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Assembly

## Research and Information Service Briefing Paper

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# Structures for the Delivery of Legal Aid and Policy Matters

## 1 Introduction

This paper examines the Access to Justice Review's thinking on structures for the delivery of legal aid and possible changes to responsibilities for legal aid policy. The paper also examines proposals in England and Wales, particularly the change in status of the Legal Services Commission from a non-departmental body to an executive agency within the Ministry of Justice.

## 2 Structures for the Delivery of Legal Aid Policy

A number of issues have been raised in relation to the structure for the delivery of legal aid and policy on access to justice. The Northern Ireland Legal Services Commission (NILSC) has been responsible for the administration of civil and criminal legal aid since it was established under the Access to Justice (NI) Order 2003. Previously functions were exercised by the Legal Aid department of the Law Society. The NILSC is a Non-Departmental Public Body (NDPB) and is run by an independent board, accountable to the government through sponsorship arrangements, employs its own staff and has a Chief Executive who is responsible for accounting matters.<sup>1</sup> The functions of the NILSC are to:<sup>2</sup>

- Determine applications for civil legal aid and advice;
- Assess applications and pay fees for work completed;
- Assess and pay fees for work completed in relation to criminal legal aid;
- Undertake reform of civil legal aid;
- Support the NICTS in its reform of criminal legal aid;
- Ensure propriety and regulatory of payments and financial procedures;
- Monitor and forecast expenditure for the purposes of financial planning and spending within the legal aid budget.

The NILSC employs around 160 staff and expenditure for staff and non-staff costs has risen from £3.8m in 2003/04 to £7.4m in 2009/10. Explanations given for this rise which has mainly occurred in staff costs include:<sup>3</sup>

- policy development and reform of civil legal aid;
- accountancy and finance;
- IT;
- Supporting the Board, Chief Executive;
- Accountability mechanisms;
- Improving service delivery and backlogs.

There are plans to move the sponsorship role of the NILSC which is currently exercised by the Northern Ireland Courts and Tribunals Service (NICTS) and presumably its legal aid responsibilities to one of the directorates in DOJ.<sup>4</sup> The NILSC has been engaged in an extensive reform agenda in a number of areas including:<sup>5</sup>

- Developing the Funding Code- the priorities and criteria for granting civil legal aid;
- Reforming the Statutory Charge;
- Simplifying and revising the rules for eligibility for civil legal aid;
- Providing a registration scheme for providers of legally aided services;

<sup>1</sup> Access to Justice Review "The Discussion Paper", November 2010, para 6.1

<sup>2</sup> Access to Justice Review "The Discussion Paper", November 2010, para 6.4

<sup>3</sup> Access to Justice Review "The Discussion Paper", November 2010, para 6.5

<sup>4</sup> Access to Justice Review "The Discussion Paper", November 2010, para 6.17

<sup>5</sup> Access to Justice Review Progress Report, March 2011 para 6.17

- A statutory remuneration scheme for setting fees.
- An organisational structure that supports effective planning and implementation of change whilst securing efficiencies and reducing running costs.

### **Landscape Review of NILSC**

A review on the Northern Ireland Legal Services Commission (The Landscape Review) was conducted by Deloitte MCS in 2007. The report found that whilst there was significant progress on reforms, the current arrangements did not deliver on the government's objectives on access to justice and value for money, do not serve the needs of all users and stakeholders and do not provide appropriate governance, accountability and risk management. The review found that these failings were not as a result of the NDPB model which was concluded to be appropriate for the work of the Commission but as a result of failures in direction and focus.<sup>6</sup> It was suggested that "an immediate step change was required was a rebalance of priorities and application of resources."<sup>7</sup> The main areas that require 'rebalancing' include: financial management including value for money and accountability and delivering service excellence.

### **Northern Ireland Audit Office Report**

In a recent report by the Northern Ireland Audit Office (NIAO) in the area of criminal legal aid suggested issues that were consistent with the earlier Landscape Review. It has been reported that the NILSC has not yet completed its reform agenda; however costs are escalating out of control. Some of the findings include:<sup>8</sup>

- Insufficient information to help the Commission predict and control expenditure, for example it was reported that every year since its establishment in 2003, the NILSC has been unable to estimate with accuracy the budget that it needed and it sought £150m in additional funding<sup>9</sup>;
- The current framework for managing criminal legal aid does not provide value for money or proper accountability for public money.
- There is scope for significant room for efficiency improvements, including direct cost savings, but this can only be achieved if the NILSC, the DOJ, the NICTS and other professional bodies work together.

The NIAO recommended that: the Commission take immediate steps to review its information used to forecast and monitor expenditure; the Commission must assess quality and value for money of criminal legal aid funded from the public purse; and the Commission and court service must review governance arrangements regularly to minimise and manage conflicts of interest.<sup>10</sup> The report noted that members of the legal

<sup>6</sup> Deloitte MCS "Landscape Review of the Northern Ireland Legal Services Commission", 2007, 12 <http://www.nilsc.org.uk/uploads/publications/documents/Landscape%20Review.pdf>

<sup>7</sup> Deloitte MCS "Landscape Review of the Northern Ireland Legal Services Commission", 2007, 12

<sup>8</sup> Northern Ireland Audit Office "Managing Criminal Legal Aid" June 2011, 3.

<sup>9</sup> Northern Ireland Audit Office "Managing Criminal Legal Aid" June 2011, 36

<sup>10</sup> Northern Ireland Audit Office "Managing Criminal Legal Aid" June 2011, 6.

profession are involved in a number of the Commission's committees and review panels and that, furthermore, legal professionals are involved in the process of determining fees.<sup>11</sup>

### **Recommendations of the Access to Justice Review**

In the final report of the Access to Justice Review, the Review Team note that arrangements have been put in place to monitor the implementation of the Landscape Review recommendations and that significant issues have not been identified that are not being addressed elsewhere.<sup>12</sup>

The Review Team identified a number of positives in the NILSC including: institutional expertise and commitment amongst staff which is important in a complex area; a commitment to addressing delivery and tackling delay; a board that has brought a range of skills and experience to the commission and independence and integrity in decision making.<sup>13</sup> However the Review Team identified some weaknesses. They highlighted that the division of policy responsibility between the Commission and its sponsor results in confusion, duplication inefficiency.<sup>14</sup> They also referred to the concerns raised by NIAO regarding financial control and forecasting.<sup>15</sup> They also noted that the NILSC as an NDPB has little scope for staff to movement in and out of the organisation to access and develop new skills.<sup>16</sup> The Review Team suggest that it wants to retain the positive arrangements of current arrangements while addressing these weaknesses. However they suggest two criteria that must be part of arrangements:<sup>17</sup>

- Individual decisions on legal aid must be made independently of government;
- Responsibility for policy development and advice to government on policy matters, including policy on civil and criminal legal aid must be brought together in one location with direct access to the Minister.

The Review Team considered the Legal Services Commission's recommendation of a Hybrid model but concluded it would not be ideal to create a structure where policy on legal aid and advice to the Minister are managed through a Board. Instead the Review Team recommended that the policy function should be integrated into the core of the Department.<sup>18</sup>

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<sup>11</sup> Northern Ireland Audit Office "Managing Criminal Legal Aid" June 2011,46

<sup>12</sup> Access to Justice Northern Ireland "The Report" August 2011, 122

<sup>13</sup> Access to Justice Review Northern Ireland "The Report" August 2011, 122-123

<sup>14</sup> Access to Justice Review Northern Ireland, "The Report", August 2011, 123.

<sup>15</sup> Access to Justice Review Northern Ireland, "The Report", August 2011, 123

<sup>16</sup> Access to Justice Review Northern Ireland, "The Report", August 2011, 124.

<sup>17</sup> Access to Justice Review Northern Ireland, "The Report", August 2011, 124

<sup>18</sup> Access to Justice Review Northern Ireland "The Report" August 2011, 126

The Review Team also considered the question of the legal aid delivery function of the Commission and concluded that removing its policy function would reduce its size and role. It was therefore recommended by the Review Team that it would not propose to recommend its continuation as an NDPB. It is recommended that all aspects of policy on criminal and civil legal aid should become part of an Access to Justice Directorate or Division within the core of the DoJ. The Review Team recommended that the legal aid delivery arm should become an executive agency within the DoJ. The Chief Executive should be a statutory appointment responsible for decisions on legal aid applications without the involvement of the Minister, political institution or staff in the core department. The Minister and the Assembly would be responsible for legislating on legal aid matters.<sup>19</sup> It is also recommended that the work of the Legal Aid Assessment office which is a part of DSD with statutory responsibility of assessing financial eligibility should be brought in-house within the agency.<sup>20</sup> It is recommended that statutory provision is given to a small advisory board with a number of functions including: providing assurance on independence of decision making; acting as an appeals panel; and to act as a source of advice to the Minister on legal aid matters.<sup>21</sup>

The Review Team acknowledges there will be costs associated with these changes which will have to be included in financial modelling. A significant one off investment that will be required is an effective IT system and the Review Team has highlighted the Scottish Legal Aid Board's system as an example of an effective system. It has also been highlighted that there will need to be a rigorous review of potential efficiencies, posts, structures and staff gradings.<sup>22</sup>

### 3 Developments in England and Wales

The Ministry of Justice Green Paper on "Proposals to reform Legal Aid in England and Wales" and The Legal Aid Sentencing and Punishment of Offenders Bill 2011 sets out the Government's policy intentions with regards to the structures involved in the delivery of legal aid and policy matters. It is proposed that the Legal Services Commission (LSC) in England and Wales will be abolished and replaced with an agency within the Ministry of Justice. Responsibilities, functions and powers would be returned to the Lord Chancellor.<sup>23</sup> Under current arrangements, the LSC is an NDPB and exercises its responsibilities at arms-length from Ministers.<sup>24</sup> The benefits of changing the status of the LSC model to an executive agency have been outlined in the Ministry of Justice Green paper as follows:

- one policy voice and one set of priorities for legal aid;
- clear lines of ministerial accountability;

<sup>19</sup> The Access to Justice Review Northern Ireland, "The Report", August 2011, 126

<sup>20</sup> Access to Justice Review Northern Ireland, "The Report", August 2011, 127

<sup>21</sup> Access to Justice Review Northern Ireland, "The Report", August 2011, 127

<sup>22</sup> Access to Justice Review Northern Ireland, "The Report", August 2011, 128

<sup>23</sup> Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 138

<sup>24</sup> Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 138

- improved financial management and performance;
- shared priorities and improved collaboration with other criminal and civil justice; and
- opportunities for administrative efficiencies through greater use of shared services across the MOJ and wider government.

The Government's consultation paper suggests that changing the status from an NDPB to an executive agency presents an opportunity to consider what further improvements can be made and asks for views on improvements in the following areas: the application process; applying amendments; providers' bill submissions; and payment mechanisms.<sup>25</sup> Responses to this aspect of the consultation are being taken forward with the LSC and will be taken forward separately from other reforms to legal aid in collaboration with the relevant bodies.<sup>26</sup>

Legislation is required to abolish the LSC, transfer staff to MOJ and transfer responsibilities, functions and powers to the Lord Chancellor. Whilst the Lord Chancellor has ultimate responsibility for legal aid schemes, individual funding decisions will be made by a new legal aid agency.

The Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) 2011 was presented to Parliament in June 2011.<sup>27</sup> Part 1 of the Bill abolishes the Legal Services Commission. The Bill sets out the role of the Lord Chancellor in relation to legal aid services. The Bill places a duty on the Lord Chancellor to secure legal aid services (Clause 1).<sup>28</sup> The Lord Chancellor may make provision of grants or loans to persons to provide services (Clause 2). Provisions enable the Lord Chancellor to make provision by regulations for remuneration to persons who provide services (Clause 2 (3)). The Lord Chancellor may set and monitor standards of services (Clause 3 (1)) and may make arrangements for accreditation of services (Clause 3 (3)).

The Lord Chancellor is required to designate a civil servant as a Director of legal aid casework (Clause 4(1)) and makes provision for the arrangement of civil servants (Clause 4 (2)). The Bill prevents the Lord Chancellor from giving directions or guidance to the Director on the carrying out of his functions in individual cases (Clause 4(4)). These clauses have given rise to some concerns that the Director would be subject to pressure in decisions on individual cases. It has been suggested "the director of legal aid casework will be a civil servant, so at the very least there is an appearance of the director not being independent."<sup>29</sup> The Bill also sets out a number of duties for the Director of legal aid casework. The Director must comply with directions by the Lord Chancellor and have regard to guidance on the carrying out of their functions (Clause 4 (3)). The Director is required to determine whether an individual qualifies for legal aid

<sup>25</sup> Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 141

<sup>26</sup> Ministry of Justice "Reform of Legal Aid in England and Wales: the Government Response", June 2011, 67

<sup>27</sup> [http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0205/cbill\\_2010-20120205\\_en\\_2.htm#pt1-pb1-11g4](http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0205/cbill_2010-20120205_en_2.htm#pt1-pb1-11g4)

<sup>28</sup> The Legal Aid, Sentencing and Punishment of Offenders Bill 2011

<sup>29</sup> Law Society Gazette "Our Analysis of the Legal Aid and Sentencing Bill" 30 June 2011.

with regards to their financial resources and criteria set out by the Lord Chancellor (Clause 10).

## 4 Developments in New Zealand

The Legal Services Act in New Zealand came into effect in July 2011. The Act abolishes the Legal Services Agency.<sup>30</sup> The provisions also set out that the staff of the Legal Services Agency are transferred to the Ministry of Justice.<sup>31</sup> The functions of the Legal Services Agency were transferred to the Ministry of Justice. Legal Aid has become part of a new business group, the Legal Services and Treaty Group. The Acting Deputy Secretary of the group is the Legal Services Commissioner.<sup>32</sup> The Legal Services Commissioner is an independent statutory officer and is responsible for decisions on whether to grant legal aid, ensuring decisions are taken independently from government.<sup>33</sup> The Legal Services Act 2011 also sets out the functions of the Secretary for Justice. These include:<sup>34</sup>

- establishing and maintaining legal services;
- assessing and determining the need for legal services by people with insufficient means;
- determining the methods for delivery of legal services;
- determining the allocation of legal services;
- delivering legal services established under the legislation; and
- undertaking or funding law related research and education.

## 5 Conclusion

The Access to Justice Review has suggested that policy responsibility for criminal and civil legal aid should be moved within an Access to Justice Directorate within the DoJ. It has also been recommended that the legal aid delivery arm should change its status from an NDPB to executive agency status within the DoJ with a Chief Executive responsible for decisions on individual legal aid application. It is also recommended that statutory provision should be given to a small board to ensure independence in decision making and to advise the Minister on legal aid matters.

In England and Wales, there are a number of changes to governance and administration currently taking place in the form of legislation, the Legal Aid,

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<sup>30</sup> The Legal Services Act 2011, Part 4, s117

<sup>31</sup> The Legal Services Act 2011, Part 4, s 120

<sup>32</sup> Law Society New Zealand "Legal Aid Changes from July 2011", Access to Justice Review Northern Ireland, "The Report", August 2011, 123.

<sup>33</sup> Law Society New Zealand "Legal Aid Changes from July 2011", Access to Justice Review Northern Ireland, "The Report", August 2011, 123, see also s71 (1) and(2) of the Legal Services Act 2011, <http://www.legislation.govt.nz/act/public/2011/0004/latest/whole.html#DLM3142903>

<sup>34</sup> s68 of the Legal Services Act 2011

Sentencing and Punishment of Offenders (LASPO) Bill 2011. Some of the key developments include:

- **Abolition of the Legal Services Commission:** changing its status from an NDPB to an executive agency within the Ministry of Justice;
- The transfer of **functions, responsibilities and powers** to the Lord Chancellor;
- The **designation of a senior civil servant** as director for legal aid casework who will be under duty to comply with direction and guidance by the Lord Chancellor.
- One question that has emerged in relation to the proposed changes is how to ensure that **decisions regarding individual cases are made from political interference**. LASPO 2011 contains a provision which prevents the Lord Chancellor from giving directions or guidance to the Lord Chancellor on decisions in individual cases. The Access to Justice Review has highlighted that independence must be a key requirement of any arrangements.

Developments have also been taking place in New Zealand in respect of structures responsible for delivery of legal aid. The Legal Services Agency has been abolished and functions have been transferred to a business group in the Ministry of Justice under the Legal Services Act 2011. The Acting Deputy Secretary of the Legislation and Treaty Group is also the Legal Services Commissioner who has responsibility for taking decision on the grant of legal aid, independently from Government. The new Commissioner was formerly the General Manager of the Legal Services Agency.<sup>35</sup>

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<sup>35</sup> Ministry of Justice "What's new for legal aid providers" <http://www.justice.govt.nz/services/information-for-legal-professionals/information-for-legal-aid-providers/whats-new-for-legal-aid-providers/whats-new-for-legal-aid-providers>