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Access to Justice: Eligibility in Criminal Legal Aid

1 Introduction

This paper examines developments relating to eligibility in criminal legal aid. This is the first paper in a series on developments in access to justice in Northern Ireland. This paper considers some recent developments in eligibility in criminal legal aid in reducing costs of the legal aid budget. This paper also highlights issues considered in the Access to Justice Review in Northern Ireland, the Ministry of Justice Green paper on Proposals for the Reform of Legal Aid in England and Wales, and the House of Commons Justice Select Committee report on the government's proposed reforms. The paper also provides information on recent developments in relation to eligibility testing in criminal legal aid in Scotland and information on the criminal legal aid scheme in the Republic of Ireland.

2 Eligibility and Means testing in Criminal Legal Aid Northern Ireland

2.1 Eligibility in criminal legal aid

Statistics provided by the Access to Justice Review Team suggests that the total expenditure for criminal legal aid cases in 2009/2010 was £60.0 million and fell to £50.8 million in 2010/11.¹ The Review Team note that the number of legal certificates registered increased from 27, 415 in 2008/09 to 34,464 in 2010/11.²

A report by the Northern Ireland Audit Office notes that spending on criminal legal aid has trebled over the last decade. Reasons given for this dramatic rise in expenditure include:³

- Increase in complexity in criminal legislation;
- Increase in penalties leading to more cases being heard in the Crown Court;
- Increase in very high cost cases (VHCCs).

There are three levels of service available for criminal legal aid:⁴

- Advice and assistance on criminal matters in general, under the same provisions as for civil cases⁵;
- Free advice and assistance for anyone being interviewed at a police station in connection with a suspected offence (PACE advice);
- And free legal aid.

The Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (hereafter known as the 1981 Order) provides that the granting of criminal legal aid is provided by the judiciary.⁶ Article 28 of the 1981 Order makes provision for free legal aid in the magistrates' court. This provision states that:

- (1) If it appears to a magistrates' court that the means of any person charged before it with any offence, or who appears or is brought before it to be dealt with, are insufficient to enable him to obtain legal aid and that it is desirable in the interests of justice that he should have free legal aid in the

¹ Access to Justice Review Northern Ireland "The Report", August 2011, 27

² Access to Justice Review Northern Ireland "The Report", August 2011, 28.

³ Northern Ireland Audit Office "Managing Criminal Legal Aid" 29 June 2011, 11
http://www.niauditoffice.gov.uk/pubs/2011/legal_aid/8935_Legal_aid_final.pdf

⁴ <http://www.courtsni.gov.uk/en-GB/Services/LegalAid/LAImpactTest/>

⁵ According to the NICTS website Legal Advice and Assistance in civil cases provides initial advice on any aspect of NI law, <http://www.courtsni.gov.uk/en-GB/Services/LegalAid/LAImpactTest/Pages/Thelegalaidimpacttest.aspx>

⁶ Part III of the Legal Aid, Advice and Assistance (Northern Ireland)Order 1981

preparation and conduct of his defence before it, the court may grant in respect of him a criminal aid certificate, and thereupon he shall be entitled to such aid and to have—

- (a) a solicitor; and
- (b) subject to paragraph (2), counsel, assigned to him for that purpose in such manner as may be prescribed by rules made under Article 36.

(2) 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.

There are similar provisions dealing with free legal aid in the Crown Court (Article 29) and relating to free legal aid on appeal to the County Courts (Article 30).

At present to qualify for legal aid, the court must satisfy itself on two matters which include:⁷

- That the means of the accused are insufficient to enable him to obtain legal aid;
- It is desirable in the interests of justice that the accused, or a person brought before it to be dealt with, should have free legal aid.

There are a number of factors known as the 'Widgery' criteria which the courts will take into account in applying the interests of justice. These include:⁸

- The gravity of the criminal charge;
- The ability of the applicant to put forward his or her own case;
- The nature of the defence.

If there are doubts whether the accused is entitled to criminal legal aid, the courts must 'resolve this in favour of granting it.'⁹ Criminal legal aid must be offered in cases where there is a murder charge, or where the court intends to sentence the accused to a term of imprisonments or detention in a young offenders centre.¹⁰ Criminal legal aid is granted in the form of a criminal legal aid certificate.¹¹ The judiciary decides on granting of criminal legal aid certificates and the Northern Ireland Legal Services Commission (NILSC) assesses and pays fees for completed work on criminal cases.¹²

⁷ <http://www.courtsni.gov.uk/en-GB/Services/LegalAid/LAImpactTest/>

⁸ Dickson B (2004) "The Legal System of Northern Ireland" fifth edition.SLS Legal publications 156

⁹ Dickson B (2004) "The Legal System of Northern Ireland" fifth edition.SLS Legal publications 156

¹⁰ Dickson B (2004) "The Legal System of Northern Ireland" fifth edition.SLS Legal publications 156

¹¹ Dickson B (2004) "The Legal System of Northern Ireland" fifth edition.SLS Legal publications 156

¹² Access to Justice Review Northern Ireland Discussion Paper, November 2010, 32

2.2 Developments in Criminal Legal Aid

The Northern Ireland Courts and Tribunals Service (NICTS) consulted on proposals to revise the means test for criminal legal aid in Northern Ireland in March 2010. The NICTS paper noted that the 1981 Order does not prescribe a fixed financial limit beyond which an accused is ineligible for legal aid.¹³ Based on research commissioned by the NICTS, three options for reforms were identified including:¹⁴

- Option 1: No Intervention- do nothing to reform the current grant of criminal legal aid;
- Option 2: Replicate the reforms introduced in England and Wales by reforming both the means test and merit test, including decisions on who would grant legal aid;
- Option 3: Replicate the reforms brought forward in England and Wales in a phased approach by firstly considering the reform of the means test only and following this with work on the interests of justice test and the grant of criminal legal aid.

The NICTS indicated that option 3 was its preferred option. It was decided that priority would be given to reforming the means test in the first instance as the research commissioned by the NICTS identified that reform of the means test may be a higher priority than reform of the merits test.¹⁵ NICTS has noted that the absence of a fixed financial means test for criminal legal aid has implications that an accused or their representative will not know in advance of proceedings whether the accused will pass the means test. However NICTS commented that this does not impact on an accused person in receipt of passporting benefits such as Jobseekers Allowance as their assessment will not depend on whether they pass the means test but rather whether they pass the interests of justice test. However the absence of a fixed means test is reported to have an impact on persons in employment or the self-employed.¹⁶ It was suggested that further research would be required regarding the financial level at which any new means test would be set.¹⁷

Recently the Northern Ireland Assembly passed the Justice Act (Northern Ireland) 2011.¹⁸ This Act includes a clause providing an enabling power to introduce a fixed means test determining eligibility for legal aid in criminal cases.¹⁹ Subordinate legislation will be required to implement the detail of this provision. It has been

¹³ Northern Ireland Courts and Tribunals Service “A Proposal to Revise the Means Test for Criminal Legal Aid in Northern Ireland: Report on Consultation”, October 2010, 4.

¹⁴ Northern Ireland Courts and Tribunals Service “A Proposal to Revise the Means Test for Criminal Legal Aid in Northern Ireland”, March 2010, 15

¹⁵ Northern Ireland Courts and Tribunals Service “A Proposal to Revise the Means Test for Criminal Legal Aid in Northern Ireland”, March 2010, 15

¹⁶ Northern Ireland Courts and Tribunals Service “A Proposal to Revise the Means Test for Criminal Legal Aid in Northern Ireland: Report on Consultation”, October 2010, 5.

¹⁷ Northern Ireland Courts and Tribunals Service “A Proposal to Revise the Means Test for Criminal Legal Aid in Northern Ireland”, March 2010, 16

¹⁸ The Justice Act (Northern Ireland) 2011 received Royal Assent on 5 May 2011.

<http://www.niassembly.gov.uk/legislation/primary/assleg10.htm>

¹⁹ Northern Ireland Courts and Tribunals Service A proposal to revise the Means Test for Criminal Legal Aid: A Consultation Response Document, 13. Section 80 of the Justice Act (Northern Ireland) 2011.

estimated that if all the savings proposals for legal aid were implemented then there could be savings of £0.5 million.²⁰ Research has been commissioned by the NICTS to consider the impact of options for the introduction of means testing in the magistrates' court in Northern Ireland.²¹ The research has set out two preferred options. The first option is the current financial eligibility test in England and Wales which will be discussed later in relation to developments in England and Wales. The second preferred option is a single stage disposable income test adapted from the Scottish test.²²

Officials from the NICTS in evidence to the Justice Committee noted that most of the options except one considered by the research produced savings of over £1 million and after discounting costs it has been projected that the savings produced would range from £0.578m to £0.846m.²³ The costs would take into account implementation costs.²⁴ The NICTS said that there was merit in proceeding with the policy proposal to produce savings.²⁵ In addition to a provision relating to a fixed means test for criminal legal aid, the Justice Act (Northern Ireland) 2011 also includes an enabling power which would allow courts to make an order to recover costs in cases of convicted legal aided defendants where a court considers that they have sufficient financial means to pay for their defence.²⁶ It was proposed that this power would only be used in exceptional cases.²⁷

2.3 Access to Justice Review Recommendations on means testing and decision making in criminal legal aid

The Access to Justice Review Team recommends in its final report that the Widgery criteria provides a sound basis for determining whether the circumstances of a case merit the grant of legal aid to financially eligible defendants.²⁸ The Review Team considered recent developments included in the Justice (Northern Ireland) Act 2011 on fixed means testing and recovering costs from convicted defendants. The Access to Justice Review Team recommended that the DoJ and NILSC plan on action to implement a fixed means test in the Magistrates' Court, paying attention to introducing efficient business processes, maximising the use of IT, keeping running costs to a minimum and ensuring business of the courts is not impeded.²⁹ Furthermore the

²⁰ Evidence from NICTS officials, Committee for Justice Official Report, Hansard, Fixed Means Test for Criminal Legal Aid, 20 January 2011, available at

http://www.niassembly.gov.uk/record/committees2010/Justice/110120_FixedMeansTestforCriminalLegalAid.htm

²¹ Committee for Justice Official Report "Fixed Means Test Criminal Legal Aid", 20 January 2011, 5

²² The research commissioned by the NICTS states that "A single-stage disposable income test, following the approach used by the Scottish Legal Aid Board (SLAB). The test is broadly similar to the current test for advice and assistance in Northern Ireland, except that a single income threshold is used rather than the range of thresholds used for the contributory advice and assistance scheme." A Revised Means Test for Criminal Legal Aid in Northern Ireland: Financial and Economic Modelling and Evaluation" Submitted to the Northern Ireland Courts and Tribunals Service, 62

²³ Committee for Justice Official Report "Fixed Means Test Criminal Legal Aid", 20 January 2011, 5

²⁴ Committee for Justice Official Report "Fixed Means Test Criminal Legal Aid", 20 January 2011, 3

²⁵ Committee for Justice Official Report "Fixed Means Test Criminal Legal Aid", 20 January 2011, 6

²⁶ Section 81 of the Justice Act (Northern Ireland) 2011.

²⁷ Committee for Justice Official Report "Briefing on Proposals for Reform of Legal Aid" 1 July 2010

²⁸ Access to Justice Review Northern Ireland "The Report", 26.

²⁹ Access to Justice Review Northern Ireland "The Report", August 2011, 31

Review Team recommended that regulations are made as soon as possible to enable recovery of defence costs orders to be made and establish procedures for identifying defendants who have enough funds to be made subject to orders upon convictions.³⁰

Another issue considered by the Review Team was where the responsibility for making decisions on means testing in legal aid should lie. In the final report, the Review Team concluded that while the current means testing arrangements remain in place, the responsibility should lie with the judiciary. However if fixed means testing were to be introduced, responsibility for the decision should pass to the Legal Services Commission or court staff acting on behalf of the Commission.³¹. The Review Team highlighted that research conducted for the NICTS in 2010 indicated that 97% of criminal legal aid applications were granted but decision-making on this issue is stable.³² The Review Team concluded that there was not a case at present for removing the responsibility for determining the merits test from the judiciary to court staff or to an executive body. However the Review Team recommended that DoJ and NILSC should research factors behind the increase in volume of legally aided criminal cases in 2010/11 with reference to the case mix. It was highlighted if the research was to reveal a tendency to grant legal aid where it would not have been previously available, ‘corrective action’ would need to be taken, such as stricter controls or changing the locus of decision making.³³

The Review Team highlighted in its report that the introduction of the means test would “throw into sharp relief” the availability for costs for defendants who pay for their cases but who are acquitted or the charges are dropped against them. The Review Team recommends that when implementing the fixed means test, the suitability and operation of provisions in this legislation for defraying the costs of privately funded defendants who are acquitted or their cases dropped should be researched.³⁴

3 Criminal Legal Aid in England and Wales

3.1 Eligibility in Criminal Legal Aid

The Ministry of Justice has set out its proposals for reforming financial eligibility rules for civil and family legal aid in its recent Green Paper in November 2010 and subsequent Bill.³⁵ The government has no plans to change financial eligibility rules for

³⁰ Access to Justice Review Northern Ireland “The Report”, August 2011, 140

³¹ Access to Justice Review Northern Ireland “The Report”, August 2011, 31

³² Access to Justice Review Northern Ireland “The Report”, August 2011, 29

³³ Access to Justice Review Northern Ireland “The Report”, August 2011, 30

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³⁵ The Legal Aid, Sentencing and Punishment of Offenders Bill 2011

criminal legal aid in this Green Paper. The Green Paper explains that following a consultation in November 2008, means testing was introduced in the Crown Court across England and Wales, between January and June 2010.³⁶ It is also explained that means testing was re-introduced in magistrates' courts in 2006, having been abolished in 2000.³⁷ However it would be useful to consider the criminal legal aid means test as means testing takes place in both Magistrates' Courts cases and Crown Court cases. As is the case in Northern Ireland, to qualify for legal aid a person would have to satisfy two tests, the means test and the merits test.³⁸

Criminal Legal Aid covers:³⁹

- Advice and assistance at a police station;
- Advice and help (help from a solicitor including general advice, writing letters, negotiation, getting a Barrister's opinion and preparing a written case);
- Advocacy assistance (help from a solicitor in preparing a case and representation in certain proceedings);
- Representation-(help from a solicitor in preparing a defence before court as well as representation at court by a barrister or solicitor).

Free advice from a solicitor is provided for anyone who is detained at a police station or is unrepresented at their first appearance in the magistrates' court. However a means test is applied for all other criminal cases.⁴⁰ The Legal Aid, Sentencing and Punishment of Offenders Bill 2011 allows for regulation to be made for provision for advice and assistance for individuals in custody and allows for possible means testing for advice and assistance for individuals detained in police stations to be introduced in future.⁴¹ However it has been suggested that this proposal would be unworkable as means testing requires documentary verification of financial resources which would not be available to individuals on arrival at police stations. It is highlighted this proposals could delay investigations and impact on scarce resources.⁴² The proposals has also received criticism from the former Director of Public Prosecutions who argues that administering means testing is often more expensive to administer than to operate and that means testing at police stations would be unwieldy.⁴³ It has been suggested that the Government has currently no plans to introduce means testing or legal representation upon arrest however it gives the government the powers to introduce it if circumstances

³⁶ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 27

³⁷ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 29

³⁸ http://www.legalservices.gov.uk/criminal/criminal_legal_aid_eligibility.asp

³⁹ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 23-24

⁴⁰ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 24

⁴¹ Clause 12 of the Legal Aid, Sentencing and Punishment of Offenders Bill 2011,

http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0205/cbill_2010-20120205_en_2.htm#pt1-pb3-l1q12

⁴² Liberty's Committee Stage Briefing on Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill in the House of Commons, July 2011

⁴³ The Guardian "Legal Aid Reform could end the right to a free solicitor" 27 June 2011

dictate it.⁴⁴ It is worth noting that in Northern Ireland, the total costs for legal advice and assistance to clients in police stations under Police and Criminal Evidence (PACE) legislation in 2009/10 was £3.43 million.⁴⁵

People who are in receipt of certain types of benefits known as ‘passporting’ benefits including Income Support, Jobseekers Allowance, Employment and Support Allowance and Pension Credit and those who are under 18 when the application is made are automatically entitled to free legal aid and do not have to undergo a separate means test assessment.⁴⁶ However everyone else will have to undergo a means test. There are two means tests, one for cases in the Magistrates’ Courts and one in the Crown Court.

Means Test in the Magistrates’ Court⁴⁷

A simple income means test is applied under which free representation is available to those whose income is within the prescribed financial limits.⁴⁸ This test is also applied in committals for sentencing.

There are two levels of means test in the magistrates’ court, the initial means test and full means test.

Initial means test

In the initial means test the applicant’s gross annual household income is weighted to take into account family circumstances resulting in the applicant’s adjusted income. If this income is:

- £12,475 or less, then the applicant passes the means test and is eligible for legal aid providing they pass the interests of justice test;
- £22,325 or more then they have failed the means test and are not eligible for legal aid
- If the applicant’s income is more than £12,475 and less than £22,325 then a full means test is carried out to ascertain eligibility.

Full Means Test

The full means test combines the applicant’s gross household income, allowance outgoings and a weighted living allowance resulting in disposable income. If this income is:

- £3,398 or less then the applicant passes the full means test and is eligible for legal aid;

⁴⁴ The Guardian “Legal Aid Reform could end the right to a free solicitor” 27 June 2011

⁴⁵ Access to Justice Review Northern Ireland Discussion Paper, November 2010, 44

⁴⁶ Ministry of Justice “Proposals for the Reform of Legal Aid in England and Wales”, November 2010, 24

⁴⁷ The following information has been obtained from Ministry of Justice “Proposals for the Reform of Legal Aid in England and Wales”, November 2010, 156

⁴⁸ Ministry of Justice “Proposals for the Reform of Legal Aid in England and Wales”, November 2010, 24

- £3,398 or more they are ineligible for legal aid as they have failed the means test.

Applicants who have been refused legal aid can submit an application for Review on the Grounds of Hardship form which will be reviewed by the Legal Services Commission

Means Test in the Crown Court⁴⁹

Free legal aid is available for those whose assessed disposable income or capital are below the threshold, For those whose income is above the threshold, they are eligible for legal aid provided they make a contribution.⁵⁰

Income test

The income threshold levels applied to Crown Court means testing are the same as those in the magistrates' court. No income contribution is required if:

- the applicant passes the initial income means test;
- the applicant's annual disposable income is £3,398 or less.

If the applicants income is more than £3,398 than a contribution will be required

Capital Test

If the applicant has pleaded or has been found guilty they will have to pay defence costs from their capital if:

- they have more than £30,000 in capital; and
- their defence costs have not already been covered by income contributions.

3.2 Recovering Costs from acquitted defendants

Clause 52 and Schedule 6 of the Legal Aid, Sentencing and Punishment of Offenders Bill 2011 introduces limits on when an accused person can claim reimbursement for costs in the event of an acquittal out of central funds and provides that the Lord Chancellor may introduce regulations about the amount of such reimbursement. Schedule 6 explicitly sets out that such regulations may allow for reimbursement that is less than what a court rules is reasonably sufficient to compensate the person.⁵¹ The explanatory notes to the Bill suggest that where the court considers it appropriate, it

⁴⁹ The following information is taken from Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 157

⁵⁰ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 24

⁵¹ Clause 52 and Schedule 6 of the Legal Aid , Sentencing and Punishment of Offenders Bill 2011,
<http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0205/en/12205en.htm>

may reduce the amount awarded to the accused because they may have been convicted of some offences but acquitted in other cases.⁵²

4 Developments in Scotland in Criminal Legal Aid

The Scottish Government has recently consulted on proposals to introduce a requirement to pay financial contributions in criminal legal aid and changes to financial eligibility in legal assistance. The Government has outlined two options for changes to financial eligibility for legal aid. The first option proposed is to introduce a unified financial eligibility test for Assistance by Way of Representation (ABWOR)⁵³ and criminal legal aid based on the undue hardship test currently applied for criminal legal aid.⁵⁴ The second option is to maintain the current financial eligibility test for ABWOR but increase the upper limit to a level equivalent to the assessment for disposable income in summary criminal legal aid.⁵⁵

The Government has also proposed that graduated contributions are introduced for ABWOR and criminal legal aid as “it is important for the taxpayer that as many people as possible pay their costs as is reasonable and affordable.”⁵⁶ The graduated amount of contributions has been sets out in the documents as follows:⁵⁷

- Band 1: Disposable income between £100-£120 per week- contribution paid at 50% of disposable income;
- Band 2 Disposable income between £121-£140 per week- contribution paid at 65% of disposable income;
- Band 3 Disposable income between £141-£160 per week- contribution paid at 80% of disposable income’
- Band 4: Disposable income over £160 per week- contributions paid at 100% of disposable income.

The consultation paper also sets out a number of options for payment periods including:⁵⁸

- Paying contributions over the lifetime of the case;

⁵² Section 282 of the Explanatory Memorandum to the Legal Aid, Sentencing and Punishment of Offenders Bill 2011, <http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0205/en/12205en.pdf>

⁵³ Assistance by Way of Representation is a form of advice and assistance and is used in criminal proceedings where the applicant pleads guilty or in particular categories of court proceedings, see Scottish Government “Consultation on the Introduction of Financial Contributions in Criminal Legal Aid and Financial Eligibility: A Consultation Paper”

⁵⁴ Scottish Government “Consultation on the Introduction of Financial Contributions in Criminal Legal Aid and Financial Eligibility: A Consultation Paper”, 15

⁵⁵ Scottish Government “Consultation on the Introduction of Financial Contributions in Criminal Legal Aid and Financial Eligibility: A Consultation Paper”, 16

⁵⁶ Scottish Government “Consultation on the Introduction of Financial Contributions in Criminal Legal Aid and Financial Eligibility: A Consultation Paper”, 17

⁵⁷ Scottish Government “Consultation on the Introduction of Financial Contributions in Criminal Legal Aid and Financial Eligibility: A Consultation Paper”, 17

⁵⁸ Scottish Government “Consultation on the Introduction of Financial Contributions in Criminal Legal Aid and Financial Eligibility: A Consultation Paper”, 17-18

- Paying contributions over set periods depending on the type of legal aid as there are differences in the average length of cases for each type of aid; or
- Combination of two options so that if the case is not complete by the set period, the weekly graduate contribution would be payable for the lifetime of the case.

5 Eligibility in Criminal Legal Aid in the Republic of Ireland

The main type of legal aid provided to someone who is accused of a criminal offence is free legal aid provided under the Criminal Justice (Legal Aid) Act 1962. The applicant must satisfy the court that his/her means are insufficient for them to pay the legal aid his or herself. Decisions whether or not to grant legal aid in criminal proceedings is a discretionary matter for the courts and is not governed by financial eligibility guidelines. The court must also be satisfied that that by reason of the gravity of the offence or exceptional circumstances of the case, it is essential to the interests of justice to grant the person legal aid.⁵⁹

There are a number of other criminal legal aid schemes. The Garda Station Legal Advice Scheme was established in 2001. The scheme applies to anyone detained at a Garda station for the purpose of investigation in relation to three types of offences:⁶⁰

- Offences under s 30 of Offences Against the State Act 1939, as amended by the Offences Against the State (Amendment) Act 1998;
- Section 4 the Criminal Justice Act 1984;
- Section 2 of the Criminal Justice (Drug Trafficking) Act 1996;
- Section 50 of the Criminal Justice Act 2007.

The Garda Station Scheme was extended in 2007 to cover payments to solicitors who attend extension hearings in the District Court where the police wish to extend the time limit for holding suspects under the Offences Against the State Act 1939, Criminal Justice (Drug Trafficking) Act 1996 or Criminal Justice Act 2007. The scheme is confined to persons who are in receipt of social welfare payments or whose earnings are less than €20,316 per year.

The Attorney General's Scheme is a non- statutory scheme which covers fees payable to solicitors and counsel in certain criminal proceedings. The scheme is administered by the Department of Justice and Equality and covers the following criminal proceedings;⁶¹

- Applications for bail in the High Court;

⁵⁹ <http://www.justice.ie/en/JELR/Pages/WP07000067>

, see also See sections 2-6 of the Criminal Justice (Legal Aid) Act 1962

⁶⁰ National Report ILAG Conference, Helsinki, 2011,

http://www.ilagnet.org/scripts/tiny_mce/plugins/filemanager/files/Helsinki_2011/national_reports/Ireland_National_Report_ILAG_2011.pdf

⁶¹ <http://www.attorneygeneral.ie/ac/agscheme.html>

- Judicial Review Proceedings which are concerned with criminal matters or where the persons liberty is at stake;
- Applications under the Extradition Act 1965 and the European Arrest Warrant Act 2003;
- Habeas Corpus applications (brought by a person who claims they are unlawfully detained by the State).

The individual must make an application to the court for a recommendation for funding under the scheme at the start of proceedings.⁶² The applicant must satisfy the court that he or she is not in a position to retain a solicitor unless he or she benefits from the scheme. The applicant must provide such information about his or her means as the court deems appropriate.⁶³

The Criminal Assets Bureau Ad Hoc Legal Aid Scheme is administered by the Department of Justice and Equality. The scheme provides legal aid to persons who are defendants in court proceedings brought by the Criminal Assets Bureau including court proceedings under the Proceeds of Crime Act 1996, Revenue Acts or Social Welfare Acts. The scheme also includes:

- Social welfare appeals made to the Circuit Court under Section 307 of the Social Welfare Consolidation Act 2005;
- Tax appeals made to the Circuit Court under the Taxes Acts where the Criminal Assets Bureau is the defendant;
- Applications made by the Director of Public Prosecutions under Section 39 of the Criminal Justice Act 1994.

The court with the specific jurisdiction decides on the grant of legal aid and the level of representation and/or witness expenses allowed.⁶⁴

6 Conclusions

The Access to justice Review Team has outlined its thinking in relation to eligibility and contributions in criminal legal aid. Some of the recommendations are:

- The Widgery criteria provide a sound basis for determining whether the circumstances of a case merit the grant of legal aid to financially eligible defendants;
- The DoJ and NILSC should plan to implement a fixed means test in the Magistrates' Court, paying attention to introducing efficient business processes, maximising the use of IT, keeping running costs to a minimum and ensuring that

⁶² http://www.citizensinformation.ie/en/justice/legal_aid_and_advice/criminal_legal_aid_and_advice.html

⁶³ <http://www.attorneygeneral.ie/ac/agscheme.html>

⁶⁴

http://www.ilagnet.org/scripts/tiny_mce/plugins/filemanager/files/Helsinki_2011/national_reports/Ireland_National_Report_ILAG_2011.pdf

business of the court is not impeded. It is noted the implementation of arrangements for fixed means testing will produce savings of £0.5 m;

- While the current means testing arrangements remain in place, the responsibility for making decisions on means testing should lie with the judiciary. However if fixed means testing were to be introduced, responsibility for the decision should pass to the Legal Services Commission or court staff acting on behalf of the Commission
- The DoJ and NILSC should research factors behind the increase in volume of legally aided criminal cases in 2010/11 with reference to the case mix;
- When implementing the fixed means test, the suitability and operation of provisions in this legislation for defraying the costs of privately funded defendants who are acquitted or their cases dropped should be researched;
- Regulations should be made as soon as possible to enable recovery of defence costs orders to be made and establish procedures for identifying defendants who have enough funds to be made subject to orders upon conviction.

Meanwhile a number of reforms are being pursued in England and Wales in the Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) 2011 and in Scotland in relation to financial contributions in criminal legal aid.

- The Ministry of Justice in its Green Paper on legal Aid reforms did not make proposals on changes to eligibility in criminal legal aid as **means testing has been introduced in criminal legal aid cases in the Crown Court in 2010**.
- LASPO 2011 allows for **the possibility of means testing to be introduced for advice and assistance for individuals detained in police stations**;
- In England and Wales, LASPO 2011 **has introduced limits on when an accused person can be reimbursed for such costs**, allowing the Lord Chancellor to make regulations about such reimbursement.
- Scotland has proposed the introduction of **graduated financial contributions and changes to financial eligibility testing** in respect of criminal legal aid.
- In the Republic of Ireland, the main type of legal aid provided to someone who is accused of a criminal offence is **free legal aid** provided under the Criminal Justice (Legal Aid) Act 1962. The **Garda Station Legal Advice Scheme** was established in 2001. The scheme applies to anyone detained at a Garda station for the purpose of investigation in certain types of offences. The scheme is confined to persons who are in receipt of social welfare payments or whose earnings are less than €20,316 per year.

