be that the two sides would agree to appoint an experienced solicitor or barrister to determine the case. The arbitrator's fee would be comparable to the court fees which would otherwise have been incurred at various stages of the litigation process. The proposed procedure would mirror the usual stages of civil litigation but with savings on time, flexibility over location and arrangements for the final hearing and less need for legal representation for the Defendants.

20.21 I wish such initiatives well. Such an approach could be particularly effective where there is a high volume of cases involving the same law firms or insurers. If there is a good degree of respect between the parties or their representatives, it should not be impossible to design processes which are a better fit to their objectives than the courts. It is the nature of courts to strive for the best possible decision making processes, assembling every piece of relevant evidence before the final decision. If parties prefer to choose a system which may deliver a less perfect form of justice but which is cheaper and meets their needs, good luck to them.

20.22 I do not need to make any recommendations on arbitration schemes which should be allowed to develop naturally where the need arises. Establishment of an arbitration scheme might be assisted under the new approach to grant funding which I propose in Chapter 26.

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<sup>344</sup>See "Absurd" neighbour wars to be kept out of court, Times, 24<sup>th</sup> February 2015

<sup>345</sup>See Judges' fury at 'Dickensian litigation' over 'toxic' dispute, Law Society Gazette, 16<sup>th</sup> January 2015

## **Summary**

20.23 The legal aid scheme has for too long been court-centred, failing to recognise the importance of complaint and ombudsman schemes and all varieties of alternative dispute resolution. Criteria for public funding should ensure that recourse to the courts is the last resort, as it would be if people had to pay for legal representation with their own money. Mediation and early neutral evaluation should be encouraged within the legal aid scheme, supported by new reporting obligations to identify cases where funding should be diverted from court resolution towards ADR. Arbitration schemes should be allowed to develop in specific areas where they are found to be a better alternative than the courts.

## 21 Judicial Review

***“And still when mob or Monarch lays  
Too rude a hand on English ways,  
The whisper wakes, the shudder plays,  
Across the reeds at Runnymede”<sup>346</sup>***

21.1 No topic has aroused more passion on consultation than the future of legal aid for judicial review proceedings, the means by which the lawfulness of decisions by the state are challenged. This Chapter looks at recent reforms of judicial review in the United Kingdom and options for reform of the procedures and funding of judicial review in Northern Ireland.

### Recent reforms

21.2 In England and Wales, government reforms have made it harder to challenge government decisions. In April 2014 new remuneration regulations under LASPO came into force for legally aided judicial reviews.<sup>347</sup> These provided that if the court refused permission<sup>348</sup> in a publicly funded judicial review, no fees could be claimed under the legal aid certificate. In cases where the court neither granted nor refused permission, for example where the case was settled or withdrawn, payment would be at the discretion of the Legal Aid Agency.

21.3 These regulations were themselves judicially reviewed on the grounds that they were *ultra vires*,<sup>349</sup> were incompatible with the statutory purpose of the legislation and would have a chilling effect on access to justice. During this review I was able to discuss the case with Mackintosh Law, one of the firms leading the challenge. The case was successful in that the regulations were struck down as being incompatible in certain respects with the statute, although the court did not find that the “no permission, no fee” regime was inherently unlawful.<sup>350</sup> It remains to be seen what steps the Ministry of Justice will take to revise the regulations and to what extent the “no permission, no fee” policy will be reinstated in England and Wales; whether such an approach should apply in Northern Ireland is discussed at paragraph 21.18 below.

21.4 The Criminal Justice and Courts Act 2015, which received Royal Assent shortly before the general election, made significant changes to the law and practice of judicial review in England and Wales. Section 84 of the 2015 Act provides that the court:

“must refuse to grant relief on an application for judicial review...if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.”

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<sup>346</sup>Or indeed, Irish ways; from *The Reeds of Runnymede* by Rudyard Kipling, written on 700th anniversary of Magna Carta

<sup>347</sup>See the Civil Legal Aid (Remuneration) Regulations 2013, regulation 5A

<sup>348</sup>Permission (or “leave” as it is known in Northern Ireland) is an important filtering stage in which the court, initially on the papers, determines whether there is sufficient merit in the case to proceed to a full hearing

<sup>349</sup>i.e. that ministers had no power under the Act to make the regulations

<sup>350</sup>*Ben Hoare Bell Solicitors & Ors, R (On the Application Of) v The Lord Chancellor* [2015] EWHC 523, 3rd March 2015

“The court may disregard the [above] requirements...if it considers that it is appropriate to do so for reasons of exceptional public interest.”

21.5 Previously, if a court on judicial review found a government decision unlawful, the usual approach would have been to quash that decision and refer it back to the government to be retaken. The above reform means that the court will need to consider more closely whether there is any real prospect of the decision changing if it is quashed. It is hard to predict how significant the reform will be, not least because there is no statutory guidance as to how the court will interpret the test of “exceptional public interest.” The reform brings into sharp focus two separate arguments for the importance of judicial review and the priority it should have within the legal aid scheme:

- The general public interest in ensuring that public authorities act within the law;
- The specific importance of protecting the public from the consequences of unlawful decisions.

21.6 I return to these justifications at paragraph 21.27 below because they are relevant to the way merits criteria should be defined for judicial review cases. The 2015 Act also makes changes in relation to orders for costs in judicial review proceedings; again, these provisions would not apply directly to Northern Ireland but the policy behind them is considered at paragraph 21.21 below.

### **Judicial review statistics**

21.7 In Northern Ireland the High Court dealt with 345 applications for leave to apply for judicial review in 2013/14.<sup>351</sup> Of these 107 were granted, 208 were refused, withdrawn or dismissed while 30 were listed as “Other”. As seen in Table 8.2 this is a slightly lower figure per head than in England and Wales, but if one takes away the immigration and asylum judicial reviews (which are the majority category in England and Wales) Northern Ireland has significantly more judicial reviews per head than England and Wales.

21.8 In 2013/14 the LSC received 405 applications for civil legal aid for judicial review of which 276 certificates were granted (68% of the total, a relatively high refusal rate compared to other non family civil categories). In the same year 200 judicial review certificates were closed at a total cost of £2,103,000, an average cost per case of £10,515. This is the highest average cost per case of any reported civil category although, as the Law Society correctly point out, it is less than the average cost of such cases in the previous year. Of the total costs in 2013/14, 41% relates to solicitor’s fees, 44% counsel’s fees and 15% disbursements. In 2014/15 263 judicial review certificates were closed at a total cost of £2,676,978, a slightly reduced average cost per case of £10,179.<sup>352</sup> In England and Wales the average cost of a closed judicial review certificate in 2013/14 was £5,478;<sup>353</sup> this rose to an average of £6,351 for 2014/15. Average judicial review costs were therefore 60% higher in Northern Ireland in 2014/15 (having been 90% higher the previous year).

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<sup>351</sup>Northern Ireland Courts and Tribunals Service, data request

<sup>352</sup>Legal Services Agency figures – the % breakdown by cost type was almost unchanged

<sup>353</sup>Legal Aid Agency, legal aid statistics; the cost breakdown for 2013/14 was 61% solicitor’s fees, 31% counsel’s fees and 8% disbursements and other costs

21.9 Table 21 shows the number of judicial review certificates granted in Northern Ireland in recent years. 324 certificates<sup>354</sup> in 2014/15 equates to one certificate for every 5,647 members of the population. The equivalent figure for England and Wales is 3,766 certificates<sup>355</sup> which equates to one certificate for every 15,122 people. Publicly funded judicial reviews are proportionality 2.7 times more common in Northern Ireland than in England:

**Table 21 Northern Ireland judicial review certificates granted**

Year	Volume
2011/12	216
2012/13	270
2013/14	276
2014/15	324

21.10 Higher volumes would not be such a worry if these cases were producing good outcomes, but they are not: of 230 results recorded in 2013/14, 71 are recorded as won or settled, 95 as unsuccessful and 64 as “other”. As discussed in Chapter 23, I am suspicious of this “other” category, which probably relates to certificates discharged at an early stage; I do not believe this outcome is likely to be recorded if a substantive benefit were achieved for the client so I regard these cases as unsuccessful (although some other results will relate to cases transferred to a new court or solicitor). This means that only 31% of judicial review certificates issued were successful in that year, the lowest success rate of any civil category. Outcomes in 2014/15 were even more worrying: of 294 results recorded, only 64 are recorded as won or settled, 131 as unsuccessful and 99 as “other”; a success rate of 22%! Even if one excludes the “other” cases from the figures, success rates in the last two years have only been 43% and 33% respectively. Clearly a lot of weak cases are applying for legal aid and many are being granted.

### Judicial review in Northern Ireland

21.11 Agenda consultation question 25 asked what priority should be placed on judicial review remaining within scope of legal aid. What respective roles should the personal benefit to the applicant, the wider public interest and human rights considerations play in determining whether a case qualifies for legal aid? Are there further measures that can and should be taken in Northern Ireland to ensure that the judicial review process is not abused through frivolous or vexatious claims?

21.12 All responses agreed that judicial review was an essential safeguard for the rule of law and should have a high priority within the legal aid scheme. The Bar described judicial review as sitting at the apex of the system for requiring public authorities to adhere to the rule of law. The Law Society and Belfast Solicitors Association emphasised the constitutional undesirability of the executive and the legislature setting the terms of their own accountability. The Housing Rights Service quoted concerns expressed by Lord Neuberger, President of the Supreme Court:

“Any attack on judicial review, or any attempt to limit it, has to be looked at very critically. Judicial review is increasingly essential if we have an increasingly powerful executive. It is an

<sup>354</sup> Indicative figure as 2014/15 volumes not finalised

<sup>355</sup> Legal Aid Statistics Bulletin, January to March 2015, page 35, Figure 25

irritant to the executive but it is a very important, fundamental control on the executive. And the fact that members of the executive know that they are subject to judicial review helps to ensure that they carry out their job properly.”<sup>356</sup>

21.13 Responses also recognised the importance of the leave stage and legal aid controls in excluding frivolous or vexatious cases. The Bar explained how exchange of information under the Pre Action Protocol helped to identify whether the case was strong enough to proceed to court. The Northern Ireland Human Rights Commission recommended that a grant of leave by the court should create a strong presumption in favour of granting legal aid. Practitioners were strongly opposed to the England and Wales system under which no payment would be made for cases refused leave. The Law Society referred to the chilling effect of such a reform as described at paragraph 21.3 above. They preferred instead the recommendation made by senior judiciary that legal aid costs should be irrecoverable only if the court makes a finding that the application was “totally without merit.”<sup>357</sup>

21.14 Responses from bodies more likely to be on the receiving end of judicial reviews were understandably keen to emphasise the need for proper checks to exclude weak cases. The Police Service Northern Ireland referred to the significant financial and operational impacts of judicial review. The LSC said that “no leave, no fee” should not be introduced in Northern Ireland until it was possible to measure the impacts of the reform in England and Wales.

21.15 Some concerns were expressed at the suggestion in paragraph 6.14 of Agenda that the legal aid applicant must “personally benefit” from the application. This relates to proposals to reform the law of standing<sup>358</sup> which were abandoned during the passage of the 2015 Act. The Law Society, Belfast Solicitors Association and Citizens Advice Northern Ireland all believed that the wider public interest and human rights considerations should play a more prominent role in legal aid decision making.

21.16 The Law Society also expressed concern at potential reforms of costs orders in judicial review proceedings, some now included in sections 85-90 of the 2015 Act. The proposals which cause concern, and could still be considered in Northern Ireland, include:

- Restricting the availability of protective costs orders, namely orders made to protect applicants from the full impact of adverse costs orders if they lose;
- Wider powers to order costs against third parties who intervene in judicial review proceedings;
- Wider powers to order costs against judicial review applicants who are unsuccessful in obtaining leave at an oral hearing.

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<sup>356</sup> Lord Neuberger, evidence to House of Lords Constitution Committee, February 2013

<sup>357</sup> In England and Wales there is already provision for the court to certify an application as totally without merit on the papers, in which case there is no right to request an oral hearing – Civil Procedure Rules, Rule 54.12(7)

<sup>358</sup> That is, who is allowed to bring a judicial review

## **Analysis and recommendations**

21.17 There is no doubt that judicial review proceedings are a high priority within the legal aid scheme and should remain in scope. Judicial reviews arising out of a client's business should however remain excluded.<sup>359</sup> Like all areas remaining in scope, judicial review must be subject to clear and appropriate merits criteria as described below.

21.18 I am not keen on introducing a general "no leave, no fee" regime in Northern Ireland. It is hard to justify such an approach at the level of principle, when there is no balancing proposal to pay anything additional in those cases where leave is granted. However I agree with the judicial proposal mentioned at paragraph 21.13 above that an exceptional procedure should apply for cases that have no merit. In England and Wales 17% of non-immigration judicial review applications are certified by the court as "totally without merit".<sup>360</sup> One would hope that if such cases applied for legal aid, they would be filtered out by merits criteria, but for those that manage to obtain funding I recommend that:

- **By means of a Practice Direction or otherwise, whenever the court decides to refuse an application for leave to bring a judicial review (either on the papers or at an oral hearing) the court must consider whether the application was totally without merit; if it is the court must so certify;**
- **Remuneration regulations should specify that where a court has certified that an application was totally without merit, no costs may be claimed under the certificate, other than any disbursements incurred.**

21.19 In Chapter 20 at paragraph 20.5 I proposed a new merits criterion to ensure that litigation is a last resort and should not be pursued if there are complaints or Ombudsman schemes which should be tried first. This criterion will be particularly important in judicial review cases, especially in areas such as challenges to police or prison decisions. The criterion is discretionary and consultation should take place on its application. Guidance should identify relevant alternatives to litigation and consider how far complaints should be pursued before it is reasonable to resort to judicial review. The difficulty here is that judicial review proceedings must be brought "promptly and in any event not later than 3 months after the grounds to make the application first arose."<sup>361</sup> These time limits create a powerful incentive to start judicial review proceedings, even if only to protect the client's position (the costs of which may be substantial), rather than to await an ongoing complaints process.<sup>362</sup> The issue of when a decision should be treated as final decision and when the grounds to make an application for judicial review arise is not always straightforward.

21.20 **I recommend that, under a Practice Direction or otherwise, the judiciary should be notified of the powers of the Legal Aid Agency to refuse legal aid for a judicial review on the grounds that**

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<sup>359</sup> Any civil proceedings arising out of a clients business are already excluded under the 2003 Order, Schedule 2, paragraph 1

<sup>360</sup> HM Courts and Tribunals Services figures for 1<sup>st</sup> October 2012 to 30<sup>th</sup> June 2014; for all judicial reviews including immigration/asylum, 28% were certified as totally without merit

<sup>361</sup> Rules of the Court of Judicature (Northern Ireland) Order 53 Paragraph 4(1), see also Judicial Review Pre-Action Protocol, revised 10<sup>th</sup> October 2013

<sup>362</sup> There is an analogy here with people who attend accident and emergency departments at a hospital instead of awaiting an appointment with their general practitioner. Like judicial review, hospitals should be reserved for the most serious and urgent cases

**the client should first pursue their concerns via a complaints procedure or ADR; in cases where this power has been exercised, but it subsequently becomes necessary to proceed by way of judicial review, the court should usually be prepared to exercise any discretion over time limits in favour of the applicant.** The attitude of the respondent is also an important factor here – most respondents would prefer to face a complaint than a judicial review and should support any application to extend time limits (though the final decision must rest with the court); if respondents are not supportive, there may be a stronger case for granting legal aid.

21.21 I do not support the changes to the costs regime of judicial review listed at paragraph 21.16 above. I hope the proposals to discourage interveners and to make it harder to obtain protection from costs orders are resisted in Northern Ireland. By contrast **I recommend that the courts in Northern Ireland make wider use of protective costs orders.** There are many highly respected independent bodies in this jurisdiction who have much to contribute to public interest litigation. The Northern Ireland Human Rights Commission told me how they have to be very cautious about involvement in judicial review proceedings because of the fear of costs orders; it would be better if the normal regime in judicial reviews with a strong genuine public interest was that each side would bear their own costs.

21.22 In Chapter 24 I recommend that the Department should adopt a stricter approach to remuneration rates in relation to non family cases where costs are usually recoverable from the opponent if the case is successful. This approach should also apply to judicial review certificates and will help to discourage weaker cases. It should also address the high costs of judicial review in Northern Ireland compared to England and Wales, especially in relation to counsel's fees.<sup>363</sup>

21.23 I believe more must be done to address the disappointingly low success rate of publicly funded judicial reviews. In many cases it is difficult to assess prospects of success until it becomes clear what the opponent says about the issues. It may be the case that certificates are being granted too early and are not being reviewed at key stages. **I recommend that:**

- **All work under the judicial review pre-action protocol should be carried out under the Green Form scheme; civil legal aid should only be applied for once the case is ready to issue;**
- **Applications for civil legal aid for judicial review should be accompanied by the respondent's response to the pre-action protocol letter; this would not apply in genuinely urgent cases but these would be exceptional;**
- **All judicial review certificates should be subject to a condition requiring a report to the Legal Services Agency once the respondent has served its evidence; that is a key stage at which to assess whether the case has sufficient prospects to justify continued funding.**

#### **Merits Criteria for judicial review**

21.24 In Chapter 3 I recommended that all cases remaining within the scope of civil legal aid should be subject to clear and subject specific merits criteria, largely based on the policy previously outlined in the Northern Ireland Funding Code. The appropriate criteria for non family cases are discussed in Chapter 24, but the criteria for judicial review require special attention. I agree with the

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<sup>363</sup>See comparative costs at paragraph 21.8

views expressed in consultation that human rights and public interest considerations should be expressly taken into account in funding decisions, which must also acknowledge the significance of judicial decisions to grant leave. The criteria must make clear that human rights and public interest issues are factors to take into account but do not provide a justification for funding weak cases.

21.25 Defining criteria for prospects of success is not straightforward in judicial review cases. The merits threshold I propose in Chapter 24, which I believe is also appropriate for judicial review, requires a minimum of “Borderline” prospects for cases which raise significant human rights issues, have a significant wider public interest or have overwhelming importance to the client;<sup>364</sup> prospects of success of at least 50% are required for all other cases. **I recommend that the grant of leave by the court should be recognised in the legal aid regulations.** It should entitle the Legal Services Agency to conclude that prospects of success are at least Borderline, unless circumstances have changed since leave was given. A similar provision existed in the Northern Ireland Funding Code.

21.26 For the purpose of a prospects of success criterion, what is “success” in a judicial review? There are several possibilities:

- The prospects of obtaining leave from the court;
- The likelihood of the opponent making an acceptable offer of settlement;
- The prospects of the court granting the substantive relief sought;
- The prospects of the decision complained of ultimately being changed by the decision maker.

21.27 I believe that prospects of success should be defined in a way which reflects the objective underlying legal strength of a case. **I recommend that the Legal Services Agency should be primarily concerned with the prospects of the court granting the substantive relief sought,** the third option listed above. This is the approach previously taken under the Funding Code. The application of this criterion would be affected if provisions similar to those in the 2015 Act<sup>365</sup> were brought into force in Northern Ireland. The court would then need to take into account the likelihood of the executive decision changing as part of its discretion in deciding whether to grant relief. This factor would make it somewhat harder for legal aid applicants to satisfy the prospects of success test, but I think this is appropriate to ensure that funding is concentrated on the most important cases. Ultimately I believe it should be a higher priority to direct funding toward those cases which will materially benefit the public, than it is to support cases which do no more than identify unlawful decision taking by public bodies (important as that is). Such considerations should form part of the cost benefit analysis of the merits test.

21.28 The Funding Code contained several other criteria specific to judicial review, such as whether the decision complained of was amendable to judicial review and whether the client had sufficient interest in the proceedings. I do not think it is essential to replicate these criteria specifically as they are considerations which can be taken into account in the assessment of prospects of success. Other criteria relevant to judicial review are summarised in Chapter 24.

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<sup>364</sup> All these concepts were defined under the Funding Code – see further Chapter 24

<sup>365</sup> Criminal Justice and Courts Act 2015, section 84 - see paragraph 21.4 above

21.29 Overall, the objective of all the new controls should be to reduce the number of judicial review certificates issued by about 50%; that should result in a clear majority of those cases which are still funded being successful. If this does not prove to be the case, additional controls will need to be considered, such as further reductions in remuneration for unsuccessful cases.

### **Research and learning from judicial reviews**

21.30 Agenda consultation question 26 asked whether research into the grounds and outcomes of judicial review cases was worth pursuing. Could more be done to ensure that the outcome of judicial reviews was used by public authorities to inform and improve future decision-making processes?

21.31 This proposal was generally supported in consultation responses, although some public bodies believed that there was already a good awareness within the public sector of public law obligations. The Northern Ireland Human Rights Commission believed there was potential for systemic learning to strengthen compliance with ECHR and ensure that clients had effective remedies when breaches occurred. The Bar suggested research would help to provide the evidence base for any future reforms.

21.32 I agree that a research project would be useful, although I am anxious that government resources to undertake this may be limited and such work cannot be a priority for public funds compared to the demanding programme of work needed to deliver legal aid reform.<sup>366</sup> It may be that much can be learned through informal methods, for example by asking experienced legal aid caseworkers about the common themes they see emerging from the applications before them. **I recommend that, as and when resources allow, the Legal Services Agency should undertake a survey of legally aided judicial reviews over the last two to three years.** This should identify volumes, identity of respondents and subject matter, as well as outcomes. Where recurring themes emerge, the Department of Justice should engage with the relevant departments with a view to reviewing procedures to reduce the future need for judicial review challenges.

### **Summary**

21.33 The right of individuals to challenge the legality of decisions by the state has real constitutional significance. Legal aid must remain available for judicial review proceedings. Although such funding is a high priority, judicial review is a significant and increasing area of spend. Increased controls are needed to address high costs and poor outcomes. Research should seek to identify the underlying causes of increases in the volume of judicial review applications.

21.34 The reforms in England and Wales, which made legal aid payments conditional on leave being granted by the court, should not be replicated in Northern Ireland except for cases which are found to be totally without merit. Greater use should be made of protective costs orders to improve access to justice for judicial reviews with a wider public interest. Legal aid funding should be based on the likelihood of the court ordering the substantive relief sought and should take into account human rights considerations, the wider public interest and any judicial decision to grant leave. Other funding criteria should ensure that only meritorious judicial reviews are funded and that

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<sup>366</sup>Independent bodies such as the United Kingdom Administrative Justice Institute could have a valuable research role, especially in shedding light on some of the policy issues raised in this Chapter

judicial review is not pursued until all reasonable alternatives to litigation have been tried. The courts should be prepared where necessary to extend time limits to facilitate this.

## 22 Conditional Fees and Self Funding

***“The biggest risk is not taking any risk... In a world that is changing really quickly, the only strategy that is guaranteed to fail is not taking risks.”<sup>367</sup>***

22.1 This Chapter is not about legal aid. It considers the potential for conditional fee agreements (“CFAs”) and other funding systems to enhance access to justice in Northern Ireland. The relevance of CFAs to the scope of civil legal aid is considered in the next Chapter.

### **Competing interests**

22.2 For many years discussion around whether CFAs would be a good thing in Northern Ireland has been looked at through the prism of the future of money damages cases within the legal aid scheme. This gives the impression that the only justification for bringing in CFAs is to create a justification for reducing the scope of legal aid. Creating alternative methods of funding can certainly have a significant impact on legal aid, but the real debate should be around finding ways that would allow the whole population of Northern Ireland to have a mechanism to pursue meritorious damages claims.

22.3 There are several competing interests at play here. 30,047 personal injury claims were notified to the Compensation Recovery Unit in Northern Ireland in 2013/14. In the same year the LSC closed approximately 1,700 legal aid certificates for personal injury claims, 6% of the above total. So clearly the vast majority of current claimants manage to secure access to justice without the need for public funding. There is legitimate worry that, if CFAs become available, that majority could lose out by facing deductions from their damages. Alternatively, if CFAs are structured in a way which protects those claimants by instead imposing additional liabilities on defendants, then those defendants (including government departments) will have cause for complaint and will argue that such reforms are not affordable in the current economic climate.

22.4 My worry is that there is a further constituency who do not seem to feature in this debate. What about the unknown number of people in Northern Ireland who have valid personal injury claims but no means of pursuing them? This middle group of people always have the worst deal on access to justice. They are often known as “Minela” (middle income, no entitlement to legal aid) although I prefer “Nigela” (not in group eligible for legal aid). I have asked many Northern Ireland practitioners how clients with good but not straightforward claims, like clinical negligence, proceed if they are outside financial eligibility limits. I have yet to hear a satisfactory answer. This review is not just about saving money, it is about improving access to justice wherever possible. I believe it is possible to help Nigela without unfairly penalising anyone else involved in personal injury litigation. We need to look to other jurisdictions and see what has worked and what has not.

### **CFAs in England and Wales**

22.5 CFAs first came into being in England and Wales on the 5<sup>th</sup> July 1995 under the Courts and Legal Services Act 1990. It became legal for lawyers to charge fees to clients only in the event of

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<sup>367</sup>Mark Zuckerberg

success. Lawyers had been doing this for years of course, taking on clients “on spec” knowing they would never look to them for fees, but the practice became legitimised. It also became possible for lawyers to charge a success fee, namely a percentage increase in their costs on winning cases to compensate for the inability to claim anything on losing cases. Therefore, if you take on a case with a 50% chance of success, a 100% success fee might be legitimate. Clients had the right to challenge the success fee if it was not a proper reflection of risk. Law Society guidance advised how to set the success fee based on the assessment of prospects of success:<sup>368</sup>

**Table 22.1 Calculation of success fees**

Prospects of Success	Recommended Success Fee
100%	0%
90%	11%
80%	25%
75%	33%
70%	43%
60%	67%
50%	100%

22.6 Success fees were paid by the successful client out of damages awarded. Because the success fee is a % of the reasonable costs of the case, there will always be a degree of proportionality between the fee and the amount of work done.<sup>369</sup> As an additional safeguard there was a practice, not then enforced in law but universally applied, that the success fee should be capped at a maximum of 25% of damages.

22.7 No client would want to risk having to pay the costs of the other side in the event of a loss, so after-the-event insurance products (“ATE”) became available to guard against this. In return for a small premium, which in the early days could be less than £50, the insurer would accept liability for other side costs and the client’s own disbursements if the case was lost.<sup>370</sup> Insurers were happy to come into the market for types of case which had high success rates, so that the standard insurance model of the many paying for the few could operate.

22.8 These early CFAs worked well for several years and existed alongside legal aid (there was a statutory rule that legal aid could not be refused on the grounds of CFA availability). Then, when legal aid was removed from most personal injury claims from 1<sup>st</sup> April 2000 under the Access to Justice Act 1999, the Lord Chancellor decided that it would be a good idea if CFAs were made even more attractive for claimants.

**Recoverable success fees and premiums**

22.9 Both the success fee and the ATE premium were made recoverable from the losing defendant. As many people pointed out at the time, this created a very dangerous set of conditions:

<sup>368</sup>See Conditional fees – A Survival Guide (2<sup>nd</sup> Edition, 2001) – mathematically, the prospects of success multiplied by (1 + the success fee), all expressed as decimals, should equal 1

<sup>369</sup>See by contrast Contingency Fees discussed at paragraphs 22.53 to 57 below

<sup>370</sup>Under many ATE products, the premium cunningly insures itself, so the client only has to pay the premium in the event of a win; it is a very peculiar model of insurance

- The claimant suddenly had no interest in the level of fees being incurred by his or her lawyers;
- Defendants faced a sharp additional liability which bore no logical connection to the merits of the claim; perversely, the weaker the claimant's case (or the lower the degree of negligence by the defendant), the greater the risk for the claimant and hence the higher the success fee and liability of the defendant;
- Insurers became prepared to move into more risky territory but charge huge premiums, sometimes larger than the lawyers' fees; in this way the additional liabilities of defendants were often trebled;
- All this took place within a system where underlying costs already lacked effective controls (and were in many cases far in excess of the costs which might be awarded in similar cases in Northern Ireland).

22.10 Inevitably, the cost of litigation in England and Wales grew rapidly. It became common for the total of costs, success fees and premiums to be many times greater than the damages in issue. It shows what happens when access to justice is detached from common sense and proportionality and allowed to run wild. A fierce costs war raged for years as liability insurers sought to challenge aspects of the regime. Although the system of recoverability was abolished in 2013 under the Jackson reforms, horror stories continue to arise as cases which were started under the previous regime reach their conclusion.

22.11 The most striking of these is *Coventry and others v Lawrence and another*<sup>371</sup> which was recently before the Supreme Court. In a nuisance dispute between neighbours, where damages would never have been substantial, the appellants' base costs were £398,000, the success fee was £319,000, and the ATE premium £350,000, a total exceeding £1 million.<sup>372</sup> Costs on this scale are so grotesque that it was argued that the entire system of recoverability is and always was in violation of the right to a fair hearing and property rights under ECHR. In a surprise move, the Attorney General of Northern Ireland intervened in these proceedings to add to these arguments despite the fact that the relevant provisions have never been brought into operation in this jurisdiction. Judgment was handed down on the 22<sup>nd</sup> July 2015. By a majority of 5 to 2, the court held that, despite some serious flaws, the recoverability regime was not incompatible with ECHR. The court noted that, at least in the absence of a widely accessible civil legal aid system, it is "impossible to devise a fair scheme which promotes access to justice for all litigants."<sup>373</sup> The minority view of the court was that the recoverability system was inherently disproportionate.

### **The Jackson reforms**

22.12 When it became clear that something had gone terribly wrong with costs in England and Wales, Lord Justice Jackson was asked to undertake a fundamental review of the costs regime. He produced his final report in December 2009.<sup>374</sup> The report was wide ranging and it is beyond the

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<sup>371</sup>[2015] UKSC 50

<sup>372</sup>The court only ordered payment of 60% of the winning party's costs which reduced the liability to a trifling £640,000

<sup>373</sup>Leading judgment of Lords Neuberger and Dyson at paragraph 72

<sup>374</sup>Review of Civil Litigation Costs, Final Report, TSO, December 2009; I was fortunate to be one of the panel of assessors working with Rupert Jackson on the report

scope of this review to consider the potential application of every recommendation to Northern Ireland. In any event, many of the issues covered proposed solutions to problems which were specific to England and Wales. However, the analysis of conditional fees and the revised funding models which emerged from the review in my view have direct relevance to this jurisdiction.

22.13 The legal changes to CFAs under the Jackson reforms came into effect on 1<sup>st</sup> April 2013.<sup>375</sup> In brief, the regime of recoverable success fees and ATE premiums was largely abolished.<sup>376</sup> The concept of CFA s was retained but reverted to the model under which the success fee was payable out of the winning claimant’s damages. General damages for pain and suffering were increased in England and Wales by 10% to compensate for this. As a further protection, the success fee was capped at no more than 25% of the claimant’s damages, excluding damages for future losses.<sup>377</sup>

22.14 The most difficult problem was how to deal with the potential liability of claimants to pay costs to the other side. ATE premiums could be substantial despite the fact that costs orders are only made and enforced against claimants in a small minority of cases (if a personal injury claim looks likely to fail well before trial, the more common outcome would be for the claim to be withdrawn, each party bearing their own costs). It is important to look at this question from first principles: take the situation of a Nigela claimant, approaching trial in a difficult clinical negligence case which will turn on the expert evidence. If the claimant pursues the case to trial and loses, an order to pay the costs of the defendant could be ruinous, possibly leading to bankruptcy. This is manifestly unjust. There is no real access to justice unless claimants are protected from such costs orders (as they always have been in legal aid cases). There are two possible responses to this dilemma: either rely on insurance products to be developed to guard against the risk (in which case how does the claimant pay for them?); or reform the underlying jurisdiction under which the court orders costs. The latter is by far the best option.

22.15 Thus was Qualified One-Way Cost Shifting (“QOCS”) born. The rule is that unsuccessful claimants are not generally liable to pay costs to defendants. The principle that losers must pay winners’ costs should be seen as a useful mechanism to discourage weak claims, not as a fundamental feature of justice. Under QOCS as now implemented in England and Wales, the claimant remains liable for defendant costs in limited circumstances:

- Where the claim is struck out as frivolous or vexatious;
- Where the court finds the claim to have been fundamentally dishonest;
- If the claimant has recovered damages in the action (typically where damages awarded fail to beat the defendant’s payment into court) the claimant is liable in costs up to the amount of those damages.<sup>378</sup>

22.16 In its practical effect, QOCS extends statutory legal aid cost protection to non legally aided clients. Protection against cost orders has been a feature of legal aid since its inception in 1949. I was interested to discover that the original architects of the post war scheme envisaged that as legal aid cost protection was “an anomaly under the existing legal system”, in the course of time it might

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<sup>375</sup>See the revised RSC Order 44.13 to 44.17 and Conditional Fee Agreements Order 2013

<sup>376</sup>Except for some limited exceptions – see 2013 Order, article 6

<sup>377</sup>2013 Order, Article 5(2)

<sup>378</sup>See detailed provisions in RSC Order 44.15 to 16

well have to be “extended in some degree to the unassisted litigant”.<sup>379</sup> There are no new ideas under the sun.

22.17 QOCS has been implemented in England and Wales only for personal injury claims although the policy arguments in support of QOCS are equally applicable to other areas, including other claims against public authorities or housing disrepair claims. As Jackson acknowledges, QOCS can only work in “asymmetric” claims, those where the claimant and defendant have very specific and different roles. QOCS could not operate for example in contractual disputes where either side might have the right to start proceedings. QOCS could in principle also apply to judicial review claims although the wider use of protective costs orders, as encouraged in Chapter 21, would make this less necessary.

22.18 There can still be a role for ATE in post-Jackson CFAs but it is a limited and non essential role. Even if not liable for other side costs, unsuccessful claimants still have the problem of needing to fund their own disbursements, such as expert reports and court fees. These are usually borne by the client if they can afford it, otherwise by the solicitors (this is often manageable for a large firm with a high success rate). Alternatively ATE can be purchased to cover own disbursements if the case is lost. One of the objectives of the Jackson reforms was to reduce the role of the “middle-men” of civil litigation, claims management companies and insurers, who had become an integral part of the litigation system in England and Wales, needing to earn their profits from the process.

### **Speculative fees in Scotland**

22.19 Conditional fees are lawful in Scotland, where they are known as speculative fees. As in England and Wales, success fees may be claimed as a percentage of costs, and are payable by the claimant out of damages recovered. As part of the Making Justice Work reform programme in Scotland, Sherriff Principal Taylor was asked to carry out a review of costs in Scotland, considering many of the issues and options addressed by the Jackson review in England and Wales. The Taylor review reported in 2013.<sup>380</sup> The Scottish government accepted the Taylor recommendations and recently consulted on implementation of the proposals.<sup>381</sup> Any reforms are to be implemented in the forthcoming draft Expenses and Funding of Civil Litigation Bill.

22.20 Taylor recommended that QOCS should be implemented in Scotland, for similar policy reasons to those applicable in England and Wales. There was particular concern that the ATE market was not as well established in Scotland as in England and could not be relied upon to cover the full range of cases at an affordable cost.<sup>382</sup> Taylor recommended a slight variation of the Jackson QOCS rules in that where a claimant recovers some damages but still incurs a costs liability, 25% of those damages are protected from being set off against the costs.<sup>383</sup>

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<sup>379</sup>Legal Aid by Eric Sachs, King’s Counsel, Eyre & Spottiswoode, 1951

<sup>380</sup>Review of Expenses and Funding of Civil Litigation in Scotland, Scottish Government, 11 September 2013

<sup>381</sup>Consultation on Expenses and Funding of Civil Litigation Bill, Scottish Government, closed 24<sup>th</sup> September 2015

<sup>382</sup>Taylor report, Chapter 8, page 168-9

<sup>383</sup>Taylor Report, page 180; compare to Jackson as described at paragraph 22.15 where damages can be wiped out

22.21 Taylor also recommended that success fees be capped by reference to the damages recovered but proposed different safeguards to England and Wales.<sup>384</sup> It is difficult to exempt only certain heads of damage from the definition of the cap because the majority of cases settle for a lump sum which does not identify all the individual elements of the claim. Instead the cap should be based upon the global damages but limited to:

- 20% of the first £100,000 recovered;
- 10% on the award in excess of £100, 000, up to £500,000;
- 2.5% on damages over £500,000.<sup>385</sup>

22.22 Equivalent caps were fixed at 35% for employment tribunal cases and 50% for all other areas of civil litigation.

### **Funding arrangements in Northern Ireland**

22.23 How are personal injury claims currently funded in this jurisdiction, for the majority of cases which do not rely upon legal aid? It is clear that a variety of approaches are adopted. During this review I have spoken to specialist personal injury practitioners who deal with large volumes of cases and have established ATE insurance arrangements covering all their clients. As is common in England and Wales, commercial arrangements can be made between lawyers and insurers, often linked to vehicle leasing schemes, giving the lawyers delegated authority to incur premiums. Other funding options include trade union support. For smaller firms however more informal practices are used. My understanding is that most claims are pursued “on spec” on the express or implied understanding that the solicitor will not pursue the client for costs if the claim is unsuccessful, although the client will usually be expected to fund the disbursements if they can afford to do so.

22.24 In other words, many personal injury cases in Northern Ireland operate under what are in practice conditional fee agreements, although they are not recognised as such. Technically, a successful claimant can only claim costs from a defendant to the extent that the claimant has incurred a liability to pay costs to his or her own solicitor. This is the infamous “indemnity principle” which Jackson sensibly recommended should be abolished because of its capacity to generate satellite litigation.<sup>386</sup> **I recommend the abolition of the indemnity principle in Northern Ireland for similar reasons.**<sup>387</sup> Solicitors can sidestep the problem by notionally agreeing with their clients that the client is liable, but charitably deciding at the end of the case to waive those fees if the case fails. I asked why defendants do not more regularly challenge the legality of claimant retainers – I was advised that this is often because defendant solicitors do not wish to shine too strong a light on their own retainers with their insurance clients. The recent case of *Baranowski v Rice*<sup>388</sup> is an illustration of this.

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<sup>384</sup> 25% of damages other than for future loss – see paragraph 22.13 above

<sup>385</sup> Taylor report page 157

<sup>386</sup> See Jackson final report, pages 53-59

<sup>387</sup> In England and Wales there is power to do so under section 51 of the Supreme Court Act 1981 as amended by section 31 of the Access to Justice Act 1999; there is no similar provision in Northern Ireland which suggests that such a reform may need to await new legislation

<sup>388</sup> [2014] NIQB 122

22.25 Success fees are not recoverable in litigation under the current law in Northern Ireland<sup>389</sup> but the position is less clear if no proceedings are issued. There were over 30,000 personal injury claims notified to the Compensation Recovery Unit in 2013/13, far greater than the number of personal injury proceedings issued, so the great majority of claims settle pre issue. Pre-issue work is generally classed as non-contentious business, for which there are no restrictions on conditional or contingency fees (i.e. solicitors agreeing to take a share of the damages awarded).<sup>390</sup> In England and Wales some well known solicitors have described the practice of working for a contingent share of damages in cases settled pre-issue. I am not aware of that practice in Northern Ireland although it is hard to find evidence of the forms of retainer being used at the pre-issue stage. According to the Belfast Solicitors Association the normal practice in cases settled before issue is to negotiate costs as a percentage of the court scale fee.<sup>391</sup> In any event, I believe there is a strong case for regulation of all retainers for all personal injury claims, whether or not they settle before proceedings are issued.

### **Potential for CFAs in Northern Ireland**

22.26 The Jackson report in England and Wales and Taylor report in Scotland were hugely impressive and authoritative pieces of work which analysed in detail the pros and cons of different approaches to CFA funding. They reached broadly the same conclusions: in favour of CFAs; against additional recoveries; in favour of QOCS. I believe those arguments are equally forceful in the context of Northern Ireland. Indeed in my view the case for CFAs with QOCS is even stronger for Northern Ireland than it was for England and Wales because of the lack of a fully developed ATE market in this jurisdiction. Access to Justice 1 also recommended the implementation of post Jackson style CFAs.<sup>392</sup> In this report I cannot hope to deal with all the policy arguments addressed by Jackson and Taylor and there is no substitute for studying those reports in detail, but I will try to address some of the specific concerns on this topic which have been expressed to me during the course of this review.

22.27 I have encountered significant resistance from some practitioners to the proposal that CFAs be introduced in Northern Ireland, especially from the Bar. The first objection is to the whole principle of lawyers being paid according to results. In my view this objection is outmoded and proceeds on a false premise, namely the assumption that there is no problem with more traditional forms of retainer. Lawyers who get paid simply according to the work they do, win or lose, have a direct conflict of interest with their clients (who want to achieve a result at minimum cost). Professor Zuckerman has summarised it in this way:

“In our system, whether charging is by the hour, by the day or in proportion to complexity, lawyers have no direct incentive to economize in the provision of services. These two economic factors, the natural desire to maximise reward and the systemic incentive, lead irresistibly to forensic practices designed to increase profits”<sup>393</sup>

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<sup>389</sup>See the 2003 Order, Article 38 (not yet in force) and the Solicitors (Northern Ireland) Order 1976

<sup>390</sup>See Solicitors Act 1974, section 57 as amended, Law Society of Northern Ireland, Solicitors Practice Regulations 1987, as amended

<sup>391</sup>See BSA Guide to Costs Revisited, the Writ, February 2000

<sup>392</sup>AJ1 paragraph 5.107

<sup>393</sup>Lord Woolf's Access to Justice: Plus ca change, A.A.S.Zuckerman, (1996) 59 Modern Law Review 773

22.28 At least under a CFA the lawyer has something like the same incentive as the client. CFAs create their own issues and conflicts of course, but if a member of my family was seriously injured I would want any resulting claim to be brought under a CFA, not under legal aid or payment by the hour. CFAs do give lawyers a financial interest in the outcome of a case but in light of all the experience of them elsewhere in the United Kingdom, I do not see why it is thought that the introduction of CFAs would somehow undermine the integrity of lawyers in Northern Ireland. Although the public policy issues are very much alive in this jurisdiction;<sup>394</sup> I think we should be much more worried about the public policy of allowing lawyers to charge by the hour.

22.29 The next objection is that CFAs “increase costs”. This depends how CFAs are structured. If anyone was daft enough to propose full recoverability of success fees and premiums in Northern Ireland, costs would indeed be a problem, but if there are no additional recoveries between the parties, there is no need to change the way costs between the parties are quantified. In some cases, CFAs can actually reduce costs, because claimant lawyers have an incentive to keep their costs low in order to protect their client’s damages as much as possible. This is less of a consideration where costs are standardised, as in the system of county court scale costs. CFAs could operate alongside scale costs in Northern Ireland just as they do alongside fixed costs in fast track cases in England and Wales.

22.30 The final objection is the most serious: that CFAs may end up taking money away from clients and placing it in the hands of lawyers. To prevent this happening we need to design the system to ensure that any success fee taken from damages by the lawyer is no more than a proper compensation for the risk taken. This topic is considered further at paragraph 22.32 below.

22.31 In April 2013 the Department consulted on a range of Alternative Methods of Funding Money Damages Claims. The Post Consultation report was published in June 2014. There was significant support for CFAs although in terms of the model of CFA to be adopted, consultation responses tended to split along party lines:<sup>395</sup> those representing claimants believed that success fees should be paid by defendants; those representing defendants proposed that claimants should pay out of damages. Similar responses have been made to this review in response to Agenda consultation question 21.<sup>396</sup> There was no support in the Money Damages consultation for the “Jackson model”. At first I assumed that this was a case of an option being unpopular simply because it represented a sensible compromise between options favouring one side or another.<sup>397</sup> However the Jackson model was described in terms of applying the full package of reforms which have been implemented in England and Wales. As mentioned at paragraph 22.12 above, many of the Jackson proposals were responses to particular problems in England which do not arise in the same way in this jurisdiction. The new system of costs budgeting in particular seems to me unlikely to be beneficial in Northern Ireland. I do not recommend the wholesale implementation of the Jackson reforms in Northern Ireland.

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<sup>394</sup> See the Baranowski case at paragraph 22.21 above

<sup>395</sup> See Alternative Methods of Funding Money Damages Claims, Post Consultation Report, Department of Justice, June 2014, section 3

<sup>396</sup> See summary in Chapter 23, paragraphs 23.8 to 10

<sup>397</sup> Perhaps future policy consultation responses should be required to adopt the Single Transferable Vote system?

### **Financial impact of CFAs on current claimants**

22.32 For the reasons given in this Chapter I strongly recommend against imposing additional liabilities on defendants, whether in the form of success fees, premiums or additional damages. This would simply not be affordable in the present financial climate. Insurance premiums cease to be a significant issue under QOCS, however success fees must be payable by claimants out of the damages they recover. Will this lead to large numbers of claimants, who currently retain 100% of their damages, losing a substantial share of their damages in favour of their lawyers?<sup>398</sup>

22.33 If one could rely on the market working effectively, this would not happen. Allowing for the possibility of success fees does not oblige any lawyer to charge a success fee to his or her client. Competition from the numerous law firms offering personal injury work would give a substantial commercial advantage to firms who were able to guarantee that their clients retained 100% damages for straightforward claims. The relatively large number of providers in Northern Ireland encourages competition. Unfortunately we can be sure that the market alone will not fully protect clients – client loyalty or lack of knowledge of alternatives will discourage clients from shopping around.

22.34 The primary purpose of introducing CFAs is to ensure that potential claimants with less straightforward claims are afforded access to justice. The healthy volume of claims in this jurisdiction suggests that there is no problem with simpler claims finding a way to proceed. Consideration should therefore be given to finding a way not to impose any risk of a financial impact on the majority of claims. This is an area where consultation may well generate further ideas but my recommendation is that success fees are not authorised in the largest and most straightforward area of personal injury – road traffic claims. Although road traffic cases may concern serious injuries, they seldom raise difficult liability issues. I doubt there is a real access to justice problem in such cases. Of the 30, 047 claims notified to the Compensation Recovery Unit in 2013/14, 19,846 were road traffic matters, 66% of the total.<sup>399</sup>

22.35 For the remaining one third of claims, one option is to specify maximum success fees in regulations for different classes of claim. This was tried in England and Wales (for example a 15% cap was at one stage imposed on success fees for road traffic claims) but it was found that there was a tendency for every claim to use the maximum allowed, so the regulations were dropped. The most effective safeguard therefore is to prescribe a limit on the maximum amount that can be taken from damages. In England and Wales this is 25% of damages other than compensation for future loss and care. In Scotland the proposed maximum is 20%, applicable to all damages, tapered for cases with high damages and costs. I believe the Scottish approach of an overall cap is simpler and gives better protection.

22.36 In my previous work with the Civil Justice Council I looked at numerous funding systems across the world. The principle that successful claimants must be guaranteed to retain 100% of their damages is not widely adopted. Many jurisdictions deliberately regulate costs payable between the parties at rates which are significantly below solicitor and client costs; as a result, the further the

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<sup>398</sup>The possibility of judges increasing damages to compensate clients is discussed below from paragraph 22.38

<sup>399</sup>See the breakdown in Chapter 8 at Table 8.3

case progresses, the greater the shortfall in costs which the clients must meet from their damages. As discussed in Chapter 1, risk free litigation is not necessarily a good thing. In my view CFAs will impose a better set of incentives to encourage settlement.

22.37 In summary, there will no doubt be some cases where the introduction of CFAs will result in claimants suffering a reduction from their damages. This will only apply to a small minority of claims once road traffic cases are excluded from success fees and taking into account the fact that pre-issue damages are already unprotected. Of those cases which are affected, the maximum deduction from damages would be 20% and would on average be significantly less than this, especially if the market operates to keep success fees down. It appears to be widely acknowledged that general personal injury damages are significantly higher in Northern Ireland than in the rest of the United Kingdom, but there is a lack of clear evidence to quantify the difference. I hope consultation will shed further light on this issue. Zurich Insurance report that according to their database, for cases with general damages under £10,000, average settlements in this jurisdiction exceed Scotland by 36% and England by 44%. When set against the advantages to CFAs allowing meritorious cases to be brought which would previously have no access to justice, this seems to me a better balance than the current system. Access to Justice 1 reached the same conclusion.<sup>400</sup>

#### **Financial impact of CFAs on defendants**

22.38 Although I am proposing no additional liabilities on defendants and no general increase in damages levels, it has been argued that there may be damages “creep” as judges make higher awards in an effort to compensate for a potential reduction in damages under some CFAs. Since only a very small minority of cases proceed to trial this would initially at most be a minor effect, but if precedents were set, the level of settlements would be affected. I think it would be prudent to introduce the reforms in a way which made the position clear in the relevant regulations. There could be an “avoidance of doubt” provision in regulations stating that nothing in the new provisions altered the principles applied by a court when assessing damages. In that way if a judge appeared to be inflating an award under the new regime, there would be a clear legal ground on which a defendant could appeal.

22.39 To what extent will successful defendants lose out on recovery of costs from claimants after the introduction of QOCS? I am told that this has been a concern in England and Wales in relation to local authorities dealing with tripping cases, where a significant number of cases which go to trial are unsuccessful. The context of this is that in England and Wales, prior to the Jackson reforms, all claimants would be covered by ATE policies ensuring that winning defendants would be able to recover their full costs regardless of the claimant’s means. The situation in Northern Ireland is different where recovery is much less certain. This issue can be considered further on consultation. The following factors will minimise any impact:

- The vast majority of unsuccessful claims can and should be disposed of well before trial; it is usually strongly in the interests of the defendant to agree to a claim being withdrawn with no order as to costs, rather than to risk the expense of a case proceeding to trial;

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<sup>400</sup>AJ1 at paragraph 5.107

- Costs orders made against claimants with limited resources are unlikely to be economic for defendants to recover in any event;
- Defendants who make a settlement offer are still protected under QOCS (see rules on setting off damages and costs referred to at paragraph 22.15 above);
- QOCS gives no protection to dishonest claimants – there are no restrictions on defendants obtaining and enforcing costs orders where claims are found to be bogus.

22.40 With the introduction of CFAs defendants are likely to face new claims which could not have been brought without CFAs. This is the nature of anything which increases access to justice. There is no way of knowing for certain how many new claims will come forward. We do know that there are already a lot of personal injury claims in Northern Ireland. If we ignore road traffic claims (which would not be significantly incentivised under the proposals in this Chapter) there were 10,201 non road traffic personal injury claims notified to the Compensation Recovery Unit in 2013/14 in Northern Ireland, equivalent to 5.58 claims for every 1,000 people in the population.<sup>401</sup> The proportionate likelihood of making a non road traffic personal injury claim in Northern Ireland is already 42% higher than the rest of the United Kingdom, despite the generous funding arrangements in England and Wales under which the majority of such claims were being concluded during this period.

22.41 On balance therefore it seems unlikely that there is a large volume of new cases to come forward in this jurisdiction. Any increase must however be considered as against the potential savings to defendants which may arise from other reforms recommended in this report, particularly the reductions in the scope of civil legal aid proposed in Chapter 23 and more restrictive approach to merits criteria, financial conditions and remuneration rates proposed in Chapter 24. Moving from public to private funding will cause lawyers to consider more carefully which cases to take on. There will certainly be some cases previously funded under legal aid which would not now proceed under these proposals. These will tend to be the weaker claims which might nevertheless have caused defendants to incur significant costs.

22.42 My overall judgment is that the package of reform proposals to public and private funding in this report is unlikely to have a substantial net financial impact on government departments and other defendants. I suspect that gains and losses will be modest and will tend to cancel each other out, but there is of course a risk that this will not be the case. I do not believe any amount of analysis and research will be able to make an accurate prediction of how behaviours would change under a reformed funding system, or fully quantify the financial impacts. Although views expressed on consultation on these reforms will be informative, the proof of the pudding will be in the eating. **I do however recommend that the volume of new personal injury claims should be closely monitored over the first three years of the new system so that adjustments can be made at the earliest opportunity if required.**

### Summary of CFA policy issues

22.43 It is important that Northern Ireland has a fair and properly regulated system for the funding of money damages cases on behalf of all its citizens. There is currently no funding option available

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<sup>401</sup>Comparative figures for England and Wales are given in Chapter 8 at Table 8.3

for claimants who have claims which are not straightforward but who are not financially eligible for legal aid. It is hard to see why Northern Ireland should be the only part of the United Kingdom which denies its citizens the option of properly regulated conditional fees. Current arrangements lack transparency and some are probably unlawful. **I recommend that:**

- **CFAs are made available in Northern Ireland by bringing into operation Article 38 of the 2003 Order;**<sup>402</sup>
- **Claimants are protected against adverse costs orders under a system of QOCS, bringing Northern Ireland into line with the equivalent safeguards in England and Wales and similar reform proposals in Scotland;**
- **The risk and extent of claimants losing a share of their damages through payment of a success fee is mitigated by regulation and binding restrictions on success fees as set out below.**

22.44 The detailed rules governing the introduction of CFAs should be the subject of consultation. The following table lists the most significant policy questions and my recommended approach (subject of course to the outcome of that consultation):

**Table 22.2 CFA policy issues**

For what types of case should CFAs be available?	I recommend that CFAs be available for all types of case permitted under the 2003 Order, namely all proceedings except criminal and family proceedings (Article 39(1))
For what categories of case should it be permissible to charge a success fee?	Although in England and Wales a success fee is allowed whenever a CFA is allowed I recommend (for the reasons discussed above) that no success fee be permitted initially for road traffic claims
What should the maximum permitted success fee be?	Logically a success fee of up to 100% may be needed for cases with a 50% prospect of success; I recommend that this is adopted for all cases where a success fee is allowed but a lower figure could be considered initially if that more cautious approach is strongly supported on consultation
In what range of cases should the QOCS rule apply?	As a minimum QOCS must apply to all personal injury claims, as is the case in England and Wales; however, bearing in mind the potential for QOCS both to enhance access to justice and to contribute to legal aid savings <sup>403</sup> I recommend that the Department consult on applying QOCS more widely, in particular to claims made by individuals against public bodies concerning serious wrongdoing, abuse of position or power or significant breach of human rights; housing disrepair claims and judicial review

<sup>402</sup>The Law Society and Bar Council will no doubt review professional conduct rules to ensure compatibility with the new system

<sup>403</sup>See next Chapter

In what circumstances should a claimant lose the benefit of QOCS protection?	Subject to consultation I recommend following the approach set out at paragraph 22.15 above, which is a clear and objective test, protecting defendants against frivolous or dishonest claims
What proportion of damages should be safeguarded from the success fee?	For the reasons given above I recommend that success fees be capped at 20% of total damages; the tapered approach under the Taylor proposal at paragraph 22.21 above could also be considered but would only have an impact in the largest cases; <sup>404</sup> Consideration should also be given to appeal costs where the 25% protection in England and Wales does not apply <sup>405</sup>
Should any specific heads of damage be ring fenced from the operation of the success fee?	I recommend not, because of the difficulty of identifying such damages in cases which settle (hence the proposal for a 20% rather than a 25% cap)
What should happen if the claimant recovers damages but also becomes liable to pay costs, typically because he or she recovers less than the defendant offered? Should any part of the damages be protected?	I recommend following the stricter England and Wales approach, although the limited safeguard which applies in Scotland could also be considered (see paragraphs 22.15 and 20 respectively)
What additional safeguards for the client should be available?	It is important that clients have the ability to challenge unfair CFAs, for example if the solicitor claims 100% success fee in a straightforward case – the risk of this happening is illustrated by the recent case of <i>A and M v Royal Mail</i> <sup>406</sup> ; the procedure could operate as a right for the client to apply to court for assessment of costs charged, but consultation may propose other mechanisms – however, regulations should be kept to a minimum to avoid technical and satellite challenges
How should cases settled without issue of proceedings be regulated?	I recommend that the 20% damages cap on success fees should also be applicable pre-issue; the Department should discuss with the Law Society how this is best achieved.
What damages cap should apply to non personal injury claims?	As a starting point I recommend that the 20% cap should apply for all types of case, but consultation may suggest a higher limit is appropriate for some categories – see Lord Taylor’s recommendations at paragraph 22.22 above and the limits on contingency fees given at paragraph 22.55

<sup>404</sup>Those where damages exceed £100,000 AND costs exceed £20,000

<sup>405</sup>See Conditional Fee Agreements Order 2013, Article 5(1)(b)

<sup>406</sup>[2015] EW Misc B24 (CC) (14 August 2015)

## CLAF and SLAS

22.45 Warning, you are entering an AHZ.<sup>407</sup> CLAF is Conditional Legal Aid Fund which is a free-standing and self-supporting fund for damages claims. The idea is that the fund pays out claimant legal costs in unsuccessful cases; in winning cases costs and damages are recovered from the opponent, there is no net claim from the fund but the fund recoups a small share of the damages (say 10 or 15%). Over time the fund is expected to pay for itself, including administrative costs.

22.46 SLAS is a Supplementary Legal Aid Scheme. This is the same concept as CLAF except that it is developed as part of an existing legal aid scheme. By building a profit-making element into legal aid for successful damages claims, it should be possible to reduce the net cost of legal aid for money damages cases, including administration costs, to zero. This further offers the exciting prospect of greatly expanding the financial eligibility limits for these cases, or abolishing the means test for legal aid altogether.

22.47 CLAF and SLAS are theoretically attractive ways of funding damages cases. They are likely to be popular with lawyers, who like the idea of being paid for losing cases, compared to the uncertainties of conditional or contingency fees. CLAF and SLAS have been the subject of numerous academic studies<sup>408</sup> but have failed to take off as major players in litigation funding. It is sometimes said that almost as many people visit and study the famous Hong Kong SLAS than it actually supports each year.<sup>409</sup> Two factors have prevented the development of self funding systems across the world: seed funding and adverse selection.

22.48 To get a CLAF started, someone needs to stump up the initial funds (and is unlikely to do so unless they can be sure it really will pay for itself). There is little prospect of this ever happening in Northern Ireland, although there is nothing to prevent anyone trying this on a private commercial basis. The big advantage of a SLAS is that it does not require seed funding.<sup>410</sup> If a legal aid scheme already funds money damages claims, all you need to do is to amend the financial conditions of legal aid to provide for the damages levy, keep all other aspects of the scheme the same, sit back and carefully monitor income, expenditure and administrative costs for these cases. There is no need to “ring fence” such a system from the rest of the scheme provided you can track all the relevant cases.

22.49 Adverse selection is a more significant problem; self funding systems (rather like insurance products) rely on having a good spread of straightforward and low risk cases, most of which will generate a net income for the fund, to pay for the more difficult cases. If a mechanism exists under which claimants with strong easy claims can get access to justice while retaining nearer 100% of their damages, why would they choose to go into a CLAF or SLAS? Such mechanisms would never survive alongside more adaptable and voracious life forms like the CFA.

22.50 SLAS as a concept has been under consideration in Northern Ireland for very many years. Much work was undertaken between 2005 and 2007 on a Northern Ireland Alternative Legal Aid

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<sup>407</sup> Acronym Heavy Zone!

<sup>408</sup> See in particular Funding Options and Proportionate Costs, Paper 2, Civil Justice Council, June 2007

<sup>409</sup> 175 certificates were issued in 2014

<sup>410</sup> This is one point where I regret I disagree with AJ1 – at paragraph 5.105 it seems to be assumed that seed funding is required for a SLAS

Scheme (“NIALAS”). It is a great shame that this idea was never tried out because it could have had real potential in this jurisdiction. In my opinion it failed for several reasons:

- Lack of a clear political steer; the government should have made it clear that from a specified date it was no longer prepared to be a net funder of money damages cases; consultees should have been invited to consider only options which satisfied this objective;
- Lack of practitioner support for radical change – the belief that if reforms are objected to for long enough, the status quo will be preserved indefinitely; such an approach is still commonly encountered to this day;
- Undue complexity in the proposal – in particular the decision that NIALAS should accept liability for other side costs in unsuccessful cases damaged the viability of the scheme beyond repair.

22.51 If I was conducting this review ten years ago, my primary recommendation would have been to keep money damages within the scope of legal aid, subject to an obligation on successful claimants to pay 10 or 15% of their damages into the fund (capped by reference to the level of costs). If that had been tried we would know by now if the experiment had worked and should be continued. If necessary the conditions of the scheme could have been tweaked up or down to secure self funding. Even if the system had proved not to be capable of full self funding, the taxpayer would at least be better off than if nothing had been tried.

22.52 But now the ship has sailed. In the current financial climate it would be too much of a risk to introduce a SLAS. Adverse selection, bearing in mind the 96% of cases which do not currently rely on legal aid, might leave the fund with nothing but the unsuccessful cases and with little achieved in terms of savings. Whilst I do not recommend a CLAF or SLAS for Northern Ireland I believe there is a strong case for a self funding mechanism to be applied to those damages cases which remain within legal aid after the majority have been removed from scope – this is discussed further in Chapter 24.

### **Contingency fees**

22.53 Under contingency fees, claimant lawyers claim their remuneration primarily as a percentage of the damages recovered by their client. This is another form of “no win, no fee” agreement. Contingency fees are the dominant funding mechanism for claims in the United States. In the States there is no general rule that losing defendants should pay costs to successful claimants. Therefore the damages awarded, which tend to be high by European standards, are the only source of payment for the claimant lawyer. Contingency fees are less common in jurisdictions where costs are routinely recovered by winning parties, but do operate in certain Canadian jurisdictions.<sup>411</sup> Contingency fees have always been allowed in the United Kingdom for “non contentious business” which is a surprisingly wide concept including damages claims settled before proceedings and tribunal cases (most significantly employment tribunals dealing with dismissal and discrimination claims).

22.54 There are two ways contingency fees can be made to work alongside cost recovery:

- Successful claimant lawyers recover their costs from the other side as normal then claim a share of damages by way of a success fee; this form of funding would be very similar in

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<sup>411</sup>See Funding Options and Proportionate Costs, Paper 1, Civil Justice Council, August 2005

nature to a CFA except that the success fee is primarily determined by the level of damages rather than the level of costs;

- Successful claimant lawyers are paid the agreed percentage of damages but the client gains the benefit of the costs order to offset this; this is the so called “Ontario model”;<sup>412</sup> which is the approach endorsed by the Jackson report and implemented in England and Wales.<sup>413</sup>

22.55 Contingency fees for contentious business were brought into effect in England and Wales in April 2013 under the title of Damages Based Agreements (“DBA”s).<sup>414</sup> The maximum slice of damages which can be claimed is 25% for personal injury claims, 35% for employment tribunals and 50% for all other cases, including commercial disputes.

22.56 DBAs have some peculiar features; if costs recovered are less than the contingency fee, the claimant bears the shortfall out of the damages; however if costs would be greater than the contingency, the defendant can argue under the indemnity principle that the costs liability should be reduced to the amount of the contingency. This is a strange result in my view – the principle should be that the level of costs recoverable should not be affected by the funding mechanism chosen by the claimant.<sup>415</sup>

22.57 I am told by experienced practitioners and the Ministry of Justice in England and Wales that nobody is using DBAs. They are largely untested but seem to hold few advantages for lawyer or client compared to CFAs. In the context of Northern Ireland, assuming CFAs become available as recommended above, I cannot identify an access to justice gap which needs to be addressed by the introduction of DBAs. I do not recommend that any form of contingency fee arrangement is brought in for contentious business in Northern Ireland. However I do propose that:

- Contingency fees remain available for non contentious business in Northern Ireland; clients should enjoy the same level of protection for their damages as is proposed for CFAs above;<sup>416</sup>
- The operation of DBAs in England and Wales should be kept under review so that, if they become more widely available and are seen to be enhancing access to justice, further consideration could be given to their potential in this jurisdiction.

## Summary

22.58 Despite the high volume of personal injury claims in Northern Ireland, no obvious funding mechanism is available for claimants who have less straightforward claims but are not financially eligible for legal aid. Conditional fee agreements (“CFAs”) have the potential to maintain and enhance access to justice for the whole population of Northern Ireland. In order to be effective and affordable in this jurisdiction CFAs should be introduced without any additional liabilities being imposed on defendants and with success fees payable from damages recovered. Claimants must be protected from adverse costs orders by one-way cost shifting. These recommendations are all in line

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<sup>412</sup>CJC Paper above, Appendices

<sup>413</sup>See Jackson final report, pages 125-133

<sup>414</sup>See LASPO section 45 and the Damages Based Agreement Regulations 2013 (2013/609)

<sup>415</sup>Another argument for doing away with the pesky indemnity principle

<sup>416</sup>See paragraph 22.44 above

with the Jackson reforms in England and Wales, the Taylor report in Scotland and the recommendations of the first Access to Justice Review.

22.59 To safeguard client damages, success fees should not be permitted in road traffic claims and success fees should be limited in all other cases to 20% of damages recovered. Additional safeguards, including regulation of pre-issue settlements, should be considered on consultation. There is currently no case for the general introduction of self-funding systems or contingency fees in Northern Ireland.

## 23 The Scope of Civil Legal Aid

### *“Action expresses priorities”<sup>417</sup>*

23.1 This Chapter considers the priorities for non family civil legal aid in Northern Ireland, taking into account the approaches adopted in other jurisdictions. This Chapter does not deal with the future of advice and assistance, which raises different policy issues and is considered in Chapter 25.

#### **Civil legal aid in Northern Ireland**

23.2 Table 23.1 lists the main areas of work covered by civil legal aid in Northern Ireland, based on the year 2013/14. This includes cases previously covered by Assistance by Way of Representation (“ABWOR”).<sup>418</sup> I have excluded all family cases except in general categories such as “Appeals”, “Committal” or “Contempt”, which include a mix of family and non family. Table 23.2 is a similar breakdown of the category of “Other” based on case types, but excludes all categories which generated fewer than 10 final bills in the year:

**Table 23.1 Civil legal aid volumes and costs (£) – Main Categories**

Case Type	Number of grants in the year	Number of claims against the fund <sup>419</sup>	Average cost per case to the fund <sup>420</sup>	Total cost of the category to the fund <sup>421</sup>
Criminal detention (PACE etc)	63	58	£322	£18,674
Mental Health Tribunal	173	138	£698	£96,269
Prison issues	136	119	£1,444	£171,890
Appeals	434	358	£14,099	£5,047,360 <sup>422</sup>
Immigration	268	174	£1,283	£233,248
Criminal bail	1,142	1,190	£477	£567,402
Bankruptcy	9	15	£6,020	£90,302
Assault/trespass	103	39	£4,070	£158,729
Injunctions	384	427	£2,945	£1,257,402
Judicial review	276	200	£10,515	£2,103,018
Contract	48	51	£10,310	£525,820
Employer liability	141	36	£4,985	£179,450
Negligence – general	455	166	£4,693	£778,991
Negligence - medical	238	136	£3,196	£434,700
Negligence - tripping	193	59	£3,745	£220,975
Road Traffic claims	335	125	£2,533	£316,668

<sup>417</sup> Mahatma Ghandi

<sup>418</sup> These would now be categorised under the 2003 Order as “Representation (Lower Courts)”

<sup>419</sup> Cases which recover costs in full from the other side do not generate a claim against the fund

<sup>420</sup> Considering only cases which generated a claim on the fund

<sup>421</sup> Based on cases closed in the year

<sup>422</sup> Total includes some exceptionally high claims during the year – see next Chapter

**Table 23.2 Civil legal aid volumes and costs (£) – Other**

Case Type	Number of grants in the year	Number of claims against the fund	Average cost per case to the fund	Total cost of the category to the fund
Actions re: Land	18	14	£9,038	£126,528
Committal	25	18	£2,049	£36,875
Contempt	23	17	£2,237	£38,036
Debt	12	14	£6,212	£86,965
Ejectment	29	42	£1,587	£66,656
Non-molestation	144	103	£3,083	£317,511
Partition	16	18	£2,884	£51,921
Proceeds of Crime Act	12	14	£6,193	£86,705
Repossession	33	13	£8,717	£113,318
Miscellaneous	52	37	£4,930	£182,395

23.3 Outcomes are also an important consideration when looking at the priority of different areas of non family legal aid. The most reliable measure of outcomes would be the proportion of cases which end up making a claim from the fund, but it is difficult to identify these because there is no reliable mechanism to ensure that the outcome of successful cases is promptly notified to the Agency. This could lead to an underreporting of success rates in areas where costs are routinely recovered. Outcomes reported on closed cases are classified as either “won/settled”, “lost” or “other”. “Other” often represents cases which are withdrawn at an early stage or cases where the issue in dispute goes away for some other reason. Ultimately though, the value of legal aid must in part be determined by the proportion of cases which achieve something for the client – this is best measured by looking at “won/settled” outcomes as the percentage of the total. The results for the most significant categories are as follows:

**Table 23.3 Civil non family legal aid reported outcomes**

Case type	Number of win or settle reports	Total number of reports	Percentage win or settle
Appeals (non children)	96	192	50%
Assault / Battery/Trespass	90	133	68%
Criminal	658	1,333	49%
Debt and Housing	14	26	54%
Immigration	76	170	45%
Injunctions	356	472	75%
Judicial Review	71	230	31% <sup>423</sup>
Money Damages	1,090	1,696	64%
Other	248	442	56%

### Scope in England and Wales

23.4 Personal injury claims were taken out of scope in England and Wales on 1<sup>st</sup> April 2000. Note that, although the debate in Northern Ireland has always been around “Money damages” as a category, the overwhelming majority of money damages claims relate to personal injury. In England and Wales other non priority damages cases, such as contract claims, remained in scope but were

<sup>423</sup>See discussion of judicial review outcomes in Chapter 21, paragraph 21.10

considered under the General Funding Code under which legal aid could and usually would be refused on the grounds that the case was suitable for a CFA. For practical purposes, money damages claims were no longer funded in England and Wales after April 2000 except for the higher priority categories retained in scope. These were Clinical Negligence and Claims Against Public Authorities, the latter category covering only cases concerning “serious wrong-doing, abuse of position or power or significant breach of human right”.<sup>424</sup>

23.5 In April 2013, under LASPO, further scope reductions were made. The most significant of these related to private law family cases, but there were also major reductions for non family. Civil legal aid moved from a system where everything was covered, except for specified exclusions, to funding only being available for specific cases. The scope rules are now contained in twenty pages of complex and densely packed statutory provisions in Schedule 1 of LASPO, one outcome of which is that few people understand exactly what legal aid is still available for.<sup>425</sup> The following is a rough guide to the changes and the principal non family services which are still in scope:

- Clinical negligence cases are now excluded from scope, with the exception of cases relating to babies with severe neurological injury;<sup>426</sup>
- Housing is no longer in scope as an entire category, but legal aid is still available for people facing the loss of their home, harassment or serious disrepair;
- Immigration work is largely excluded but legal aid can still cover asylum cases and cases relating to trafficking or domestic abuse;
- Claims against public authorities are also more restricted now – legal aid may cover human rights challenges and cases of abuse of power and is also available for cases concerning abuse of children or vulnerable adults (including by individuals);
- The main categories which remain fairly completely within scope are judicial review, mental health, mental capacity and community care.

### **Civil legal aid in Scotland**

23.6 To date, Scotland has managed to retain a civil legal aid scheme which covers the full range of civil litigation.<sup>427</sup> I believe that it has been possible to maintain this coverage in part due to the significantly lower spend on family cases in Scotland, especially public law cases dealt with under the inquisitorial system discussed in Chapter 16.<sup>428</sup>

23.7 Legal aid has therefore continued to exist alongside other funding mechanisms such as their system of speculative fees. There are now signs that this approach may not be maintained in the longer term. There was a significant shortfall between budget allocation and predicted spend on legal aid in Scotland for the years 2014/15 and 2015/16.<sup>429</sup> The Scottish government has recently consulted on its draft Expenses and Funding of Civil Litigation Bill. Consultation closed on 24<sup>th</sup> April 2015. The consultation posed the question: “Do you agree that the Legal Aid Fund should only be

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<sup>424</sup>Identical definitions were proposed in the Northern Ireland Funding Code, LSC, 2005, section 8

<sup>425</sup>See Impact of the changes to civil legal aid under Part 1 of LASPO, House of Commons Justice Committee, 12 March 2015 at pages 10-12

<sup>426</sup>LASPO Schedule 1 paragraph 23

<sup>427</sup>It appears that even defamation cases can be covered to a limited extent – see Civil Legal Aid for Defamation or Verbal Injury Proceedings (Scotland) Direction 2010

<sup>428</sup>See figures on legal aid spend per head in Chapter 8, Tables 8.8 (overall) and 8.15 (family)

<sup>429</sup>See Scottish Legal Aid Board annual Report 2013/14, Overview, page 3

used as a funder of last resort in respect of civil litigation?”<sup>430</sup> No details were provided in the consultation as to what this would mean in practice. However if the policy were implemented to its logical conclusion, alongside the proposed improvements in speculative fees discussed in the last Chapter, it is hard to see how legal aid could continue to be available in Scotland for the majority of money damages cases.

### **Money damages in Northern Ireland**

23.8 In 2011, Access to Justice 1 recommended that “most money damages cases, except for more complex clinical negligence cases, should be removed from the scope of legal aid, provided that alternative means of securing and improving access to justice can be implemented”.<sup>431</sup> These cases nevertheless remain in scope, 15 years after their removal in England and Wales. The difficulty has been to decide what should exist in place of legal aid and to define the types of case for which public funding should be retained. To speed the debate, Agenda consultation question 21 asked whether, if money damages cases in general are to be afforded a lower priority for inclusion within the scope of legal aid, should different considerations apply to the more serious cases where substantial special damages might be at issue or to particular types of case which might not be so amenable to alternative funding models. If so, at what point, in terms of quantum or type of case, would those considerations apply?

23.9 Practitioner responses remain strongly opposed to the removal of money damages from scope, consistent with responses to the Department’s 2013 consultation.<sup>432</sup> The Law Society, Bar, Belfast Solicitors Association, APIL and FOIL all warn of the unforeseen consequences of removal of legal aid, including any impact on the Compensation Recovery Unit or NHS. The Bar emphasise the efficiency of the current litigation system in promoting settlement of claims at the earliest stage.

23.10 Suggestions on safeguards to remain within legal aid scope were therefore limited and influenced by differing views on what should replace legal aid. APIL proposed that high priority should be given to asbestos cases and to claims concerning catastrophic or life-changing injury, especially to children and babies. Zurich Insurance from the defendant viewpoint recognised that a different approach might be needed for serious cases with life-changing circumstances. JMK Solicitors, who are personal injury specialists, warned against defining rules by reference to the quantum of the claim; complexity was a far better guide. JMK also emphasised the need to support cases which had the potential to set new judicial precedents, clarifying the law for future cases.

23.11 During the course of this review the Department, in response to the intense pressures on the legal aid budget, have confirmed their intention to remove money damages from scope at the earliest opportunity, prior to the introduction of any alternative funding mechanisms. Legal aid would still however be retained for “serious clinical negligence cases and cases where the claim arises from the actions of state agencies”.<sup>433</sup>

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<sup>430</sup> Expenses and Funding of Civil Litigation Bill, Consultation, Scottish Government, January 2015, Question 53

<sup>431</sup> AJ1 paragraph 5.106

<sup>432</sup> See Alternative Methods of Funding Money Damages Claims, Post Consultation Report, Department of Justice, June 2014, section 3

<sup>433</sup> David Ford, Paper for the Northern Ireland Executive, March 2015 - annexed to the Scope of Civil Legal Aid Post Consultation Report

23.12 My overall conclusion on money damages is the same as Access to Justice 1. These are cases where significant amounts of money by way of damages and costs flow between the parties. There is no need for the state to be a net funder of these cases. **I recommend that legal aid is removed from the great majority of money damages cases**, subject to the safeguards discussed below. In my view, in terms of priorities for the scheme, the Department is broadly on the right track in seeking to remove legal aid from money damages and other non family areas while retaining cover for private law family disputes. Where I differ somewhat is over the timing and coordination of reforms. For the reasons given in the last Chapter I support the early introduction of CFAs in this jurisdiction. It is of course desirable if at all possible to have a safety net in place before funding is withdrawn. **I recommend that, if resources allow, the removal of legal aid from money damages should be timed to coincide with, or else follow, the introduction of CFAs, assuming it proves possible to bring these in without delay.**<sup>434</sup> If the legal changes necessary for CFAs are delayed for some reason I suspect that it would soon become necessary to remove money damages from legal aid in any event.

23.13 In terms of which damages cases legal aid should remain available for, this question can only be determined in a coherent way if there is clarity over the alternatives to legal aid. As discussed in the last Chapter, I believe CFAs are the best alternative. For any damages claims still funded under legal aid, whether as a sub category remaining within scope or through the exceptional funding procedure, there is a good argument that **legal aid should operate as a supplement, not a full alternative, to CFAs**. In other words public funding should be available only for those elements of a case, such as high investigative costs and disbursements, which might not allow the case to be viable under a CFA alone.

23.14 When legal aid was removed for personal injury claims in England and Wales in April 2000, a system of Support Funding was introduced under the Funding Code. This set thresholds for investigative costs and disbursements above which legal aid could be obtained to assist a claim otherwise being pursued under a CFA. For the investigative stage, legal aid only kicked in to cover disbursements exceeding £1,000 or profit costs exceeding £5,000. However this new form of funding was very seldom used and, after a few years, it was withdrawn. In April 2013, when legal aid ceased for clinical negligence claims, there was little outcry as the CFA market had developed to cope with these cases.

23.15 In light of these experiences I do not recommend that clinical negligence as a category should remain in scope. Subject to further consultation **I recommend that only a very limited range of money damages claims should remain within scope, limited to those which can be regarded as a high priority in light of their importance to the individual or the state**. I suggest that the Department consult upon only the following money damages cases remaining within the scope of legal aid:

- Claims against public authorities concerning serious wrong-doing, abuse of position or power or significant breach of human rights;
- Claims concerning the abuse of children or vulnerable adults or sexual assault;
- Clinical negligence claims relating to babies with severe neurological injury;

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<sup>434</sup>See suggested timings for reform in Chapter 28

- Claims relating to diffuse mesothelioma;<sup>435</sup>
- Housing claims relating to disrepair or harassment.

23.16 Even for these cases, the Legal Services Agency will need to develop a consistent approach to deciding what costs should be covered by legal aid and what can be left to a CFA. I do not think the rigid financial limits previously imposed under Support Funding in England and Wales need be replicated. A better approach in these high priority cases might involve public funding being used for the early stage of a case until the claim reaches a point where, if it is to proceed at all, it should do so under a CFA.

23.17 Exceptional funding would of course be available for any damages case removed from scope. The operation of this is considered at paragraphs 23.48 to 54 below. If the Agency found that significant numbers of cases of a particular type were successfully applying for exceptional funding the scope rules could be adjusted accordingly.

### **Injunction and community cases**

23.18 As is clear from the table at paragraph 23.2, the category of “injunction” is a significant area of spend, costing over £1.2M in 2013/14. There is no equivalent category in England and Wales, which indicates that this area of activity is related to local conditions. Agenda consultation question 27 asked how high a priority injunctive relief should be the legal aid fund. If the generality of injunctive relief cases is not to be treated as of high priority, how could we identify the small number of such cases that might be afforded a higher level of priority? Should legal aid in such circumstances be reserved for an exceptional grant category that would only apply when an applicant’s safety was at issue?

23.19 There were only limited responses on this topic. The Bar pointed out that there were some situations where only the High Court has jurisdiction to grant injunctive relief, even if the case is before a different tribunal – for example immigration removal cases. Such situations should not be automatically excluded from legal aid. The LSC suggested that civil injunctions should not be a high priority and could safely be limited to a system of exceptional funding. NIACRO proposed that cases could be retained in scope if they had an element of public interest, perhaps by benefiting a local community. The Housing Rights Service cautioned that more information should be obtained about the nature of these cases before decisions were taken on scope.

23.20 From my discussions during this review, particularly with the Legal Services Agency, it is clear to me that these cases cover a range of issues, but many arise from tensions between communities. I understand that low level abuse, harassment or property damage may lead to police involvement but if the police cannot assist or if it is thought that the presence of the police may increase tensions, civil remedies may be sought instead. Although the outcome data shows that most of these cases are successful in achieving the order sought from the court, there is no way of knowing how beneficial such orders are. Invoking legal processes in disputes between neighbours always risks making matters worse rather than better, especially if the process involves someone making a

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<sup>435</sup>This group were singled out in England and Wales as requiring special protection under post-Jackson CFAs; see the Conditional Fee Agreements Order 2013, Article 6(2); I understand there may be a higher incidence of asbestos and mesothelioma cases within Northern Ireland

determination that one side or the other is “right” or “wrong”. It may be significant that there is a further category of “non molestation” cases, not categorised as family, which suggests that the “injunction” category covers a wider range of issues, not always concerning the safety of the individual.

23.21 It seems to me that proceedings to protect the physical safety of clients must be a high priority within the scheme, but any more general practice of going to court for an injunction is not. I agree with the Department’s current proposal that the majority of these cases should not remain within the scheme. **I recommend that civil non family proceedings for injunctions should be removed from scope unless the injunction is needed to protect the physical safety of the applicant.** Some immigration cases would fall within this category. In relation to community disputes, I suggest that some form of community mediation service might be a better way of addressing disputes which might otherwise proceed to court for injunctive relief. Mechanisms which could support such a service are discussed in Chapter 26.

### **Housing and debt**

23.22 In England and Wales, during the period between the removal of personal injury claims and the imposition of LASPO, housing accounted for the highest volume of civil non family certificates. In Northern Ireland housing is less prominent in the civil legal aid scheme, but the true significance of this area is masked by two factors:

- Housing is not recorded as a separate category and many of these cases are hidden within the “Other” category, which includes ejection and repossession cases;
- Much housing work is undertaken outside mainstream civil legal aid by the Housing Rights Service (“HRS”) under grant funding arrangements, which have recently been renewed.

23.23 Grant funding was considered in Chapter 5 and a new procedure for future grant funding is proposed in Chapter 26. It is important that grant funding has the flexibility to cover work which would otherwise be excluded from the scope of civil legal aid. Although there is no legal restriction on housing work under the current scheme, many solicitors I have spoken to prefer to direct clients to the HRS rather than undertake the work themselves. This raises the option that some or all of housing work could be removed from the normal scope of civil legal aid, leaving the current grant funding arrangements in place.

23.24 In my view, housing should be a priority area within the legal aid scheme because of its importance to clients. Perhaps more than any other area of law, timely advice and support on 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. Many of these cases are also urgent. I do not think it would be safe to place this entire area within the grant funding regime. **I recommend that housing as a category should remain within the scope of civil legal aid but further consultation should take place with the Law Society, HRS and others to develop clearer signposting arrangements to identify what work is best undertaken by HRS and where solicitors can add greatest value in these cases.**

23.25 The definition of housing proposed in the Northern Ireland Funding Code is probably suitable in defining the scope of this category:

“Proceedings which concern possession of the client’s home, the client’s legal status in the home or the obligations of a landlord or other person to keep the client’s home in good repair and allow quiet enjoyment of the property.”

23.26 Many housing cases arise as a result of debt (and would be covered under the above definition) but the priority of other free standing debt cases is less clear. In line with the Department’s conclusions in its recent scope consultation<sup>436</sup> **I recommend that, unless falling within the housing category, debt cases are not a priority for civil legal aid and should be removed from scope.**

### **Immigration and asylum**

23.27 Spend on immigration and asylum services is significant but proportionately less in Northern Ireland than it was in England and Wales prior to LASPO. As described above, funding in England and Wales is now restricted to asylum cases and a range of specific cases. Given that I will be proposing that advice and assistance should remain available in this category, and exceptional funding will be available under the usual tests (which will take into account the ability of clients in this category to manage without representation) I do not believe that all immigration cases are a priority for funding. Like all scope rules I do not favour the legalistic definitions used in LASPO and suggest that that priority areas are defined in plain English. **I recommend that civil legal aid is removed for immigration matters other than:**

- **Asylum applications;**
- **Proceedings where the detention of the client is in issue;**
- **Proceedings arising from domestic violence or human trafficking.**

### **Inquests**

23.28 Funding for representation at inquests, in particular those relating to the conduct of state agencies which engage article 2 of ECHR,<sup>437</sup> are now an established part of legal aid schemes in the United Kingdom. Funding for these cases is part of the exceptional funding system which was subject to a recent consultation.<sup>438</sup> A new legal framework for such cases came into operation on 1<sup>st</sup> April 2015 under the 2003 Order. Decisions on inquest funding are now matters for the Director of Legal Aid casework, rather than the Minister.

23.29 Agenda consultation question 30 asked whether legal aid to secure representation for the immediate family in Article 2 inquests or where death has occurred during detention under mental health legislation should be regarded as part of the irreducible minimum of provision.

23.30 Responses were unanimous on this issue: representation in article 2 inquests is part of the irreducible minimum of legal aid. I agree with this conclusion. This does not mean that funding is automatic – it is not always straightforward to determine the extent of article 2 engagement and

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<sup>436</sup>Scope of Civil Legal Aid, Post Consultation Report, Department of Justice, March 2015, pages 9-11

<sup>437</sup>Article 2 is the Right to Life – caselaw has developed a procedural obligation on states to carry out an effective investigation into certain deaths, particularly of individuals in state custody

<sup>438</sup>See Review of the Statutory Exceptional Grant Scheme, Post Consultation Report, Department of Justice, June 2014

whether in all the circumstances the investigative obligation of the state requires that representation be provided for the applicant. The Bar believed there should be greater clarity around the proximity of the applicant to the deceased. In my view the concept of next of kin can be given a wide interpretation but, even in cases where the tests are satisfied, I think it is important that the Director resists arguments, based on conflicts of interest, that more than one party should be separately represented at the inquest. These are inquisitorial processes and the purpose of funding is solely to assist the coroner to carry out an effective investigation. However these are considerations for funding criteria and guidance, rather than scope.

23.31 The Northern Ireland Human Rights Commission and the Law Society make the point that because these important cases are part of the irreducible minimum, they should be dealt with as part of the mainstream legal aid scheme, not as exceptional funding. The *Letts* case<sup>439</sup> lends support to this approach. I agree with this suggestion; it is very odd for part of the irreducible minimum of the scheme to be notionally excluded from funding, although so long as the right test is applied I do not think it will make a great deal of difference in practice. **I recommend that article 2 inquests are brought within the scope of civil legal aid by amendment to Schedule 2 of the 2003 Order.** The merits criteria in regulations should reflect the article 2 obligation. Funding at inquests on wider public interest grounds, which is inherently more discretionary, should continue to be dealt with under the exceptional funding system.

23.32 The decision making process for inquest funding should be considered further on consultation. Current regulations allow a right of appeal against decisions to refuse funding for cases within the scope of civil legal aid but no right of appeal against exceptional funding decisions.<sup>440</sup> If article 2 inquests are brought within the normal procedure for Representation (Higher Courts) there would be a new right of appeal unless regulations were amended to exclude this. There is an argument that this area of expenditure needs to be carefully controlled and the very different inquisitorial nature of the proceedings justifies different decision making procedures. On balance, however, since funding depends on a determination of legal entitlement, I believe that a right of appeal is appropriate.

#### **Priorities within non family civil legal aid**

23.33 In October 2014, in parallel with this review, the Department consulted on the removal of a range of types of case from the scope of civil legal aid.<sup>441</sup> Annex E of the consultation paper set out a detailed schedule of case categories, suggesting which should be considered for removal. All responses to that consultation have been made available to this review.

23.34 The Post Consultation report was published in March 2015. In summary, the Department concluded that civil legal aid should remain for private law family cases, even though they had largely been removed from scope in England and Wales. A range of non family categories should however be removed from scope. These were in addition to the proposed removal of money damages previously consulted upon<sup>442</sup> and new proposals annexed to the Post Consultation Report

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<sup>439</sup> *R (Letts) v The Lord Chancellor & Another* [2015] EWHC 402 (Admin)

<sup>440</sup> Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015, Schedule

<sup>441</sup> Scope of Civil Legal Aid, Consultation Document, Department of Justice, October 2014

<sup>442</sup> See Chapter 22 at paragraph 22.31 and paragraphs 23.8 to 17 above

to remove funding for ancillary relief and injunctions.<sup>443</sup> The categories proposed for removal in the Post Consultation report were:

- Contract and consumer issues;
- Bankruptcy matters;
- Actions regarding land;
- Debt;
- Inheritance claims;
- Probate claims.

23.35 There is inevitably a good deal of overlap between those proposals, which are in response to the immediate pressures on the budget, and this review, which is more focussed on the longer term. My terms of reference require me to “identify and prioritise” the services which should be funded under the scheme. Removal of a category from scope is the ultimate expression of priorities. The reality is that if a category of case is removed from scope, it is very unlikely to return. Scope changes require the affirmative procedure, namely a vote in the Assembly, and are therefore not taken lightly. I think it is therefore necessary that in this review I look at the full range of services currently within scope and make recommendations for reform.

23.36 The Agenda consultation listed the following range of factors which might be considered in deciding on the priority of different categories of case:

- Matters affecting right to life.
- Where individual liberty is potentially at issue.
- Whether an individual may be at risk of being subjected to violence or intimidation.
- Whether homelessness is an immediate risk.
- The potential impact of the matters at issue – proportionality.
- Whether parties to a dispute or potential dispute may be vulnerable.
- Where the interests of children are affected.
- Allegations against public authorities of serious wrongdoing, abuse of power or significant breach of human rights.
- Potential power imbalances, for example between the individual and the state or a multi-national company.
- Complexity of issues at stake.
- Ensuring that legal aid does not put the recipient in a position to pursue cases unreasonably or put unfair pressure on a non-legally aided party.
- The availability of other means of securing advice or resolving problems, such as CAB, complaints procedures and ombudsmen.
- The availability of other sources of funding, including where money and/or other assets are the subject of the litigation.
- The extent to which the matter at issue may be amenable to litigation in person, perhaps with pre-hearing advice.
- The extent to which publicly funded advice and assistance at an early stage might increase the chances of early resolution, thus producing more satisfactory outcomes and saving

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<sup>443</sup> I deal with ancillary relief in Chapter 18 at paragraphs 18.34 to 40, and injunctions at paragraphs 23.18 to 21 above

expense at later stages in the process – but being aware of the danger that immediate access to publicly funded advice from a lawyer might encourage individuals to think in terms of litigation rather than other options for resolving issues.<sup>444</sup>

23.37 Agenda consultation question 28 asked for views on the priority to be attached to different categories of case taking into account these factors. What other categories should be regarded as part of the irreducible minimum of legal aid provision?

23.38 The Law Society take issue with this analysis but agree on the need for a “planned approach based on clearly articulated principles”. As discussed in Chapter 6, the Law Society opposes reductions in scope in the context that they do not accept that there should be a further reduction in the budget for legal aid. The Society argue that there needs to be a fuller analysis of the benefits of legal aid, the savings measures which have already been achieved (especially in relation to the latest Crown Court fee reductions) and the unintended consequences of the removal of categories of case from scope. It cannot be assumed that ADR or the wider advice sector will fill the gap left by removal of legal aid. A greater understanding is needed of why people come to court and the social consequences if they are prevented from doing so.

23.39 The LSC agreed that a proper framework was needed to establish priorities, but considered the proposed exclusions from scope to be reasonable provided there were systems in place to signpost clients to other forms of help. Practitioner responses were reluctant to identify any categories for exclusion but some drew attention to what they saw as particular priority areas. These included serious injury cases (APIL and FOIL), housing and homelessness (HRS), clinical negligence, discrimination and criminal records disclosure (NIACRO), cases concerning children (Belfast Solicitors Association).

### **Conclusions on civil legal aid scope**

23.40 If the Law Society are right and there is no need to make savings, there is no need to consider further scope changes which, as discussed in Chapter 3, should be seen as a last resort. However in my view it is wholly unrealistic to believe that the scheme can proceed at the current level of expenditure through this continuing period of austerity. It is inevitable that savings will have to be made so there should be a structured and objective approach to the assessment of relative priorities.

23.41 Looking across the scheme as a whole there are three areas of work: crime; family and civil non family. Criminal legal aid is an essential part of the criminal justice system and is directly protected by article 6. We have seen what happens when family provision is cut too deeply. I set out in Chapter 18 why family services should generally be regarded as a priority for funding – the interests of children, vulnerability of clients and the lack of private funding alternatives are important considerations. By contrast, civil non family services are a mixed bag, some areas having real constitutional importance or fundamental importance to the individual, while other areas do not. The ability to recover costs in successful cases creates a funding stream which may provide an alternative means of access to justice, especially if supported by properly regulated CFAs and (for

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<sup>444</sup> Agenda paragraph 3.10

cases involving damages) success fees. In Chapter 2 I talked of the need to recognise certain aspects of legal aid provision as “front line services”, a necessary part of the provision of an effective justice system for the public. I think this is generally true of most criminal and family services and of certain areas of non family, such as mental health and housing. However I do not think the majority of civil non family work can properly be regarded as a front line service.

23.42 For all these reasons I believe the Department is absolutely right in seeking to preserve criminal and family legal aid while looking to make substantial savings in civil non family. I also agree that scope changes are necessary; simply increasing controls will not achieve the necessary savings. We need both to remove lower priority areas from scope and to ensure that all services remaining within scope are subject to appropriate controls as discussed in the next Chapter.

23.43 I do take a different view from the Department about the process to be used to redefine the scope of the scheme. To date there have been a series of proposals to take individual categories out of scope. I broadly agree with the categories so far chosen for exclusion, but it is being approached through successive reductions from the whole – often referred to as “salami slicing” of the scheme. This is particularly demoralising for practitioners who often complain that: “No sooner have they imposed one set of cuts, than they start on the next”. Money damages represent the largest volume of non family cases and when these are taken out along with the other proposed categories one is left with certain priority categories (like judicial review) together with a wide range of miscellaneous types of case. However it cannot be said that those various low volume categories are necessarily a higher priority than the categories specifically excluded; cases should not remain in scope just because it is difficult to define them.

23.44 I therefore believe it is time to depart from the approach under which everything is treated as within the scope of civil legal aid unless it is specifically excluded.<sup>445</sup> **I recommend that the scope of civil legal aid is redefined so that, in future, it is available only for specified descriptions of case. I recommend that civil legal aid for non family proceedings is limited to categories of case where there is a clear policy basis for treating the category as a priority.** The most significant policy justifications for civil non family categories will usually be a combination of:

- Constitutional importance, concerning the legality of state action;
- Overwhelming importance to the client, in particular safety and preserving the home;
- The protection of children and vulnerable adults.

23.45 It is my hope that if this approach is taken it can be achieved in one exercise and can then form the basis of a stable and sustainable scheme. Amendments may be needed over time as substantive law and legal procedures change but one advantage of defining what is in scope is that legal aid will be more resistant to future pressures. If another government department makes reforms which generate new legal needs, these will need to be identified, budgeted for and specifically reflected in Schedule 2 of the 2003 Order.

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<sup>445</sup>Note that in one respect this more exclusive approach is already adopted in Schedule 2 of the 2003 Order: civil legal aid is generally excluded unless it covers representation before specific courts and tribunals

23.46 Here then is my proposal for the categories of case for which civil legal aid should remain available in Northern Ireland, subject of course to anything arising in further consultation:

- Family proceedings, other than representation in the divorce process (see Chapter 18); note this would include child abduction proceedings;
- Judicial review;
- Claims against public authorities concerning serious wrong-doing, abuse of position or power or significant breach of human rights;
- Housing (see paragraphs 23.22 to 26 above); this should exclude proceedings relating to business tenancies or squatters;
- Mental Health Review Tribunal Proceedings;
- Proceedings relating to Mental Capacity;<sup>446</sup>
- Community Care proceedings;
- Clinical negligence claims relating to babies with severe neurological injury;
- Claims relating to clients with diffuse mesothelioma;
- Claims concerning the abuse of children or vulnerable adults or sexual assault;
- Proceedings for an injunction to protect the physical safety of the applicant;
- Proceedings (such as contempt or committal proceedings) where the liberty of the applicant is in issue;
- Discrimination proceedings;
- Proceedings relating to environmental damage;
- Immigration proceedings where the detention of the client is in issue, which arise from domestic violence or human trafficking or which relate to asylum;
- Representation at an inquest where such representation may be needed to satisfy the article 2 obligation;
- Representation relating to criminal justice (bail hearings in the High Court; PACE hearings; Proceeds of Crime Act);
- Representation required by international obligations (EU enforcement and cross-border disputes).

23.47 I believe all these categories can be justified by one or more of the factors listed at paragraph 23.44 above. The categories removed from scope under this approach would be those discussed earlier in this Chapter together with certain miscellaneous categories listed in Tables 23.1 and 2. Cases which are within scope at first instance must in principle remain in scope on appeal, subject to strict merits controls as discussed in the next Chapter. Definitions should be in plain English and can in many cases be based on definitions used in the draft Northern Ireland Funding Code, avoiding the endless legislative provisions specified in LASPO. The above list is considerably wider than the current scope rules in England and Wales. However, there are a handful of provisions covered in LASPO which are not specified above: these include representation before the Special Immigration Appeal Commission, certain Upper Tribunal cases, Special Educational Needs cases and proceedings concerning the register preventing people from working with children or vulnerable adults. A point to be considered on consultation is whether such cases (or indeed other categories

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<sup>446</sup>The Mental Capacity Bill, currently before the Assembly, may assist to define this category

in the list above) can safely be left to the exceptional funding procedure, bearing in mind that Northern Ireland is a much smaller jurisdiction and the volumes of such cases will be very low.

### **Exceptional Funding**

23.48 Exceptional funding, the process under which individual cases otherwise outside the scope of civil legal aid can receive funding, is now an established feature of legal aid schemes across the United Kingdom. Exceptional funding started life even before the Access to Justice Act 1999, when the then Lord Chancellor wished to make a special grant to represent the families at a second inquest into the Marchioness disaster. The essence of the system was firstly that it was intended as an entirely discretionary regime and secondly that final decisions should always rest with ministers. Over time exceptional funding has morphed into the opposite, as is often the way with legal processes. It is now a system primarily based on legal entitlement under ECHR articles 2 and 6; with effect from 1<sup>st</sup> April 2015, ministers are no longer involved in decision making.<sup>447</sup>

23.49 Exceptional funding will assume increased importance if the scope changes proposed above are brought into effect. Agenda consultation question 29 asked how the exceptional funding regime could be effectively controlled by ensuring that cases are genuinely exceptional and that this is not regarded as a way of circumventing rules on scope and financial eligibility. If a grant is made, how is the necessary funding to be secured?

23.50 To a large extent these issues have already been answered by the new legal framework for exceptional funding which has been established from April. I agree with the procedures now established save for one suggestion. I agree that these decisions should not be subject to formal rights of appeal<sup>448</sup> but **I recommend that where the Director refuses an application for exceptional funding, the regulations should require the Director to review his decision if requested to do so by the disappointed applicant.** I suggest that primarily as a mechanism to allow further consideration and to ensure that the applicant cannot simply go charging off to judicial review without giving the Director the chance to reconsider or change the decision if appropriate. This should happen anyway in the process of a letter before action but I see advantages for both sides if an extra stage is introduced before the decision becomes legally final. I believe the review procedure should apply to all determinations where no formal right of appeal exists.

23.51 I recommended at paragraph 23.31 above that article 2 inquests should be part of mainstream funding and therefore technically not subject to exceptional funding. One could make a similar argument about civil litigation cases where funding is required under article 6 – such cases are in a legal sense just as much part of the irreducible minimum of the scheme. However I think there is a valid distinction: civil legal aid has traditionally covered civil courts and not inquests; if a category of civil case is excluded from civil scope, then bringing an individual case from that category back into scope on article 6 grounds is properly to be regarded as an exceptional decision; however inquests remain generally excluded and the sub-category of article 2 inquests can more readily be regarded as an aspect of mainstream funding.

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<sup>447</sup>See Civil Legal Services (General) Regulations (Northern Ireland) 2015, Part 6

<sup>448</sup>Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015, Schedule

23.52 The Law Society and the LSC highlighted the need to learn lessons from the operation of the exceptional funding system in England and Wales since the LASPO scope changes. Serious concerns have been expressed both about the way the test has been interpreted and about the very low proportion of cases which are granted. In relation to the test to be applied, some aspects of the exceptional funding guidance applied in England and Wales were successfully challenged in the *Gudanaviciene* case.<sup>449</sup> This case made clear that guidance should not over-emphasise the exceptional nature of the power since “exceptionality” is not itself a test. Further, the issue for the decision taker is simply whether the ECHR obligation requires legal aid to be provided, not how likely it is that a judge would reach that conclusion. Exceptional funding decisions in Northern Ireland will no doubt be taken with this approach in mind.

23.53 More fundamental criticism of the exceptional funding system has been made in the *I.S.* case,<sup>450</sup> in particular its complexity and inaccessibility to unrepresented clients. That judgment is under appeal; hopefully the outcome of that appeal will be available in time to inform decisions on the structure of an exceptional funding regime for Northern Ireland. In one significant respect the scheme I am proposing in this report would be more accessible than that operating in England and Wales; in Chapter 25 I recommend that Green Form advice and assistance should remain widely available, including in many areas removed from the scope of civil legal aid. Green Form could be used to complete the application forms for exceptional funding, which inevitably have to require detailed information because the test under article 6 is so fact-specific.

23.54 In terms of the source of funding, the Law Society make an interesting suggestion as to whether legacy inquests should be funded not from the normal legal aid fund but by Westminster, referring to paragraph 31 of the Stormont House Agreement.<sup>451</sup> The Bar also see a case for the separate treatment and funding for legacy cases. I think the source of funding is more a political than a legal or policy question and so make no recommendation.

23.55 The volume of exceptional funding grants in England and Wales is remarkably low but, as discussed in Chapter 2, I believe this is in large part due to the very high threshold established by caselaw which must be satisfied for funding to be required under article 6 of ECHR. Evidence by the Law Centres Federation to the House of Commons Justice Committee observed that “Sixteen cases is not a safety net”.<sup>452</sup> In my view it is a safety net, provided of course that that caseworkers are applying the correct test. I would expect the volume of exceptional grants in Northern Ireland to be proportionately higher than has been observed in England and Wales to date, but still an extremely small proportion of the volume of cases excluded. Under the proposals at paragraph 23.46 above, many cases which by their nature concern vulnerable clients who might struggle to have a fair hearing without legal representation have been retained in scope.

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<sup>449</sup> *R (Gudanaviciene & Ors) v Director of Legal Aid Casework & Anor* [2014] EWCA Civ 1622

<sup>450</sup> *IS and Director of Legal Aid casework and Lord Chancellor*, [2015] EWHC 1965 (Admin), Mr Justice Collins, 15<sup>th</sup> July 2015, see Chapter 3 at paragraph 3.35

<sup>451</sup> Northern Ireland Office, *Stormont House Agreement* (23 December 2014)

<sup>452</sup> Impact of changes to civil legal aid under Part 1 of LASPO, House of Commons Justice Committee, 4 March 2015 at page 15; non inquest exceptional grants have however increased significantly to 117 in 2014/15

## **Summary**

23.56 Civil legal aid in Northern Ireland presently covers a wide range of non family cases with varying degrees of priority. Money damages claims should be removed from scope, as recommended in the first Access to Justice review, but the timing should if possible be linked to the introduction of CFAs. Only a very limited range of money damages cases should remain in scope.

23.57 It is right to regard civil non family legal aid in general as a lower priority for funding than criminal or family legal aid. Significant scope reductions are needed to achieve necessary savings. The scope of civil legal aid should in future be defined by what remains in scope, not what is excluded. The categories of non family cases retained within scope should reflect priorities based on their constitutional significance, the importance of the proceedings to the client or the need to protect children or vulnerable adults.

23.58 Under this approach the principal non family categories within scope would be: judicial review, certain claims against public authorities, housing, mental health and capacity, community care, discrimination, and claims concerning the abuse of children or vulnerable adults or sexual assault. Inquests raising article 2 issues should be brought within mainstream funding. A limited range of immigration cases and injunctions to protect the individual should also be covered. The exceptional funding procedure should be available for all excluded areas to ensure compliance with ECHR obligations.

## 24 Control of Civil Legal Aid

***“Annual income twenty pounds, annual expenditure nineteen pounds, nineteen shillings and sixpence, result happiness. Annual income twenty pounds, annual expenditure twenty pounds ought and six, result misery.”<sup>453</sup>***

24.1 Chapters 3 and 4 described the various mechanisms which could be applied to control the cost of services within the scope of legal aid. This Chapter looks at the specific controls which should be considered for non family civil legal aid.

### **Approach to merits criteria**

24.2 In Chapter 3 at paragraph 3.34 I recommended that all services remaining within scope should be subject to clear and strict criteria which target funding towards the highest priority cases. These should reflect the underlying policy of the Northern Ireland Funding Code but in a simplified form set out in guidance and regulations. This is a particularly important control for non family civil legal aid where criteria can be more specific than is appropriate for family cases.

24.3 The draft Funding Code set out detailed lists of criteria for each category of case, although there was often considerable overlap between the criteria for different categories. I think there is scope for a shorter and simpler set of rules. There is no need to replicate the Funding Code concept of “levels of service” (which would no doubt require primary legislation to achieve). The criteria discussed below would simply be conditions to apply to grants of Representation under the 2003 Order. The Department has already indicated an intention to introduce a stricter approach to prospects of success and cost benefit via guidance to the Agency.<sup>454</sup>

24.4 At paragraph 3.34 I also recommended, as a longer term reform, simplifying the legal framework relating to merits criteria in the 2003 Order, replacing the current provisions with a general power to set merits criteria in regulations. That would allow everything proposed at paragraphs 24.5 to 13 below, together with the family criteria proposed in Chapter 18 at paragraphs 18.53 to 55, to be set out in a free standing set of regulations under the 2003 Order.

### **Prospects of success**

24.5 When evaluating prospects of success it is important to be clear what constitutes “success”. Guidance can clarify what is meant by this for each type of case. **I recommend that “success” is defined in terms of the likelihood of the client obtaining a successful outcome in the proceedings, assuming the case were determined at trial or other final hearing.** This definition restricts public funding to cases which have genuine legal merit and excludes cases which simply have a good chance of securing a settlement (which a defendant might offer in a weak case just to avoid the time and cost of proceeding to trial). A case with a 60% prospect of winning at trial might well have a 90% prospect of securing a settlement before trial, but that all depends on the behaviour of the defendant and so is not a reliable criterion for public funding. The LSA may wish to organise training

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<sup>453</sup>Mr Micawber to David Copperfield, Dickens

<sup>454</sup>See Scope of Civil Legal Aid, Post Consultation Report, Department of Justice, March 2015, pages 14-16

or a seminar to promote a shared understanding of prospects of success criteria and consistency of approach.

24.6 In some categories, such as mental health proceedings, prospects of success criteria should not apply. For everything else **I recommend that the following bands of prospects of success are recognised**, in line with the Funding Code:

- Very Good – 80% or higher
- Good – 60 to 80%
- Moderate – 50 to 60%
- Borderline – prospects are not Poor, but because there are difficult issues of fact, law or expert evidence, it is not possible to say that prospects of success are better than 50%
- Poor – clearly less than 50% so that the claim is likely to fail
- Unclear – the case cannot be put into any of the above categories because further investigation is needed

24.7 Estimating prospects of success is not an exact science, so in a sense there is no meaningful distinction between a case with 49% prospects and one with 51%; however, experience has shown that the above *bands* of prospects are meaningful and workable. In my view, the above definitions are clear and proportionate, having been in operation in England and Wales for 15 years. Both the definitions of these bands and the minimum merits thresholds required for different categories of case are likely to be affected by the outcome of the appeal in the *I.S.* case.<sup>455</sup> Cases with Poor prospects should be refused; cases with Unclear prospects should be able to access only limited funding as explained below. The important question is whether the minimum threshold should be set at “Moderate” (at least 50%) or “Borderline”. In England and Wales cases with Borderline prospects have been removed from funding under LASPO, but this is now being revisited in light of *I.S.* In any event, I do not support the wholesale removal of Borderline cases; instead **I recommend that non family cases with Borderline prospects of success should be funded only in the following high priority areas:**

- Cases concerning the life, liberty or physical safety of the client or his or her family or preserving a home for them (the Funding Code concept of “overwhelming importance to the client”);
- Cases accepted by the Agency as having a significant wider public interest (a concept already recognised in the new statutory framework, at least in relation to inquests – see Article 12A of the 2003 Order);
- Cases which raise significant human rights issues.

24.8 As seen in the last Chapter, funding civil appeals is a major area of expenditure, with very high costs per case and an overall cost of over £5 million in 2013/14. A large proportion of this related to the exceptionally high fees charged in the Omagh bomb litigation. In any event I would propose a 50% minimum merits threshold to fund any appeal (interim or final), whether or not it falls within the priority areas listed in the last paragraph. In principle this criterion should apply

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<sup>455</sup>*IS and Director of Legal Aid casework and Lord Chancellor*, [2015] EWHC 1965 (Admin), Mr Justice Collins, 15<sup>th</sup> July 2015, see Chapter 3 at paragraph 3.35

both to bringing or resisting an appeal, although in practice it will be easier for the party resisting an appeal (who has the benefit of a favourable judicial decision at first instance) to satisfy the test.

### Cost benefit

24.9 This is one of the most fundamental criteria. Many different types of cost benefit criteria were contained in the Funding Code but I **recommend** a simpler system under which the following approach could be of general application:

- If the Agency accepts that a case has a **significant wider public interest**, those wider interests may be taken into account in deciding whether the benefits justify the likely costs; otherwise-
- If the claim is primarily a claim for damages or other financial benefit, **strict cost benefit ratios** should apply as described below;
- In all other circumstances the **Private Client Test** should apply: the likely benefits to be gained from the proceedings must justify the likely costs, such that a reasonable private paying client would be prepared to litigate, having regard to the prospects of success and all other circumstances.

24.10 With the general removal of money damages cases there will be relatively few quantifiable claims within non family civil legal aid, but objective criteria must apply to those which remain, as well as to any damages claim seeking exceptional funding. Minimum damages ratios are not arbitrary but reflect the fact that no sensible private paying clients would litigate at their own expense in a case with 50/60% prospects unless the likely damages were very much greater than the likely cost. By analogy, under a CFA a client with 50% prospects might well have a 100% success fee and would then require damages which were at least five times the cost, to ensure that the success fee would not exceed 20% of the damages. **The proposed minimum ratios for legal aid would be:**

**Table 24.1 Cost benefit ratios**

Prospects of Success	Minimum ratio of damages to costs
Very good (80%+)	1:1
Good (60-80%)	2:1
Moderate (50-60%) or Borderline	4:1

24.11 A different approach is needed to cost benefit if prospects are Unclear. Funding should only be granted when “there are reasonable grounds for believing that when the investigative work has been carried out the claim will be strong enough, in terms of prospects of success and cost benefit, to satisfy the [normal minimum criteria for funding].”<sup>456</sup> In addition, if the case is a claim for damages there must be a minimum damages threshold: no private paying client would invest much money investigating a potential claim unless it was likely to be substantial. Under the draft Funding Code a minimum damages threshold of £5,000 was intended but I **believe a more realistic figure would be £10,000** (aligned to the jurisdiction of District Judges in the county court).

### Standard Criteria

24.12 The following criteria should apply generally to applications for non family civil legal aid, unless dis-applied in specific categories as proposed below:

<sup>456</sup>Draft Northern Ireland Funding Code, criterion 5.6.3

- Alternatives to litigation - civil legal aid may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued;<sup>457</sup>
- Alternative funding – civil legal aid may be refused, or alternatively funding may be limited, if alternative funding is available to the client (through insurance or otherwise) or there are other persons or bodies, including those who might benefit from the proceedings, who can reasonably be expected to bring or fund the case;
- Conditional fee agreements – civil legal aid may be refused, or alternately funding may be limited, if the case appears suitable for a conditional fee agreement;
- The need for litigation – civil legal aid may be refused if it is unreasonable to proceed to litigation at this stage or if the matter should otherwise be pursued under advice and assistance;
- The need for representation – civil legal aid may be refused if, in light of the complexity of the case or procedure, and the capabilities of the client, it is not necessary for legal representation to be provided;<sup>458</sup>
- Small Claims – civil legal aid will be refused if the case has been or is likely to be referred to the Small Claims Court;
- Affordability – civil legal aid may be refused or deferred if the case is or is likely to become very high cost and is not considered to be affordable from the legal aid budget.<sup>459</sup>

**Category specific criteria**

24.13 In light of all the above criteria, relatively few category specific criteria are needed for non family cases. I **recommend** the following:

**Table 24.2 Non family category specific criteria**

Judicial review	Success should be defined by reference to the substantive order sought, not the prospect of obtaining permission; Where the court grants leave, the Agency should deem the case to have a least Borderline prospects of success, unless new information comes to light which was not before the court at the leave stage; Notification to respondent: legal aid may be refused unless the proposed respondent has been given a reasonable opportunity to respond to the challenge or deal with the applicant’s complaint, save where this is impracticable in the circumstances <sup>460</sup>
Mental Health	Prospects of success criteria should not apply; Suitability for a CFA should not apply

<sup>457</sup>See Chapter 20, paragraph 20.5

<sup>458</sup>Given the proposed reduced scope of civil legal aid, this criterion is unlikely to be applied very often, but should be available if needed

<sup>459</sup>See Chapter 3 paragraph 3.40

<sup>460</sup>See Chapter 21 at paragraph 21.23

Criminal and quasi-criminal proceedings	If a case is a criminal matter within the meaning of ECHR, the Interests of Justice test should apply in place of civil criteria; however all appeals (including renewed bail applications) should require at least Borderline prospects of success.
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### Limited funding

24.14 We are used to a civil legal aid certificate covering all the costs of a case while it is in force and covering all stages of litigation so long as the merits criteria and financial conditions of legal aid are satisfied. To make the best use of public funds, legal aid should only cover those parts of a case which are necessary to ensure access to justice.

24.15 In cases where prospects of success are Unclear, legal aid certificates should be limited in two ways:

- The scope of the certificate should specify that the only work covered is that necessary to investigate the strength of the claim, which may involve obtaining a legal or expert opinion; other work should however be permitted to preserve the client's rights, for example if proceedings must be issued because of an imminent limitation<sup>461</sup> deadline;
- The cost limitation on the certificate should be lower than is normal for the relevant category, reflecting the limited work which may be undertaken.

24.16 The criterion of suitability for a CFA is most likely to be applicable in damages claims. As discussed in the last Chapter,<sup>462</sup> for the limited range of damages cases within scope the Agency could where appropriate fund only part of the case, leaving the remaining costs to be covered under a CFA. A certificate might cover certain disbursements only or cover early investigative costs; then when the merits become clear, the certificate could be discharged and the claim would continue, if at all, under a CFA. The statutory charge and other financial conditions (other than contributions) would continue to apply after discharge; legal aid costs would be recovered if the claim was ultimately successful.

24.17 The general criterion for alternative funding could also lead either to refusal of legal aid or to a certificate which covers only part of the costs. If legal aid is applied for on the grounds of wider public interest because the outcome of the case will benefit a particular community, the Agency should consider what contribution to costs should be made by that community and what should fall to the legal aid fund.

### Financial conditions

24.18 Chapter 3 suggested a range of reforms to financial conditions in relation to eligibility levels, contributions and the statutory charge. These should generally apply in non family cases. As suggested at paragraphs 3.25 to 29 the obligation to repay legal aid costs (legal aid as a loan) should apply initially to clients who own or have an interest in their home. Consultation should explore whether there are categories of non family work where it would not be appropriate to impose this

<sup>461</sup>The Limitation Acts places statutory time limits on when proceedings can be brought

<sup>462</sup>At paragraphs 23.13 to 16

obligation. Mental health proceedings, which are in any event exempt from means testing, should not be subject to the new approach.

24.19 Chapter 22 described the concept of a Supplementary Legal Aid Scheme (or “SLAS”), financial conditions within the legal aid scheme to make it self-funding.<sup>463</sup> As previously discussed, the state should not be a net funder of damages claims. Although only a small minority of damages claims will remain within scope, and for those only a limited degree of funding may be available, I **recommend that an additional financial obligation is imposed on those damages claims supported by legal aid, designed to make such cases self-funding.** Article 17(2)(c) of the 2003 Order allows for regulations to provide for clients to agree to make a payment to the fund in specified circumstances, and this payment may even exceed the cost of the services.

24.20 I realise that this new obligation would be controversial and could be seen as a tax on successful claimants. In my view it is more accurate to describe it as a form of compulsory insurance: a premium payable to cover the cost of unsuccessful claims. Regulations should impose this obligation with a view to placing the legally aided client in a similar position to someone proceeding solely on a CFA. This would also create a level playing field as between publicly and privately funded cases, removing any financial incentive towards applying for legal aid. As a condition for receiving legal aid for any damages claims, the client would agree that, if the claim is successful and damages recovered then, in addition to the normal costs consequences (which would normally result in there being no net claim against the fund), the client would agree to make a payment back to the fund out of damages (the “SLAS payment”). Subject to consultation I suggest that the SLAS payment is calculated as:

- The amount which would have been claimed from the legal aid if the claim had not succeeded OR
- 20% of the net damages recovered;

whichever is the less.

24.21 In cases supported by both a CFA and legal aid, regulations should safeguard 80% of the damages recovered. If the CFA success fee and the SLAS payment together exceed 20% of damages, both should be reduced pro rata so that they total no more than 20%.

24.22 If a client with a damages claim was also a home owner it would be harsh to impose both a SLAS payment and legal aid as a loan, allowing the fund to recoup payments if the claim failed but claim an additional payment if the claim succeeded. In those circumstances, if the client agrees to legal aid as a loan, the fund is already protected and the SLAS obligation should not apply.

### **Remuneration – risk rates**

24.23 Chapter 4 discussed remuneration strategy generally but civil non family cases require a different treatment. The ability to recover costs in successful cases changes the nature of funding. One would expect the majority of legally aided claims to succeed and recover costs so that only a minority of cases make any net claim on the fund. It is therefore wrong to view legal aid as an

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<sup>463</sup>See paragraphs 22.46 to 52

outright funder in the same way as criminal or family. In non family civil cases, legal aid is primarily an *insurer*. In cases where payments on account have been made, legal aid is also a *banker*.

24.24 As an insurer, the Legal Services Agency should pay no more than is necessary to compensate the lawyer in the event of losing, sufficient to make it viable for the lawyer to accept that degree of risk. Such an approach has been in operation in England and Wales for many years and is known as setting “risk rates”. It is obviously desirable for lawyers to be incentivised to find and pursue meritorious cases. To encourage this, lawyers should be paid less from the legal aid fund for losing cases than they would receive from the other side in the event of a win. Such a change will be seen by many stakeholders in Northern Ireland as a fundamental reform, breaking away from the indemnity principle which requires symmetry between own client costs and costs paid between the parties. I believe such a change is a necessary reform to reflect the very different dynamic of non family litigation, to incentivise the pursuit of meritorious cases and to produce savings for the legal aid fund.

24.25 Any general changes to remuneration rates should recognise the fact that legal aid rates only govern remuneration in a subset of non family cases. By way of illustration, if 64% of money damages are successful<sup>464</sup> a 15% reduction in legal aid rates will result in just over a 5% loss of fee revenue; for a 15% reduction in revenue, legal aid rates would have to fall by 42%!

24.26 **I recommend that:**

- **Remuneration regulations should make clear that prescribed legal aid rates do not restrict the level of costs which may be recovered from the other side – this dis-applies the indemnity principle in relation to legal aid rates;**<sup>465</sup>
- **When setting remuneration rates for non family cases where costs are generally recoverable, the Department should aim to set rates substantially below the levels of costs recoverable from the other side in successful cases.**

### Summary

24.27 The merits criteria for non family civil legal aid should be set out in guidance and regulations, based on the policies previously proposed in the Northern Ireland Funding Code. There should be a minimum 50% prospects of success threshold except for the highest priority cases. Unless there is a wider public interest, cost benefit should be based on strict damages to costs ratios for quantifiable claims and the private client test for all others. Some cases should have a mix of public and private funding, legal aid covering only what is needed to secure access to justice.

24.28 Damages cases remaining within scope should be subject to an additional obligation to make a payment into the fund in successful cases, reducing or eliminating the net cost of such cases to the scheme. Investigative work should not be funded for damages claims worth less than £10,000.

24.29 Remuneration for non family cases acts as a form of insurance cover for those cases where costs are not recovered from the other side. In order to incentivise the selection of meritorious

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<sup>464</sup>See Chapter 23, Table 23.3

<sup>465</sup>Precedents for such a regulation can be found in the Community Legal Service (Costs) Regulations 2000, regulation 15(2) and previously the Civil Legal Aid (General) Regulations 1989, regulation 107B(3)

cases, legal aid remuneration rates should be set substantially lower than the rates recoverable between the parties.

## 25 A Strategy for Advice and Assistance

*“You can still get Legal Aid for many legal issues”<sup>466</sup>*

25.1 This Chapter considers the future of the Green Form scheme, concentrating on advice and assistance on civil non family issues.<sup>467</sup> This is looked at both in the context of reducing advice provision in England and Wales and the wider advice strategy for Northern Ireland.

### The current scope of advice and assistance

25.2 The advice and assistance scheme covers advice on any point of Northern Ireland law, but does not extend to representation in proceedings. Also, under the new framework applying from 1<sup>st</sup> April 2015 a range of services are excluded.<sup>468</sup> The excluded services are:

- Conveyancing
- Boundary disputes
- The making of wills
- Defamation or malicious falsehood
- Matters of company or partnership law
- Other matters arising out of the carrying on of a business

25.3 Criminal is the dominant area of advice and assistance spend. Table 25.1 shows volumes and spend as between the principal areas for 2013/14:

**Table 25.1 Overview civil and criminal advice and assistance**

Area of work	Volume	Cost	Percentage Cost
Criminal – Police Station	22,104	£3,015,520	67%
Criminal - Other	8,682	£493,613	11%
Family	2,006	£156,802	3%
Civil Non Family	7,017	£848,806	19%
Total	39,809	£4,514,741	

25.4 A more detailed breakdown for non-criminal advice and assistance was set out at page 38 of the Agenda and is copied here for reference:

<sup>466</sup>Campaign poster to raise awareness of areas remaining within scope in England and Wales, Law Society/LAPG/LAG, September 2014

<sup>467</sup>Criminal advice and assistance was covered in Chapter 11 and family advice in Chapter 18 at paragraphs 18.8 to 12

<sup>468</sup>See Schedule 2, paragraph 1 of the 2003 Order; this excludes funding any advice “beyond the provision of general information about the law and the legal system and the availability of legal services” – such general information does not seem to amount to either “Advice” or “Assistance” as defined in the 2003 Order but it might be helpful to make this clear

**Table 25.2 Civil and family advice and assistance categories**

Category	Volume	Cost (£)
Asylum	228	64,072
Immigration	319	62,497
Inquests	32	20,066
Complaints against the police and historical inquiries	616	59,106
Family (including children order, public and private)	2006	156,802
Benefits	606	56,610
Health, social services and education	360	42,217
Housing	417	28,234
Landlord and tenant	176	11,914
Debt	297	20,445
Non molestation order	202	13,009
Neighbour disputes and injunctions	503	32,736
Judicial review	136	15,340
Miscellaneous, including small claims, defamation, name change and freedom of information	426	27,665
Money damages	1562	240,020
Parole Commission cases	137	59,609
Prison issues	519	30,683
Wills/probate	214	14324
Work and employment issues	212	28,706

### The Low Commission

25.5 In 2012 Lord Low chaired a Commission to consider the future of advice services for social welfare law in England and Wales. Social welfare law was taken to include debt, housing, welfare benefits, employment, immigration, asylum, education and community care. Most of these areas were affected to a greater or lesser extent by the legal aid scope reductions implemented under LASPO in April 2013. The Low Commission reported in January 2014,<sup>469</sup> generating considerable interest and further initiatives. A follow-up report was produced in March 2015.<sup>470</sup> The Welsh Government has also undertaken a Review of Advice Services.<sup>471</sup>

<sup>469</sup>Tackling the Advice Deficit, Low Commission Final Report, January 2014

<sup>470</sup>See report and newsletters at [www.lowcommission.org.uk](http://www.lowcommission.org.uk)

<sup>471</sup>See Advice Services Review, Final Research Report, Welsh Government, March 2013

25.6 The Low Commission called for a national strategy for advice and legal support to replace the current piecemeal approach, which was failing to protect the poorest and most vulnerable. The Commission proposed a £100m implementation fund – with half the money coming from central government, and half raised from other sources, including a levy on payday loan companies. Other recommendations included:

- Creation of new ministerial post to oversee implementation of the advice and legal support strategy;
- Restoring legal aid for housing cases to enable people to receive help before they faced imminent eviction;
- Urgent reform of the ‘safety net provisions’, introduced by LASPO;
- Development of online advice services and advice by telephone;
- Increased public legal education so that people know their rights and where to go for help;
- Central and local government to do more to reduce preventable demand.

25.7 Advice services in England and Wales have always been funded from a range of sources, voluntary sector providers deriving much of their funding from local authorities. Strategic coordination between the Legal Services Commission and local authorities in the provision of advice services was one of the central objectives of the scheme operating under the Access to Justice Act 1999. The Low Commission was concerned that whilst legal aid advice services were being scaled back, local authority funding was under similar financial pressures and cutting back services, leading to increasing “advice deserts”.<sup>472</sup>

25.8 The House of Commons Justice Committee shared these concerns and took evidence about the impacts of reducing advice services.<sup>473</sup> Evidence to the Committee was “almost unanimous”<sup>474</sup> that early intervention was likely to be considerably cheaper than allowing legal aid to kick in only when an individual faced a threat to life, liberty, physical safety or homelessness. Even negative advice could generate savings if it discouraged the client from taking court action. Lord Low told the Committee that:

“..it makes more sense to put the fence at the top of the cliff than to call the expensive ambulance when the person has fallen to the bottom.”<sup>475</sup>

### **A strategy for advice services in Northern Ireland**

25.9 Legal aid covers only a small minority of advice services in this jurisdiction. Citizens Advice Northern Ireland deal with 332,000 enquiries per year, Advice Northern Ireland services with 270,000. Welfare benefit issues generate more enquiries than any other category. In total the Northern Ireland Advice Service Consortium reported 589,853 enquiries for generalist advice services in 2013/14, of which 233,336 (40%) related to welfare benefits.

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<sup>472</sup> A far cry from the days of expanding advice provision in the early years of the 1999 Act – we were tackling those deserts and turning them to sandpits!

<sup>473</sup> See Impact of the changes to civil legal aid under Part 1 of LASPO, Justice Committee, 12 March 2015 at pages 30 to 25 and 60 to 64

<sup>474</sup> Page 60 of the report

<sup>475</sup> Page 61

25.10 Most agencies receive funding from both devolved and local government, such services falling within the responsibility of the Department for Social Development. The DSD recently consulted upon a strategy for the delivery of generalist advice services in Northern Ireland 2015-2020.<sup>476</sup> Generalist advice services include all the main social welfare law categories but also family and “legal” problems. The vision is to have all these services in place for the people of Northern Ireland, empowering and enabling them to better manage their own affairs.

25.11 It seems from my discussions with the DSD that funding for advice services in Northern Ireland is on a more secure footing than is the case in England and Wales. Advice provision is generally seen as a “frontline service”. £3.5 million will be available for advice services from April 2015 to March 2016 (£1.6 M from central government and £1.9 M provided by councils). Under the arrangements for reform of local government, local councils are likely to take sole responsibility for frontline advice services from April 2016. A range of initiatives have targeted specific areas of need:

- Belfast City Council fund a Tribunal Service providing advice and advocacy at Social Security and Employment Tribunals;
- DSD also provide core funding to the Housing Rights Service;
- Mortgage Debt Advice and Debt Action Northern Ireland support clients with debt problems;
- A Mortgage Repossessions Taskforce has proposed a range of supportive measures including coordinated debt advice between the DSD and the DETI.<sup>477</sup>

25.12 Access to Justice 1 recognised the need for a joined up approach to advice funding, one result of which is that the Department of Justice is now represented on the inter-departmental Government Advice and Information Group. Agenda consultation question 33 asked for views on how legal advice and assistance should be integrated into the wider advice strategy and when would direct input from a solicitor bring most benefit to the client?

25.13 The Law Society emphasised the interdependence and networking of the various advice providers. The experience in England and Wales showed why it could not be assumed that reductions in legal aid would lead to other advice providers plugging the gaps. The Belfast Solicitors Association in any event challenged the assumption that non lawyers would be in a position to provide advice as effectively as highly regulated lawyers. The Bar had similar reservations.

25.14 The LSC suggested that there were substantial areas of overlap between solicitors and agencies in categories such as debt, welfare benefits and housing. There was a need for clearer quality standards, signposting and referral arrangements. Similar issues had been addressed in the “Making Justice Work” initiative in Scotland. Several consultees (LSC, Ulster University Law Clinic and STEP) referred to the possibility (suggested in the DSD strategy) of generalist advice providers referring more difficult cases to specialists like solicitors, although it was not yet clear how this would work in practice.

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<sup>476</sup>Advising. Supporting, Empowering’, DSD, September 2014 and consultation response, May 2015

<sup>477</sup>See Housing Repossessions Taskforce, Final Report, DSD, February 2015

### **Advice to individuals on tribunal cases**

25.15 This review is not looking at tribunals specifically, but Agenda consultation question 23 asked where advice to individuals on tribunal-related issues should stand within the wider advice strategy. Should such services be a priority for legal aid or should each responsible department ensure that clients have access to appropriate advice services and assistance to promote early dispute resolution? The Belfast City Council scheme referred to above is an example of an initiative outside the legal aid system.

25.16 The Bar emphasised the importance of tribunals and also their complexity, especially Employment tribunals. Ulster University Law Clinic agreed that such tribunals dealt with issues just as complex as the courts, with similar need for support. The Belfast Solicitors Association similarly identified the complexity of cases before the Criminal Injuries Compensation Appeals Panel, while stressing that existing provision of legal aid at Mental Health and Immigration Tribunals should remain a priority for the scheme.

25.17 Citizen's Advice Northern Ireland, NIACRO and STEP argued that clients often needed advice and support while going through the tribunal processes, but this need not always be from lawyers. CANI and STEP referred to the higher success rate of represented clients in Social Security Tribunals and the proven benefits of expert assistance.<sup>478</sup> The complexity of some social security appeals, especially at Commissioner level, was also raised with me by the Justice Committee. CANI and STEP also called for greater availability of mediation and other ADR techniques in tribunal cases.

25.18 LSC and CANI agreed that more cooperation was needed between different Departments – no more working in silos! UULC believed the top priority was for tribunals to become less legalistic and more simple and accessible.<sup>479</sup> The Housing Rights Service believed there was a case for a specialist housing tribunal, based on the Scottish tribunals service which runs a Private Rented Housing Panel and Committee. The Bar considered that more effective appeal processes were needed for employment matters in the form of a specialist Employment Appeal Tribunal.<sup>480</sup>

### **Priorities for the Green Form Scheme**

25.19 Agenda consultation question 34 asked whether the Green Form scheme should be retained. Were there categories of case (from those listed in Table 25.2 above) where immediate direct access to a solicitor for advice and assistance, supported by legal aid, should be regarded as of high priority? Was there scope for the scheme to be replaced by a combination of:

- Telephone advice lines, such as the Civil Legal Advice line in England and Wales which operates as a mandatory telephone gateway for debt, discrimination and special educational needs cases;
- Generalist advice but with the capacity to signpost to specialist advisers (including solicitors), where it is clear that expert advice would be of direct benefit to the client;
- Advice counters such as those operated in the Netherlands;

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<sup>478</sup>See Grainne McKeever and Brian Thompson, Redressing Users Disadvantage: Proposals for Tribunal Reform in Northern Ireland, Law Centre NI, June 2010

<sup>479</sup>See the McKeever research above

<sup>480</sup>I have much sympathy for this proposal as I believe the Employment Appeal Tribunal worked well in England, but I think this is not an issue for this review

- The presence of specialist advisers in court buildings along the lines of the service provided by the Housing Rights Service in the Royal Courts of Justice and Laganside Courts for those facing mortgage re-possession or eviction;
- Web-based systems, such as Rechtwijzer;<sup>481</sup>
- Facilitating pro bono assistance, for example the work of the Legal Support Project under the auspices of the Northern Ireland Law Centre and financed by Atlantic Philanthropies;
- Requiring all law firms registered to provide legally aided services to provide 30 minutes free advice on matters of law to financially eligible clients (as some firms do now for private clients);
- Legal advice clinics operated on a voluntary basis by lawyers and by students acting under their supervision.

25.20 The LSC and STEP believed there was much potential for reform; the future scheme should have more emphasis on triage / signposting, telephone advice and web solutions. The LSC believed that whilst trainees and other pro bono services could have an important role, legal aid should be retained for priority areas and vulnerable clients.

25.21 Practitioners strongly favoured retaining the Green Form scheme. The Law Society feared that without Green Form many clients would have no alternative source of advice because other funding channels might not be secure. The Belfast Solicitors Association and the Housing Rights Service argued that the scheme provided superb value for money, both in terms of the low cost per case and the low overall cost of the service. Help for clients early on with their problems was likely to be more cost effective than developing new delivery models. In light of the low remuneration rates available for Green Form work, practitioners could not afford to provide extensive pro bono advice.

25.22 Citizens Advice Northern Ireland and NIACRO wanted to see advice and assistance developed into a block funding model, incorporating the advice sector. The BSA agreed that the advice sector could deal with most cases in certain categories: benefits; health, social services and education; housing (other than re-possession or eviction); landlord and tenant. In these areas, advice agencies should be able to refer issues to solicitors when specialist legal input was necessary.

### **The future of advice and assistance**

25.23 Some general conclusions can be drawn from the wealth of information and opinion provided on consultation or drawn from experience in other jurisdictions:

- The Green Form scheme forms just a small part of what is a complex tapestry of advice provision within Northern Ireland, so decisions on the future of the scheme must not be made in isolation but as part of that wider strategy;
- There is considerable overlap and interdependence between advice services provided by solicitors and those provided by the advice sector; though it is far from easy to define what categories or types of case are best suited to solicitors;

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<sup>481</sup>See next Chapter

- Advice and assistance under the Green Form scheme covers a range of activities beyond pure legal advice – these include diagnosis, letter drafting, negotiation, triage, signposting and deterrence of lost causes;
- I share the concern of the Low Commission and others that it is particularly difficult to predict the consequences of any reduction in advice services; there is an obvious risk that if problems are not addressed at an early stage, they may get worse and be more difficult and expensive to resolve later on;
- Civil and family advice and assistance costs about £1 million, which is less than 1% of the total legal aid budget; the potential for significant savings is inevitably limited.

25.24 For these reasons I am cautious about recommending any fundamental change to the Green Form scheme at this stage. I am sure that if we were designing an advice and assistance service from scratch as part of the legal aid scheme in the 21<sup>st</sup> century, it would not look much like the current scheme. However we are where we are; reforming the current scheme to replace face to face services with telephone or internet advice would be a difficult project with uncertain benefits. There is sufficient concern over the mandatory telephone gateway in England and Wales to cast some doubt on the cost effectiveness of such a reform. There is no shortage of innovative ways to develop future advice services but I favour exploring these as targeted initiatives supported by grant funding as discussed in the next Chapter. There is currently insufficient evidence to recommend wholesale reform.

25.25 In Chapter 5 I explained why I was not in favour of funding all legal aid services through contracts, primarily because of the cost and complexity of setting up and operating such a scheme. Delivery of advice services via contracts would have enabled targeted tender exercises to meet identified need. For example if evidence had emerged that there was a serious shortage of housing advice in Strabane, tenders could be invited from solicitors or agencies to provide that specific service. If we do not go down that road, and I still think it would not be practicable to do so, we have to accept that there are few mechanisms available to match the available supply of advice services to priority needs or to reduce overlaps in advice provision between solicitors and agencies. As a simple and low cost scheme, I am not keen on requiring clients to go via an agency before being able to see a solicitor.

25.26 The principal question to consider therefore is scope. The Department's recent consultation proposed significant reductions in the scope of advice and assistance, potentially only retaining Green Form for priority areas.<sup>482</sup> For the reasons given above **I recommend that Green Form scheme continues to cover a wide range of services. Unlike civil legal aid, advice and assistance should be available on all areas of Northern Ireland law unless specifically excluded.** Policy concerning the scope of advice and assistance should be considered separately from that for civil legal aid.

25.27 Advice on potential money damages claims is the largest category in terms of Green Form spend. This is typical solicitor work so the issue is not whether the advice should be obtained from another source, but whether the work should be publicly or privately funded. As discussed in

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<sup>482</sup>Scope of Civil Legal Aid, Post Consultation Report, Department of Justice, March 2015, page 19

Chapter 22, damages claims give rise to significant money payments by way of damages and costs which should make it unnecessary for such cases to be subsidised by public funds. This will be even more viable if CFAs are introduced. All over the world, lawyers compete for these cases by offering free initial consultations to assess whether the client may have a claim worth pursuing. Many law firms in Northern Ireland offer this too;<sup>483</sup> there is no need for the taxpayer to subsidise those which do not. **I recommend that advice and assistance on money damages claims is removed from scope.** This should cover any claim for which the principal remedy sought is damages or other financial compensation. I would however preserve advice and assistance for the limited range of cases for which civil legal aid will remain available, as described in Chapter 23 at paragraph 23.15.

25.28 For other categories currently in scope, welfare benefits and debt are two areas where there is an abundance of expertise in advice agencies, in addition to the specific initiatives listed at paragraph 25.11 above. It is hard to see why advice from solicitors on these topics should be a priority for public funding. **I recommend that advice on debt and welfare benefits be removed from scope.** Consultation may indicate other areas which should or should not remain in scope - health, social services, education and housing (except for possession cases) might be further candidates.

25.29 I note all the comments at paragraphs 25.16 to 18 above concerning the importance of help for clients before tribunals but it is completely unrealistic to consider any general expansion in the scope of services in the current financial situation. Targeted initiatives to provide support at particular tribunals could however be considered under the grant funding system proposed in the next Chapter.

25.30 In Chapter 11 at paragraph 11.20 I recommended that criminal advice and assistance should be subject to a merits criterion, reflecting the private client test. This would be applied by the solicitor, to ensure that the issue is sufficiently serious to justify seeking legal advice. The same logic applies to all types of advice and assistance, so **I recommend that the following test is of general application:**

**“Advice and assistance may only be provided where the issues are of such significance to the client that a reasonable client would be prepared to pay privately for legal advice, if they could afford to do so”**

### Summary

25.31 The Green Form scheme for advice and assistance with civil problems covers a wide range of cases at relatively low cost. Early advice is often a very cost effective form of assistance, and there is always a risk of clients having more serious and costly problems further down the line if advice services cease to be available. However, there are many other sources of advice in Northern Ireland; the Green Form scheme is only a small part of wide network of advice provision.

25.32 Although face to face is not necessarily the most efficient method of advice provision, alternative approaches need time to be tested and developed. Advice and assistance should continue to be available on the full range of legal problems, subject to specific exclusions. Advice on

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<sup>483</sup>Try a quick internet search for help with a personal injury claim

damages claims should be removed from scope because solicitors can be expected to provide initial claims advice free of charge. Advice on welfare benefits and debt should be removed from scope because expert advice on these topics is widely available from other sources. The private client test should be applied to all applications for advice and assistance.

## 26 Development of Civil Justice and Legal Aid

### *“To Boldly Go Where No Man Has Gone Before”*

26.1 This Chapter looks at a range of innovative and radical ways of delivering civil justice or legal services and how these might be developed and supported in Northern Ireland.

#### **Replacing courts with specialist bodies – the Personal Injuries Assessment Board (“PIAB”)**

26.2 Chapter 16 discussed the Children’s Hearing system in Scotland, dealing with public law children issues which in other jurisdictions would be dealt with through the court system. There are other examples. In Ireland the Personal Injuries Assessment Board Act 2003 established a new body, PIAB,<sup>484</sup> to administer and determine compensation for personal injury claims. This was set up in response to concerns over spiralling costs and delay in personal injury litigation before the courts. All personal injury claims (other than clinical negligence) must be made to PIAB; the respondent can then decide to accept liability and allow the claim to be assessed by PIAB, or can reject liability in which case the claimant is free to start proceedings in court. PIAB handled over 31,000 claims in 2013 and awarded damages of over 142 million Euros, applying the same principles to quantification of damages as the courts.<sup>485</sup>

26.3 PIAB aims to operate a non adversarial and consumer-focused process which is intended to allow claimants to access the system without needing a lawyer. PIAB does not therefore award costs but is funded by application fees;<sup>486</sup> the costs of resolving cases via PIAB amount to 7.3% of awards made; it is claimed that the costs of pursuing such cases through the Irish courts would be 58% of awards made. PIAB was highly controversial when first set up but after 11 years of operation has become well established.

26.4 It has not been possible within the scope of this review to investigate the pros and cons of establishing a body like PIAB to handle personal injury cases in Northern Ireland. In any event I understand that both damages and costs in personal injury proceedings were historically higher in the Republic of Ireland than in this jurisdiction. This review has instead concentrated on reform of public and private funding (aimed at producing savings and enhancing access to justice respectively) for damages claims within the court system. During this review I have not detected any fundamental dissatisfaction with the way the courts deal with damages claims but, if such concerns exist or if planned reforms of funding cannot be introduced, there may be a case for investigating the potential of the PIAB model in this jurisdiction.

#### **Online dispute resolution - Rechtwijzer**

26.5 Of all the delivery models considered in this review, the development of online information and dispute resolution tools surely has the greatest potential to widen access to justice.<sup>487</sup> The most impressive initiative around at the moment was developed in the Netherlands by Tilburg University

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<sup>484</sup> Now operating under the working name InjuriesBoard.ie

<sup>485</sup> See PIAB Strategic Plan 2014-19, pages 7-10

<sup>486</sup> 45 Euros for claimants and 600 Euros for respondents

<sup>487</sup> See consultation comments summarised in Chapter 5 at 5.32 to 35

and the Hague Institute for the Internationalisation of Law; it is now provided by the Dutch Legal Aid Board. Rechtwijzer (which roughly translates as “Signpost to justice”) was initially developed as an interactive website to provide legal information, diagnosis and triage advice. In February 2015 Rechtwijzer 2.0 was launched as an online dispute resolution tool, providing facilitated negotiation for parties going through separation and divorce. Where such negotiation does not produce a settlement, the system facilitates mediation, neutral evaluation or adjudication. An increasing number of couples have now reached concluded settlements under the system. Work is underway to extend the system from divorce to other areas such as landlord and tenant.

26.6 The platform used by Rechtwijzer is capable of being adapted to different national jurisdictions. A Canadian version will shortly go live in British Columbia and there are discussions with Relate and Essex University aimed at making a service available in England. Rechtwijzer has been described as a “game changer”.<sup>488</sup> Online dispute resolution is also supported in the CJC and Justice reports described below. **I recommend that the Department monitor the development of Rechtwijzer and similar initiatives, particularly if such systems become available within the United Kingdom or Ireland, and investigates the benefits and feasibility of making them available to the citizens of Northern Ireland.** A joint initiative could be considered with the Irish Legal Aid Board.

#### **Her Majesty’s Online Court – the Civil Justice Council report**

26.7 Making online dispute resolution available is one thing, but creating a new official internet-based court or tribunal service is an even bolder step. There are interesting and innovative developments in this direction in British Columbia.<sup>489</sup> Closer to home, in February 2015 the Civil Justice Council in England and Wales has proposed an online court for low value claims.<sup>490</sup> The report team, led by Professor Susskind, proposed a radically different system from our traditional courts, in the context of the reducing provision of legal aid and often prohibitively high private legal costs.<sup>491</sup> Under the proposals, HM Online Court would provide a three tier service for low value claims:

- Tier One would provide Online Evaluation: this would clarify and categorise clients’ problems and make them aware of their options;
- Tier Two would provide Online Facilitation: this would be an innovative role for the courts – online facilitators would assist the parties to reach settlement through mediation or negotiation, supported where necessary by telephone conferencing;
- Tier Three: judges would make online determinations based on documents and pleadings submitted electronically, again supported where necessary by telephone conferencing.

26.8 It remains to be seen whether and under what timescale these proposals are taken forward for England and Wales. Even if they are, the subject matter of the report (low value non family claims) would have minimal impact on the areas covered by legal aid. In any event, this is not an area where Northern Ireland needs to develop its own systems in isolation. **I recommend that the Department monitor the progress of the proposal for an Online Court, ensuring that if it is**

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<sup>488</sup>See Roger Smith – “I’ve seen the future: it works (maybe) and it’s in Dutch”, blog, 18<sup>th</sup> March 2013

<sup>489</sup>See the British Columbia Civil Resolution Tribunal, due to open in early 2016

<sup>490</sup>Online Dispute Resolution for low value civil claims, Civil Justice Council, February 2015

<sup>491</sup>See report Foreword by Lord Dyson

**developed for England and Wales, consideration is given to feasibility of extending the service to Northern Ireland.**

### **Courts as ADR providers – the Justice report**

26.9 In April 2015 Justice, the human rights and law reform organisation, produced bold proposals for justice reform designed for a time when austerity reforms were leading to increasing numbers of litigants in person trying to navigate the civil justice system.<sup>492</sup> The report proposed an integrated online and telephone service for the provision of information, advice and assistance, very much in line with Tier One of the Online Court proposed by the CJC as described above. The Justice report also made proposals for a significant change in the structure and functions of existing civil courts and tribunals. Two quotes from the report set the scene:

“Our justice system is in crisis. Ongoing state retrenchment has resulted in an advice deficit that is making it increasingly difficult for ordinary people to navigate an adversarial justice system developed on the assumption that people will be legally represented.”<sup>493</sup>

“It has been said that ‘there are three things that can be done in relation to self representation by litigants: one is to **get them lawyers**, the second is to **make them lawyers** and the third is to **change the system**’.”<sup>494</sup>

26.10 Recognising that legal aid was no longer available to get people lawyers, and that there was a limit to how far advice and information could go to help people to act like lawyers, Justice proposed underlying reform in the shape of a new model of dispute resolution in civil courts and tribunals. Courts and tribunals should provide legally qualified primary dispute resolution officers, referred to as Registrars, trained to specialise in particular types of dispute. Registrars would review all cases where a defence is filed and would then have four main options:

- Strike out the case where it appeared to have no reasonable prospects of success (there would be a right to appeal such a decision to the judge);
- Conduct an Early Neutral Evaluation;
- Mediate the dispute;
- Refer the case to the judge to continue under normal court procedures.

26.11 Such a function within the court may not be as revolutionary as it sounds, especially in this jurisdiction. In the context of family proceedings, several consultees have highlighted the valuable role Court Children’s Officers play in helping families navigate the court system and find solutions. In the High Court, the Masters provide Early Neutral Evaluation in ancillary relief cases to form the basis of settlement. The Lord Chief Justice has also been seeking ways to support litigants in person who might otherwise become confused or overwhelmed by the court system. It is a shame that an initiative to provide volunteer lawyers for this purpose did not progress. In his speech on the Opening of the Legal Year 2013, the Lord Chief Justice said this:

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<sup>492</sup>Delivering Justice in an Age of Austerity, Justice, April 2015

<sup>493</sup>Report Executive Summary

<sup>494</sup>Report at paragraph 1.8 quoting Deputy Chief Justice Faulks, Family Court of Australia, Self-Represented Litigants: Tackling the Challenge, February 2013

“...there is a great deal of good work that could be done by providing [unrepresented litigants] with legal assistants who could explain how the litigant will get the opportunity to make their case, help identify the issues that are likely to be involved, alert the litigant to the papers that the judge will already have, introduce them to the other party, seek to identify those matters which are agreed and which are in dispute and perhaps, most important of all, make them feel that their entitlement to be there is respected.”

26.12 It seems to me that the excellent Justice report is radical in its specific proposals but not in its direction of travel. It is about the courts developing a much wider role than that of mere adjudication machines. I believe there is particular merit in the Justice proposal for a dispute resolution officer who is integrated into the court service and has a degree of autonomy and authority, subject to judicial supervision. This model would lend itself very well to piloting. **I recommend that the Department, in close liaison with the judiciary and the Northern Ireland Courts and Tribunals Service, develop proposals for a pilot scheme to test the effectiveness and potential of the Registrar model within one of the courts or tribunals of Northern Ireland.**

#### **Redefining legal aid services – unbundling**

26.13 Legal aid has always operated as a comprehensive service. Once you, the client, have your legal aid order or certificate, you can sit back and relax – your lawyer will do everything. The ancient court practice of lawyers appearing “on the court record” reinforces this approach, tending to make the lawyer central and the client subsidiary to the litigation process. Questions 42 and 43 of the Agenda ask whether a fundamentally different approach is possible with legal aid providing a lawyer to do only the tasks for which they are really needed, leaving the client to deal with everything else. Would a combined approach involving legal aid, the advice sector and web-based tools be better placed to address the totality of client needs?

26.14 Consultation responses on these issues were varied. Many, including the LSC, the Housing Rights Service, NIACRO and the University of Ulster Law Clinic (“UULC”) were supportive of the concept as interesting and worthy of further development. The LSC highlighted the potential of the approach to address the clusters of problems which clients often face. UULC proposed that the Ulster Legal Innovation Centre could assist in developing the idea, especially with a view to developing IT solutions.

26.15 There is wider interest in the topic. The Legal Services Consumer Panel in England and Wales is researching the potential and risks of an unbundled approach. According to the evidence presented to the Justice Committee<sup>495</sup> unbundling is widely used in probate, immigration and employment matters. However, partial legal involvement raises serious issues around professional negligence and indemnity.

26.16 Other consultation responses were more sanguine. APIL described unbundling as “confusing and unworkable”. The Belfast Solicitors Association believed that the approach has little potential for family disputes - these cases stem from relationship breakdown where clients are not able to

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<sup>495</sup>See Impact of changes to civil legal aid under LASPO, House of Commons Justice Committee, 4<sup>th</sup> March 2015, page 50

resolve matters themselves and need a solicitor or mediator to sort out what is relevant and important. A general adviser at court is no substitute for proper research and help beforehand. A combined approach of support for litigants in person via web tools, the voluntary sector and occasional ad hoc legal support would be unrealistic and unwelcome, only workable for articulate clients. This echoes a remark from one of my consultation meetings, that unbundling “only works for the middle class”.

26.17 My conclusion is that the time has not yet come to propose a comprehensive policy of itemised or unbundled legal services as part of the legal aid scheme. I agree that for the majority of legal aid clients in criminal and family cases, the approach has limited potential. However the concept that legal aid should exist to cover what it needs to cover and that this need not be everything is an important one to cling to. An example of such unbundling exists in my proposal in Chapter 24 for limited forms of legal aid in support of a conditional fee agreement.<sup>496</sup> I also agree that there is enormous potential for unbundling outside mainstream legal aid and that the universities can play an important role in developing these innovative approaches. Perhaps some of these ideas can be given impetus from the wider application of grant funding recommended below.

#### **Services for vulnerable clients**

26.18 Historically, there has always been a tendency for legal aid and justice policy to consider priorities according to the nature of the case or type of procedure involved. Increasingly, justice issues are being considered according to the needs of particular clients or client groups. ECHR case law tends to reinforce this approach: the individual capabilities of the client are just as important in determining the state’s obligation to provide legal aid as is the complexity of the case itself.<sup>497</sup>

26.19 Children are usually the first group thought of in this context. In July 2014 the Centre for Children’s Rights at Queen’s University, Belfast published ‘The Legal Needs of Children and Young People in Northern Ireland’.<sup>498</sup> Agenda consultation question 31 asked about the implications of this report for legal aid priorities. How should any available resources be most effectively and efficiently directed towards providing legal advice, information and support for children and young people? What delivery model would most successfully facilitate positive engagement with children and young people on legal matters that affect them?

26.20 Responses on the topic were limited. The LSC believed it should be part of the general responsibility of lawyers to provide services accessible to children and young people. The Belfast Solicitors Association suggested that internet training for solicitors in dealing with children would be of assistance. It was important to relate the provision of information to the cognitive ability of the child. However the courts already did a great deal, especially Court Children’s Officers in the family courts. The Law Society and NIACRO emphasised the importance of different agencies working together to ensure that the needs of children were recognised, as discussed earlier in this report in relation to youth engagement clinics.<sup>499</sup> NIACRO noted the high incidence of learning difficulties

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<sup>496</sup>See paragraphs 24.14 to 17

<sup>497</sup>See discussion of article 6 at Chapter 2, paragraph 2.10

<sup>498</sup>Authors Lesley Emerson, Katrina Lloyd, Laura Lundy, Karen Orr and Ellen Weaver

<sup>499</sup>Chapter 11 at paragraphs 11.13 to 15

among children within the youth justice system and the need for children to be taught more about their legal rights and responsibilities at an earlier age.

26.21 Agenda consultation question 32 asked whether older people or people with physical or mental disabilities have particular legal or access needs that are not currently being addressed adequately. Were there other categories of people who should receive particular consideration in this review?

26.22 The Commissioner for Older People drew attention to the United Nations Principles for Older Persons (1991) which require governments to ensure that older people have access to social and legal services to enhance their autonomy, protection and care. Advice and information should be adapted to recognise the needs of older people and should be clear, unambiguous and easy to understand. These issues should be carefully considered in any equality impact assessment of reforms arising out of this review.

26.23 The Housing Rights Service proposed that homeless people should receive particular attention in the review, recognising the cluster of serious legal problems they often face.

26.24 Rather than making specific recommendations for a range of vulnerable client groups I believe the interests of children and vulnerable adults should be borne in mind throughout the consideration of the various reforms proposed in this review. Changes to the scope of legal aid are likely to have the most significant impacts; the proposals concerning which non family cases should remain within the scope of civil legal aid seek to preserve certain services for children and vulnerable adults.<sup>500</sup> I agree with the Commissioner for Older People that equality impact assessments need to consider such groups carefully. Grant making powers, which are discussed below, may be an effective way to target scarce resources to protect the interests of particular client groups. **I recommend that in the proposed new structure for grant funding, priority should be given to initiatives which protect the rights of children and vulnerable adults, including older people, those with physical or mental disabilities and the homeless.**

#### **Development and innovation of legal aid in a period of austerity**

26.25 This review has considered a wide range of ideas to improve access to justice, including greater use of online services, greater support for clients before tribunals and support for particular client groups. In a period of continuing austerity, when the overall budget for legal aid is decreasing, it is unrealistic to propose general extensions to the scheme; it is more often a question of planning reductions in services in a way which minimises any loss of access. Nevertheless, with so much unlocked potential for better and innovative ways of delivering legal services, it would be very unfortunate if the legal aid scheme in Northern Ireland was not open to development and innovation, beyond the specific measures proposed in this review.

26.26 Under the 2003 Order, the Department has a general power to discharge its functions by making grants (with or without conditions).<sup>501</sup> At the moment this power is being used to fund

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<sup>500</sup>See Chapter 23 paragraphs 44 to 46

<sup>501</sup>Article 7(2)(b) of the 2003 Order

certain high priority services provided by the Housing Rights Service. **I recommend that in future the Department should use its grant making powers more widely with the general aim of supporting new and innovative initiatives to enhance access to justice in Northern Ireland. I recommend that out of the savings generated from civil legal aid<sup>502</sup> the Department should establish a cash-limited fund for this purpose, which I suggest could be called the Access to Justice Development and Innovation Fund (“AJDIF”).**

26.27 The principles and administration of AJDIF should be the subject of consultation, but I suggest the following:

- The fund should have a wide scope, covering both proposals for the direct funding of services to the public (as for HRS) and for developing access to justice in the longer term (for example via a new online tool or helpline);
- There should be a formal application procedure, perhaps with an annual process for considering applications to the fund (although there should be scope to committing some funds for more than one year, as is the case with the HRS grant);<sup>503</sup>
- Applicants would need to show: first, that the grant would support services not currently covered by the legal aid scheme or other sources of funding; second, why the proposed services should be regarded as a priority for public funding – for example if the services were targeted at identified vulnerable client groups;
- Services covered by grant funding should not be limited by the usual rules governing legal aid scope, merits criteria or financial eligibility, although some such restrictions might be desirable to target the services on those who need them most; services which are accessible by the whole population of Northern Ireland should be considered;
- The fund could be used to support ADR initiatives, especially those which might help to divert cases from the courts or from legal aid; as an example, mediation services specialising in resolving or diffusing community disputes might be a strong contender for funding;
- A mix of local or national initiatives could be considered.

26.28 In my view, decisions on which applications to approve from the fund should rest with the Minister, rather than the Agency. These will be decisions reflecting relative priorities for public funding rather than legal entitlement. However I think there should be a wider or community involvement in the decision making process. **I recommend that a Panel be established to review all applications to AJDIF and make (non binding) recommendations to the Minister.** The Panel would probably only need to meet once a year as part of the bidding cycle. Membership of the Panel could be considered in consultation. Although it would be important for members of the Panel to come from organisations with a strong interest and expertise in the promotion of access to justice, care would be needed to minimise the likelihood of conflicts of interest arising in relation to individual bids. A clear process would be needed to deal with such conflicts when they arose. Subject to consultation, membership of the Panel might include:

- The Director of Legal Aid Casework, or another representative of the Department;

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<sup>502</sup>Including scope reductions and increased controls over merits criteria, financial conditions and remuneration

<sup>503</sup>Future extensions of the HRS grant could be considered within the new framework, unless those services have meanwhile been brought within mainstream legal aid funding

- A representative of the DSD, in particular to consider consistency with other initiatives within the wider advice strategy, and avoid duplication of resources;
- A lawyer appointed after consultation with the Law Society or Bar Council;
- A representative nominated by the Northern Ireland Advice Service Consortium;
- A representative nominated by the Universities.

### **Summary**

26.29 There are many radical alternatives to traditional court procedures for civil litigation. In Northern Ireland there is considerable potential to build ADR processes into court procedures and to develop online dispute resolution systems.

26.30 The Department should make wider use of grant-making powers to develop new services or increase support for vulnerable client groups. A cash-limited Access to Justice Development and Innovation Fund should be established for this purpose, inviting bids on an annual basis.

# Part E Next Steps

## 27 Summary of Recommendations

*“If I were you, I wouldn’t start from here.”*

This Chapter gives a brief summary of the 150 recommendations in this report and groups them into 17 topics. Proposals on the steps needed for implementation are covered in the next Chapter. Each recommendation is referenced with the paragraph number to show where it appears in the report. Legal aid reforms are listed first, followed by wider justice reforms.

### 1 Legal aid principles and planning

These are high level issues for consideration by the Minister:

- The positive case for legal aid should be made to the Executive, as a basis for future budgets (2.30)
- There should be a statement of the priorities for access to justice and for legal aid (2.38)
- Reductions in scope should take place only when all other savings options have been considered (3.6)
- General principles of remuneration should be adopted to guide future reform of fees (4.13)
- The budget for 2016/17 should be based upon the predicted cost of the scheme, not on earlier baseline budgets (6.10)

### 2 A controlled and sustainable civil and family legal aid scheme

This topic has the greatest number of recommendations. These require various regulatory and guidance changes. The first sub-group contains the proposed changes in scope and other reforms which would require the affirmative procedure:<sup>504</sup>

- Contested and uncontested divorce proceedings should be removed from the scope of civil legal aid (18.22)
- Money damages claims should be removed from scope, but this should be coordinated with the introduction of conditional fee agreements (23.12)
- Only a limited range of damages claims should remain within scope (23.15)
- Most injunction cases should be removed from scope (23.21)
- Legal aid should remain for Housing cases (23.24)
- Non housing debt cases should be removed from the scope of civil legal aid (23.26)
- A narrower range of immigration and asylum cases should remain in scope (23.27)
- Article 2 inquests should be brought within mainstream funding (23.31)
- Civil non family legal aid should be available only for specified descriptions of case (23.44)
- Advice on money damages claims should be removed from the scope of advice and assistance (25.27)
- Advice on debt and welfare benefits issues should be removed from the scope of advice and assistance (25.28)

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<sup>504</sup>These are reforms where the legislation requires the legal changes to be approved by a vote in the Assembly

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

The following recommendations relate to the financial conditions of civil legal aid:

- There should be uniform civil income limits and a gross income cap (3.13)
- All civil legal aid should be subject to a disposable capital limit of £8,000 (3.13)
- Benefit receipt should operate as a passport on income only, not capital (3.13)
- There should be Increased income contributions for civil legal aid (3.20)
- A £100,000 limit should be placed on the subject matter of the dispute exemption (18.40)
- Statutory charge regulations should cover registration and the charging of interest (3.24)
- The £2,500 statutory charge exemption should be abolished except for Early Resolution Certificates (18.52)
- Family mediation costs should be exempt from the statutory charge (17.31)
- Homeowners should be under a new obligation to repay their legal aid costs: “Legal aid as a loan” (3.29)
- Legal aid as a loan should apply to ancillary relief cases but not to children disputes resolved under an Early Resolution Certificate (18.52 and 18.57)
- A new financial obligation should apply to successful damages claims to make them self-funding (24.19)

Merits criteria:

- All funded services should be subject to clear and strict merits criteria based upon the Northern Ireland Funding Code (3.34)
- There should be a new power to refuse a high cost case on affordability grounds (3.40)
- Family legal aid may be refused if mediation has not been attempted (17.31)
- 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)
- Contested ancillary relief cases should not be funded where alternatives sources of funding are available (18.40)
- Early Resolution Certificates should be subject to the private client test and a test of whether a serious family dispute exists (18.48)
- A range of specific merits criteria should apply to family legal aid (18.55)
- Where alternatives to litigation are available, the court should be regarded as the last resort (20.5)
- The grant of leave for judicial review should be recognised in the merits criteria (21.25)
- Legal aid for judicial review should be based on the prospects of securing the substantive relief sought (21.27)
- Funding should be based on the prospects of success at trial, not the prospects of securing a settlement (24.5)
- There should be defined bands of prospects of success (24.6)
- Cases with borderline prospects of success may be funded in high priority areas (24.7)
- Cost benefit criteria for non quantifiable claims should be based on public interest or the private client test (24.9)
- There should be strict damages to costs ratios for quantifiable claims (24.10)
- Investigative funding for potential damages claims should be restricted to those likely to be worth at least £10,000 (24.11)

- A range of standard and category specific merits criteria should apply to non family civil legal aid (24.12 and 24.13)
- The private client test should apply to all civil and family advice and assistance (25.30)

Administration of the scheme:

- Binding cost limitations should apply to all certificates (3.45 and 18.32)
- There should be a single procedure governing all civil legal aid certificates (3.49)
- Quality standards should be recognised for family mediation (17.34)
- No prior authority should be required for mediation (17.35)
- 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)
- A new system of Early Resolution Certificates should be established to emphasise settlement over court procedures (18.47)
- Early Resolution Certificates should also to be available for pre proceedings meetings in public law cases (18.10)
- The interests of the opponent should be taken into account in long running family cases (18.33)
- There should be a new power to revoke legal aid certificates for non compliance with court orders (18.33)
- Judicial review certificates should be issued only after pre-action steps are complete and the opponent has had an opportunity to respond (21.23)
- The Director of legal aid casework should be under an obligation to review decisions where no right of appeal lies (23.50)
- A legal aid certificate may cover only partial funding of a case (23.13 and 24.16)
- Grant funding should be available from a new Access to Justice Development and Innovation Fund (26.26)
- Services for children and vulnerable adults should be prioritised in applications to the fund (26.24)
- A Panel should be established to review grant funding applications (26.28)

### **3 Improved criminal legal aid controls**

Although no change is suggested to the content of the interests of justice test for criminal legal aid, a range of improved controls are proposed, most significantly in relation to means testing:

- The private client test should apply to criminal advice and assistance (except at a police station or youth engagement clinic) (11.20)
- 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)
- The court should also give reasons for certifications of counsel (4.46)
- There should be a new structured approach to criminal means testing, taking into account gross income, available capital and benefit status (13.9)

### **4 A new strategy for remuneration**

These proposals relate to levels of representation and to issues not covered by current fee schemes:

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

- The right to instruct and agree payment to counsel should be clarified in the regulations (4.34)
- There should be consultation on options for tightening the test for certification for counsel in the magistrates' court (4.46)
- Counsel's scale costs in the county court should operate as a ceiling rather than an entitlement (4.50)
- A far more restrictive approach should be adopted to the rules for authorising leading counsel or two counsel, across all case categories (4.58)
- Guideline rates for expert fees should be adopted (4.60)
- Standard fees should be established for family mediation (17.35)
- Legal aid prescribed rates should not affect the level of costs recovery from an opponent (24.26)
- A new system of payment at "risk rates" should apply to non family civil legal aid (24.26)

## **5 New fee schemes**

- New fee schemes should target savings on the higher courts and fees and incentivise desirable behaviours (4.30)
- Family fee schemes should consider the requirement for counsel in the Family Care Centre and county court (4.51)
- Family fee schemes should be structured to discourage long running contact disputes (18.32)
- Family fee schemes should be adapted to cater for Early Resolution Certificates (18.51)

## **6 The Registration Scheme**

- A date should be set for implementation of the scheme (5.11)
- Standards should be developed for police station advice (11.8)
- Cooperative standards should apply to family lawyers (18.43)

## **7 Other legal aid reforms**

These are various reform options which can be looked at independently rather than as part of the potential reform packages listed above; some require legislation or are dependent on other reforms, suggesting a longer timescale for implementation:

- The Department should engage with the NI Land Registry on statutory charge registration procedures (3.24)
- The merits provisions in the 2003 Order should be replaced with a general power to set merits criteria in regulations (3.34)
- A system of stage limitations should be established for all legal aid certificates (3.47)
- The statutory factors governing remuneration orders should be deleted (4.5)
- The Department should engage with stakeholders with a view to commissioning a study of cost profiles to inform future remuneration policy (4.18)
- There should be a process to simplify and harmonise miscellaneous legal aid fee schemes (4.32)
- LSA should develop proposals and a business case for creating an online process for criminal legal aid decision making (4.47)
- 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 Department should review the potential for overlaps between the different criminal schemes (11.22)
- The “benefit of the doubt” provision for criminal legal aid should be deleted (13.12)
- There should be power to refuse payment for judicial reviews found by the court to be totally without merit (21.18)
- A survey should be undertaken of legally aided judicial reviews (21.32)

## **8 Conditional fee agreements**

- CFAs should be made available in Northern Ireland (22.43)
- CFAs should operate with no additional liabilities upon defendants (22.43)
- A system of qualified one-way cost shifting should be adopted to protect claimants from the risk of adverse costs (22.43)
- The level of success fees claimable under a CFA should be regulated and capped at 20% of damages recovered (22.43 and 22.44)
- The operation of CFAs should be reviewed after three years (22.42)

## **9 Costs**

- There should be provision for *pro bono* costs orders (5.31)
- The courts should be prepared to use costs orders to penalise unreasonable refusal of ADR (20.7)
- There should be wider use of protective costs orders (21.21)
- The indemnity principle of costs should be abolished (22.24)

## **10 Justice reform – underlying principles**

These are principles for the Minister to consider, together with the Lord Chief Justice:

- There should be a general move away from adversarial towards more inquisitorial processes (7.11)
- Parties should be under a general obligation to engage with each other and the court prior to a hearing (7.13)
- Where possible, business should be conducted by telephone or email rather than at oral hearings (7.15)
- The practice of placing cases on a whole day list should cease (7.18)
- The practice of over-listing should be reduced (7.20)
- Judicial duties should extend beyond completion of the list (7.22)
- Plain English should be used in all reforms (7.27)
- Judges should lead working groups on procedural reform (7.38)

## **11 Litigants in person**

- There should be a statement and action plan to support litigants in person across all court levels (7.34)
- The court’s powers to authorise McKenzie friends should be liberalised (7.36)

## **12 Criminal justice reform**

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

## **13 Family justice reform**

- A joint approach to family justice should be agreed between the responsible departments (15.4)
- A joint policy should be agreed covering the funding of family mediation at all stages (17.32)
- The tandem model of representation for the child in public law proceedings should be adapted or abolished (15.24)
- The budget for legal representation for the child should be transferred from the legal aid fund to NIGALA (15.24)
- The Department should consult on the establishment of a unified family court (15.31)
- 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)
- Issues raised by consultees concerning public law proceedings should be addressed in the forthcoming public law pilot (15.39)
- Consideration should be given to the abolition of lay magistrates in the Family Proceedings Court (15.40)
- Divorce procedures should be made more administrative (15.44)
- All divorce petitions should start in the county court (15.44)
- Family court procedures should require parties to attend information meetings to learn of alternatives to the court (17.31)
- There should be a practice direction on enforcement of contact orders (15.50)
- Greater use should be made of costs and financial sanctions for non compliance with orders (15.50)
- There should be power to impose community orders for non compliance with orders (15.50)
- There should be a practice direction on the use of assets to fund ancillary relief (18.40)
- A feasibility study should be commissioned into introducing the Scottish system of Children's Hearings into Northern Ireland (16.22)

## **14 Civil non family justice reform**

- The county court should be made the compulsory point of entry for an increased range of cases (19.21)
- 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 courts should have power to certify judicial review cases as "totally without merit" (21.18)
- The courts should exercise a wider court discretion over judicial review time limits to facilitate ADR (21.20)

## **15 Innovations in justice**

- The Rechtwijzer system and its potential in Northern Ireland should be kept under review (26.6)
- The development of online courts and their potential in Northern Ireland should be kept under review (26.8)
- A pilot scheme for basing dispute resolution “registrars” in a Northern Ireland court or tribunal should be considered (26.12)

## **16 The legal profession**

These are issues raised in this report which are either matters for the representative bodies or for the responsible department (DFP):

- The Law Society should encourage more *pro bono* provision from larger firms (5.31)
- The Law Society should publish the rules for a comprehensive duty solicitor scheme (11.8)
- The DFP should review the operation of the Law Society waiver and other protectionist professional rules (9.13)
- The Bar Council should liberalise the rules for QCs acting alone (4.58)
- The Law Society and Bar Council should consider a protocol for the provision of an ENE service (20.17)

## **17 Steady as she goes**

Some of the recommendations in this report do not propose immediate change, although in some cases the status quo should only be continued for the time being (see main text for details and full context):

- Decisions on certification for counsel should remain with the court, pending an alternative online system (4.47)
- There should be no general move to contracting for all legal aid services (5.8)
- The Widgery criteria for criminal legal aid should not be amended (12.4)
- The grant of criminal legal aid should remain with the court, pending an alternative online system (12.17)
- No panel of Crown Court advocates should be established (14.6)
- No public defender service should be established (14.11)
- Private law family legal aid should remain in scope (18.7 and 18.34)
- The Green Form scheme should be retained largely in its current form (25.26)

## 28 Delivering the Strategy

*“You cannot escape the responsibility of tomorrow by evading it today.”<sup>505</sup>*

### A single reform programme

28.1 During this review much concern was expressed about coordination between this review, the outstanding projects left over from AJ1 and the Department’s other reform initiatives. The Bar are particularly forthright in their response:

“The duplication and overlap between the two Reviews and the additional current departmental consultations has only served to complicate and confuse the present position in respect of legal aid policy. In its engagement with the Review team it has become clear that time and budgetary constraints have meant that this Review is not going to fulfil the requirement of being an unfettered holistic and strategic review of the needs of the system that consolidates and prioritises all of the current and proposed changes. The potential to make this Review a “once in a generation” opportunity has been missed.....

The Review is therefore taking place against a backdrop of a rapidly changing and reducing level of Legal Aid provision and expenditure and yet the Review has not sought to bring stability and strategy to these various strands. .The approach adopted has lacked any strategic direction or focus on providing an overall long term improvement to the administration of justice.”<sup>506</sup>

28.2 I would like to challenge every one of those assertions. The fact that measures have to be taken to address the legal aid budget crisis in the short term does not invalidate or remove the necessity of taking a strategic look at the longer term. Of course there must not be inconsistent rival reform programmes, especially in a small jurisdiction like Northern Ireland. What will emerge after this report is published must be a single coordinated reform agenda which creates a clear path for the legal aid scheme both for the current situation and after the next Assembly elections in 2016. This Chapter makes further suggestions as to how this might be managed.

### Progress under Access to Justice 1

28.3 Annex 1 gives a brief summary of all the 39 projects<sup>507</sup> arising out of Access to Justice 1. This was an ambitious programme of work and a great deal has been achieved since publication of the first report, especially in the areas of criminal remuneration, diversion and the administration of legal aid. The great majority of these projects have either been completed or have been updated and are dealt with in the recommendations contained in this report.

28.4 Important pilot schemes are underway or pending in relation to criminal proceedings in the Crown Court and public law family proceedings. These arose out of Access to Justice Projects 1 and 18 respectively. The following significant AJ1 projects are currently underway:

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<sup>505</sup> Abraham Lincoln

<sup>506</sup> Bar Council response to Access to Justice 2, page 1

<sup>507</sup> It was originally 38 projects but a 39<sup>th</sup> was added on Crown Court remuneration

- New family fees (AJ1 project 24)
- The Registration Scheme (AJ1 project 34)
- Expert fees (AJ1 project 7)
- Solicitor advocates (AJ1 project 3)
- IT development (AJ1 projects 33 and 35)

28.5 The only AJ1 projects which have not progressed and have not been taken forward in this review are:

- Contingency planning (AJ1 project 16)
- Civil Justice Council (AJ1 project 17)

The Department will no doubt take a view on these as it will on all of the recommendations in this report. In any event once the way forward on this report is decided, it should not be difficult to draw everything together into a single and consistent reform programme.

### **Implementing this strategy**

28.6 Almost all the recommendations in this report would need to be subject to further consultation before they could be implemented. The decision for the responsible Minister is whether the ideas appear sound in principle and should be taken forward. I hope that, not too long after the publication of this report, each recommendation can be placed in one of three categories:

- Support in principle; proceed to next steps, usually consultation
- Disagree in principle; do not pursue
- Neutral; decide at a later date or find some other mechanism to explore the idea further.

28.7 In the last Chapter I organised the recommendations into 17 groups as an aid to planning implementation. Some of the groups represent a coordinated plan for addressing an area and should ideally be taken forward together; other groups relate to separate reform timetables or are more of a *smorgasbord* of options to consider as resources allow.<sup>508</sup>

28.8 In the current financial situation, the potential of each reform to produce savings is bound to weigh heavily in decisions over implementation priorities. Reform options can be divided into “hard” and “soft” measures in terms of their potential to generate savings. Hard measures are those where it is relatively easy to calculate the financial impacts and the effect will be fairly certain – for example, reductions in scope or remuneration. Soft measures are those where the financial implications cannot be calculated precisely because they depend on lawyer or client behaviour or case profiles within a category – such as merits criteria, financial conditions and wider system reform. For example, it is very hard to predict how many clients would be deterred by higher contributions or by legal aid as a loan. In my experience hard measures are usually prioritised by government. I encourage the Department not to underestimate the cumulative benefits of the softer measures. As discussed in Chapter 3, the reforms which are easiest to implement and which generate the most definite savings tend to be those which have the most negative impact on access to justice.

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<sup>508</sup> Groups 1, 5, 6, 7, 9, 15 and 16 fall into this category

28.9 I think the Department should be firm on its financial objectives but flexible as to how to achieve them. Consultation should be on the basis that those who oppose a particular measure should be expected to come up with a better idea for achieving the same savings, bearing in mind the compromises already made in arriving at the proposals contained in this report.

### **An approach to legal aid reform**

28.10 The legal aid reforms set out in groups 2, 3 and 4 of the last Chapter are central to this report. All these measures fall squarely within the responsibility of the Department of Justice and can be achieved without new primary legislation. I therefore encourage the Department to pursue this package of reforms at the earliest opportunity. Conditional fee agreements (group 8) should be introduced under the same timetable, if not earlier. Although a lot of work and some nifty drafting will be needed to bring these changes about, if taken as an entire package it need not be too daunting. A raft of reforms can often be covered in a single statutory instrument. I would encourage the Department to press ahead with these legal aid reforms as a whole to a single timetable, avoiding a piecemeal approach which is likely to create more work and uncertainty in the longer term.

28.11 If the reforms proceed, the implementation timetable is a matter for the minister and the Department, but I would offer the following observations:

- Major reforms in Northern Ireland tend to have a longer period of gestation than is the case in England and Wales; there is more significant and prolonged process of stakeholder engagement; in general this is commendable, but in a period of austerity I believe a more streamlined and driven process may be needed;
- Although some of the proposals in this report are new, many have been consulted on and debated in various forms for very many years; there is no prospect of consensus on issues such as scope or CFAs; at some point, what is needed is a decision and the political will and means to see it through;
- Consultation is nevertheless an essential part of the process and final policy decisions can only be taken in light of such consultation, so I would urge the Department to concentrate on beginning formal consultation on the legal aid and CFA issues as soon as possible;
- For reforms requiring the affirmative procedure, it would be advantageous to investigate whether it is possible to secure a vote in the Assembly prior to its dissolution for the elections in March 2016;
- Implementation clearly cannot take place in the current financial year, but could be delivered at the earliest opportunity during 2016/17.

### **An approach to justice reform**

28.12 The recommendations set out in groups 10, 11, 12, 13 and 14 of the last Chapter cover a wide range of options for reform of the underlying criminal and civil justice systems; some of these are fairly minor or are closely linked to related legal aid reforms, but others are quite fundamental. Many of the issues are not the exclusive responsibility of the Department of Justice and require discussion with other departments. The judiciary of course have a keen interest in all these issues.

28.13 It was never the objective of this review to create a blueprint for justice reform in Northern Ireland. The aim has been to try to identify inefficiencies or cost drivers and to make proposals

which, if appropriate, could be taken forward by others, where necessary under a longer implementation timetable than that proposed above for legal aid reform. On 7<sup>th</sup> September 2015 the Lord Chief Justice announced the Review of Civil and Family Justice to be chaired by Lord Justice Gillen. That Review provides an ideal vehicle to take forward any of the recommendations in groups 13 and 14 that are thought to have merit.

28.14 My concern about justice reform is that it needs to have a clear sense of direction. The clearer our ideas about what is wrong with the current system, the better chance of any reform initiative leading to lasting improvements. As discussed in Chapter 7, an early steer from the top would be very useful. It is my hope therefore that, as soon as possible, both the Minister and the Lord Chief Justice could express a view (whether positive, negative or neutral) on the key policy issues discussed in that Chapter<sup>509</sup>: the need to become more inquisitorial, doing business by email whenever possible, oral hearings reserved for where they are needed; cooperation outside court; radical reform of listing practice.

28.15 There are also some major reform options which I believe require decisions, or at least a clear timetable and framework within which the decision can be made, at the earliest opportunity. In my view the question of a unified family court needs to be addressed at an early stage and as a specific initiative, because so many other issues are dependent on whether that is the ultimate destination. Better and more consistent support for litigants in person<sup>510</sup> is also a high priority which I hope is pursued to a shorter timescale.

28.16 I am planning to visit Belfast in 2020 and pay another visit to the Laganside Courts. If the courts would no longer seem familiar to a visitor from Ancient Rome, and if there are no more madding crowds of lawyers in each courtroom awaiting a mention in an all-day list, this aspect of the review will have been a success.

### **A legal aid scheme to be proud of**

28.17 Finally in this report I would like to take stock of the shape of a future legal aid scheme if the majority of recommendations in this review, and other current initiatives, are implemented. The process of implementation will be difficult for practitioners, as is inevitable when really substantial savings have to be made. I realise that the impact on the Bar will be particularly significant. I am very sorry about this, but I cannot find a better alternative: I believe that maintaining a good range of services for the client must take priority over maintaining existing levels of representation.

28.18 I also believe that the reformed scheme will be one that Northern Ireland can be proud of. It will offer a greater range of services than the scheme in England and Wales. In March 2015 the Legal Aid Practitioners Group, representing legal aid lawyers in England and Wales, published a Manifesto for Legal Aid, setting out the steps they would like the government to take to improve legal aid and access to justice. If one carries out a quick audit of those recommendations in comparison with the proposals in this report, it is clear that the scheme I am proposing for Northern Ireland would address many (though I agree not all) of the concerns expressed.

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<sup>509</sup>The recommendations in Group 10 in the last Chapter

<sup>510</sup> Group 11

28.19 The legal aid scheme emerging from this review would be narrower than the present scheme in some respects, but it would more than satisfy human rights obligations as well as covering priority services to safeguard the interests of the vulnerable. It would represent greatly improved value for money. Every part of the scheme would be justifiable on an objective assessment of priorities and all services remaining within scope would be subject to more effective controls. That would provide the basis on which the longer term funding of the scheme might be secured.

28.20 Meanwhile we would see positive improvements in access to justice through new private funding options and targeted grant funding to support innovative methods of delivery. It will be a secure and sustainable legal aid scheme for the longer term.

### **Summary**

28.21 The proposals put forward in this review, together with other current initiatives, must form a single coordinated programme for reform. The majority of legal aid reform proposals could be considered for implementation during 2016/17. Reforming the justice system itself will take longer but the process should be started as soon as possible with a statement of the principles and objectives of justice reform. The question of a unified family court and increased support for litigants in person should be addressed at an early stage.

28.22 The legal aid scheme emerging from this review will be narrower than the current scheme but access to justice will be widened in other ways. The scheme will be under greater control and far more sustainable in the longer term. Funding will cover a wide range of services, safeguarding the most vulnerable members of society. This will be a legal aid scheme that Northern Ireland can be proud of.

## Annex 1 Access to Justice Review – the story so far

*“If you’re going through hell, keep going”<sup>511</sup>*

The table in this Annex lists the all the projects arising out of the first Access to Justice Review, including an update on the status and progress of each project to date. In the right hand column I have included some comments and links to the issues being considered in this review.

Number and Title	Description (with reference to AJ1 recommendations)	Status and Progress to date	Links to AJ2
1. Reduce delay	Examine the causes of delay in the criminal justice system. (AJR 3)	Not proceeding as a separate project – but measures to address delay are included in 2015 Justice Act; Speeding Up Justice branch conducting Indictable Cases Pilot in Ards Crown Court	Further measures to streamline criminal proceedings and reduce costs are considered in Chapter 10
2. Legal needs of children and young people	Commission and publish research into the legal needs of children & young people. (AJR 42)	Complete. Final report was published by the Minister and considered by the Justice Committee in September	Legal support for young people is considered in Chapter 26
3. Accredited solicitors / solicitor advocates	Develop policy for legal aid remuneration and quality assurance for solicitors exercising rights of audience. (AJR 140, 141, 142)	Regulations on requisite training for solicitor advocates require to be brought forward by the Law Society before legislation can be made by the Department. The Law Society has undertaken a consultation on the draft regulations and is developing an RIA. This has taken longer than expected but the Law Society expects to issue it shortly	
4. On call duty scheme	Develop and implement a system to deliver early legal advice to persons in custody, to agreed quality standards. (AJR 24, 26, 27, 28)	No movement on this at present. This is not currently a priority given resource constraints	Administration of police station advice is considered in Chapter 11

<sup>511</sup>Winston Churchill

5. Alternative approaches to funding (e.g. grant funding / contracts)	Develop different approaches to the funding of civil legal advice and assistance to improve support for the assisted person, and implement pilot projects to test those approaches (AJR 52, 53, 58, 101, 127, 129)	Evaluation of two pilots completed. Concluded that Housing Rights Service should continue. Pilot in respect of asylum and immigration did not demonstrate sufficient value for money and has not been continued	The potential for grant funding is considered in the proposal for an access to justice fund in Chapter 26
6. Basic legal advice ("Green Form Scheme")	Develop a new system for the provision of basic advice and assistance (AJR 55, 56)	To be considered in light of other work on scope (project 30)	The future of civil advice and assistance is considered in Chapter 25
7. Expert witnesses	Conduct a review of the use of expert witnesses and make recommendations to improve their use to speed up proceedings and better manage costs (AJR 73, 74, 119)	Public consultation concluded in February 2015. Post consultation report and next steps being developed	This is a very important area but hard to progress until good data becomes available; discussed briefly at the end of Chapter 4
8. Alternatives to money damages	Consider an alternative mechanism for the funding of money damages cases which secures and improves access to justice (AJR 90, 91, 92, 93, 95)	Post consultation report published in June 2014. Minister has decided that Money Damages will be removed from scope, with some serious clinical negligence and other categories retained. Detailed arrangements are being developed	Chapter 22 proposes a system of conditional fees for money damages in Northern Ireland, in light of which most such cases could be removed from scope
9. Alternatives to money damages - communication	DOJ to heighten awareness of the potential role of legal expenses insurance (AJR 90, 91, 92, 93, 95)	See above	The form of conditional fee proposed in Chapter 22 would not depend on insurance
10. Exceptional grant inquests	Review the use of exceptional grant funding (AJR 111, 112, 113, 114, 115)	Responsibility for decisions on applications for exceptional funding removed from the Minister in the Legal Aid & Coroners' Court Act 2014. Fees are being addressed in the Civil Remuneration Project	Exceptional funding is considered in Chapter 23

11. Single guilty fees	Consider setting a single fee for all guilty pleas in criminal cases, as part of the reviews of magistrates' court and Crown Court fees (AJR 29, 30)	Completed. Implemented for magistrates' courts on 26 <sup>th</sup> June 2014 Implemented for Crown Court along with other fee changes on 5 <sup>th</sup> May 2015	Crown court remuneration not covered in detail in AJ2 but remuneration principles are discussed in Chapter 4
12. Diversionary interventions	Urgent consideration is given to introducing prosecutorial fines and implementing the diversionary interventions legislated on to date, and the continuing development of restorative justice and youth conferencing (AJR 34)	Project completed with implementation of prosecutorial fines; further diversionary measures included in the 2015 Justice Act	Diversion is not covered substantively in AJ2 but advice in support is considered in Chapter 11
13. Mixed model	Develop a mixed model for the delivery of advice and assistance (AJR 43)	Evaluation of the two pilots complete. No further work pending Access to Justice Review Part II	The potential for grant funding is considered in the proposal for an access to justice fund in Chapter 26
14. Advice / Voluntary sector	Develop partnerships with the advice and voluntary sector (AJR 44, 45, 46, 51)	Evaluation of the two pilots complete. No further work pending Access to Justice Review Part II	See above; advice strategy in covered in Chapter 25
15. Early advice in respect of diversionary measures etc	To ensure that children, young people and adults have access to appropriate advice so they are in a position to give informed consent when offered diversionary measures, pre-court advice, including the advice provided at police stations. Review legal advice provided outside police stations (AJR 25, 35, 36, 37)	An Adult Restorative Justice Strategy is currently being developed in consultation with key partners.  Youth Engagement Clinics are being rolled-out across all police districts in Northern Ireland	Advice on diversionary measures is covered in Chapter 11
16. Contingency planning	Undertake contingency planning to ensure continuity of provision of publicly funded legal services (AJR 39)	Focus of this work has been on a criminal defence service. Approach being reconsidered to focus on other contingencies. This is not currently a priority	It is difficult to undertake meaningful contingency planning when so much is already changing. I agree it cannot be a short term priority

17. Civil Justice Council	Consider setting up a Civil Justice Council (AJR 155, 156)	Not proceeding	Although there is merit in the idea, there are other forums in this jurisdiction with an interest in civil justice. I agree that setting up a civil justice council should not be a priority in the current climate
18. Scope review of operation of family justice system	Consider how a review of the operation of the family justice system could be taken forward (AJR 68, 69, 70, 84, 89)	The Minister has approved a staged approach to family justice reform. The first stage includes a joint DoJ and DHSSPS pilot aimed at minimising unnecessary delay in care proceedings. Commencement of the pilot has been contingent on the identification of funding for the project and the appointment of a project manager from a social services background. Funding has now been secured and a project manager identified. Other preparatory work is underway	The pilot will no doubt be a valuable exercise but this report looks at more fundamental strategic options for family justice – see Chapters 15 and 16
19. Alternative dispute resolution	Promote and support a suite of alternative dispute resolution mechanisms (AJR 48, 50, 59, 60, 61, 62, 63, 64, 65, 66, 67, 79, 80, 81, 82, 83, 102, 104 & 107)	DHSSPS are leading on the development of a cross-departmental strategic approach to ADR in the family justice system. To date, progress has been impeded by resource constraints  DoJ, with the support of the Law Society and in consultation with the judiciary, is developing a mediation pilot in small claims cases. This should commence before the end of the year	The funding of family mediation by DHSSPS and the small claims pilot are very welcome but we are some way off a coordinated approach to ADR – see Chapter 17 for family and Chapter 20 for non family

20. Future structure for service delivery	Examine the future structures for the delivery of legal aid (AJR 145, 147, 150, 151, 152, 154)	Completed. Legal Aid Agency established within Department from 1 <sup>st</sup> April 2015 under the Legal Aid and Coroners' Courts Act 2014	Administration of legal aid is considered briefly in Chapter 5
21. Introduce recovery of defence costs orders	Introduce the power to recover costs from convicted defendants with sufficient funds and consider scope to recover funds which have been confiscated (AJR 31, 32)	Completed June 2012	Liability of convicted defendants is considered in Chapter 13
22. Fixed means test for criminal legal aid	Conduct further work prior to introducing a fixed means test for criminal legal aid in the magistrates' court and consider further privately funded defendants (AJR 13, 14, 15)	Proposals for reform were with the Justice Committee. CJINI have been asked to comment on impact of these reforms. Department currently considering next steps	Proposals for a more structured but simple criminal means test are set out in Chapter 13
23. Review of Magistrates' courts fees	Review of the 2009 Rules governing remuneration for criminal cases in the magistrates' courts (AJR 17, 18, 24)	Complete. Changes to Rules implemented in May 2014	Magistrates' court remuneration is not covered in detail in AJ2 but remuneration principles are discussed in Chapter 4
24. Civil legal aid remuneration	Review the levels of remuneration for civil and family cases with a view to identifying the necessary savings for legal aid to live within budget by 2014/2015 (AJR 54, 85, 86, 87, 88, 116, 117, 118, 130)	Phase 1 of the project is considering the fees payable for family cases at the 3 court tiers. Proposals made to the profession but taking longer to consider due to other issues. Proposals to be presented to the Justice Committee in due course	I support the move towards standard fees – some of the recommendations in this report would impact upon them (listed in Chapter 27)
25. Level of representation in civil and family cases	Review the levels of representation in civil and family proceedings at the magistrates' court, County Court and the High Court. (AJR 71, 72, 75, 76, 77, 78)	New arrangements came into effect on 1 <sup>st</sup> April 2014. Monitoring of the implementation of these reforms is ongoing	Levels of representation across all court levels are considered in Chapter 4

26. Financial eligibility	Review financial eligibility for civil legal aid (AJR 120, 121, 146)	Proposals for reform consulted on in 2013. Proposals currently with the Justice Committee. CJINI have been asked to comment on impact of these reforms. Consideration being given to alternative approaches	An approach to eligibility levels, contributions, the statutory charge and repayment of costs is proposed in Chapter 3
27. Funding Code (now known as "Civil Legal Services")	Complete development and introduce Civil Legal Services - being developed by the Legal Services Commission – to prioritise funding for more serious legal problems (AJR 40, 41, 126, 180)	Proposal for a Northern Ireland Funding Code not proceeded with; framework of Civil Legal Services implemented under the Legal Aid and Coroners' Courts Act 2014 with effect from 1 <sup>st</sup> April 2015	In this report I recommend improved control of civil certificates through transparent and prioritised merits criteria – see Chapter 3 Specific proposals for family are at Chapter 18 and non family at 24
28. Representation	Review the level of representation in criminal proceedings in the magistrates' court and Crown Court (AJR 16, 21)	Restrictions on level of representation in the Crown Court implemented April 2012 – see also project 39	Levels of representation across all court levels are considered in Chapter 4
29. Review of Crown Court fees	Conduct a Review of the 2011 Rules governing remuneration for cases in the Crown Court (AJR 20)	Closed – Replaced by Project 39	
30. Scope of civil legal aid	If further savings are required, consider reducing what legal aid is available for – the scope of legal aid (AJR 45, 109,125)	Consultation on the scope of civil legal aid was issued in October 2014. The post consultation report was issued in March 2015. Minister decided on areas of scope to be reduced. Detailed papers on each area to be presented to Justice Committee during 2015	I consider the scope of civil legal aid in Chapter 23 and Green Form in 25
31. Clinical negligence	Review legal aid funding of clinical negligence cases. (AJR 98)	Policy being developed in response to consultation – Project 8. Serious clinical negligence to be retained	I am proposing that conditional fees should be the main mechanism for funding clinical negligence in Northern Ireland, as discussed in Chapters 22 and 23

32. Legal aid appeals	Introduce a new mechanism for legal aid appeals and improve decision making (AJR 122, 123, 124)	Complete. New appeals mechanisms now introduced under the Legal Aid and Coroner's Court Act from 1 <sup>st</sup> April 2015	
33. Management information project – legal aid forecasting	Develop an accurate forecasting model for legal aid, including a reliable mechanism for average case costs (AJR 6, 7, 9, 10, 12)	Complete. New methodology has been designed and was introduced in July 2014. Forecasting model is now mainstreamed	Budget forecasting discussed in Chapter 6
34. Compulsory registration scheme	Develop and implement a compulsory registration scheme for solicitors conducting legally aided cases (AJR 97, 132, 133, 134, 135, 136, 137, 138)	Consultation completed and the new scheme is being designed and legislation drafted. A new digital case management system is being developed, and the registration scheme will form the front end for that system	This is an important project which I hope will now be given a firmer timetable for completion, as discussed in Chapter 5
35. NILSC It improvement	Develop and put in place replacement for NILSC case management system (AJR 149)	LSA now on IT Assist. The Agency case management system is part of the NICS and is receiving a high priority. The project is now in the "Discovery Phase"	
36. Management information project – justice system forecasting	Develop an integrated forecasting system on a justice wide basis (AJR 6, 7, 9, 10, 12)	Complete. Working in conjunction with Project 33. New forecast methodology has arrangements for input from across the justice system. Forecasting methodology now mainstreamed	Budget forecasting is discussed in Chapter 6
37. Counter fraud project	Develop and implement an effective counter-fraud strategy, leading to lifting of the current qualification of the NILSC's accounts	Range of counter-fraud measures have been mainstreamed and work is in hand to estimate the fraud and error rate in publicly funded legal services – a revised counter fraud strategy is being prepared to reflect progress in this area and link into the implementation of the registration scheme	

38. Integrated remuneration strategy	With PPS, develop a common approach to the remuneration and governance of publicly funded legal services within the justice system	Continuing to work closely with PPS in context of the reform to criminal fees. This work is now mainstreamed	Remuneration strategy discussed in Chapter 4; panels for Crown Court advocacy discussed in Chapter 14
39. Reduction in Crown Court fees	Further reduction in Crown Court fees following the outcome of the review completed in early 2013.	Complete. Revised Crown Court fees implemented 5 <sup>th</sup> May 2015	Crown Court remuneration not covered in detail in AJ2 but remuneration principles are discussed in Chapter 4

## **Annex 2 List of Responses Received**

Responses to the Agenda consultation were received from the following organisations and people – all these responses may be viewed on the Department of Justice website

Advice NI  
Association of Personal Injury Lawyers  
Bar Library  
Belfast Solicitors' Association  
Bonnie Bateson (individual)  
Children's Law Centre  
Citizens' Advice Bureau  
Clare Oliver (individual)  
Commissioner for Older People for Northern Ireland  
Family Law Solicitors' Association  
Family Mediation (NI)  
Forum of Insurance Lawyers (FOIL)  
Housing Rights Service  
JMK Solicitors  
John D McHugh (individual)  
KRW Law Associates  
Law Society  
Legal Services Commission  
Newry and Banbridge Solicitors' Association  
NIACRO  
Northern Ireland Housing Executive  
Northern Ireland Human Rights Commission  
Prisoner Ombudsman  
Prof. Jack Anderson QUB (Research for Nuffield Foundation)  
PSNI  
SEN Advice and Advocacy NI (private education consultancy)  
South Tyrone Empowerment Programme  
Southern Trust  
Ulster Law Clinic  
Victim Support NI  
Zurich Insurance

## **Annex 3 List of Meetings Held**

### **Meetings in Northern Ireland**

#### **2014 (Jim Daniell)**

Barra McGrory, Director, PPS  
Les Allamby, Law Centre NI  
Eugene MacNamee, UUJ Head of Law School  
Ulster Law Clinic  
NIGALA  
Chief Exec and Chair, Bar Council  
Family Mediation Northern Ireland  
Children's Law Centre  
Northern Ireland Courts and Tribunals Service

#### **2015 (Colin Stutt)**

Lord Chief Justice  
Family Judges  
Gerald McAlinden QC, Chair, Bar Council  
David Mulholland, Chief Executive, Bar Council  
Arleen Elliott, President, Law Society  
Alan Hunter, Chief Executive, Law Society  
Series of meetings with Northern Ireland practitioners, facilitated by the Bar Council and Law Society  
Belfast Solicitors' Association  
North Down and Ards Solicitors' Association  
Newry and Banbridge Solicitors' Association  
Family Law Solicitors Association  
JMK Solicitors  
Children's Law Centre (and Annual Lecture)  
Family Mediation Northern Ireland  
Les Allamby, Northern Ireland Human Rights Commission  
Barra McGrory, Director, PPS  
Family policy team, DHSSPS  
Donna Darlington, Advice Policy, DSD  
Laura McPolin, DFP  
Series of meetings with LSC/LSA and Department of Justice officials  
Justice Committee (11th June)

### **Meetings in England and Wales**

Richard Miller, Law Society  
Carol Storer, Legal Aid Practitioners Group  
Nicola Mackintosh, Mackintosh Law and LAPG  
David Marshall, APIL  
Harry Trusted, Barrister, Outer Temple Chambers  
Hugh Barrett, Steve O'Connor, Legal Aid Agency

Malcolm Bryant and legal team, Legal Aid Agency  
Robert Wright, Costs and Funding, Ministry of Justice

**Meetings in Scotland**

Colin Lancaster, Catriona Whyte, Scottish Legal Aid Board  
Malcolm Schaffer, Nick Hobbs, Scottish Children's Reporter Administration  
Alyson Evans, Children's Hearings Scotland

**Meetings in the Republic of Ireland**

John McDaid, Chief Executive, Legal Aid Board