

Committee for Justice

Report on the Legal Aid and Coroners' Courts Bill (NIA 33/11-15)

**Together with the Minutes of Proceedings, Minutes of Evidence, Written Submissions
and Other Memoranda and Papers relating to the Report**

Ordered by the Committee for Justice to be printed 18 June 2014

Powers and Membership

The Committee for Justice is a Statutory Departmental Committee established in accordance with paragraphs 8 and 9 of the Belfast Agreement, Section 29 of the Northern Ireland Act 1998 and under Standing Order 48. The Committee has a scrutiny, policy development and consultation role with respect to the Department of Justice and has a role in the initiation of legislation.

The Committee has the power to:

- consider and advise on Departmental budgets and annual plans in the context of the overall budget allocation;
- consider relevant subordinate legislation and take the Committee stage of primary legislation;
- call for persons and papers;
- initiate inquiries and make reports; and
- consider and advise on any matters brought to the Committee by the Minister of Justice.

Membership

The Committee has 11 members including a Chairperson and Deputy Chairperson and a quorum of 5.

The membership of the Committee during the current mandate has been as follows:

Mr Paul Givan (Chairman)
 Mr Raymond McCartney (Deputy Chairman)
 Mr Sydney Anderson^{1,5}
 Mr Stewart Dickson
 Mr Tom Elliott²
 Mr William Humphrey⁴
 Mr Séan Lynch
 Mr Alban Maginness
 Ms Rosaleen McCorley³
 Mr Patsy McGlone⁴
 Mr Jim Wells

1 With effect from 1 October 2012 Mr William Humphrey and Mr Alex Easton replaced Mr Peter Weir and Mr Sydney Anderson.

2 With effect from 23 April 2012 Mr Tom Elliott replaced Mr Basil McCrea.

3 With effect from 10 September 2012 Ms Rosaleen McCorley replaced Ms Jennifer McCann.

4 With effect from 23 April 2012 Mr Patsy McGlone replaced Mr Colum Eastwood.

5 With effect from 16 September 2013 Mr Sydney Anderson replaced Mr Alex Easton.

Table of Contents

List of abbreviations and acronyms used in the Report	iv
Report	
Executive Summary	1
Introduction	4
Consideration of the Provisions and Schedules in the Bill	6
Consideration of a proposed New Provision for inclusion in the Bill	23
Clause by Clause Consideration of the Bill	27
Appendix 1	
Minutes of Proceedings (Extracts)	31
Appendix 2	
Minutes of Evidence	53
Appendix 3	
Memoranda and correspondence from the Department of Justice	107
Appendix 4	
Written Submissions	287
Appendix 5	
Correspondence from the Attorney General for Northern Ireland and the Minister for Health, Social Services and Public Safety on the Attorney General's proposed amendment to the Bill	339

List of abbreviations and acronyms used in the Report

AG	Attorney General
APIL	Association of Personal Injury Lawyers
DHSSPS	Department of Health, Social Services and Public Safety
DoJ	Department of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICO	Information Commissioner's Office
NDPB	Non-Departmental Public Body
NICS	Northern Ireland Civil Service
NICTS	Northern Ireland Courts and Tribunals Service
NIHRC	Northern Ireland Human Rights Commission
LSC	Northern Ireland Legal Services Commission
SCS	Senior Civil Service
TUPE	Transfer of Undertakings (Protection of Employment) Regulations (Northern Ireland) 2006

Executive Summary

1. This report sets out the Committee for Justice's consideration of the Legal Aid and Coroners' Courts Bill.
2. The Bill consists of 13 clauses and 3 schedules and proposes to make arrangements to dissolve the Northern Ireland Legal Services Commission and transfer its functions and staff to an Executive Agency to be established within the Department of Justice; sets in statute a number of safeguards to protect the independence of individual decisions on the granting of civil legal aid by the Director of Legal Aid Casework; and makes the Lord Chief Justice the President of the Coroners' Courts and requires him to appoint a Presiding Coroner.
3. During the Committee Stage of the Bill, the Committee also considered a proposed new provision from the Attorney General for Northern Ireland to amend the Coroners Act (Northern Ireland) 1959, which provides him with the power to direct an inquest where he considers it 'advisable' to do so, to confer on him a power to obtain papers and provide a clear statutory basis for disclosure in circumstances relating to deaths in hospital or where there was otherwise a suggestion that medical error may have occurred.
4. The Committee received written submissions from 20 organisations and held an oral evidence event on 14 May 2014 with 7 stakeholders to discuss various issues relating to the Bill and the Attorney General attended the Committee meeting on 28 May 2014 to discuss his proposed amendment. The Committee also explored the issues raised in written and oral evidence with departmental officials both in writing and in an oral briefing. The Committee also sought advice from the Examiner of Statutory Rules on the delegated powers within the Bill to make subordinate legislation and the choice of Assembly control provided for each power.
5. Given that the Bill is largely technical in nature and following a request from the Minister of Justice for a shorter Committee Stage to enable the Bill to receive Royal Assent by autumn 2014, the Committee completed scrutiny of the Bill within a 10-week period.

Clauses of the Bill

Part 1

6. Part 1 of the Bill contains 6 clauses and 2 schedules the majority of which the Committee was content to support subject to two amendments proposed to regulation making powers contained in Schedule 2.
7. The Committee was content to support the primary aim of the creation of an Executive Agency within the Department of Justice to administer the delivery of legal aid as provided by Clause 1 recognising that this represented an opportunity to address issues associated with the Legal Services Commission, improve governance arrangements relating to legal aid and increase transparency, accountability and efficiency.
8. In relation to Clause 2(1) of the Bill, which requires the Department to designate a civil servant in the Department as the Director of Legal Aid Casework, in the evidence received by the Committee questions were raised regarding whether the post was only available to civil servants or whether a person outside the civil service could be appointed. Departmental officials clarified that the post did not have to be filled by a civil servant and there were a number of ways in which the post could be filled. Whilst the Committee agreed it was content with Clause 2 as drafted some Members expressed the view that it could be better worded to ensure that there is not a perception that a person within the Department must be appointed to the post of Director of Legal Aid Casework.

9. A substantial number of those who provided written and oral evidence in relation to Clause 3 raised concerns regarding whether there are adequate and sufficient safeguards included to protect and ensure the independence of decision-making once the Executive Agency is established and the Director of Legal Aid Casework appointed to take decisions on individual cases and the grant of civil legal aid. The Department of Justice in response outlined the range of safeguards in the legislation to protect the independence of individual decisions on the grant of civil legal services which it considered to be sufficient and would be fully compatible with ECHR Article 6(1).
10. The Committee was content to support Clause 3 with some Members indicating they were satisfied that any direction issued by the Minister or the Department could not override the provisions of the relevant primary or secondary legislation and noting that the requirement to follow directions and guidance issued by the Minister already exists.
11. Other Members however had reservations about the proposed framework to ensure the independence of the Director in relation to decisions in individual cases, whether policy constraints could impact negatively on the exercise of that independence because a category of cases could be excluded from consideration by the Director of Legal Aid Casework and whether proper safeguards were in place and indicated that they may wish to give further consideration to these issues and the two amendments proposed by the Law Centre (NI) at a later stage.
12. Clause 6 introduces Schedule 2 of the Bill which contains a large number of amendments relating to Part 3 of the 1981 Order in relation to representation in criminal proceedings and to the 2003 Order in relation to civil legal services and criminal defence services. While the majority of amendments are technical in nature, Schedule 2 also covers areas of substantial amendment including the establishment of Appeal Panels which will hear appeals against decisions taken on the provision of civil legal services.
13. The Assembly Examiner of Statutory Rules advised the Committee that both regulation making powers relating to new articles 36A, 36B and 38A(1) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (as inserted by paragraph 1(5) and (6) of Schedule 2 of the Bill) which makes provision for rules in respect of the assignment of solicitor and counsel where a criminal aid certificate has been granted and new Article 20A of the 2003 Order (paragraph 6(22) of Schedule 2 of the Bill) which provides for rules for the constitution and procedure of Appeal Panels in respect of individual decisions relating to the granting of civil legal services were significant and should be subject to the draft affirmative procedure on the first and subsequent exercise of the powers rather than subject to the draft affirmative procedure on first exercise with subsequent rules being subject to the negative resolution procedure as currently provided for in the Bill. The Committee agreed with the Examiner's assessment and indicated that it would support amendments to make the two changes.
14. The Department subsequently advised the Committee that, in light of its decision, the Department would instruct Legislative Counsel to draft the necessary amendments to be brought forward at the appropriate stage.

Part 2

15. The Committee supported the inclusion of the provisions in Part 2 of the Bill to make the Lord Chief Justice the President of the Coroners' Courts and require the Lord Chief Justice to appoint a Presiding Coroner noting that they were intended to assist in the better administration of the Coroners' Courts and case management of inquests.

Part 3

16. The 5 clauses contained in Part 3 and in Schedule 3 of the Bill cover technical issues and were supported by the Committee.

Proposed New Provision

17. The Attorney General wrote to the Committee asking it to consider a proposed amendment to the Coroners Act (Northern Ireland) 1959 which provides him with the power to direct an inquest where he considers it 'advisable' to do so, to confer on him a power to obtain papers and provide a clear statutory basis for disclosure in circumstances relating to deaths in hospital or where there was otherwise a suggestion that medical error may have occurred. The Committee took the opportunity to seek views on the proposed provision when requesting written evidence on the Bill including from the Minister for Health, Social Services and Public Safety and the Health Trusts.
18. Having considered the responses received and discussed the proposed provision with the Attorney General the Committee agreed that it was generally supportive of the principle of the proposed provision. However, it was of the view that the proposal raised a number of issues which required further scrutiny and consideration which could not be undertaken within the timescale for completion of the Committee Stage of this Bill. The Committee agreed that if an alternative Bill could be found within which the amendment could be taken forward and considered properly in the foreseeable future the Committee would support that approach.
19. The Committee considered and agreed its report on the Legal Aid and Coroners' Courts Bill at its meeting on 18 June 2014.

Introduction

Background to the Bill

1. The Legal Aid and Coroners' Courts Bill was introduced to the Northern Ireland Assembly on 31 March 2014 by the Minister of Justice and was referred to the Committee for Justice for consideration, in accordance with Standing Order 33(1), on completion of the Second Stage on 8 April 2014.
2. The Bill (as introduced) has 13 clauses and 3 schedules.
3. The main purpose of the Bill, resulting from a recommendation of the Access to Justice Review and which forms part of the wider programme of reform of the legal aid system in Northern Ireland, is to make arrangements to dissolve the Northern Ireland Legal Services Commission (LSC) and transfer its functions and staff to an Executive Agency to be established within the Department of Justice. The Bill will also set in statute a number of safeguards to protect the independence of individual decisions on the granting of civil legal aid by the Director of Legal Aid casework.
4. Linked to the transfer of the LSC's functions to the newly created Agency, the Bill will make a series of amendments to the Access to Justice (NI) Order 2003, only limited provisions of which have been commenced, to reflect the fact that the Department of Justice rather than the LSC will have statutory responsibility for the administration of legal aid.
5. The Bill will also make the Lord Chief Justice the President of the Coroners' Courts and require him to appoint a Presiding Coroner. These provisions will formalise the Lord Chief Justice's responsibilities in relation to the Coroners and Coroners' Courts in line with existing arrangements for the other judiciary and courts in Northern Ireland and follows from a recommendation in the 2000 Review of the Criminal Justice System in Northern Ireland.

The Committee's Approach

6. Following a request from the Minister of Justice for a relatively short Committee Stage to enable the Bill to receive Royal Assent by autumn 2014, and given the Bill is largely technical in nature, the Committee decided that a Committee Stage of 10 weeks would be sufficient to provide for appropriate scrutiny of the Bill. At its meeting on 30 April 2014 the Committee therefore agreed to seek an extension to the Committee Stage of the Bill until 20 June 2014 and this was supported by the Assembly on 13 May 2014.
7. Prior to commencement of the Committee Stage of the Bill, the Attorney General for Northern Ireland wrote asking the Committee to consider a proposed new provision to the Bill to amend the Coroners Act (Northern Ireland) 1959. Under section 14(1) of the Act the Attorney General has the power to direct an inquest where he considers it 'advisable' to do so but has no powers to obtain papers or information that may be relevant to the exercise of that power. The Attorney General indicated that he had experienced some difficulty in recent years in securing access to documents that he needed and his proposed amendment to the 1959 Act would confer a power on him to obtain papers and provide a clear statutory basis for disclosure. The Attorney General indicated that the principle focus of his concern was deaths that occur in hospital or where there was otherwise a suggestion that medical error may have occurred.
8. The Committee published a media sign-posting notice on 4 April 2014 seeking written evidence on the Bill and on the Attorney General's proposed amendment and also wrote to a range of key stakeholders inviting their views. Stakeholders were asked to structure written

submissions to address the specific clauses of the Bill. In response to the call for written evidence the Committee received 20 written submissions and these are included at **Appendix 4**.

9. The Committee was first briefed by departmental officials on the principles and final content of the Legal Aid and Coroners' Courts Bill on 13 March 2014. The Committee also held an oral evidence event on 14 May 2014 with representatives from seven organisations to discuss a range of issues relating to the Bill. The Committee explored the issues raised in the written and oral evidence both in writing and with departmental officials when they attended the meeting on 28 May 2014. The Committee also discussed his proposed amendment with the Attorney General for Northern Ireland at the meeting on 28 May 2014. The Minutes of Evidence are included at **Appendix 2** and memoranda and papers from the Department of Justice are included at **Appendix 3**. The correspondence from the Attorney General for Northern Ireland and the Minister for Health, Social Services and Public Safety regarding the proposed amendment to the Coroners Act (Northern Ireland) 1959 are included at **Appendix 5**.
10. The Committee sought advice from the Assembly Examiner of Statutory Rules on the range of delegated powers within the Bill to make subordinate legislation and the choice of Assembly control provided for each power. The Examiner raised issues regarding new articles 36A, 36B and 38A(1) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (as inserted by paragraph 1(5) and (6) of Schedule 2 of the Bill) which makes provision for rules in respect of the assignment of solicitor and counsel where a criminal aid certificate has been granted and new Article 20A of the 2003 Order (paragraph 6(22) of Schedule 2 of the Bill) which provides for rules for the constitution and procedure of Appeal Panels in respect of individual decisions relating to the granting of civil legal services. The Examiner indicated that both regulation making powers were significant and should be subject to the draft affirmative procedure on the first and subsequent exercise of the powers rather than subject to the draft affirmative procedure on first exercise with subsequent rules being subject to the negative resolution procedure as currently provided for in the Bill. This issue is covered in detail in the main body of the report.
11. The Committee carried out an initial clause-by-clause scrutiny of the Bill at its meeting on 4 June 2014 and undertook its formal clause-by-clause scrutiny on 11 June 2014.
12. At its meeting on 18 June 2014 the Committee agreed its report on the Bill and ordered that it should be printed. The relevant extracts from the Minutes of Proceedings are included at **Appendix 1**.

Consideration of the Provisions and Schedules in the Bill

13. In response to its call for evidence, the Committee received 20 written submissions and held an oral evidence event which was attended by 7 organisations.
14. The organisations that provided written and oral evidence to the Committee outlined a range of views and raised a number of issues in relation to some of the clauses and schedules in the Bill. The Committee explored these with the Department of Justice both in writing and in the oral evidence session.

Part 1: Legal Aid

Clause 1 and Schedule 1:

Clause 1 - Dissolution of the Northern Ireland Legal Services Commission

Schedule 1 – Transfer of Assets, Liabilities and Staff of Commission

15. Clause 1 will dissolve the Northern Ireland Legal Services Commission (LSC) and transfer its functions and staff to the Department. On transfer it is intended that an Executive Agency will be created within the Department to administer the delivery of legal aid services in Northern Ireland.
16. Schedule 1 makes provision for the transfer of the assets, liabilities and staff of the Commission to the Department.
17. The Bar Council noted that the stated impetus for the formal dissolution of the LSC and the re-designation from a Non-Departmental Public Body (NDPB) to an Executive Agency was due to failings on the part of the Commission to manage its processes, budget and forecasting on legal aid expenditure. The Bar Council welcomed any improvements that could be made to ensure transparency, predictability and accountability.
18. In contrast KRW LLP outlined that it opposed the dissolution of the LSC due to concerns regarding independence and the potential for interference in decision making which are outlined in more detail under Clause 3 of the Bill. KRW LLP expressed the view that the present arrangement regarding legal aid funding was satisfactory in that the LSC is an independent public body and to dissolve it to create a Director of Legal Aid Casework within the Department of Justice (DoJ) would, in its opinion, give rise to a potential conflict of interest in the event that the DoJ was to be joined in litigation requiring publicly funded legal aid and the proposed arrangement would not therefore be sufficiently independent to satisfy human rights compliance in litigation engaging the European Convention on Human Rights (ECHR). KRW LLP asked the Committee to reflect on the particular circumstances of the recent past in Northern Ireland and to consider, in the context of the Bill, conflict-related legacy cases highlighting that mechanisms for dealing with the past continue to be subject to judicial challenge to ensure human rights compliance.
19. The LSC, in its written and oral evidence, supported the core proposal to transfer its responsibilities to the Department of Justice subject to effective arrangements to ensure that individual decisions on the granting of legal aid are taken independently.

20. The Chairman of the Commission, in his oral evidence, highlighted that he had previously described the current arrangements as “faulty architecture”¹ and the Commission had been of the view for some time that major changes are necessary.
21. The LSC was of the view that, while the structural change would not in itself solve all the issues around legal aid and access to justice, it would provide a more appropriate framework and assist in delivering improved transparency, effectiveness and accountability. It would also assist in better management of the challenges in forecasting legal aid spending and resourcing that spend.
22. The Commission also highlighted that the creation of an agency would provide improved career opportunities for staff currently employed by the Commission and assist in securing additional skills which the Agency may require to implement reforms to the legal aid arrangements.
23. The Information Commissioner’s Office (ICO) indicated that there were practical matters relating to the transfer of records from the Commission to the Department which needed to be considered in advance of the dissolution date and it would contact both the Commission and the Department regarding the transfer of records.
24. The Department confirmed that increased transparency, accountability and efficiency were one of the strategic drivers for the change in status of the LSC and improved financial modelling, monitoring and forecasting was another driver.
25. The Department also highlighted that career and development opportunities would open up for Commission staff when they transferred to the NI Civil Service (NICS) with potential for them to broaden their experience and express an interest or apply for posts in the wider NICS. The Agency would also benefit from having greater access to a wide range of skills and greater integration with the wider NICS. Consideration was also being given to the transfer of records and information and any advice provided by ICO would be welcome.
26. During the oral evidence sessions the Committee sought assurances that there were no outstanding issues to be resolved regarding the status of staff that were transferring from the LSC to the new Agency, pay issues or change of pension rights.
27. The Department stated that all staff would move under the Transfer of Undertakings (Protection of Employment) Regulations (Northern Ireland) 2006 to Northern Ireland Civil Service terms and conditions and the LSC indicated that all outstanding pay matters had been satisfactorily resolved.
28. **The Committee is very well versed in the problems associated with the LSC, particularly in relation to inaccurate financial modelling and forecasting of legal aid spend, lack of accountability and significant budget overspends, and the inadequacies of the current structure. The Committee was also aware that there had been low staff morale within the LSC and equal pay issues which it was pleased to note had now been satisfactorily resolved.**
29. **The Committee noted the drivers for the change in status of the LSC and supported the creation of an Executive Agency within the Department of Justice, noting that this provided an opportunity to improve the governance arrangements relating to legal aid and increase transparency, accountability and efficiency.**
30. **The Committee agreed that it was content to support the inclusion of Clause 1 and Schedule 1 as drafted in the Bill.**

1 <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Committee-Minutes-of-Evidence/Session-2013-2014/May-2014/Legal-Aid-and-Coroners-Courts-Bill-Oral-Evidence-Event/>

Clause 2: Designation Of Director Of Legal Aid Casework

31. Clause 2 makes provision for the appointment of a Director of Legal Aid Casework. The purpose behind the creation of this statutory position is to ensure that there will be no Ministerial involvement in individual decisions on civil legal aid funding. The Department will be required to designate a civil servant in the Department as the Director. The Director's function will be to make decisions on the grant of civil legal aid in individual cases.
32. The Law Society, the Bar Council and the Association of Personal Injury Lawyers (APIL) stated that the Director of Legal Aid Casework should be legally trained or have experience in civil justice matters. The Bar Council and APIL indicated that a legally trained Director of Legal Aid Casework would have the requisite experience, understanding, knowledge and qualifications to make decisions on individual cases many of which are very complex and require detailed scrutiny. Both organisations were of the view that decisions made by a Director who was not legally trained could lead to more challenges through the appeals process, thereby increasing the workload and costs.
33. The LSC during the oral evidence event, stated that when previously advertising for the Chief Executive post, it required applicants to have appropriate experience and expertise but did not specifically require a legal qualification. The Commission highlighted that as well as being able to properly consider the legal issues relating to individual legal aid decisions the Director of Legal Aid Casework would also be managing a reasonably large organisation of over 100 people and a budget in excess of £100 million. The Director would have access to legal expertise within the Agency itself.
34. During oral evidence the Law Society also questioned the rationale for specifying that the Director would come from the civil service and suggested that it may be better for the post to be filled by someone outside the civil service with no pre-existing loyalties within the Department. When questioned on how the appointment should be made the Law Society proposed that the appointments process should enable those outside the civil service as well as civil servants to apply for the post.
35. The Department, in its written evidence, stated that, as has been the case with the Head of the LSC and the Legal Aid Department of the Law Society, it does not consider that it is essential for the Director to be legally qualified. The Department outlined that the Director will have recourse to independent legal advice if, and when, required and will receive all necessary training to effectively discharge his functions which will include running a large Agency with a considerable budget.
36. In relation to whether the Director of Legal Aid Casework should be an externally recruited person, the Department advised that public appointments do not normally apply to Departments or their Executive Agencies but to appointments made to a public body listed in the Commissioner for Public Appointments (NI) Order.
37. The Committee, during the oral evidence session with departmental officials, sought further clarification regarding whether the post of Director could be filled by someone external to the Department or whether, given the wording of Clause 2(1), it had to be filled by a civil servant. The officials indicated that the post, which was a Senior Civil Service (SCS) post, did not necessarily have to be filled by a civil servant but a person who is employed in an Agency is normally a civil servant therefore the person to be recruited would be appointed to the Department first and the Minister would then designate them as the Director of Legal Aid Casework. The officials also outlined that there were a number of ways in which this type of post could be filled such as direct recruitment, competition within the existing grades of staff across the SCS in all Departments or a more managed move of a particular person within the Department or more generally across the SCS.
38. The officials indicated that the Department had no plans at this point to hold an external competition and highlighted that consideration needed to be given to the current Chief

Executive of the LSC and the potential for retaining the expertise over a transition period and then considering how to fill the post in the future.

39. **Some Members expressed the view that Clause 2(1) could be better worded to ensure that there is not a perception that a person within the Department must be appointed to the post of Director of Legal Aid Casework. Other Members noted that the words “must designate a civil servant” did not preclude the recruitment of someone from outside who then becomes a civil servant.**
40. **The Committee agreed that it was content to support the inclusion of Clause 2 as drafted in the Bill.**

Clause 3: Exercise of Functions by Director

41. Clause 3 includes a number of safeguards to guarantee and protect the independence of the Director and his decisions on the grant of civil legal aid in individual cases.
42. Subsection (1) requires the Director to comply with directions given by the Department and to have regard to guidance issued by the Department.
43. Subsection (2)(a) provides that the Department must not give a direction or guidance about the granting of civil legal aid in individual cases. Subsection (2)(b) places a duty on the Department to ensure that the Director acts independently of the Department when applying a direction or guidance under this section in relation to an individual case.
44. Subsection 3(3) requires the Department to publish any such directions or guidance.
45. Subsection 3(4) provides for directions and guidance under this section to be revised or withdrawn from time to time.
46. The primary concern of a range of organisations in relation to this Bill related to whether there are adequate and sufficient safeguards included to protect and ensure the independence of decision-making once the Executive Agency is established and the Director of Legal Aid Casework appointed to take decisions on individual cases and the grant of civil legal aid.
47. A number of respondents, including the Bar Council, the Law Society, the Law Centre (NI), the Northern Ireland Human Rights Commission and KRW LLP raised concerns regarding the need to ensure the independence of the Director and the potential for a conflict of interest and cited similar issues raised by the Westminster Joint Committee on Human Rights when it considered the provisions contained in the Legal Aid Sentencing and Punishment of Offenders Act 2012 which were similar to these provisions.
48. The Law Society, the Law Centre (NI), the Bar Council and KRW LLP also highlighted the fact that Clause 3 prevents the Department issuing direction or guidance about decisions by the Director in individual cases but is silent in relation to classes of cases. There was concern that any direction about a class of case could impact on individual cases and that there may be a need to ensure that legal aid could not be restricted by category.
49. The Law Society indicated that it was vital, in terms of securing independence, that the Bill prevented the potential for political interference in the patterns and norms of decision making in respect of legal aid. It also highlighted the concerns raised by the Westminster Joint Committee regarding the adherence of the Director of Legal Aid Casework, who was to be designated as a department official, to the Civil Service Code pledging loyalty to the Minister which, in its view, effectively trumped the practical arrangements for independence.
50. The Law Society stated that it was questionable whether the requirement for the Director to comply with guidance requires to be set out explicitly on the face of the Bill as this arguably places the primary duty of the Director as obedience to departmental direction, rather than to the impartial application of consistent principles in relation to legal aid decision making.

The Society considered that this removes the judicious distance provided by separation of the legislative power to determine broad principles of decision making from the operational responsibility for providing legal aid in a just manner which provides access to justice for all.

51. The NI Human Rights Commission (NIHRC) highlighted that the Westminster Joint Committee on Human Rights was not satisfied that comparative provisions contained in the Legal Aid Sentencing and Punishment of Offenders Bill to those in this Bill provided sufficient institutional guarantees of the independence of the Director to prevent any appearance of a conflict of interest arising. The NIHRC indicated that to ensure compatibility with Article 6 of the ECHR a regime governing eligibility for legal aid must contain sufficient guarantees against arbitrariness. The NIHRC noted that Schedule 2 proposed the establishment of Appeal Panels to hear appeals against decisions taken by the Director and indicated that an appeal to an independent and impartial body is vital in ensuring that the overall decision-making framework is compatible with Article 6 of the ECHR. It recommended that the Committee should ask the Department to set out how it would ensure the institutional independence of the Legal Aid Agency and the Director to ensure full compliance with Article 6 and it also suggested that the Committee may wish to consider whether the right of appeal is sufficiently robust.
52. Both the Law Society and the NI Human Rights Commission referred in their written submissions to the case in the European Court of Human Rights *'Del Sol v France'* in which it was alleged that a refusal to grant legal aid constituted an infringement of the applicant's rights to a fair hearing under Article 6 (1) ECHR in which it was said "*the Court considers it important to have due regard to the quality of a legal aid scheme within a state. This scheme set up by the French legislature offers individuals substantial guarantees to protect them from arbitrariness*". The Law Society asserted that the above judgement demonstrates that the qualities of a legal aid scheme, including the degree of independence and provision for effective appeals against decisions taken, are relevant to the compliance of that scheme with Article 6 ECHR.
53. The Bar Council stated that legal aid has a defining role in upholding access to justice. It affords many individuals access to justice, enabling them to defend themselves and enforce their legal rights. In the Council's view the administration of the system and its independent decision-making processes are vitally important and require robust protection from any form of interference.
54. The Bar Council did not believe that the provisions contained within Clause 3 would provide the operational independence required in making individual decisions on the granting of legal aid and was of the view that they were not sufficiently robust to enable the Director to challenge directions from the Department. While welcoming the inclusion in the Bill "*the Department must not give a Direction or guidance about the carrying out of those functions in relation to an individual case*" the Bar Council expressed the view that it would remain possible to compromise an individual decision through budgetary or financial guidance in relation to a certain class or type of legal case and therefore recommended the inclusion of a caveat at Clause 3(1)(a) which allows the Director to, whilst acting in a reasonable manner, initially challenge and ultimately, if necessary, choose not to comply where the Direction from the Department compromises the independence of decision-making.
55. The Bar Council indicated that it would be helpful to have more information on the sanctions available if the Department did not comply with the legislation and what reporting mechanism would be available to the Director of Legal Aid Casework in circumstances where he/she was concerned about the direction or involvement of the Department. It welcomed the commitment by the Department to publish any directions or guidance it gives.
56. The Law Centre (NI) highlighted that the Westminster Joint Committee was particularly concerned about preventing any conflict of interest arising when making decisions about the availability of legal aid to challenge decisions of the government. It also outlined that there appeared to be no impediment to the Department instructing the Director of Legal Aid

Casework in a way which restricts decision making across a class of cases which will impact indirectly on a particular case without specifically addressing the specific case itself.

57. The Law Centre indicated that it had two concerns about the independence of the Director of Legal Aid Casework. The first was around challenges to government and the second around cases which may have significant financial consequences to the legal aid fund (for example a lead public interest case where many other cases may follow).

58. To provide further safeguards to the independence of the Director, the Law Centre proposed two amendments to the Bill:

3(1) The Director must –

Comply with directions given by the Department about the carrying out of the Director’s functions with the additional words as follows:

a. “save where this compromises the Director’s independence”

and

b. 3(2) “But the Department-

must not give a direction or guidance about the carrying out of those functions in relation to an individual case “

c. with the additional words as follows:

“or to a class of cases where it unreasonably impinges on the Director’s ability to act independently in an individual case”.

59. The Law Centre welcomed the commitment for the Department to publish any directions or guidance and suggested that clarity should be provided regarding where these will be published so that they are widely available and accessible to interested parties.

60. KRW LLP stated that it was not clear how independence is to be achieved and recommended that the Committee clarify with the Department the protocols, procedures and systems to ensure rigorous independence. It highlighted that there is nothing in the Bill to prevent the Minister from issuing guidance or directions in relation to categories of case. KRW LLP used the example of judicial review in which it indicated that the NI Executive and the Assembly would clearly have a direct interest thus giving rise, in its opinion, to a conflict of interest.

61. KRW LLP also indicated that the Bill did not contain any right of appeal to an independent body against a determination by the Director of Legal Aid Casework of whether a person qualified for legal aid and was concerned that the absence of such a provision, when a legal aid decision which may lay against the state e.g. in terms of a breach of an Article 2 conflict related legacy case when state collusion is an issue, had been determined as not eligible by the state, may be incompatible with Article 6 of the ECHR.

62. In contrast to the concerns raised the Children’s Law Centre indicated that it was satisfied that the legislation reflected the independent role of the Executive Agency from the Department in considering individual legal aid applications and noted that an appeals procedure had been developed.

63. The Association of Personal Injury Lawyers (APIL) welcomed the assurance in the Explanatory and Financial Memorandum that there would be no ministerial involvement in individual decisions on civil legal aid funding. The Association stated that legal aid should always be awarded on a case by case basis and funding should be awarded based on the merits of a case and not based on a political agenda.

64. The LSC indicated that it supported the measures proposed to ensure that individual decisions in respect of legal aid are, and are seen to be, taken independently of Government,

- including the concept of the Agency's Chief Executive being a statutory office holder. The Commission also supported the creation of an independent appeals mechanism and the requirement for all ministerial guidance to the Agency to be published.
65. The Commission highlighted in oral evidence that, in the 10 years of the Commission's existence, both under the Lord Chancellor's Department initially, and under the Department of Justice since devolution, there had been no case in which a Minister tried to influence a decision taken therefore the evidence suggested that this was not a problem. It also drew attention to the fact that the Board of the new organisation would have three independent members and one of their roles would be to focus on any situation in which the Director was being asked to do something he/she did not believe to be right.
 66. The Commission suggested that the Committee should seek an accommodation with the Minister that he would always consult the Committee in advance of making any significant direction which might provide an additional safeguard. This proposal was supported by the NI Human Rights Commission.
 67. The Information Commissioner's Office also welcomed the transparency afforded by the statutory requirement for the Department of Justice to publish directions and guidance given to the Director of Legal Aid Casework in respect of his functions.
 68. In response to the concerns raised the Department, in both written and oral evidence, set out the range of safeguards in the legislation to protect the independence of the individual decisions on the grant of civil legal services which it considered to be sufficient and which included a requirement that the Department cannot give direction or guidance in relation to an individual case, that directions and guidance must be published, imposes a duty on the Department to ensure that the Director acts independently of it when applying any guidance or direction to an individual case and provides for the establishment of an independent appeals process.
 69. The Department indicated that under the proposed new arrangements the independence of the Director's decision-making in any individual case would be no less than the independence of the LSC's decision-making under the current arrangements and it was satisfied that the new arrangements would be fully compatible with ECHR Article 6(1).
 70. In the Department's view the mandatory requirement that any directions and guidance must be published would ensure transparency and provide a robust protection against any attempt to influence the Director's decision-making in an inappropriate manner. The directions and guidance would be published for example on the Agency's webpage and they would also be reported on in the Agency's Annual Reports which would be published and laid in the Assembly. Any directions or guidance may be challenged in the courts. Furthermore, in the normal way, any funding decision by the Director of Legal Aid Casework would be subject to the exercise of the High Court's supervisory jurisdiction by way of an application for judicial review.
 71. The Department emphasised that any direction or guidance could not override the provisions of the relevant primary or secondary legislation and highlighted that the requirement to follow directions and guidance issued by the Minister already exists. It also stated that it was not its intention to place the primary duty of the Director as obedience to departmental direction, and all the safeguards are of equal importance.
 72. The Department outlined that, subject to any delegation of his/her functions under Clause 4 of the Bill, the Director of Legal Aid Casework would consider applications for funding to challenge decisions of the government in accordance with the provisions in the legislation and the requirements of the scheme, including any published directions or guidance. In its view the robust, transparent arrangements provided for in the Bill would ensure there is no conflict of interest. All applications for civil legal services would be dealt with individually with

the decisions taken on the merits of the case and not influenced by political or budgetary considerations.

73. The Department indicated that the concerns of the Westminster Joint Committee on Human Rights were in the context of the absence of the right to appeal to an independent appeals body. This has been addressed by including in Schedule 2 of the Bill a requirement for the Department to make regulations that will provide for an independent Appeal Panels to determine appeals and for the decisions of the Appeal Panels to be final.
74. At the request of the Committee the Department considered what effect the two amendments proposed by the Law Centre (NI) would have if they were adopted. In relation to the proposed amendment to Clause 3(1)(a), the Department indicated that Part 1 of the Bill is designed to create the statutory office of the Director of Legal Aid Casework and to provide protection for this office when taking decisions in respect of individual cases. The concept of independence is therefore limited to the Director's decision-making in individual cases. The Department was of the view that the proposed amendment would widen the scope of the Director's independence considerably and would go beyond individual decisions in respect of civil legal aid. It could also lead to uncertainty in the law.
75. With regard to the proposed amendment to Clause 3(2)(a), the purpose of the Clause as currently drafted is to preclude the Department from giving a direction or guidance in relation to an individual case, but it is intended that a direction or guidance may be given in other aspects of the Director's work, including in relation to a class of cases. The Department noted that the proposed amendment appeared to seek to manage the risk that it would give a direction impinging on the Director's ability to act independently in a class of cases resulting in inappropriate Departmental interference in the Director's decisions in individual cases within that class. The Department highlighted that the shape of the present law meant that such a concern is misplaced and the only way to restrict the availability of funding in relation to a class of cases is by way of an amendment to the 2003 Order which must be done by regulations which are subject to Assembly control by way of the draft affirmative procedure.
76. **When considering Clause 3 some Members expressed reservations about the proposed framework to ensure the independence of the Director in relation to decisions in individual cases, whether policy constraints could impact negatively on the exercise of that independence because a category of cases could be excluded from consideration by the Director of Legal Aid Casework and whether proper safeguards were in place. They indicated that they may wish to give further consideration to these issues and the two amendments proposed by the Law Centre (NI) at a later stage.**
77. **Other Members were satisfied that any direction issued by the Minister or Department could not override the provisions of the relevant primary or secondary legislation and noted that the requirement to follow directions and guidance issued by the Minister already exists.**
78. **The Committee agreed that it was content to support the inclusion of Clause 3 as drafted in the Bill.**

Clause 4: Delegation of Functions of Director

79. This Clause makes provision about the delegation of the Director's functions.
80. The Association of Personal Injury Lawyers (APIL) noted that Clause 4 enables the Director of Legal Aid Casework to delegate functions to other individuals in the Department of Justice while regulations under Schedule 2 create Appeal Panels. APIL was of the view that it was important that anyone in the Department of Justice who is involved in considering an application for legal aid funding, as well as those on Appeal Panels, should be legally qualified and have legal knowledge, experience or training.

81. The Bar Council indicated that the current system of panels of practising lawyers works well in the context of considering an application for legal aid funding and believed that it was important to continue to constitute Appeal Panels with suitably qualified, presently practising legal representatives who have experience in the area of law under consideration.
82. KRW LLP raised concerns regarding the independence of the Department of Justice civil servants who would be provided to the Director of Legal Aid Casework. In the view of KRW LLP, even if accountable to the Director when exercising functions delegated to them by the Director, they are ultimately accountable to the Minister of Justice and would remain accountable to the Minister in respect of their other functions as civil servants.
83. The Department indicated that any staff involved in considering an application for civil legal aid will receive the necessary training to discharge the function effectively and will have recourse to independent legal advice if, and when, required. The Department highlighted that, following consultation, it had revised its position regarding the Appeal Panels and had decided that appeals would be considered by a panel of 3 with the presiding officer being a lawyer. The Department still intended to open up membership of Appeal Panels to lay people from a range of professional backgrounds with experience of the types of issues involved, who would be appointed through a public appointments process. In its view this approach would introduce a multi-disciplinary approach to decision making thereby strengthening the process.
84. **The Committee noted that the effect of this provision was to provide for the Director of Legal Aid Casework to delegate decisions to his staff and solicitors under the green form scheme to facilitate decisions to be taken at the right level. This process already occurs under the current legislative framework.**
85. **The Committee agreed that it was content to support the inclusion of Clause 4 as drafted in the Bill.**

Clause 5: Annual Report of Director

86. Clause 5 concerns the production of an Annual Report by the Director of Legal Aid Casework.
87. The Information Commissioner's Office welcomed the requirement for the Director to produce an Annual Report to be laid before the Assembly.
88. The Law Centre (NI) stated that the Annual Reports of the LSC had regularly been published more than twelve months after the end of the relevant financial year covered by the report. It therefore suggested an amendment to require the report to be published within nine months to copper fasten the commitment to provide a timely report.
89. The Bar Council also highlighted that the publication of the Annual Report of the LSC had in recent years been fraught with difficulties and challenges. It therefore welcomed the provision, expecting that the information in the report would improve in content and accuracy. The Bar Council also suggested a time limit for the laying of the report before the Assembly to ensure timely receipt of it.
90. During oral evidence the LSC indicated that there is a requirement on public authorities to make annual reports but the key issue was how the Director reports on the discharge of his functions. The LSC expressed the view that, if any directions are issued that impinge on the independence of the decision making process or if any inference or influence is brought to bear on it, it is critical that the report is clear regarding how the functions are discharged not only by the Director but others involved in the day-to-day processing of decisions. This was key to the integrity of the post.
91. During the oral evidence event the Committee sought opinions on whether the clause could be improved by including additional information in the legislation on what the Report

should cover. The views expressed noted that there were established protocols about the content of annual reports that would apply and there was no need to include that detail in the legislation. It may however be useful to establish by way of correspondence with the Department the parameters or framework of the expected content of the Report.

92. In response to the suggestions made, the Department advised that there were already statutory obligations covered under the Government Resources and Accounts Act (Northern Ireland) 2001 to lay the Departmental, including Agency, Annual Report and Accounts in the Assembly. The statutory deadline is 15 November. The Department indicated that, while there was a question mark over whether this report would form part of the annual report and accounts, or form a separate report, the Department envisaged that it would be published in line with the timing of those and an amendment to Clause 5 was not necessary.
93. **The Committee noted the requirements regarding the publication of the Annual Report as outlined by the departmental officials and agreed that it was content to support the inclusion of Clause 5 as drafted in the Bill.**

Clause 6 and Schedule 2

Clause 6 - Amendment of Law Relating to Legal Aid, Civil Legal Services and Criminal Defence Services

Schedule 2 – Amendments

94. Clause 6 introduces Schedule 2 which contains a large number of amendments. The amendments relate to Part 3 of the 1981 Order in relation to representation in criminal proceedings and to the 2003 Order in relation to civil legal services and criminal defence services.
95. Schedule 2 sets out a large number of amendments to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and other pieces of legislation. The majority of amendments are purely technical in nature and necessary to reflect the transfer of functions regarding the administration of legal aid from the LSC to the Department of Justice.
96. Areas of substantial amendment relate to:
- the assignment of counsel and solicitors, registration of solicitors and counsel eligible to be assigned and the restriction of disclosure of information for criminal legal aid.
 - pending the commencement of criminal defence services under the 2003 Order, advice and assistance in criminal matters will be provided under civil legal services. For this purpose, paragraph 6(9) of Schedule 2 inserts a new definition for the term civil legal services.
 - the provision of legal aid funding in ‘exceptional cases’.
 - the removal of the requirement to have a statutory funding code, setting out the criteria according to which any decision is to be taken whether to fund (or continue to fund) civil legal services for an individual. Instead, decision-making on the funding of civil legal services in respect of any individual case will be on the basis of a uniform prescribed merits test as provided for by the amendment under paragraph 6 (15)(c) of Schedule 2.
 - the Department must make regulations to provide for Appeal Panels which will hear appeals against prescribed decisions taken on the provision of civil legal services.
97. A range of issues were raised by the key stakeholders in both written and oral evidence.
98. The Bar Council informed the Committee that it had requested a legal opinion to ascertain the impact of the amendments relating to the legal aid, civil legal services and criminal

defence services which it indicated it would share with the Committee. At the time of the completion of the Committee Stage of the Bill a copy of the legal advice had not been received.

Statutory Exceptional Grant Funding

99. A number of respondents raised the issue of the importance of independence in decision making in relation to Statutory Exceptional Grant funding.
100. The Law Society stated that, in the case of the Statutory Exceptional Grant Funding provision, the importance of independence in decision-making is paramount. It outlined concerns that it had raised during the Department's initial consultation that caution should be taken in ensuring the effective operational independence of decision making in inquest/legacy cases and civil actions in terrorist cases and asserted that this is particularly the case in a post-conflict society in which the application of clear, consistent and impartial legal principles to some controversial cases is necessary to ensure widespread confidence in the administration of justice.
101. KRW LLP noted that under the Schedule of Amendments to existing legislation the Access to Justice (Northern Ireland) Order 2003 Article 12A is amended to bring into the Bill matters relating to exceptional funding provisions. KRW LLP pointed out that the state has a responsibility to ensure that legal aid is available to secure access to justice for those with insufficient resources in relation to legally complex disputes including matters of human rights and was concerned that exceptional funding decisions made by the Director of Legal Aid Casework may not be prompt or fair or may be subject to interference because of policy guidance, compliance structures or directions as issued by the Department of Justice.
102. KRW LLP stated that the Committee should reflect on the particular circumstances of Northern Ireland in relation to litigation issued, pending and proposed, in relation to the conflict related legacy cases both of the families of the deceased victims of the conflict and those surviving as the injured of the conflict and the need to ensure compliance with human rights legislation. It suggested that the legacy of conflict related violence is specific to Northern Ireland and a mirror Bill to England and Wales should not pass without intense scrutiny including broader political consideration as to how to litigate the past. It also outlined the need for effective resourcing to ensure access to justice particularly in conflict related legacy cases.
103. In oral evidence KRW LLP highlighted that there were concerns about the current system and noted that the provisions mirror some provisions in England and Wales where only 5% of applications were approved.
104. The Northern Ireland Human Rights Commission (NIHRC) highlighted that it had previously queried why funding for inquests raising issues with regard to Article 2 of the ECHR are not within the scope of the mainstream legal aid system. It advised the Committee to seek an assurance that the requirement on a family member seeking legal assistance in inquest proceedings to apply for legal aid by way of the exceptionality provisions will not unnecessarily burden them.
105. The NIHRC also recommended that the cases to be funded by way of the exceptionality provision should be categorised and it would be useful for the Committee to have an indication from the Department of the number of applications that it thinks will be received each year and the number that will be granted given that the number of applications in England and Wales, with comparable provisions, has been extremely low and the number of successful applications even lower.
106. The Department indicated that the provisions relating to exceptional funding give effect to the recommendation of the Access to Justice Review that the Department/Minister should

have no role in decisions on exceptional funding and that the appeals process also applies to applications for exceptional funding.

107. The Department also outlined that the Northern Ireland Courts and Tribunals Service is developing proposals to establish a Legacy Inquest Unit which will be organised along the lines of the inquest into the London bombings on 7 July 2005, and comprise: Senior Coroners assigned to Article 2 cases; specialist investigative support (e.g. Coroners' Investigators, medical examiners etc.) to support the Coroners' investigations; dedicated legal support – including in-house legal and paralegal staff; and dedicated administrative support, including a secure IT platform for managing sensitive material. Subject to securing the necessary resources, the Department expects to start putting the arrangements in place later this year.
108. The Department indicated that the categorisation of funding decisions would be considered as part of governance arrangements with the new Agency.

Funding of Civil Legal Services by the Department

109. The Law Society stated that the revised Article 11 of the 2003 Order to provide the Department with an explicit aim to “obtain the best possible value for money” in funding civil legal services should be clarified in statute. The Law Society outlined that this phrase is not defined or qualified in any way, nor its relationship to the other clauses in the 2003 Order set out in the subsequent sections, leaving its meaning vague and open to interpretation.
110. The Law Society stated that this Clause has the potential to tip the balance of decision-making priorities over the long-term towards cost-cutting rather than ensuring access to justice as the core principle. The Law Society highlighted that there were various accountability mechanisms built into the framework of legal aid governance which have the effect of rationing resources to cases of genuine need, such as the means and merits test and which strike the balance between preserving access to justice for meritorious cases and applicants in socio-economic need under Article 6 ECHR with the reality of scarce resources.
111. The Law Society expressed the view that a broad ‘value for money’ clause cannot avoid those public law requirements and recommended that, if the Department is committed to proceed with this clause, it should be clarified to include matters to be taken into account.
112. In response, the Department of Justice indicated that substantively there is no change being made to the provision in Article 11 of the 2003 Order and the provision reproduces an already existing provision. In taking decisions in individual cases, the Director will be applying the relevant legislation relating to the specific scheme and the proposed change is simply to reflect the change of status from the LSC to an Executive Agency.

Appeal Panels

113. The Law Society welcomed the fact that the Department had moved away from its original proposal for a single member appeals process but expressed concern that the Appeal Panels would not be composed of externally recruited lawyers, which it stated was considered by the Commission as a vital safeguard in terms of independence. The Law Society indicated that, given the need for knowledge of the legal issues involved and the failure to require that the Director has a background in civil justice affairs, the new arrangements may be lacking in the expertise and distance necessary to create a balanced, arms-length relationship between the Department and the new Agency.
114. The Law Society stated that for the appeals mechanism to have confidence it must be seen to be fair, accessible and rigorous and expressed the view that Schedule 2 should specify that Appeal Panels would be made up of a majority of legal members with provision for the third member of a panel to be drawn from other relevant backgrounds. It also recommended

that the Committee pay close attention to the regulations relating to the appeals mechanism that would come forward in due course.

115. The Association of Personal Injury Lawyers, at the oral evidence event, stated that the current legal aid committees operate extremely well because there are qualified solicitors and barristers who are trained to know all the issues with the applications and appeals that they are dealing with.
116. The Northern Ireland Human Rights Commission questioned whether the appeals process was sufficiently robust and advised the Committee to seek further information on the proposed appeals body, including the manner of appointment of members, the terms on which they would be appointed, terms for any disqualifications and what guarantees of independence will be provided to exclude any legitimate doubt as to the independence or impartiality of the appeals body.
117. The Assembly Examiner of Statutory Rules, when providing advice to the Committee on the range of delegated powers within the Bill to make subordinate legislation and the choice of Assembly control provided for each power, indicated that the provision in Schedule 2, paragraph 6(22)/new Article 20A of the 2003 Order is clearly significant, providing the framework for the constitution and procedure of Appeal Panels (deciding appeals on individual applications for civil legal services). He expressed the view that if Article 20A of the 2003 Order was to remain as a regulation-making power, rather than placing some of the most significant provisions on the face of the Bill, then the regulation-making power is of some great significance to the Bill and should be subject to the draft affirmative procedure on the first and subsequent exercise of the powers rather than, as provided in the Bill as drafted, on the first occasion with subsequent regulations subject to the negative resolution procedure.
118. The Department outlined that its intention was to seek individuals from a range of professional backgrounds including legally qualified individuals and practising lawyers (solicitors and barristers) with experience of the types of issues involved who would be able to bring this experience to the appeals process. In oral evidence the Department explained that they were keen to include people who have experience in relevant areas, for example, social care in relation to family matters.
119. The Department indicated that the panel would be appointed through a public appointments process following the principles set out by the Commissioner for Public Appointments Northern Ireland. The decision to move to a panel of three persons, rather than one, meant that each appeal could be heard by individuals from a range of backgrounds. An explicit requirement in the Appeal Regulations would be for the presiding officer to be a lawyer.
120. The Department outlined that all applicants would retain the right of appeal if their application for civil legal services was refused and that applicants would be given reasons and would have the opportunity to address those reasons before and when going to appeal.
121. In response to the issue raised by the Examiner of Statutory Rules, the Department outlined that the regulations would be very detailed and include provisions relating to operational matters and highlighted that, as currently drafted, the new clause gave the Assembly a say in the initial setting up of the relevant regime but did not require every minor or technical amendment to that regime to be subject to debate in the Assembly. The Department indicated that if the Committee was minded to accept the Examiner's advice it would not wish to argue against it.

Oral Hearings

122. The Law Society noted that Schedule 2 provided that oral appeals would be available only in circumstances to be prescribed in regulations to follow under the proposed new Article 20A(2)(f) of the 2003 Order and expressed the view that provision should be made for

oral appeals when it is considered that the complexity of the circumstances render this appropriate. The Law Society suggested that the proposed new Article 20A(2)(f) of the 2003 Order should be redrafted to remove the phrase “except in such cases as may be prescribed” in favour of a phrase along the lines “except in cases where the complex issues of law or fact requires an oral appeal”. The Law Society argued this would provide greater flexibility than a prescriptive list of hurdles. It also suggested that natural justice would indicate that appellants should always be allowed to appear in person unless they determine that they do not wish to do so.

123. In response the Department outlined that robust arrangements would be introduced to consider applications for civil legal services. This would include a review process and, when an application for funding is refused, clear reasons will be given. If the decision is appealed it will be subject to further consideration to see if approval can be granted before going to an Appeal Panel. The Department therefore anticipated that the quality of applications for funding would improve and the number of appeals reduce. The provision of reasons for refusing an application (which an appellant will be required to address in writing as part of the appeals process) means that, in most situations, it would be appropriate to deal with the appeal on paper. The Department explained that, under the current arrangements, a large number of appeals are dealt with on paper. The Appeal Regulations will however include provision for oral representation in appropriate cases. The criteria for allowing oral hearings would be set out in the regulations, which would be subject to the Assembly’s control by way of the draft affirmative procedure.

Assignment of counsel and solicitors; registration of solicitors and counsel eligible to be assigned; and disclosure of information

124. The Bar Council highlighted that the Bill replicated 36(1)(4) of the 2003 Order but unfortunately 36(5) had not been transferred. This required the Department to “*consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland and undertake such other consultation as appears to him to be appropriate*”. The Bar Council asserted that it is important that the profession and key stakeholders have a role in the development of any registration scheme and asked the Committee to propose the replication of 36(5) within the draft Bill.
125. The Bar Council outlined that the Department had yet to discuss the matter of registration in detail with the Bar and it would welcome the opportunity to do so. It noted that the Department was preparing a public consultation on the matter.
126. The Assembly Examiner of Statutory Rules advised the Committee that the rules in respect of the assignment of solicitor and counsel where a criminal aid certificate has been granted, which are provided for in new Articles 36A, 36B and 38A (1) of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981 as inserted by paragraph 1 (5) and (6) of Schedule 2, were significant powers in themselves and were also intended to replicate provisions in the 2003 Order. That Order recognises their significance by making them subject to the draft affirmative procedure on first and subsequent occasions and, in the Examiner’s view, the Bill should provide for them to be subject to that same control rather than, as provided in the Bill as currently drafted, on the first occasion with subsequent regulations subject to the negative resolution procedure.
127. In response to the issue raised by the Bar Council, the Department outlined that the amendment referred to, which is contained in paragraph 1(5) of Schedule 2 to the Bill, is to insert a new Article 36B provision into the 1981 Order. It is to provide for a register of solicitors and counsel eligible to be assigned under criminal legal aid. The Department explained that the new provision refers, in Article 36B(1), to rules under the existing general rulemaking power in Article 36(3) of the 1981 Order. In its current form, Article 36(3) of the 1981 Order prescribes a number of statutory consultees, including the Lord Chief Justice

and the Attorney General. When bringing forward rules under this rule-making power, in compliance with its obligation under common law, the Department has always – without fail – consulted with both the Law Society and the Bar Council. On that basis, it was the view of the Department that it was not necessary to make the amendment proposed by the Bar Council.

128. The Department confirmed that it would separately bring forward proposals for a registration scheme and would be consulting with the Bar Council as a key stakeholder.
129. With regard to the issue raised by the Examiner of Statutory Rules, the Department acknowledged that, in relation to their respective 'matching provisions' in the 2003 Order, they are subject to the Assembly's control by way of the draft affirmative procedure throughout. The Department stated that the draft clauses involved here follow the approach adopted in respect of the relevant amendments made to its legal aid legislation by the Justice Act (Northern Ireland) 2011. The Department indicated that if the Committee was minded to accept the Examiner's advice it would not wish to argue against it.

Disclosure of information

130. The Information Commissioner's Office noted the statutory bar on the disclosure of information contained within draft Article 38A. The bar would not apply where the consent of the person who provided the information had been obtained or unless permitted by rules made under Article 36. The Information Commissioner recommended that, unless otherwise contained in the legislation, the Bill should be amended to require that the rules made under Article 36 be published.
131. The Department explained that, as with all other secondary legislation, the Disclosure of Information Regulations to be made under Article 32 of the 2003 Order and also any corresponding Disclosure of Information Rules made under Article 38A of the 1981 Order will be published and laid before the Assembly.
132. When the Committee discussed Clause 6 and Schedule 2 one Member expressed some reservations about the proposed make-up of the Appeal Panels and the intention to include lay persons as well as legally qualified persons. While content with a panel of three members and a lawyer chairing the panel, they questioned what lay people could bring to the evaluation of appeals given the Panel would deal primarily with legal issues that require a thorough understanding of the law and the facts relating to the law. The Committee noted that the detail of the appeals mechanism, including the make-up and procedures of the panels, would be set out in subordinate legislation which would provide an opportunity for in-depth scrutiny.
133. **The Committee agreed with the assessment of the Assembly Examiner of Statutory Rules that both regulation making powers relating to new articles 36A, 36B and 38A(1) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (as inserted by paragraph 1(5) and (6) of Schedule 2 of the Bill) which makes provision for rules in respect of the assignment of solicitors and counsel where a criminal aid certificate has been granted and new Article 20A of the 2003 Order (paragraph 6(22) of Schedule 2 of the Bill) which provides for rules for the constitution and procedure of appeals panels in respect of individual decisions relating to the granting of civil legal services were significant and should be subject to the draft affirmative procedure on the first and subsequent exercise of the powers rather than subject to the draft affirmative procedure on first exercise with subsequent rules being subject to the negative resolution procedure as currently provided for in the Bill. The Committee agreed that it would support amendments to make these changes to Schedule 2.**
134. **The Department subsequently wrote to the Committee indicating that, in light of its decision, the Department would adopt the same approach and instruct Legislative Counsel to draft the necessary amendments to be brought forward at the appropriate stage. On 17 June 2014 the Department provided the proposed wording of the two amendments for the Committee's information.**

Part 2: Coroners' Courts

Clause 7: Lord Chief Justice to be President of Coroners' Courts

Clause 8: Presiding Coroner

135. Clause 7 makes provision for the Lord Chief Justice to be the President of the Coroners' Courts by amending section 12(1D) of the Justice (Northern Ireland) Act 2002.
136. Clause 8 requires the Lord Chief Justice to appoint a Presiding Coroner with responsibility for the Coroners' Courts and the other coroners and deputy coroners.
137. These clauses were generally supported by those organisations who commented on them in written and oral evidence. The Lord Chief Justice noted that the provision to appoint him President of the Coroners' Courts was consistent with his judicial leadership role for other judicial tiers and he therefore welcomed the provision as did both the Bar Council and the Law Centre (NI).
138. Both the Northern Ireland Human Rights Commission and the NI Policing Board, noting the issue of delays in relation to legacy inquests, were interested in whether the appointment of the Lord Chief Justice as President of the Coroners' Courts would have any positive implications for addressing delay in the Coroners' Courts and what role, if any, he would have in managing such delays.
139. The Department of Justice outlined that the new arrangements were intended to assist in the better administration of the Coroners' Courts and case management of inquests including legacy inquests, and would allow the Lord Chief Justice to introduce improved judicial case management in those courts. The Department also highlighted that the new powers had also been referred to as part of a package of measures put forward to the Committee of Ministers in Strasbourg on 16 April 2014 specifically directed at helping to address delay in legacy inquests.
140. During the oral briefing by departmental officials on the principles of the Bill, the Committee noted that the provisions regarding the Coroners' Courts arose as a result of a recommendation in the Review of the Criminal Justice System in Northern Ireland in 2000 that the Lord Chief Justice should have a clearly defined position as head of the judiciary and that each tier of the judiciary should have a representative in order to facilitate the co-ordination and management of court business and to provide a figurehead. While those recommendations had been implemented in the Justice (Northern Ireland) Act 2002 arrangements were not included at that time for the Coroners' Courts. The Committee questioned the delay in bringing forward legislative changes relating to the Coroners' Courts given that the other related changes had been made at a much earlier stage.
141. The Department explained that, while the reason for not including the Coroners' Courts in the relevant provision of the 2002 Justice Act was not entirely clear, the 'Luce' Review which was a fundamental review of death certification and investigation in England, Wales and Northern Ireland and the Shipman Inquiry were underway at that time and it may have been considered that the outcome of these Reviews had the potential to raise wider issues and it would have been more appropriate to deal with all such matters together.
142. The Department also highlighted that alternative non-statutory arrangements were put in place in 2006 which were intended to provide senior judicial leadership for the Coroners' Courts. Under these administrative arrangements a High Court Judge, Mr Justice Weir, became the Presiding Judge.
143. **The Committee, noting that the provisions were intended to assist in the better administration of the Coroners' Courts and case management of inquests, agreed that it was content to support the inclusion of Clause 7 and Clause 8 as drafted in the Bill.**

Part 3: Supplementary

Clause 9: Application to the Crown

Clause 10: Supplementary, incidental or consequential provision

Clause 11: Repeals

Clause 12: Commencement

Clause 13: Short title

144. Clauses 9 to 13 are largely technical in nature. There were no comments received in relation to Clauses 9, 10, 11 or 13.
145. **The Committee agreed that it was content to support the inclusion of Clauses 9, 10, 11 and 13 as drafted in the Bill.**
146. Clause 12 sets out when the provisions of the Bill will come into operation. It is intended that civil legal services will be implemented on the same date that the Legal Services Commission is dissolved and the new Agency set up within the Department of Justice. For this reason various provisions and consequential amendments will be coming into operation on the day after Royal Assent to enable the Department to bring forward the necessary secondary legislation to implement civil legal services and have them commence on the dissolution date.
147. The Assembly Examiner of Statutory Rules, in his advice to the Committee on the delegated powers in the Bill, indicated that it seemed better that if what was in Clause 12(3) regarding transitional and transitory provisions was worked into Clause 10 (supplementary, incidental, or consequential provision) instead. Orders under Clause 10 are subject to negative resolution unless they amend or repeal a provision of primary legislation, in which case they are subject to the draft affirmative procedure. His views were based on criticism the Scottish courts had on occasion levelled at the Scottish Government for framing defective transitional provisions in commencement orders.
148. In response the Department highlighted that it had sought advice on this technical issue from Legislative Counsel who had drafted the Bill. Legislative Counsel had indicated that it was extremely common for commencement orders to contain transitional or saving provisions and, in his view, it would be difficult to deal with transitional issues in a separate Statutory Rule subject to approval as it is often not clear until the commencement order is being drafted what is needed by way of transitional provisions. He also noted that commencement and transitional provisions go together and complement each other and it is helpful to the reader to find them in the same document rather than having to look at the commencement order to find out what date something came into force and then look at a separate document to see to what extent the new provision applied to transactions which had begun but not finished on that date, or whether, and if so how, the provision applied to events which happened before commencement.
149. **The Committee noted the explanation provided by the Department and agreed that it was content to support the inclusion of Clause 12 as drafted in the Bill.**

Schedule 3: Repeals

150. Schedule 3 reflects the amendments made under Schedule 2 to the Bill.
151. Schedule 3 is technical in nature and no comments were received in relation to it.
152. **The Committee agreed that it was content to support the inclusion of Schedule 3 as drafted in the Bill.**

Consideration of a proposed New Provision for inclusion in the Bill

153. Prior to the commencement of the Committee Stage of the Bill, the Attorney General for Northern Ireland wrote asking the Committee to consider a possible amendment to the Bill.
154. The Attorney General outlined that, under section 14(1) of the Coroners Act (Northern Ireland) 1959, he has the power to direct an inquest where he considers it 'advisable' to do so but has no powers to obtain papers or information that may be relevant to the exercise of that power. He indicated that he had experienced some difficulty in recent years in securing access to documents that he has needed such as serious adverse incident report forms from Health and Social Care Trusts and the proposed amendment to the 1959 Act would confer a power on him to obtain papers and provide a clear statutory basis for disclosure. The Attorney General stated that the principle focus of his concern was deaths that occur in hospital or where there was otherwise a suggestion that medical error may have occurred and he provided the draft wording of the proposed new provision.
155. The Attorney General subsequently wrote to the Committee on 30 April 2014 suggesting a revised text for the amendment. The main change was to clearly provide a statutory basis for disclosure to the Attorney General of papers relating to deaths e.g. in a hospital or over a certain period so that he could consider whether he should exercise his section 14(1) power to direct an inquest in any particular case as the original text of the amendment could have been interpreted as only applying to papers relating to a specific death of which the Attorney General was already aware. The second change was designed to restrict the scope of the power to information or documents which relate to the health or social care provided to the deceased.
156. The Committee took the opportunity when requesting written evidence on the Bill to seek views on the Attorney General's proposed amendment. The Committee also discussed the proposal with the Attorney General at the meeting on 28 May 2014 and sought advice on the scope of the Bill as currently drafted.
157. The Law Society agreed in principle that, in order for the Attorney General to take reasonable decisions under the *Wednesbury* standard in respect of directing an inquest under Section 14 of the Coroners Act 1959, he must have adequate powers in order to provide him with sufficient information to take such decisions. Noting that the Bill proposes to install the Lord Chief Justice as President of the Coroners' Courts and create a Presiding Coroner, the Law Society expressed the view that any such amending clause should clarify the procedures between the Attorney General and the Courts and that there was a need to look at any new powers in detail to ensure that they are procedurally appropriate and clear. Doing so would ensure that any clause operates as a safety valve to provide for exceptional circumstances or circumstances in which it would be in the public interest for the Attorney General to exercise his powers under the 1959 Act.
158. The Law Society also believed that any proposed new arrangements should provide for the Attorney General to make an application to the High Court to exercise such discretion to call for evidence outlining that there is a similar provision provided for the Attorney General for England and Wales and that this would bring the jurisdiction of the Attorney General within the supervision of the Court and guarantee a collaborative, joined-up approach to policy on inquests.
159. A similar view was also expressed by the Lord Chief Justice who indicated that it would be helpful if, as in England and Wales, the Attorney General made an application to direct an inquest through the High Court which would assist the Coroners in understanding why an inquest was directed.

160. The Association of Personal Injury Lawyers stated that it was important that inquests are conducted thoroughly and concluded as quickly as possible so that a bereaved family can rebuild their lives following the loss of a loved one. The Association supported, in principle, any measures which ensure that those families are able to have all the answers to their questions as to why their loved ones needlessly died.
161. Castlereagh Borough Council indicated that the proposed amendment would be welcome as it would put in place a more structured process for dealing with medical errors which result in death. The Council's Registrar was of the view that it adds to the bereaved relative's pain when an acknowledgement of medical mistakes is not forthcoming and that greater transparency in the process is a positive step.
162. The Law Centre (NI) highlighted that the recent experience of public inquiries has been that it is not always easy to access all relevant material in a timely and straightforward manner and, in the interests of openness, administrative and financial efficiency it supported the proposed amendment. The Law Centre (NI) also stated that the power should not only cover deaths in hospital but should apply to other deaths that may fall within the ambit of the Attorney General's powers to direct an inquest.
163. The Information Commissioner's Office highlighted that, although a substantial amount of the information sought by the Attorney General will relate to the deceased persons and be of no relevance under the Data Protection Act, other information may be personal data relating to family and friends of the deceased as well as to medical staff. The Information Commissioner indicated that, given the public interest involved and the difficulties which the Attorney General had found in obtaining the papers or other information, it would appear appropriate to invest an explicit power on him and provide a statutory basis for disclosure. Consideration should, however, be given to limiting such power solely to cases involving deaths which have occurred in hospital or where medical error is thought to have led to a death.
164. The Northern Ireland Human Rights Commission noted that the Attorney General had raised concerns regarding deaths in which there is a suggestion that a medical error has occurred and advised that the procedural obligation under Article 2 of the European Convention on Human Rights extends to deaths in a medical context.
165. KRW LLP stated that, while the Attorney General's proposal had a principle focus relating to deaths that occurred in hospital or where there was a suggestion of medical error, it considered that it had a broader effect especially in relation to conflict related legacy cases. KRW LLP supported the proposal on the basis of a clear statutory basis for disclosure and wished to see the clause drafted to put in place provisions that disclosure of material directly relating to the deceased is automatically made to the families of the bereaved being so considered for a new inquest by the Attorney General to comply with the next of kin participation requirement of the Article 2 procedural investigatory obligation arising following a breach. This, it suggested, would be in the form of a presumption of disclosure following an Article 2 assessment of risk by the Attorney General.
166. The NI Policing Board noted that the Attorney General's power to direct an inquest was not limited to deaths involving hospital/medical failings and there is no time limit as regards the date of death. It wished to see further clarity regarding the proposed amendment and whether it would empower the Attorney General to obtain any documents connected with any death in respect of which he was considering directing an inquest or whether his power should be restricted to certain types of documents, such as medical records, and only in respect of certain types of cases.
167. The PSNI also questioned whether the provision could potentially extend the power to police records in which case it would wish to consider the implications for policing.
168. The South Eastern Health and Social Care Trust stated that it had no objection to the amendment suggested by the Attorney General which would provide a clear statutory basis

- for disclosure of papers to assist the Attorney General in relation to direction of an inquest under Section 14(1) of the Coroners Act (Northern Ireland) 1959. In its view the proposed amendment would assist the Trust, where required, to be clear about what documentation could be released to the Attorney General.
169. Both the Southern Health and Social Care Trust and the Northern Health and Social Care Trust indicated that, in principle, where the Coroner has decided not to hold an inquest, it would be necessary for the Attorney General to have access to relevant information to allow him to reach an informed decision as to whether to direct that an inquest be held. Both Trusts highlighted that it would be important that the legislation clearly sets out what information the Attorney General is entitled to access and also expressed concerns about duplication of process and the consequent impact on resources if the Attorney General were to exercise the power to request information while the death is still under investigation by the Coroner and a decision to hold an inquest had not yet been taken.
170. The Minister for Health, Social Services and Public Safety, in correspondence to the Committee, highlighted a number of issues regarding the proposed provision.
171. The Health Minister outlined that, in principle, he had no objection to the Attorney General having the power to access the information necessary to allow him to discharge his functions under section 14 of the Coroners Act (Northern Ireland) 1959. He however outlined that his Department promotes a culture of learning, openness and transparency and he wanted to ensure that when things go wrong the necessary learning is applied across the Health and Social Care system. He had concerns that a legislative requirement to produce documentation may have an adverse impact on staff coming forward to provide relevant information which could in turn damage the potential to identify and share learning from serious adverse incidents or deaths in hospital.
172. The Minister also stated that it would be important to have more policy clarity as to the precise intent of the provision and how it would be used in practice if the proposed amendment was to provide a power for the Attorney General to obtain information in relation to any death occurring within the Health and Social Care system, even where the Attorney General has no reason to believe an inquest would be advisable.
173. The Minister indicated that, as the proposed amendment impacts on at least two Departments, the revised policy position would need to be considered by the Executive as required under the Ministerial Code. He also noted the concerns of others about the appropriateness of using the Legal Aid and Coroners' Courts Bill as a vehicle to make the proposed amendment and the question that had been raised regarding whether it fell within the scope of the Bill.
174. The Attorney General, when he discussed the proposed provision with the Committee on 28 May 2014, indicated that the text of the amendment makes it clear that it is confined to deaths occurring within a Health and Social Care setting. He did not believe it would create a burden on the Health Service and stated that the issue that the amendment seeks to address is reasonably urgent given recent media reports about deaths occurring without being referred to the Coroner. The Attorney General highlighted that there appears to be a gap in potential investigation for accountability purposes and the proposed amendment is designed to close that gap.
175. The Attorney was of the view that the amendment fell squarely within the Bill as it dealt with an aspect of coronial procedures.
176. The Department of Justice, in correspondence to the Committee, outlined that the Attorney General had raised the question of an amendment with the Department earlier in the year, when preparation for the Bill's introduction was at an advanced stage. While the Department stated that it had no objection to considering his request in principle, it was of the view that

the amendment would require further consideration, and might be better examined in the context of a wider review of coronial law.

177. The Department outlined that it had given a commitment to review the coronial law as part of the package of measures put forward to the Committee of Ministers in Strasbourg on 16 April 2014 to help address the issue of delay in legacy inquests and is now considering how the review might be taken forward. One option was to refer the matter to the Law Commission which would facilitate proper consideration of the problems the Attorney General has encountered, and the most appropriate solution in the context of coronial law generally. The Department also raised a question regarding whether the proposed amendment may be technically outside the scope of the Bill and noted that, as it raised cross-cutting issues particularly for the Department of Health, Social Services and Public Safety, it is a matter which should be determined by the Executive. The Department concluded that it was not convinced that the Bill was the appropriate legislative vehicle for the Attorney General's request.
178. The Department of Justice subsequently wrote outlining the existing statutory framework regarding the duty to report deaths to the Coroner under Section 7 of the Coroners Act (Northern Ireland) 1959 and also setting out the powers which exist in Ireland and in England and Wales in relation to directing an inquest. The Department explained that, under section 24 of the Coroners Act 1962, the position in Ireland is almost identical to the current position here; the Coroner may direct an inquest where he has reason to believe that a person died in circumstances which, in his opinion, make the holding of an inquest advisable. The power of the Attorney General for England and Wales (AGEW) differs slightly, in that, under section 13 of the Coroners Act 1988, the AGEW may apply to the High Court for an order that an inquest (or another inquest) be held. The Department stated that in neither of those jurisdictions is there a specific ancillary power for the Attorney General to require information nor is there an intention to introduce such a power.
179. **The Committee was generally supportive of the principle of the proposed amendment and the need for the Attorney General to have access to the necessary information to enable him to properly discharge his functions under Section 14 of the Coroners Act (Northern Ireland) 1959.**
180. **However, the Committee was of the view that the proposed additional provision to the Bill raised a number of issues that required further scrutiny and consideration. Unfortunately it was not possible to undertake such scrutiny in the timescale within which the Committee was required to complete the Committee Stage of the Legal Aid and Coroners' Courts Bill. The Committee agreed that if an alternative Bill could be found within which the amendment could be taken forward and considered properly in the foreseeable future the Committee would support that approach.**

Clause by Clause Consideration of the Bill

181. Having considered the written and oral evidence received on the Bill, the Committee deliberated on the clauses and schedules of the Bill at its meeting on 4 June and undertook its formal clause-by-clause consideration at its meeting on 11 June 2014 – see Minutes of Proceedings in **Appendix 1** and Minutes of Evidence in **Appendix 2**.
182. The Committee supported two amendments to Schedule 2 of the Bill, which will be brought forward by the Department of Justice, to address issues raised by the Assembly Examiner of Statutory Rules regarding the Assembly control provided in the Bill in relation to two regulation making powers.
183. Some Members expressed reservations about the proposed framework to ensure the independence of the Director regarding decisions in individual cases, whether policy constraints could impact negatively on the exercise of that independence because a category of cases could be excluded from consideration by the Director of Legal Aid Casework, the proposed make-up of the Appeal Panels and whether proper safeguards are in place and indicated that they may wish to give further consideration to these issues at a later stage.
184. Some Members also expressed the view that Clause 2(1) which states “The Department must designate a civil servant in the Department as the Director of Legal Aid Casework” could be better drafted, and indicated that they may wish to consider this further at a later stage.
185. Information on the Committee’s deliberations on the individual clauses and schedules in the Bill can be found in the previous section of this report.

Clause 1 - Dissolution of the NI Legal Services Commission

186. Agreed: the Committee is content with Clause 1 as drafted.

Clause 2 - Designation of Director of Legal Aid Casework

187. Agreed: the Committee is content with Clause 2 as drafted.

Clause 3 - Exercise of Functions by Director

188. Agreed: the Committee is content with Clause 3 as drafted.
189. Some Members expressed some reservations.

Clause 4 - Designation of Functions of Director

190. Agreed: the Committee is content with Clause 4 as drafted.

Clause 5 - Annual Report of Director

191. Agreed: the Committee is content with Clause 5 as drafted.

Clause 6 - Amendment of law relating to legal aid, civil legal services and criminal defence services

192. Agreed: the Committee is content with Clause 6 as drafted.

Clause 7 - Lord Chief Justice to be President of the Coroners’ Courts

193. Agreed: the Committee is content with Clause 7 as drafted.

Clause 8 - Presiding Coroner

194. Agreed: the Committee is content with Clause 8 as drafted.

Clause 9 - Application to the Crown

195. Agreed: the Committee is content with Clause 9 as drafted.

Clause 10 - Supplementary, incidental or consequential provision

196. Agreed: the Committee is content with Clause 10 as drafted.

Clause 11 - Repeals

197. Agreed: the Committee is content with Clause 11 as drafted.

Clause 12 - Commencement

198. Agreed: the Committee is content with Clause 12 as drafted.

Clause 13 - Short Title

199. Agreed: the Committee is content with Clause 13 as drafted.

Schedule 1 - Transfer of assets, liabilities and staff of Commission

200. Agreed: the Committee is content with Schedule 1 as drafted.

Schedule 2 - Amendments

201. Agreed: the Committee is content with Schedule 2 subject to two amendments to be brought forward by the Department of Justice to provide for all rules made under the provisions in respect of the new Article 36A, 36B and 38A provisions in the 1981 Order, and the Article 20A provision in the 2003 Order in respect of appeal panels, to be subject to the draft affirmative resolution procedure on the first and subsequent occasions.

Schedule 3 - Repeals

202. Agreed: the Committee is content with Schedule 3 as drafted.

Long Title

203. Agreed: the Committee is content with the Long Title of the Bill.



Northern Ireland
Assembly

Appendix 1

Minutes of Proceedings

Minutes of Proceedings (Extracts)

13 March 2014

10 April 2014

30 April 2014

7 May 2014

14 May 2014

28 May 2014

4 June 2014

11 June 2014

18 June 2014

Thursday 13 March 2014

Room 30, Parliament Buildings

Present: Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr Tom Elliott MLA
Mr William Humphrey MLA
Mr Seán Lynch MLA
Mr Alban Maginness MLA
Ms Rosaleen McCorley MLA
Mr Patsy McGlone MLA
Mr Jim Wells MLA

In Attendance: Mrs Christine Darragh (Assembly Clerk)
Mrs Roisin Donnelly (Assistant Assembly Clerk)
Miss Leanne Johnston (Clerical Supervisor)
Miss Marianne Doherty (Clerical Officer)

Apologies: Mr Paul Givan MLA (Chairman)

The meeting commenced at 2.05 p.m. in public session.

5. Legal Aid and Coroners' Courts Bill

2.11 p.m. Mr Mark McGuckin, Deputy Director, Public Legal Services Division and Ms Carol Graham, Bill Manager, Department of Justice joined the meeting.

2.14 p.m. Mr McGlone joined the meeting.

Mr McGuckin outlined the main principles of the Legal Aid and Coroners' Courts Bill.

A question and answer session followed covering issues including: the delay in bringing forward the provisions relating to the Coroners' Courts given the changes arose from the Review of the Criminal Justice System in 2000; whether the new structure will improve accountability and forecasting of legal aid spend; budgetary control and oversight arrangements; the transfer of staff from the Legal Services Commission to the Department of Justice; implications for staff pension entitlements; job opportunities for those outside the civil service; anticipated levels of efficiencies and cost saving opportunities; whether an application for legal aid can be made on-line; staff turnover within the Legal Services Commission; whether there will be a new management structure; the proposed new legal aid appeals process; the proposed composition of the appeals panel; whether appeals can be made in person or are always in writing; the main concerns expressed during the consultation process; the legislative timescale for the progress of the Bill; whether there is a financial benefit in bringing the Bill through by October 2014; the outcome of the consultation on a Review of the Statutory Exceptional Grant Funding Scheme and the reason for the delay in publishing the results of this consultation; and whether the provisions in the Bill will address the more root and branch difficulties that have been identified in a number of reviews and reports in relation to the provision and cost of legal aid.

The officials agreed to provide the Committee with additional information regarding the provisions relating to the Coroners' Courts.

The briefing was recorded by Hansard.

The Chairman thanked the officials and they left the meeting.

Agreed: The Committee agreed that it was content to support the principles of the Bill and the Chairman would indicate this at Second Stage.

6. Proposals for Handling the Committee Stage of the Legal Aid and Coroners' Courts Bill

The Committee considered proposals to facilitate early completion of the Committee Stage of the Legal Aid and Coroners' Courts Bill.

The Committee also considered correspondence from the Attorney General for Northern Ireland requesting that the Committee considers a potential amendment to the Bill relating to his powers under the Coroners Act (Northern Ireland) 1959.

Agreed: The Committee agreed in principle to undertake a 10-week Committee Stage and noted the provisional timetable.

Agreed: The Committee agreed a media sign-posting notice, a list of key stakeholders, and a letter, which included a request for views on the Attorney General's proposal, to issue seeking written evidence following the introduction of the Bill.

Agreed: The Committee agreed to hold an evidence event on the Bill.

Mr Paul Givan MLA

Chairman, Committee for Justice

[EXTRACT]

Thursday 10 April 2014

Room 30, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Stewart Dickson MLA
Mr Tom Elliott MLA
Mr William Humphrey MLA
Mr Seán Lynch MLA
Ms Rosaleen McCorley MLA
Mr Alban Maginness MLA
Mr Jim Wells MLA

In Attendance: Mrs Christine Darrah (Assembly Clerk)
Ms Marie Austin (Assistant Assembly Clerk)
Mrs Roisin Donnelly (Assistant Assembly Clerk)
Miss Leanne Johnston (Clerical Supervisor)
Miss Marianne Doherty (Clerical Officer)

Apologies: Mr Sydney Anderson MLA
Mr Patsy McGlone MLA

The meeting commenced at 2.10 p.m. in public session.

10. Update on the Committee Stage of the Legal Aid and Coroners' Courts Bill

The Committee noted that the Committee Stage of the Legal Aid and Coroners' Courts Bill had commenced on 9 April 2014, written evidence was being sought from the key stakeholders and an oral evidence event would be scheduled for 14 May 2014. The Committee also noted a copy of the Delegated Powers Memorandum provided by the Department of Justice.

Agreed: The Committee agreed to forward a copy of the Delegated Powers Memorandum to the Examiner of Statutory Rules for his views/comments.

Mr Paul Givan MLA
Chairman, Committee for Justice

[EXTRACT]

Wednesday 30 April 2014

Room 21, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Tom Elliott MLA
Mr William Humphrey MLA
Mr Seán Lynch MLA
Ms Rosaleen McCorley MLA
Mr Alban Maginness MLA
Mr Jim Wells MLA

In Attendance: Mr Peter Hall (Assembly Clerk)
Mrs Roisin Donnelly (Assistant Assembly Clerk)
Mrs Sinead Kelly (Assistant Assembly Clerk)
Miss Leanne Johnston (Clerical Supervisor)
Miss Marianne Doherty (Clerical Officer)

Apologies: Mr Stewart Dickson MLA
Mr Patsy McGlone MLA

The meeting commenced at 2.05 p.m. in closed session.

6. Legal Aid and Coroners' Courts Bill – Timetable for Committee Stage of the Bill

The Committee considered proposals for handling the Committee Stage of the Legal Aid and Coroners' Courts Bill and noted a summary of the submissions received and the key issues raised by respondents on the Bill.

Agreed: The Committee agreed the organisations to be invited to the oral evidence event which will take place on Wednesday 14 May 2014 in the Long Gallery, Parliament Buildings.

Agreed: The Committee agreed to invite the Department of Justice to give oral evidence on the Bill at the meeting on 28 May 2014.

Agreed: The Committee agreed to publish the written evidence in relation to the Bill on the Committee webpage.

Agreed: The Committee agreed to forward correspondence from the Attorney General for Northern Ireland regarding his proposed amendment to the Bill to the respondents who have commented on this proposal.

The Committee considered a motion to extend the Committee Stage of the Legal Aid and Coroners' Courts Bill.

Question put and agreed:

That, in accordance with Standing Order 33(4), the period referred to in Standing Order 33(2) be extended to 20 June 2014, in relation to the Committee Stage of the Legal Aid and Coroners' Courts Bill (NIA 33/11-15).

Mr Paul Givan MLA
Chairman, Committee for Justice

[EXTRACT]

Wednesday 7 May 2014

Room 21, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr William Humphrey MLA
Ms Rosaleen McCorley MLA

In Attendance: Mrs Christine Darragh (Assembly Clerk)
Mrs Marie Austin (Assistant Assembly Clerk)
Miss Leanne Johnston (Clerical Supervisor)
Miss Marianne Doherty (Clerical Officer)

Apologies: Mr Tom Elliott MLA
Mr Seán Lynch MLA
Mr Patsy McGlone MLA
Mr Alban Maginness MLA
Mr Jim Wells MLA

The meeting commenced at 2.05 p.m. in public session.

9. **Matters Arising**

- ii. The Committee noted an updated timeline for the Committee Stage of the Legal Aid and Coroners' Courts Bill and further information provided by the Department of Justice regarding the delay in bringing forward the provisions to make the Lord Chief Justice the President of the Coroners' Courts and Keeling Schedules for the Bill which show the Legal Aid legislation as it would appear following enactment of the Bill.

Mr Paul Givan MLA
Chairman, Committee for Justice

[EXTRACT]

Wednesday 14 May 2014

Long Gallery, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr Tom Elliott MLA
Mr William Humphrey MLA
Mr Seán Lynch MLA
Ms Rosaleen McCorley MLA
Mr Alban Maginness MLA
Mr Jim Wells MLA

In Attendance: Mrs Christine Darragh (Assembly Clerk)
Ms Marie Austin (Assistant Assembly Clerk)
Mrs Roisin Donnelly (Assistant Assembly Clerk)
Mrs Sinead Kelly (Assistant Assembly Clerk)
Miss Leanne Johnston (Clerical Supervisor)
Miss Marianne Doherty (Clerical Officer)

Apologies: Mr Patsy McGlone MLA

The meeting commenced at 2.03 p.m. in public session.

1. Apologies

Apologies are detailed above.

2. Legal Aid and Coroners' Courts Bill – Oral Evidence Event

The Chairman welcomed the witnesses to the meeting and outlined the structure of the evidence session.

2.05 p.m. Stewart Dickson and William Humphrey joined the meeting.

The Chairman invited the witnesses to outline issues in relation to the clauses in the Legal Aid and Coroners' Courts Bill and Members asked questions.

Clause 1: Dissolution of Northern Ireland Legal Services Commission

Ronnie Spence and Paul Andrews, NI Legal Services Commission and Niall Murphy, KRW Law LLP raised a number of issues regarding Clause 1 of the Bill.

2.26 p.m. Tom Elliott joined the meeting.

Clause 2: Designation of Director of Legal Aid Casework

Martin Hanna, Association of Personal Injury Lawyers, Arleen Elliott, Law Society NI, Ronnie Spence, NI Legal Services Commission and David Mulholland, Bar Council of Northern Ireland raised a number of issues regarding Clause 2 of the Bill.

Clause 3: Exercise of functions by Director

Les Allamby, Law Centre NI, Arleen Elliott, Law Society NI, Colin Caughey, NI Human Rights Commission and Ronnie Spence, NI Legal Services Commission raised a number of issues regarding Clause 3 of the Bill.

Clause 4: Delegation of functions of Director

Colin Caughey, NI Human Rights Commission, and Martin Hanna, Association of Personal Injury Lawyers raised a number of issues regarding Clause 4 of the Bill.

Clause 5: Annual Report of Director

Paul Andrews, NI Legal Services Commission and Les Allamby, Law Centre NI raised a number of issues regarding Clause 5 of the Bill.

2.56 p.m. Jim Wells joined the meeting.

Clause 6: Amendment of law relating to legal aid, civil legal aid services and criminal defence services and Schedule 2: Amendments

Jerry Hyland, KRW Law LLP, Paul Andrews, NI Legal Services Commission, Arleen Elliott, Law Society NI, Martin Hanna, Association of Personal Injury Lawyers, Colin Caughey, NI Human Rights Commission, and David Mulholland, Bar Council of Northern Ireland raised a number of issues regarding Clause 6 and Schedule 2 of the Bill.

Clause 8: Presiding Coroner

Colin Caughey, NI Human Rights Commission raised an issue regarding Clause 8 of the Bill.

Clause 12: Commencement

Paul Andrews, NI Legal Services Commission commented on the arrangements required to implement Clause 12 of the Bill.

Schedule 1: Transfer of assets, liabilities and staff of Commission

Paul Andrews and Ronnie Spence, NI Legal Services Commission and Arleen Elliott, Law Society NI raised a number of issues regarding Schedule 1 of the Bill.

Proposed Amendment to the Bill by the Attorney General for Northern Ireland

Les Allamby, Law Centre NI, Colin Caughey, NI Human Rights Commission and Niall Murphy, KRW Law LLP commented on the Attorney General for Northern Ireland's proposed amendment to the Bill.

The Chairman thanked the witnesses for their evidence.

The evidence event was recorded by Hansard.

3.15 p.m The meeting was suspended.

3.24 p.m The meeting resumed.

5. Legal Aid and Coroners' Court Bill – Advice by the Examiner of Statutory Rules on the Delegated Powers Contained in the Bill

The Committee considered advice provided by the Assembly Examiner of Statutory Rules on the delegated powers in the Legal Aid and Coroners' Court Bill which highlighted a number of issues regarding the powers and proposed Assembly controls.

Agreed: The Committee agreed to refer the issues raised by the Examiner of Statutory Rules to the Department of Justice for a response.

The Chairman advised the Committee that the Attorney General for Northern Ireland had offered to attend a meeting to discuss his proposed amendment to the Legal Aid and Coroners' Court Bill with the Committee.

Agreed: The Committee agreed that arrangements should be made for the Attorney General to attend to discuss his proposed amendment.

Mr Paul Givan MLA
Chairman, Committee for Justice

[EXTRACT]

Wednesday 28 May 2014

Room 21, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Tom Elliott MLA
Mr William Humphrey MLA
Mr Seán Lynch MLA
Ms Rosaleen McCorley MLA

In Attendance: Mrs Christine Darragh (Assembly Clerk)
Ms Marie Austin (Assistant Assembly Clerk)
Miss Leanne Johnston (Clerical Supervisor)
Miss Marianne Doherty (Clerical Officer)

Apologies: Mr Stewart Dickson MLA
Mr Alban Maginness MLA
Mr Jim Wells MLA

2.06 p.m The meeting commenced in public session.

4. Legal Aid and Coroners' Courts Bill – Oral Evidence from the Department of Justice

Mark McGuckin, Deputy Director, Public Legal Services Division, Siobhan Broderick, Deputy Director, Civil Justice Policy and Legislation Division, Carol Graham, Bill Manager and Padraig Cullen, Principle Legal Officer, Public Legal Services Division, Department of Justice joined the meeting at 2.09 p.m.

Mr McGuckin outlined each of the clauses and schedules of the Legal Aid and Coroners' Courts Bill and the Department's position in relation to the issues raised in the written and oral evidence received by the Committee.

A question and answer session followed covering issues including: the recruitment process for the Director of Legal Aid Casework and who would be eligible to apply; the independence of the Director of Legal Aid Casework; the Law Centre's proposed amendments to Clause 3 and whether they would strengthen the Bill and mitigate concerns in relation to independence; the impact of the Law Centre's proposed amendments to Clause 3; the status of the Department's directions and guidance and whether they could compromise independence or override the legislation; the Director's authority to delegate functions and to whom functions can be delegated; the Assembly controls in relation to Rules made under the legislation; the appeals mechanism; whether the appeal panel's decisions are final; and the composition of the appeals panel.

The briefing was recorded by Hansard.

The Chairman thanked the officials and they left the meeting.

Agreed: The Committee agreed that the Assembly Examiner of Statutory Rules should attend a meeting to discuss his advice on the delegated powers in the Legal Aid and Coroners' Courts Bill and the Department of Justice's response.

5. Legal Aid and Coroners' Courts Bill - Oral Evidence from the Attorney General for Northern Ireland

3.04 p.m The Attorney General for Northern Ireland, Mr John Larkin Q.C. joined the meeting.

The Attorney General outlined his proposed amendment to the Legal Aid and Coroners' Courts Bill which would provide him with the power to obtain information or documents from Health and Social Care Trusts for the purposes of considering whether or not to direct an inquest under Section 14(1) of the Coroners' Act (Northern Ireland) 1959.

A question and answer session followed covering issues including: the confines of the Attorney General's proposed amendment; the rationale for including the provision in the Legal Aid and Coroners' Courts Bill; whether there are other legislative vehicles that could be used to carry this provision; how the Attorney General would identify when it was applicable to use the power; whether use of the power would be confined to Health and Social Care Trusts; and whether counsellors could be held accountable for deaths by suicide.

The briefing was recorded by Hansard.

The Chairman thanked the Attorney General and he left the meeting.

Agreed: The Committee agreed to request advise from the Assembly Bill Clerk regarding the scope of the Legal Aid and Coroners' Courts Bill.

Mr Paul Givan MLA

Chairman, Committee for Justice

[EXTRACT]

Wednesday 4 June 2014

Room 21, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr Tom Elliott MLA
Mr William Humphrey MLA
Mr Seán Lynch MLA
Ms Rosaleen McCorley MLA
Mr Alban Maginness MLA

In Attendance: Mrs Christine Darragh (Assembly Clerk)
Mrs Roisin Donnelly (Assistant Assembly Clerk)
Miss Leanne Johnston (Clerical Supervisor)
Miss Marianne Doherty (Clerical Officer)
Miss Aoibhinn Treanor (Assembly Bill Clerk)
Ms Eilís Haughey (Assembly Bill Clerk)

Apologies: None

4.31 p.m The meeting moved into closed session.

5. Legal Aid and Coroners' Courts Bill - Advice from the Bill Clerk

The Assembly Bill Clerk joined the meeting at 4.31 p.m. and provided preliminary advice to the Committee on the scope of the Legal Aid and Coroners' Courts Bill and answered Members' questions.

The Chairman thanked the Assembly Bill Clerk for the briefing.

4.43 p.m. Mr Sydney Anderson left the meeting.

4.51 p.m The meeting was suspended.

5.01 p.m The meeting resumed in public session.

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr Tom Elliott MLA
Mr Seán Lynch MLA
Ms Rosaleen McCorley MLA
Mr Alban Maginness MLA

6. Legal Aid and Coroners' Courts Bill – Clause by Clause Consideration

The Committee noted correspondence from the Department of Justice on the Attorney General for Northern Ireland's proposed amendment to the Bill and on Clause 3 of the Bill.

The Committee considered the clauses and schedules of the Legal Aid and Coroners' Courts Bill. The Committee also discussed the issues raised by the Examiner of Statutory Rules in relation to several of the delegated powers and Assembly controls contained in the Bill and the Attorney General's proposed amendments to the Bill.

Agreed: The Committee agreed that regulation making powers within Schedule 2 of the Bill in respect of the assignment of solicitor and counsel where a criminal and certificate has been granted and for the constitution and procedure of appeals panels in respect of individual decisions relating to the granting of civil legal aid services should be subject to draft affirmative procedure on the first and subsequent exercise of the power and the Bill should be amended accordingly.

Mr Paul Givan MLA
Chairman, Committee for Justice

[EXTRACT]

Wednesday 11 June 2014

Room 21, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Tom Elliott MLA
Mr Seán Lynch MLA
Ms Rosaleen McCorley MLA
Mr Patsy McGlone MLA
Mr Alban Maginness MLA
Mr Jim Wells MLA

In Attendance: Mrs Christine Darrah (Assembly Clerk)
Ms Marie Austin (Assistant Assembly Clerk)
Miss Leanne Johnston (Clerical Supervisor)

Apologies: Mr Stewart Dickson MLA
Mr William Humphrey MLA

2.45 p.m The meeting commenced in public session.

6. Legal Aid and Coroners' Courts Bill – Formal Clause by Clause Consideration

The Committee commenced its formal clause-by-clause consideration of the Legal Aid and Coroners' Courts Bill.

Clause 1 – Dissolution of the NI Legal Services Commission

The Committee considered Clause 1 as drafted.

Question: “That the Committee is content with Clause 1 put and agreed to”.

Clause 2 – Designation of Director of Legal Aid Casework

The Committee considered Clause 2 as drafted and noted that some Members had expressed the view that Clause 2(1) which states “The Department must designate a civil servant in the Department as the Director of Legal Aid Casework” could be better drafted, and had indicated that they may wish to consider this further at a later stage.

Question: “That the Committee is content with Clause 2 put and agreed to”.

Clause 3 – Exercise of Functions by Director

The Committee considered Clause 3 as drafted and noted that some Members expressed some reservations about the framework in place to ensure the independence of the Director regarding decisions in individual cases, whether policy constraints could impact negatively on the exercise of that independence because a category of cases could be excluded from consideration by the Director and whether proper safeguards are in place.

Other Members were satisfied that any direction issued by the Department could not override the provisions of the relevant primary or secondary legislation and noted that the requirement to follow directions and guidance issued by the Minister already exists.

Question: “That the Committee is content with Clause 3 put and agreed to”.

Clause 4 – Designation of Functions of Director

The Committee considered Clause 4 as drafted and noted that the Appeals Panel is covered under Schedule 2.

Question: “That the Committee is content with Clause 4 put and agreed to”.

Clause 5 – Annual Report of Director

The Committee considered Clause 5 as drafted.

Question: “That the Committee is content with Clause 5 put and agreed to”.

Clause 6 – Amendment of law relating to legal aid, civil legal services and criminal defence services

The Committee considered Clause 6 as drafted.

Question: “That the Committee is content with Clause 6 put and agreed to”.

Clause 7 – Lord Chief Justice to be President of the Coroners’ Courts

The Committee considered Clause 7 as drafted.

Question: “That the Committee is content with Clause 7 put and agreed to”.

Clause 8 – Presiding Coroner

The Committee considered Clause 8 as drafted.

Question: “That the Committee is content with Clause 8 put and agreed to”.

Clause 9 – Application to the Crown

The Committee considered Clause 9 as drafted.

Question: “That the Committee is content with Clause 9 put and agreed to”.

Clause 10 – Supplementary, incidental or consequential provision

The Committee considered Clause 10 as drafted.

Question: “That the Committee is content with Clause 10 put and agreed to”.

Clause 11 - Repeals

The Committee considered Clause 11 as drafted.

Question: “That the Committee is content with Clause 11 put and agreed to”.

Clause 12 - Commencement

The Committee considered Clause 12 as drafted.

Question: “That the Committee is content with Clause 12 put and agreed to”.

Clause 13 – Short Title

The Committee considered Clause 13 as drafted.

Question: “That the Committee is content with Clause 13 put and agreed to”.

Schedule 1 – Transfer of assets, liabilities and staff of Commission

The Committee considered Schedule 1 as drafted.

Question: "That the Committee is content with Schedule 1 put and agreed to".

Schedule 2 - Amendments

The Committee considered Schedule 2 as drafted and noted that a Member had expressed some reservations about the proposed make-up of the Appeals Panel and the intention to include lay persons as well as legally qualified persons. The Committee also noted that the detail of the appeals mechanism including the make-up and the procedures of the panels would be set out in subordinate legislation which would be forwarded for scrutiny by the Committee and the Assembly.

The Committee considered correspondence from the Department of Justice indicating its intention to bring forward two amendments to address the concerns which were raised by the Assembly Examiner of Statutory Rules, and which the Committee had agreed to support at the meeting on 4 June, which would provide for all rules made under the provisions in Schedule 2 in respect of the new Article 36A, 36B and 38A provisions in the 1981 Order, and the Article 20A provision in the 2003 Order in respect of appeal panels, to be made under the draft affirmative resolution procedure on the first and subsequent occasions.

Agreed: The Committee was content with the proposed amendments to be brought forward by the Department of Justice to ensure that all rules made under the provisions in respect of the new Article 36A, 36B and 38A provisions in the 1981 Order and Article 20A provision in the 2003 Order in respect of appeal panels should be subject to the draft affirmative resolution procedure on the first and subsequent occasions.

Question: "That the Committee is content with Schedule 2 subject to the Department of Justice's proposed amendments put and agreed to".

Schedule 3 - Repeals

The Committee considered Schedule 3 as drafted.

Question: "That the Committee is content with Schedule 3 put and agreed to".

Long Title

The Committee considered the Long Title of the Bill as drafted.

Question: "That the Committee is content with the Long Title put and agreed to".

The Chairman advised the Committee that the draft Report on the Legal Aid and Coroners' Courts Bill would be prepared for consideration at the meeting on 18 June 2014.

Mr Paul Givan MLA

Chairman, Committee for Justice

[EXTRACT]

Wednesday 18 June 2014

Room 21, Parliament Buildings

Present: Mr Paul Givan MLA (Chairman)
Mr Raymond McCartney MLA (Deputy Chairman)
Mr Sydney Anderson MLA
Mr Stewart Dickson MLA
Mr Tom Elliott MLA
Mr William Humphrey MLA
Mr Seán Lynch MLA
Ms Rosaleen McCorley MLA
Mr Patsy McGlone MLA
Mr Alban Maginness MLA
Mr Jim Wells MLA

In Attendance: Mrs Christine Darragh (Assembly Clerk)
Mrs Roisin Donnelly (Assistant Assembly Clerk)
Miss Leanne Johnston (Clerical Supervisor)

Apologies: None

2.05 p.m. The meeting commenced in public session.

4.16 p.m. Mr William Humphrey left the meeting.

4.22 p.m. Mr Sydney Anderson left the meeting.

4.48 p.m. Mr Patsy McGlone left the meeting.

4.48 p.m. Mr Seán Lynch left the meeting.

7. Committee Stage: Legal Aid and Coroners' Courts Bill - Consideration and agreement of the draft Report

The Committee considered the draft report on the Legal Aid and Coroners' Courts Bill.

Agreed: The Committee agreed to include the following additional line at the end of paragraph 134: "On 17 June the Department provided the proposed wording of the two amendments for the Committee's information."

Agreed: The Committee agreed to include the letter dated 17 June 2014 from the Department of Justice in Appendix 3 of the Report.

Title Page, Committee Membership and Powers, Table of Contents and List of Abbreviations

The Committee considered the Title Page, Committee Membership and Powers, Table of Contents and List of Abbreviations.

"Question: That the Committee is content with the Title Page, Committee Membership and Powers, Table of Contents and List of Abbreviations as drafted put and agreed to".

Introduction

The Committee considered the Introduction section of the report.

"Question: That the Committee is content with the Introduction, paragraphs 1 to 12, as drafted put and agreed to".

Consideration of the Provisions of the Bill

The Committee considered the Consideration of the Provisions of the Bill section of the report.

“Question: That the Committee is content with the Consideration of the Provisions of the Bill section of the report, paragraphs 13 to 133, as drafted put and agreed to”.

“Question: That the Committee is content with paragraph 134 as amended put and agreed to.

“Question: That the Committee is content with paragraphs 135 to 152 as drafted put and agreed to.

Consideration of a New Proposed Provision for Inclusion in the Bill

The Committee considered the Consideration of a New Proposed Provision for Inclusion in the Bill section of the report.

“Question: That the Committee is content with the Consideration of a New Provision for Inclusion in the Bill section of the report, paragraphs 153 to 180, as drafted put and agreed to”.

Clause by Clause consideration of the Bill

The Committee considered the Clause by Clause consideration of the Bill section of the report.

“Question: That the Committee is content with the Clause by Clause consideration of the Bill section of the report, paragraphs 181 to 203, as drafted put and agreed to”.

Appendices

The Committee considered the Appendices section of the report.

“Question: That the Committee is content with the contents of Appendices 1 and 2 to be included in the report put and agreed to”.

“Question: That the Committee is content with the contents of Appendix 3 as amended to be included in the report put and agreed to”.

“Question: That the Committee is content with the contents of Appendices 4 and 5 to be included in the report put and agreed to”.

Executive Summary

The Committee considered the draft Executive Summary of the report.

“Question: That the Committee is content with the Executive Summary as drafted put and agreed to”.

Agreed: The Committee agreed that it was content for the Chairman to approve the extract of the Minutes of Proceedings of today's meeting for inclusion in Appendix 1 of the report.

Agreed The Committee agreed to order the Report on the Legal Aid and Coroners' Courts Bill (NIA 174/11-15) to be printed.

Agreed: The Committee agreed that an electronic copy of the Bill report should be sent to all organisations and individuals who provided evidence to the Committee on the Bill.

4.52 p.m. Mr Jim Wells left the meeting.

The Chairman thanked the Committee Members for their cooperation in completing the Committee Stage of the Bill in 10 weeks and the Committee team, Hansard and all other Assembly staff who had assisted the Committee during its scrutiny of the Bill.

Mr Paul Givan MLA

Chairman, Committee for Justice

[EXTRACT]



Northern Ireland
Assembly

Appendix 2

Minutes of Evidence

Minutes of Evidence

13 March 2014	Department of Justice
14 May 2014	Oral evidence event with:- Association of Personal Injury Lawyers Bar Council of Northern Ireland KRW Law LLP Law Centre NI Law Society Northern Ireland Northern Ireland Human Rights Commission Northern Ireland Legal Services Commission
28 May 2014	Department of Justice
28 May 2014	The Attorney General for Northern Ireland
4 June 2014	Committee Clause-by-Clause Consideration
11 June 2014	Committee Clause-by-Clause Consideration

13 March 2014

Members present for all or part of the proceedings:

Mr Raymond McCartney (Deputy Chairperson)
 Mr Sydney Anderson
 Mr Stewart Dickson
 Mr Tom Elliott
 Mr William Humphrey
 Mr Seán Lynch
 Mr Alban Maginness
 Ms Rosaleen McCorley
 Mr Patsy McGlone
 Mr Jim Wells

Witnesses:

Ms Carol Graham *Department of Justice*
 Mr Mark McGuckin

1. **The Deputy Chairperson:** I welcome Mr Mark McGuckin, deputy director of the Department of Justice's public legal services division, and Ms Carol Graham, the Department's Bill manager. This session will be recorded by Hansard and published on the Committee's web page. Mark has been here on a number of occasions, so he knows the format. Please make your opening remarks, after which members will ask questions.
2. **Mr Mark McGuckin (Department of Justice):** Thank you very much for your introduction and for the opportunity to present to the Committee today. I will keep my comments fairly brief, as the detail is in the Bill itself and its explanatory and financial memorandum.
3. The Committee may be aware that the Justice Minister sought the Executive's agreement for the introduction of the Legal Aid and Coroners' Courts Bill. Unfortunately, the paper has not made it onto the Executive's agenda yet. Earlier this week, the Minister wrote seeking to proceed on the urgent procedure but we have not yet had a response to that and we await the outcome. In the meantime, this briefing is being presented on that basis.
4. The main purpose of the Bill is to dissolve the Northern Ireland Legal Services Commission and transfer its functions and staff to an executive agency which is to be established within the Department of Justice. The Bill will also set in statute a number of safeguards to protect the independence of the individual decisions on the grant of civil legal aid.
5. There are several key safeguards in the Bill. The first is the designation of a civil servant as the director of legal aid casework who will be responsible for individual decisions in the award of public funding in civil cases. In taking these decisions, the director will act independently of the Department and the Minister. The Department and the Minister may issue guidance and directions on how the director carries out his functions and any guidance and directions must be published. However, the Bill expressly provides that the Department and the Minister are prohibited from issuing guidance or direction in respect of individual decisions. The Bill imposes a duty on the Department to ensure that the director acts independently of the Department when applying any general guidance or direction to an individual case.
6. Secondly, the Bill contains a regulation-making power to enable the appointment of a robust and independent appeals panel to hear appeals against decisions taken by the director. This will help to ensure that there is an opportunity to challenge the decisions of the director to refuse to award funding or, indeed, further funding in an individual case. The regulations must require an appeals panel to provide written reasons for its decision on appeal. We will be supporting this with robust administrative procedures to ensure that a reasoned explanation is given for the refusal to award funding

- in the first place. The Bill also makes provision for the transfer of staff from the commission to the employment of the Northern Ireland Civil Service.
7. The main statutory provisions governing legal aid are the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and the Access to Justice (Northern Ireland) Order 2003. The 2003 Order will, ultimately, replace the 1981 Order but, in large part, it remains uncommenced. This has been a complicating factor in bringing forward the Bill, as it is necessary to make amendments to both orders to reflect the transfer of responsibilities away from the commission to either the Department or the director of legal aid casework. Those are reflected in some of the lengthy schedules in the Bill. Therefore, the Bill makes changes to both orders to reflect the transfer of responsibilities and to support the wider legal aid reform programme.
 8. At this point, I would like to make it very clear that the amendments to the existing legislation do not have any impact whatsoever on the parameters of those who are eligible for legal aid. In order to support the legal aid reform programme, the provisions in articles 10 to 14 and 17 to 20 of the 2003 Order regarding civil legal services will be commenced on the same date that the commission is dissolved and the agency created.
 9. Articles 15 and 16 relate to the funding code, and we do not propose to proceed with the funding code, which was originally intended to set out the criteria for determining whether civil legal aid services should be provided in a specific case and what service was appropriate. Following extensive work and research, and taking on board experience elsewhere, we have concluded that the funding code is an overcomplicated approach that would not best serve the needs of individual legal aid clients. Consequently, the existing arrangements for the merit test remain.
 10. The benefit of commencing civil legal services under the 2003 Order is that that legislation provides greater flexibility regarding the people eligible to receive public funding in civil cases and how that funding is delivered than is currently provided in the 1981 Order. For example, it provides for regulations that may prescribe that certain proceedings may be funded without reference to an individual's financial resources or regulations could delegate decision-making on financial eligibility to a solicitor or other provider. It helps to regularise issues such as funding for non-court-based solutions, such as mediation or telephone advice, or to enable better use of the private or voluntary sector to provide services, for example, through the Law Centre or the Housing Rights Service, which are currently enabled only by way of authorisations.
 11. All of those provisions already exist in the 2003 Order but have not yet been commenced. In order for civil legal services to be implemented, a suite of subordinate legislation will be required. That subordinate legislation will be subject to further scrutiny by the Assembly, including the Justice Committee. Some of the legislation will involve the Assembly's affirmative resolution procedure.
 12. Pending commencement of the provisions in articles 21 to 31 of the 2003 Order regarding criminal defence services, representation in criminal cases will continue to be provided under Part III of the 1981 Order. Accordingly, as an interim measure, the Bill will also amend Part III of the 1981 Order to replicate some of the provisions in the 2003 Order regarding the assignment of solicitors and counsel, to provide for a registration scheme and place restriction on the disclosure of information in relation to legal aid applications. The Bill will also make the Lord Chief Justice president of the Coroners' Courts and require him to appoint a presiding coroner, thus formalising his responsibilities in relation to coroners and the Coroners' Courts in line with the existing arrangements for the other judiciary and courts in Northern Ireland.

13. Further detail on the content of the Bill is set out in the paper and the explanatory and financial memorandum. I am happy to address any questions that the Committee might have with regard to the content of the Bill.
14. **The Deputy Chairperson:** Thank you very much for that, Mark. With regard to the urgent procedure, when do you expect that to be finalised so that it can be advanced?
15. **Mr McGuckin:** That is out of our hands. The Minister has written to the First Minister and the deputy First Minister, whom you know are out of the country at the moment, and I am not sure what the arrangements are to process it while that is happening.
16. **Mr McCartney:** It is a narrow enough one, and it would need to be as speedy as possible.
17. **Mr McGuckin:** It is, and they have been apprised of that.
18. **Mr McCartney:** This was one of the recommendations of the review in 2000.
19. **Mr McGuckin:** Yes, the Coroners' Courts was.
20. **Mr McCartney:** We are only doing it now. Is there any explanation for that?
21. **Mr McGuckin:** I think the explanation is that there was an oversight at the time. Since it was identified, this is effectively the first opportunity to remedy that.
22. **Mr Wells:** I am hoping that this change, which I am sure we will be supporting, is in response to the clear inadequacies in the present structures and the fact that year after year in monitoring rounds we have to find money because the Legal Services Commission has gone over budget. How will these new structures make the disbursement of legal aid more accountable to the Assembly and the Department of Justice?
23. **Mr McGuckin:** It is currently accountable and I am not sure that these arrangements will make it any more accountable. We hope to improve the governance of the arrangements and the process of implementing the reform programme that we are undertaking. That would bring it in closer to the Department and make the decision-making processes that much easier in terms of driving forward the reforms. It will cut out some of the governance streams and make that a much simpler process.
24. **Mr Wells:** Will it enable the Department to keep a much tighter watch on budget overruns and make certain that we do not have these annual further requests for more money from scarce budget allocations basically to put into the pockets of solicitors and barristers, as we have had this year?
25. **Mr McGuckin:** There are two aspects to that. The first is to bring the spend down within the level of the budget. Some of the other reforms that we have presented to the Committee and have progressed are intended to do that. The second element is forecasting to ensure that we have the right forecast to start with and are not hit in the middle of year with unexpected consequences. That is a major project that was initially taken forward by the Commission but was brought into the Department towards the end of last year.
26. We have gone a long way in developing the methodology for that new forecasting mechanism and, crucially, making the necessary connections and relationships with other parts of the criminal justice system and more widely so that we are alert at a much earlier stage to any changes that could impact on that forecast.
27. **Mr Wells:** Will this be simply a transfer of staff from the existing body into the new model or will a new team be recruited?
28. **Mr McGuckin:** This will be a transfer across of existing staff. The Bill makes provision for them to come across under TUPE, so they will transfer across into the new organisation. There will then be an opportunity to look at the management structure and how that operates as an agency within the Department.

29. **Mr Wells:** Will that aspect of the staff be a new team or simply a transfer across of the senior management?
30. **Mr McGuckin:** It is too early to say precisely what will happen, and there have been a number of changes within the top team in the organisation already. For example, the director of corporate services recently moved on to take up a new opportunity outside the Legal Services Commission. We seconded an experienced civil servant into that position to help to manage the change process. Because we are taking the steps towards the creation of the agency, we are already beginning to see new people coming into the organisation from a Civil Service background and with that experience.
31. **Mr Wells:** This is the third major change. Recently, it was the Law Society, then the Legal Services Commission, and it is now moving to a new body. If that does not address the fundamental problems of budgets and budget overruns, then the public, and indeed the Department of Finance, will be extremely disappointed because that is an issue that has bedevilled this organisation for many years.
32. **Mr McGuckin:** In of itself, it will not address the issues with forecasting the budget. It will assist that process but it has to be tied in with the wider range of reforms that are ongoing to reduce the cost in the system. It is a demand-led service in terms of legal aid and you need to continue to respond. That will be the same in the future.
33. **Mr Wells:** As I said to you before, the costs should be brought down to the same as every other part of the United Kingdom, a system that has worked for many years. I do not see now that we are post-Troubles why we should have a situation in Northern Ireland where it costs much more to defend most cases than in the rest of the UK. You need to be braver, and this new organisation is an opportunity to deal with that issue like-for-like. Somebody should not be paying any more in Belfast than they are in Birmingham.
34. **Mr McGuckin:** We will be continuing to bring forward reforms to the Committee and the Assembly as we progress this work with the Bill and the changing status of the organisation.
35. **Mr A Maginness:** Thank you very much for your submission. How much a year does the Legal Services Commission cost — roughly, a ballpark figure?
36. **Mr McGuckin:** The commission itself or the commission and its staff?
37. **Mr A Maginness:** The commission and its staff.
38. **Mr McGuckin:** About £7 million a year.
39. **Mr A Maginness:** About £7 million, and would you hope that you could reduce that cost?
40. **Mr McGuckin:** There will be some efficiencies in this exercise, as we go forward. At this stage, it would be difficult to say precisely what those will be. The commission is already looking at how it delivers its business model and at trying to improve its efficiency as well, so that we reduce the administration. A number of measures are in place to try to take that forward. For example, the commission is starting to develop the business case for a new IT-based case management system, which would benefit the administration within the commission and bring wider benefits to solicitors who have to interface and interact with the commission on an ongoing basis. Those sorts of measures should help improve efficiency. We will continue to do those when the agency is created and look for other opportunities.
41. **Mr A Maginness:** A thought comes to mind: can you, at this moment, make an application online?
42. **Mr McGuckin:** No.
43. **Mr A Maginness:** But that is the type of thing that could be done.
44. **Mr McGuckin:** Absolutely, and work is being done now to see whether we could bring that in in advance of the case management system.

45. **Mr A Maginness:** That would obviously improve organisation's efficiency.
46. **Mr McGuckin:** Absolutely.
47. **Mr A Maginness:** What you are doing, if this materialises, is transferring the commission from being an arm's-length body into being part of the Department. Leaving aside the whole issue of independence and so forth, how will that transform the workings of the commission in terms of its efficiency, productivity, and doing a better job, because it has had a very bad press over the Criminal Justice Inspection report and so forth? How is that going to —
48. **Mr McGuckin:** There is no single key to improving efficiency and making it work better. Creating the agency and bringing it closer to the Department allow a number of steps to be taken to look at efficiency, processes and practices within the organisation. They will come under a common set of terms and conditions of service, so, for example, there is clarity about what those are and they apply across the broader Northern Ireland Civil Service (NICS), and you do not have a small organisation trying to manage all those itself. It will allow you to draw on experience elsewhere, to second people in and to refresh, if you like, arrangements within the agency in a way that is not really possible as a non-departmental public body (NDPB). There are a range of factors there that, cumulatively, will help support improving efficiency and effectiveness.
49. **Mr A Maginness:** But simply bringing it in does not necessarily do that —
50. **Mr McGuckin:** No, absolutely —
51. **Mr A Maginness:** There is a lot of work to be done.
52. **Mr McGuckin:** There is a lot of work to be done. As I mentioned in response to Mr Wells's question, that was one of the reasons, when the director of corporate services moved on, that we took the opportunity to bring in somebody who has experience and a background in change management to help the organisation prepare itself for the transition to its new status and to bring the staff along. There is a significant programme of work, which Carol is also leading on, across a range of factors that will affect the way that the organisation works and the way that staff see themselves within the organisation.
53. **Mr A Maginness:** Just talking about staff: is one of the problems the large turnover in staff? Or is there a large turnover? I understand that there is, but —
54. **Mr McGuckin:** There has not necessarily been a large turnover in staff. Some staff have been there for a long time and are very experienced in legal aid requirements and so on. There is a turnover at certain levels, and that has been increasing recently. It is not necessarily one of the problems, and when we become an agency the turnover will give us the opportunity to refresh. That is one of the opportunities that we have.
55. **Mr A Maginness:** I will not press you on that point, but I have a couple of other points, Chair, if you will allow me, about the whole issue of decision-making. Obviously the Department cannot make decisions, and the commission, in its new form, will make decisions. The director of the commission will have the ultimate responsibility for doing that, and he or she will be separate from the Minister in doing that for individual applications. At first instance, I assume that the applications are made on paper or online, as the case may be, and a rejection is then subject to an appeal. Now, we have had some discussion about this in the past. The appeal is to three people, is that correct?
56. **Mr McGuckin:** That is correct.
57. **Mr A Maginness:** Are those three people lawyers and laypeople? What is the position?
58. **Mr McGuckin:** The position is that we are seeking to recruit a mixed group of people from which to draw the appeals panel. Each individual appeal panel will be made up of three individuals. We intend that the chair will always be a

lawyer; that is one of the points that came out in the consultation. In the consultation, we had suggested that it could be a single person and not necessarily a lawyer, and we responded to the consultation. Instead of going for a single individual, we have gone for three people sitting on the panel. The chair will always be a lawyer, and depending on the make-up of the people who apply to take on this role, it could be that most appeal panels will be made up entirely of lawyers, but we would like to try to bring in experienced people who might be involved in family situations and so on, if that is at all possible. That might be a process that will take some time to work through.

59. **Mr A Maginness:** So, you are trying to establish some sort of balance between lay members and legal persons.
60. **Mr McGuckin:** Absolutely.
61. **Mr A Maginness:** It will be a three-person panel.
62. **Mr McGuckin:** It will be a three-person panel, with the chair always being —
63. **Mr A Maginness:** One further point of detail in relation to this, Chair. Will the appeal be on paper or will the appeal be in person — obviously, the solicitor or barrister making a representation to the panel?
64. **Mr McGuckin:** Can I answer that by taking a step back to look at the broader process? The broader process currently is that solicitors, on behalf of their clients, will make an application for legal aid. That will be considered and either rejected or accepted. If it is rejected, quite often there are reasons why — some deficiencies in the way in which the application has been made. In the current environment, quite frequently they just go straight to appeal. What we want to try to do is to introduce a much more robust system where we start in the initial adjudication of the request or the application, and we give reasons for the refusal, so that, if there are deficiencies, they can be addressed and the application resubmitted without having to go to the appeals panel. We

would therefore see the number of appeals going to the panel being much reduced. Because we have been giving reasons, then, and will continue to give reasons right up to the appeal's being lodged, it will be for the solicitor involved to address the reasons for the refusal as part of the appeal. From that perspective, we envisage that most appeals could be heard on the basis of papers, but we will make provision in the regulations for the appeals panel to allow an oral hearing where that is considered appropriate.

65. **Mr A Maginness:** So you have a sort of filtering process: once there is a rejection, it is looked at by a panel on paper and then a decision is made — and, in extremis, there will probably be an oral hearing.
66. **Mr McGuckin:** There is the possibility of an oral hearing in appropriate circumstances.
67. **Mr A Maginness:** One final point, Chair, and thank you for your indulgence, about the funding code. I am not quite certain what that is all about. There is an SL1 coming to the Committee about eligibility for criminal and civil legal aid. Is that anything to do with that?
68. **Mr McGuckin:** No.
69. **Mr A Maginness:** That is a separate process.
70. **Mr McGuckin:** Absolutely, yes.
71. **Mr A Maginness:** OK. So the funding code is a separate procedure, which you have rejected.
72. **Mr McGuckin:** The funding code was an attempt to get a very detailed arrangement for how civil legal aid is awarded and the merits and so on, and it became overly complex and complicated. The paper in front of the Committee on financial eligibility is about adjusting the existing merits tests, and, as ever, those sorts of things will come before the Committee for any change.
73. **Mr Elliott:** Thanks very much for the presentation. Quickly explain again how it has been on the books since 2004

- but is now coming forward at the speed of a train.
74. **Mr McGuckin:** I am not in the lead on the policy in relation to that, Mr Elliott, but my understanding is that a lot of changes were made — probably in 2000, when the review was first published — in respect of the judiciary, and this aspect was overlooked. I am not sure when it came to light, but the Lord Chief Justice raised it fairly recently, and this is the first opportunity that we have had to address it.
75. **Mr Elliott:** Chair, it would be useful if the Committee were to get an explanation as to why. There is probably a perfectly good explanation. It would be useful for us to know.
76. My second question is about the staff. We are talking about a transfer of staff from the Legal Services Commission to the new body.
77. **Mr McGuckin:** Into the Northern Ireland Civil Service, yes.
78. **Mr Elliott:** So it is just moving the deckchairs a little.
79. **Mr McGuckin:** I would not necessarily describe it in those terms, no. As I said to Mr Maginness, there are an awful lot of very experienced staff in the commission, and we want to put them into a slightly different environment in an agency with the governance arrangements there to support them to deliver their responsibilities effectively and efficiently.
80. **Mr Elliott:** You said something like there would be opportunities for personnel from a Civil Service background to go in there. Are there any opportunities for people from the private sector to go into such an organisation?
81. **Mr McGuckin:** Into an organisation such as an NDPB or an agency?
82. **Mr Elliott:** Particularly into the new agency.
83. **Mr McGuckin:** It depends on the nature of the staff, and the terms and conditions. There are currently a number of recruitment exercises which occur at different levels in the Civil Service, and they bring people in from the private sector at all levels of the Civil Service, from the administrative grades right up to the Senior Civil Service competition that is currently under way, which is bringing people from outside the Northern Ireland Civil Service into the organisation. There will be those types of opportunities. There are some specialist grades; for example, you find that accountants are recruited at various levels in the Civil Service and go straight into organisations such as an agency at that stage.
84. **Mr Elliott:** It is not just to do with this Department, but I often wonder how people who do not have a Civil Service background can actually get into the system. At least elected representatives can stand for election and either get elected or not but, in the Civil Service, it quite often seems to be a closed process with no opportunities for people who have good experience and knowledge of the wider world to be of significant assistance to that Department. I am not just referring to this Department; it is in a wider context.
85. **Ms McCorley:** Go raibh maith agat, a Cathaoirleach. Thanks for the presentation. In the consultation, what were the main difficulties, if there were any, expressed about the changeover?
86. **Mr McGuckin:** I think that the main concerns were around the appeals panel. As I said to Mr Maginness, in the original proposals that we consulted on to do with the safeguards, we suggested that the appeals panel could be limited to one person, drawn from within a number of people, sitting hearing appeals, and that that person would not necessarily always be a lawyer. We got some convincing arguments coming back to us to suggest that, for the types of decisions that were being taken, it would be appropriate that a lawyer be involved, and that it would assist if there was more than one person sitting on the panel. So, we responded to that. It is all lawyers involved in the existing panels, and they sit, largely, as a panel of five. We have brought it down to

- three, with the aim, if at all possible, to get some lay experience onto that panel. Essentially, it will be chaired by a lawyer, so there will still be a very legal aspect to it.
87. **Ms McCorley:** Are there any issues to do with the pensions of staff moving across? This subject comes up frequently. Staff in organisations are concerned that, when changes happen, their pensions will be affected. Are there any implications for pensions?
88. **Mr McGuckin:** There certainly are. The Legal Services Commission staff are currently part of the NILGOSC local government pension scheme. When they become part of the Northern Ireland Civil Service, they will become eligible to join the Northern Ireland principal Civil Service pension scheme, so they will come under the same pension scheme as civil servants. They will be given the choice, at the time that they move across, about whether they retain their existing service in the NILGOSC scheme or transfer it across to the principal Civil Service pension scheme. They will be given an awful lot of detailed information that actuaries work out in an information pack to help them to make the best decision that meets their particular needs. I understand that, for most people, it will be attractive to make the transfer across.
89. **Ms McCorley:** So nobody will have anything forced upon them.
90. **Mr McGuckin:** No. The only change that will happen is that, from the point that they join the Civil Service, they will go onto the Civil Service pension scheme. How their past service is treated is where they get the opportunity to take the choices.
91. **Ms McCorley:** OK then.
92. **The Deputy Chairperson:** No one else is indicating. I have a couple of final questions. The timeline for this is to have it enacted for October. Is there a financial benefit to that timeline, or is it a case of getting this done as quickly as we can?
93. **Mr McGuckin:** The way that we are looking at it now is that it is tied up with a financial issue, and there is a cost associated with addressing the pensions issue. We currently have an arrangement that would allow that to happen within the next financial year. It would be preferable to try to get it done by 1 October.
94. **The Deputy Chairperson:** Is there any financial imperative to doing it, or is it that that is the best timeline possible?
95. **Mr McGuckin:** It is the best timeline that we have currently.
96. **The Deputy Chairperson:** The Department's briefing mentions that there was a consultation on the review of the statutory exceptional grant funding scheme.
97. **Mr McGuckin:** Yes.
98. **The Deputy Chairperson:** The Clerk and the Committee staff could not find any publication for us to use for scrutiny. Is there any particular reason for that?
99. **Mr McGuckin:** There was a consultation on the exceptional grant scheme last year. It has not come back to you yet, no. Other pressures have meant that we have set that to the side slightly. That is largely to do with the remuneration scheme in respect of that, and we will be coming to you hopefully around May with something on that. It is still on the agenda.
100. **The Deputy Chairperson:** There is no crossover with the scrutiny of this Bill.
101. **Mr McGuckin:** No, there should not be. This Bill will move responsibility for taking decisions on the exceptional grant scheme from the Minister to the new body. That was part of the recommendation in the access to justice review that was accepted at an early stage.
102. **Mr A Maginness:** Just a point of information arising out of Ms McCorley's question —
103. **The Deputy Chairperson:** Go ahead.

104. **Mr A Maginness:** — which related to pensions. I thought that there was some dispute within the commission about pay rates. Is there any difference between Northern Ireland Civil Service pay rates and the commission's?
105. **Mr McGuckin:** There certainly is. We have a business case approval from the Finance Minister to bring the existing staff in the Legal Services Commission on to the Northern Ireland Civil Service pay scales, with effect from the point of devolution. We are working through the final stage of that process, which is to present the pay remits to DFP and to the Finance Minister. We hope to conclude that very shortly. We have been working quite hard on that for the past weeks. That will bring those staff directly into line with NICS pay scales and help the process of moving those across to an agency.
106. **Mr A Maginness:** Staff will be happy, anyway.
107. **Mr McGuckin:** I hope so. *[Laughter.]*
108. **Mr Wells:** Mr Maginness and Ms McCorley both indicated — I think Mr Maginness used the phrase “rearranging the deckchairs” —
109. **Mr A Maginness:** No, I did not. *[Laughter.]*
110. **Mr Wells:** Sorry, it was Mr Elliott. I apologise. It was a good one-liner.
111. **Mr Elliott:** You are all right.
112. **Mr A Maginness:** I am not into clichés. *[Laughter.]*
113. **Mr Wells:** I am sure that the ‘Impartial Reporter’ was tipped off about what was coming. No, but to be serious, I do not get the impression that there is the required degree of urgency in this organisation. We have already had the damning report from the auditors, who said that this organisation was completely dishevelled and was just not working at all. It was spending far too much money, budgets were completely out of line and you had to rob much-needed services in DOJ to pay for it. I do not get the impression that there is real urgency in dealing with an organisation that was not fit for purpose. The only impression I am getting is that you are simply moving it across lock, stock and barrel into a different structure, but you have not tackled the root-and-branch problems that occurred previously.
114. **Mr McGuckin:** As I said in response to your earlier questions, there are a number of factors involved and pieces of work going on. The actual spend has to be brought down to meet the budget, and that work, as you are well aware, is going on. Within that, we are also working with the commission to improve its procedures. As part of that process, I mentioned that the director of corporate services was one post where we have started to bring in a different perspective. We have also got a new IT manager in there. In addition, within my division, we have brought some of the experienced staff from the commission to help us inform our future policy work. So, there is an exchange going on there which is, hopefully, starting to address the issues. It certainly is not about moving deckchairs around.
115. **Mr Wells:** It will be very uncomfortable if, after three years of this being up and running, we are back to exactly the same problems as have bedevilled legal aid in the Province for the past dozen years.
116. **Mr McGuckin:** I will seek to avoid that on my watch.
117. **The Deputy Chairperson:** OK. Thank you very much, Mark.

14 May 2014

Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
 Mr Raymond McCartney (Deputy Chairperson)
 Mr Sydney Anderson
 Mr Stewart Dickson
 Mr Tom Elliott
 Mr William Humphrey
 Mr Seán Lynch
 Mr Alban Maginness
 Ms Rosaleen McCorley
 Mr Jim Wells

Witnesses:

Mr Sam Ellis	<i>Association of Personal Injury Lawyers</i>
Mr Martin Hanna	<i>Bar Council of Northern Ireland</i>
Mr David Mulholland	<i>Bar Council of Northern Ireland</i>
Ms Victoria Taylor	<i>KRW Law LLP</i>
Mr Gerry Hyland	<i>KRW Law LLP</i>
Mr Niall Murphy	
Mr Paul Pierce	
Mr Chris Stanley	
Mr Les Allamby	<i>Law Centre NI</i>
Ms Arleen Elliott	<i>Law Society Northern Ireland</i>
Mr Peter O'Brien	<i>Law Society Northern Ireland</i>
Mr Colin Caughey	<i>Northern Ireland Human Rights Commission</i>
Mr John Corey	<i>Northern Ireland Human Rights Commission</i>
Dr David Russell	<i>Northern Ireland Legal Services Commission</i>
Mr Paul Andrews	<i>Northern Ireland Legal Services Commission</i>
Ms Fiona Donnelly	<i>Northern Ireland Legal Services Commission</i>
Mr Ronnie Spence	<i>Northern Ireland Legal Services Commission</i>

118. **The Chairperson:** I welcome everybody who has joined us here today to speak to us. The Bill, as you will hopefully all know, was introduced on 31 March. The Second Stage was passed on 8 April, and we began our scrutiny role on 9 April. That will complete on 20 June, and then we will provide a report to the Assembly. In response to the Committee's call for evidence there were 20 written submissions from stakeholders. Obviously, a number of you have come to today's event to provide oral evidence to us. For the evidence session, everyone should switch off their mobile phone. Do not

put it on silent. If you keep it on, it will interfere with the recording, and that will make it more difficult to get an accurate transcript of what everybody says.

119. Hopefully, everyone has received a paper outlining the way in which the evidence session will take place. If you do not have that paper, please indicate, and the Committee staff will provide you with the way in which the evidence session will be structured. There will be a microphone provided, so do not speak until the microphone gets to you, and then introduce yourself and the organisation you are from.

120. I will work through each clause of the Legal Aid and Coroners' Courts Bill in the order that has been outlined in the folder. I will take each one in turn. When we get to clause 1, it will only be clause 1, and I will call those who have indicated that they want to speak on clause 1 to do so. Once the initial organisations have made their contribution, if anyone else wants to make a comment on it they will be invited to do so. If you do not have any comment to make, do not make it — allow the event to move on. If the point has already been made, do not repeat it, but, if it is different, please feel free to share your view on it. A number of the organisations want to speak on particular clauses, and you will have the opportunity to do that, but you are at liberty to make comments on some of the other clauses as they arise.

121. OK, we will move on to clause 1. I will try to keep us right as we get through the structure. It has worked on previous occasions, so hopefully it will work today. On clause 1, which is the dissolution of the Northern Ireland Legal Services Commission (LSC), I am first going to call the Legal Services Commission to speak.

122. **Mr Ronnie Spence (Northern Ireland Legal Services Commission):** Thank

- you, Mr Chairman. My name is Ronnie Spence; I am the chairman of the commission. The commission supports the core proposal in the Bill to transfer its responsibilities to the Department of Justice, subject to effective arrangements to ensure that individual decisions on the granting of legal aid are taken independently. I will come back to that point later in the afternoon. It may seem very strange for a public body to support its own abolition or dissolution. However, the commissioners have believed for some time that the arrangements for legal aid in this jurisdiction require major changes. Some years ago, I described those arrangements as the faulty architecture — the John Cleese version of it.
123. Around the time of devolution of responsibility for justice, the commissioners pressed the need for a radical review again, and that was accepted by the new Justice Minister. Jim Daniell, who was then our chair, was released from that role to conduct the access to justice review. We supported his work and have subsequently supported the Department in carrying forward the action to implement the review. We also agree with the Justice Minister's decision last autumn to initiate a second phase of the access to justice review. We believe that it makes sense in the Northern Ireland context to bring together, in one body answerable to the Assembly, the responsibilities for policy, finance and delivery in this area. That structural change will not in itself solve all of the very difficult issues around legal aid and access to justice, but we believe that it should provide a more appropriate framework and help to deliver improved transparency, effectiveness and accountability.
124. **The Chairperson:** Thank you. Next is KRW Law.
125. **Mr Niall Murphy (KRW Law LLP):** My name is Niall Murphy, and I am a partner in KRW Law, a solicitors' firm in Belfast. I am obliged to the Chair for the invitation to address the Committee. We oppose the dissolution of the Legal Services Commission. The present arrangement regarding legal aid funding is satisfactory in that the Legal Services Commission is an independent public authority. To dissolve the LSC to create the office of a director of legal aid casework within the DOJ would be to give rise to a potential conflict of interest, in our opinion, in the event that the DOJ was to be joined in litigation requiring publicly funded legal aid. The proposed arrangement would therefore not be sufficiently independent to satisfy human rights compliance in litigation engaging the European Convention on Human Rights.
126. We request that the Committee reflect on the particular circumstances of the recent past in this jurisdiction and, in particular, consider conflict-related legacy cases, including pending litigation. The Committee will be intensely aware that the mechanisms for dealing with the past continue to be subject to judicial challenge to ensure human rights compliance. We specifically draw your attention to the package of measures accepted by the Council of Ministers of the EU following the McKerr group of cases in 2001 from the European Court of Human Rights, namely the Police Ombudsman, the Historical Enquiries Team (HET), the coronial process and inquiries.
127. It is our analysis that the unique legal imperative and responsibility that arises from the McKerr cases and package of measures, in our respectful submission, is such that this Committee must ensure intense scrutiny of the Bill so that bereaved families of victims and survivors who are forced to resort to litigation because of state failings to expedite dealing with the past are able to do so with appropriate mechanisms, systems and resources in a human rights-compliant manner.
128. Can you hear me OK?
129. **The Chairperson:** Yes.
130. **Mr Murphy:** One of the main issues is independence. The cornerstone of access to justice is the right to ensure that the ability of a next of kin to take

- a case against an agency of the state will not be prejudiced by the interference of another agency of the state. The dissolution of the independence of the LSC provides for that. As a civil servant within the DOJ, the director of legal aid casework will be responsible to the Minister. In the event that the DOJ is joined as a respondent or a defendant in litigation which is publicly funded, there would be a conflict of interest, in the absence of a rigorous mechanism to ensure independence in decision-making. We do not consider that that exists appropriately in the mechanism proposed.
131. I will afford the Committee potential examples of where the DOJ could become a respondent or joint respondent in proceedings. If, for example, the Police Ombudsman were to advise a citizen that they could not undertake an investigation on the basis of insufficient funds being available, the Minister would be a respondent to judicial review challenge. Similarly, if the coroner was unable to adequately resource an inquest to permit a timeous convention, the DOJ could be a respondent to proceedings. There could be a judicial review, as is the case at present, of the failure by the Minister to consider a recommendation — which, at present, is a referral from LSC — to exceptionally grant fund a case, as happened in Omagh. Existing case examples with months of no decision are the likes of Bridie Brown, who is engaged in an inquest on behalf of her husband, Sean Brown; James O'Donnell, who is engaged in an inquest on behalf of his son Kevin Barry O'Donnell; and Martina Dillon on behalf of her husband Seamus Dillon. Similarly, there could be a judicial review of the failure to adequately resource the PSNI legacy unit. Recently, we received a letter in the case of Teresa Slane, a case considered by Sir Desmond De Silva. It will take up to nine months to complete consideration of the papers on that case.
132. Although the Bill states — articles 2(a) and (b) — that there can be no ministerial interference, there could be
- a direction in relation to categories of cases, such as judicial review, which the Executive and the Assembly would have direct interest in. That could also give rise to a conflict of interest.
133. The second issue that I would like to address is the effective resourcing of the mechanisms, which Europe has prescribed as the appropriate article 2 discharge of the state's responsibilities. All persons affected by our recent past should receive the support of the state, and the relevant institutions of the state should be effectively resourced to discharge the investigatory procedural obligations arising under article 2. Without effective resourcing of the means to investigate legacy cases, litigation, when systems fail, will be an inevitable consequence, further delaying truth and access to justice. That is a quote from Mr Justice Stephens in the case of Jordan, which was decided at the end of January.
134. The inability of the Minister of Justice to provide for effective resourcing does not, therefore, augur well for the best intentions of the Bill, specifically with regard to the Coroners' Court. The Committee should be aware of recent correspondence from the senior coroner to the Minister in relation to the ongoing Stalker and Sampson inquests, wherein considerable frustration of the senior coroner was clear to see, specifically with regard to the inability of the PSNI and Court Service to provide necessary resourcing in terms of funding, personnel and practical arrangements. Indeed, the senior coroner stated that it:
- "should be viewed as an enormous source of embarrassment to the State that these Inquests have not been held."*
135. He further stated that the question of resourcing lay with the Minister and that this was not being asserted, so much so that the senior coroner intended to pursue the matter directly with central government.
136. The letter went on to say:
- "The Senior Coroner is of the view that the Inquests are being funded on a drip feed"*

- basis and that there is no demonstrable commitment to ensure that these Inquests are properly resourced and otherwise facilitated so that they can take place timeously."*
137. He went on to say:
- "The delay for the families of the deceased and for many of the witnesses involved must be nothing short of intolerable."*
138. I regret to inform the Committee that the delay was more than intolerable for two of our clients, the parents of Seamus Grew, who both passed away last year. After the inquest having been open for seven years, they were in effect denied access to justice and the convention of a timeous inquest, in accordance with the state's obligations under article 2.
139. The letter goes on to say:
- "the obligation of the Senior Coroner's Office is to satisfy an unconditional obligation imposed on the United Kingdom to carry out an Article 2 Investigation into the circumstances of these deaths. It is not a task that can be avoided because there is no or insufficient money ... money has to be prioritised to the completion of these Inquests. Otherwise, the further sanction of the European Court of Human Rights awaits."*
140. I take it that the Committee has that letter, but I have copies with me.
141. **The Chairperson:** Was it the Legal Services Commission that did not fund the Coroner's Court to allow those inquests?
142. **Mr Murphy:** It was the Minister.
143. **The Chairperson:** Yes, but this is about the dissolution of the Legal Services Commission, so I am trying to link it in with what you are saying about those inquests.
144. **Mr Murphy:** I use the inquests as an example. Our concern is that the independence of the Legal Services Commission would be lost if it became an in-house body within the DOJ. There already exists a concern that the Minister has not been able to discharge his obligations when it comes to effectively resourcing other limbs of justice, such as the Office of the Police Ombudsman, the legacy unit of the PSNI and, as that letter describes, the coroner system. It does not augur well if one considers that as an example that is in existence already.
145. In conclusion, we are concerned that the provisions of the Bill are unsatisfactory when considered in relation to conflict-related cases and prospective litigations thereon, in the absence of an alternative human rights-compliant mechanism of truth recovery, justice and accountability. I appreciate that there is a wider political and societal debate surrounding that.
146. The inherent concern in relation to a conflict of interest will manifest itself in circumstances whereby the DOJ is joined as a respondent and the state is tasked with discharging its procedural obligations to investigate, in compliance with both domestic and Strasbourg jurisprudence. It is foreseeable, therefore, that if the Bill proceeds as proposed, the legal aid funding decision could form part of a challenge as part of a matrix of public resource policy, combined with other components such as a thematic concern about collusion, generalities of disclosure and public interest immunity. The decision to grant, or not grant, legal aid from a ministerial perspective would therefore be a key point of contest. To ensure fairness, the office that is making those key legal aid funding decisions must be independent from the executive arm of the state.
147. **The Chairperson:** Do any members want to ask any questions of the two people who have spoken? Does anyone in the Gallery want to make any comments about the clause beyond what has already been stated?
148. **Mr Paul Andrews (Northern Ireland Legal Services Commission):** This is an attempt to be helpful to the commission. The current legal aid legislation and the proposed legislation do not require the availability of funding to be taken into account. *[Interruption.]* I hear Mr Murphy's points, but I want to make it clear that currently, and under the proposed Bill, the availability of funding will not be a factor that the commission

- or the agency can have regard to in making a funding decision. It will have to be made on the basis of the statutory tests that are set out in the legislation. *[Interruption.]*
149. **The Chairperson:** Is that your phone or someone else's?
150. **Mr Andrews:** Mine is off, I hope.
151. If I may indulge one second point, there is a technical issue that needs to be addressed. Under the existing exceptional grants scheme, in certain circumstances, the commission has to require authority from the Minister to make funding decisions. That requirement is not part of the Bill that is before you; it follows a recommendation of the access to justice review, which was undertaken by Mr Daniell, for that link to be severed. Those observations may be of assistance to the Committee. *[Interruption.]*
152. **The Chairperson:** Thank you very much. We will be asking the Department to respond to all of the concerns that are being raised about independence and the comments that have been made.
153. **Mr McCartney:** That is the point that I am making. The Department will get a transcript of today's meeting. That is OK.
154. **Mr A Maginness:** Will the Department respond today? No?
155. **The Chairperson:** Not today. Members will be able to pursue those points when the Department comes to the Committee.
156. **Mr A Maginness:** Can I ask one question then, Chair? It relates to what Mr Murphy said. I can understand the problem of independence. However, under the scheme that is being put forward, there will be operational independence as far as legal aid grant is concerned. The point that you have raised, which is an interesting one, is that you accept that that may well be but categories of cases might be excluded under the new arrangements. Is there any way to protect categories of cases
- or ensure that legal aid is not restricted by category?
157. **Mr Murphy:** I trust that that would be a matter for a parliamentary draftsman. However, from a practitioner's perspective, we are concerned that categories of practice, such as judicial review or representation at the coronial court, could be subject to ministerial discretion and that that, in and of itself, could represent an Executive fettering of what should be unfettered independence.
158. **Mr A Maginness:** Thank you very much, Chair.
159. **The Chairperson:** Clause 2 relates to the designation of a director of legal aid casework.
160. **Mr Martin Hanna (Association of Personal Injury Lawyers):** Good afternoon, members. My name is Martin Hanna. I am speaking on behalf of the Association of Personal Injury Lawyers (APIL), an association that effectively represents genuinely injured victims of accidents, disease, etc.
161. At the outset, I want to say that it is vital that all applications for legal aid funding are considered diligently and carefully. In Northern Ireland, the provision of legal aid has been vital to the most vulnerable in society, the people whom we represent, such as children and the elderly, who have little or no finance resource to fall back on to investigate matters. Members have already welcomed the safeguards to protect individual decision-making in the granting of legal aid. That is something that we support as it obviously goes without saying, as far as we are concerned, that there should be no political involvement in the granting of a legal aid certificate to a genuinely injured victim.
162. APIL is concerned, however, that no detail is contained in the Bill to ensure that the director of legal aid casework is legally trained or has legal experience. We say that it has to be a minimum requirement that a director of legal aid casework has the requisite experience, understanding, knowledge

- and qualifications to make decisions on individual cases. Decisions being made by a director without legal training will, in our view, lead to inevitable challenges through the appeals process, thereby increasing the administrative workload and costs.
163. We represent people with personal injury cases, many of which are very complex and need detailed scrutiny to decide what chance of success they have. Without the necessary knowledge and experience, the director would be unable to give any application the detailed scrutiny that it requires. I can give a number of examples to demonstrate the point. In clinical negligence cases, particularly those that involve children who were brain-damaged at the time of their birth, those brain-injured children require intensive care and have other very complex day-to-day needs which require specialist input for the rest of their life. There are many such cases in the court system. Indeed, I have been involved personally in three such cases that have come before the courts within the past 12 months. Each of those cases was ultimately resolved for a very substantial amount of money and at no cost whatsoever to the legal aid fund, as the unsuccessful defendant — the relevant hospital trust — also had to meet the costs. Although there was no cost to the legal aid fund per se, without the benefit of legal aid, those vulnerable children and their families would not have been able to investigate what are extremely complex cases with regard to establishing legal liability and causation. Therefore, it is vital in our view that the director be legally qualified and trained to determine these applications properly. They are difficult cases for experienced and qualified lawyers in any event. It is, therefore, essential that applications in this type of case be assessed and determined by legally qualified individuals. We must always remember that these cases are brought by the most vulnerable individuals in society. They rely very much on legal aid to enable them to instruct the appropriate specialist lawyers —
- solicitors and barristers — to properly investigate claims.
164. The granting of legal aid has been and must continue to be awarded on a case-by-case basis, based solely on the merits of each case and without reference to any budgetary or political agenda. The assurance of no ministerial involvement in individual decisions is contained in the explanatory and financial memorandum. If the director is not legally trained, his decisions could be more liable to a challenge. Those appeals would mean an additional cost to the taxpayer.
165. **The Chairperson:** Thank you.
166. **Ms Arleen Elliott (Law Society Northern Ireland):** Good afternoon. I am junior vice-president of the Law Society. I will pick up some themes that have been raised by previous contributors. Can you hear me?
167. **The Chairperson:** Yes.
168. **Ms A Elliott:** I share similar concerns to those of previous contributors about the independence of the role of the director. Essentially, we will have a director who is a civil servant and whose loyalty will be to the Minister. That will automatically place him in a conflicting position should he make decisions that are potentially adverse to the Minister's interests — *[Inaudible.]*
169. **The Chairperson:** We will let you swap microphones because we are not picking you up. That one is not working. The staff will get another.
170. **Ms A Elliott:** Is that better?
171. **The Chairperson:** No. We will use another one.
172. **Ms A Elliott:** Hello.
173. **The Chairperson:** That is much better. Apologies for that.
174. **Ms A Elliott:** I do not intend to repeat myself unless anybody would like me to. Turning to clause 3, you will see that the drafting of the clause deals primarily with loyalty to the Department

- and states that the director must comply with its directions and guidance. Secondly, the clause deals with independence in individual decisions. Therefore, I am saying to the Committee that the drafting of the clause suggests that loyalty, in essence, comes before independence.
175. Thinking more closely about the issue of loyalty, we see that clause 2 states that the director will come from the Civil Service. As we all know, it can be very difficult to make decisions in an objective and independent manner when those decisions may be subject to criticism or disapproval from colleagues or superiors. The Committee will be well aware of the experience of some whistle-blowers both in the Republic of Ireland and across the water, which has been quite topical recently. Those cases are examples of how difficult it can be to go against the grain or the culture of an organisation.
176. Bearing that in mind, I ask the Committee to consider why the Department wishes the director to come from a Civil Service background. If independence is a real consideration, is it not better to appoint someone from outside the Civil Service who does not have pre-existing loyalties within the Department?
177. If we adopt the position that the director is fit to carry out his role in a fair, objective and rigorous manner — picking up on the point that Mr Maginness made earlier — the Committee should consider that the Department cannot issue guidance or directions in relation to a class or classes of cases. If the Department were able to do that, it would clearly drive a coach and horses — *[Interruption.]* That is not my phone. It would drive a coach and horses through the whole decision-making process and the independence of the director.
178. On the point that was raised by the Chairman, I take the view that the establishment of the power of the director to make decisions in respect of exceptional funding is probably a progressive step in so far as that decision will not be made by the Department, which is the case presently. However, that will have integrity only if the director is fit to exercise his role in a very independent manner.
179. **Mr Spence:** I will make just a couple of supplementary points. It is, of course, for the Department to decide what qualifications are required when advertising the post, but I will point out that, when we in the commission advertised for the chief executive post that Mr Andrews occupies, we stated that the person should have appropriate experience and expertise. We did not specifically require a legal qualification.
180. You have to bear in mind that, as well as being able to properly consider the legal issues that are under consideration, the person will be managing quite a big organisation of probably over 100 people and a budget of over £100 million. If that person does not have legal expertise, they have, of course, access to lots of legal expertise in the organisation itself. To repeat an earlier point, it is a matter for the Department rather than the current commission to decide what the qualifications should be.
181. **The Chairperson:** Ronnie, was the commission ever challenged because the chief executive did not have a legal qualification? Was that ever a reason to challenge decisions not to fund cases?
182. **Mr Spence:** No. That has not been an issue.
183. **Mr Humphrey:** Arleen, I listened carefully to what you said. You are talking about someone being appointed from outside the Civil Service because you are concerned that there may be sympathies with the Minister, for example.
184. **Ms A Elliott:** The concern that I am raising is really one of independence. There is, first, the legal position and, secondly, the practical position. I think that, in practical terms, it will be very difficult for any person to come from the Department or from a Civil Service background and carry out that role, which may be quite difficult

- or controversial, in an environment where he or she may have pre-existing loyalties. I suppose that it is an expansion of the issue of whether the director can, in effect, carry out his role in an independent manner.
185. **Mr Humphrey:** How does the Law Society of Northern Ireland propose that the person be appointed?
186. **Ms A Elliott:** I am quite sure that the Civil Service is very adept at setting up an appointments procedure. Obviously, the appointment could be open not only to those in the Civil Service but to those outside it. I do not see a reason why that cannot be done in this instance.
187. **Mr Humphrey:** Are you perhaps suggesting that you would like to see the post put out to public appointment, like the chair of the Parades Commission or something like that?
188. **Ms A Elliott:** Yes.
189. **Mr McCartney:** The Department will be provided with the transcript of this meeting, but there does not seem to be anything, either in the Bill as tabled or the explanatory notes, on why the Department is insisting that it has to be a civil servant. I would like to hear why the Department is insisting on that because, when it comes to clause 3 on the exercise of functions, the issue of independence becomes starker, particularly in respect of how the person who is appointed is expected to carry out their role and challenge whatever guidance comes from the Department. That is why we need an explanation for the insistence on a civil servant.
190. **The Chairperson:** Does anyone who has not yet spoken want to comment on clause 2?
191. **Mr David Mulholland (Bar Council of Northern Ireland):** I endorse the previous comments about concerns on independence, but I will not repeat them all. I would like to draw attention to the need to demonstrate independence. The Bill touches on a few areas in which independence could be demonstrated. Accepting that this is primary legislation,
- how could each of those areas be expanded on? The first area would be the appeals mechanism. That could offer a means to test and ensure independence or appeal if there is a decision that people find unsatisfactory. However, there is not sufficient detail to assess how adequate that would be. The second area relates to clause 3 and is akin to the Law Society's point. That could be built upon to describe, if there is a perceived or real conflict of independence, what avenues or channels are available to the director to raise those points and seek a resolution. Can the director reasonably refuse a direction? What other mechanisms are available?
192. **The Chairperson:** OK. Thank you.
193. **Mr T Elliott:** Apologies for being a little late. On the issue of the designation of the director, something we struggle with all the time in any Department is getting the expertise because, quite often, with no disrespect to civil servants, they are not always a reasonable expert in the field. You only have to ask people from any business background. It is an interesting proposal that it should be a different appointment process, and I fully support that. Maybe that would set standards for other areas of government. Maybe we are setting a good and positive standard for the rest of government by making this point.
194. **The Chairperson:** We could debate whether it is a good idea or not. I might take a different view, but I will save my own views for later.
195. We will move to clause 3, which some people have already touched on. It deals with the exercise of functions by the director. If you have covered it, you do not need to speak on it again. I invite the Law Centre to comment.
196. **Mr Les Allamby (Law Centre NI):** I am the director of the Law Centre. Our starting point is that independence is like justice; it must not just be done but be seen to be done. Our concerns about clause 3 were shared by the Westminster Joint Committee on Human

- Rights but were, ultimately, rejected by the Westminster Government. We recognise and acknowledge that the clause in this Bill is identical to one that was in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the so-called LAPSO legislation.
197. There is a formidable challenge to the director of legal aid casework. He or she must enable access to justice, as the chief executive of the Legal Services Commission said. Although the financial situation is not directly an issue when making individual decisions, there is no doubt that the director of legal aid casework has to be aware of the financial backdrop. That will be one of the issues, perfectly legitimately, that will, no doubt, be addressed to some extent in the backdrop of directions and guidance.
198. One of the two issues that we have has been ventilated by KRW, which is around challenges to government. That goes beyond the Minister to other Departments. The second is around cases that may have significant financial consequences for the legal aid fund, a lead public-interest case etc. As the Bill is drafted, the legal aid casework director has autonomy around individual cases but must follow the directions given by the Department. You do not need to be a conspiracy theorist or Machiavelli to realise that you can still give directions about a class of cases that may well impinge on decision-making on individual cases. You could talk about particular types of judicial reviews or particular aspects of cases that you know are in the pipeline.
199. Our suggestion is that we bolster the independence of the director of legal aid casework. We suggest two amendments. I will read them very quickly. The first is to clause 3 and would simply read:
- “(1) The director must—*
- (a) comply with directions given by the Department about the carrying out of the Director’s functions”*
- in other words, as it is drafted now, with the addition of these words:
- “save where this compromises the Director’s independence”.*
200. That would bolster safeguards on the independence of the director.
201. Secondly, in clause 3(2), the amendment would be, starting with what is there:
- “But the Department—*
- (a) must not give a direction or guidance about the carrying out of those functions in relation to an individual case”*
- with the addition of these words:
- “or to a class of cases where it unreasonably impinges on the Director’s ability to act independently in an individual case.”*
202. We are not saying that you should not have something in the Bill on classes of cases, but not where it directly impinges on the independence of the director of legal aid casework. We think that those amendments would bolster the independence of the director and would be significant and important.
203. Our other comment on clause 3 is on subsection (3), which states:
- “The Department must publish any directions and guidance given under this section.”*
204. I must be a conspiracy theorist, because the Law Centre’s view is that, frankly, although we do not need it in the clause, we would want the Committee to get reassurance from the Department about where and how that will be published. You could publish in something that has a normal readership of half a dozen or you could publish in something that everybody regularly gets to see and read. Therefore, the guidance and the directions must be published in places where people will be able to find and access them easily and be able to respond accordingly. As I said, I do not think that needs to be in the Bill, but I would like to get that type of reassurance and detail so that we avoid a situation where, after the event, we become aware that there have been particular directions or guidance, and the ramifications come when it is too late to comment on them.

205. **Ms A Elliott:** The society fully supports the comments made by Mr Allamby. I have raised the issue of classes of cases that could put the director's independence in an impossible position. The amendments to clause 3 suggested by Mr Allamby are worth careful consideration by the Committee.
206. **Mr Colin Caughey (Northern Ireland Human Rights Commission):** I am the policy lead at the Human Rights Commission. In light of concerns regarding the independence of the director, the provision for an appeal to an independent and impartial body is vital in ensuring that the overall decision-making framework is compatible with article 6 of the European Convention on Human Rights. In that regard, the commission advises the Committee to seek further information on the proposed appeals body, including the manner of appointment of members, the terms on which they will be appointed, terms for any disqualifications, and what guarantees of independence will be provided. The Committee should ensure that sufficient guarantees are in place to exclude any legitimate doubt as to the independence or impartiality of the appeals body.
207. **Mr Spence:** It is worth reflecting on the fact that, in the 10 years of the commission's existence, both under the Lord Chancellor's Department, which was responsible initially, and under the Department of Justice since devolution, there has been no case in which a Minister tried to influence a decision taken by the commission. Therefore, the evidence is that this is not a problem, or has not been a problem in the past. That is not to deny that it might become a problem at some stage, but I think that there are a number of safeguards.
208. First, you have to rely on the professional integrity of the person who is the director of the organisation. He will be appointed as an independent person, probably after some form of public competition. The professional integrity of that person is one of the guarantees. Secondly, there is the fact that the board of the new organisation will have three independent members. One of their roles will be to focus on any situation in which the director is being asked to do something that he or she does not believe to be right.
209. The final point that the Committee should consider is whether it is worth its while to seek an accommodation with the Minister under which the Minister will always consult the Committee before making any significant direction. Therefore, the Committee and the Assembly would not be faced with a fait accompli when a significant direction is being made. The Minister would undertake to consult the Committee in advance. That might provide an additional safeguard.
210. **The Chairperson:** Do members have any questions or comments?
211. **Mr McCartney:** It is worth noting that the Department has rejected the two amendments, as proposed. We need to see the rationale for that. I do not think that anyone would question the professionalism or the process for making public appointments, but you want to put the person who heads this up into the best position possible to do what is best in the interests of justice. A person may be appointed, but the law might restrict them in challenging the Minister. We have to ensure that, whatever law we frame, the public interest is best served.
212. **The Chairperson:** Clause 4 concerns the delegation of functions of the director. I invite the Human Rights Commission to comment.
213. **Mr Colin Caughey (Northern Ireland Human Rights Commission):** We support Ronnie Spence's suggestion that directions be sent to the Committee for scrutiny before they are placed on the director.
214. **Mr Hanna:** In many respects, our comments on clause 4 mirror those that the association made on clause 2. Clause 4 allows the director to delegate functions to other people as necessary. Anyone considering an application for legal aid, whether it is the director or

- someone who has functions delegated to them, should be legally qualified and have legal knowledge, experience or training. The current system of panels of practising lawyers works well in considering applications for legal aid funding. It is essential that we continue to constitute legal aid appeals with suitably qualified practising solicitors and barristers who have experience in the area of law under consideration.
215. **The Chairperson:** Do any members have any questions or comments?
216. **Mr McCartney:** I have a broad point. In one sense, it is a good idea and good practice for the Minister to bring something to the Committee. However, unless the Committee has a power of blockage, that could be meaningless. We should not put great store in the fact that a Minister who is going to make a big policy change has to bring it to the Committee if we have no power to say whether we think that it is right, wrong or indifferent. The Minister might bring something to the Committee every week and just walk out the door. I am not saying that the current Minister would do that; I am talking about the government structure. A Minister might tell the Committee about a change of direction but not necessarily listen to its views. Why would he? He or she would say that they have the Executive power to do what they want.
217. **The Chairperson:** Clause 5 concerns the annual report of the director. I invite the Legal Services Commission to comment.
218. **Mr Andrews:** The broad context of this is fairly uneventful. There is a requirement on public authorities to make annual reports, so the majority of the clause is entirely fine. The issue that is of more direct importance is how the director reports on the discharge of his functions. That is particular to this environment. We need to reflect on the fact that there are already a number of legally qualified people making decisions on the granting of legal aid. An independent appeals mechanism was established, and a discernibly independent appeals mechanism is proposed in the Bill. If any directions are issued that impinge on the independence of the decision-making process or if any inference of influence is brought to bear on it, it is critical that the report is clear. A key issue with the integrity of the post is to be very clear about how the functions are discharged not only by the director but by anyone who, in the day-to-day operation of decisions, has to face the applications and process them appropriately.
219. **Mr Allamby:** I have a brief point about the timeliness of the annual report. In the past, the Legal Services Commission has not always produced its report within a reasonable period. I say that with a certain chagrin because I was a member of the Legal Services Commission, so I know that the commission was not in any way cavalier in its approach to annual reports. A set of circumstances often took over events, and, occasionally, the annual report took time to get together. There was also a variety of other circumstances.
220. We are suggesting a short amendment to clause 5(1). It currently reads “as soon as reasonably practicable”. The addition of “and in any event within nine months” is being proposed. Clause 5(1) would then read, “As soon as reasonably practicable and in any event within nine months after the end of each financial year, the Director must prepare an annual report for the financial year.” The end of the financial year is April, so that would guarantee a report by the end of the calendar year. “As soon as reasonably practicable” is a great deal more flexible, and, no doubt, any kind of arguments could be made as to what would lead to a delay. This bolsters the chance of ensuring timely reports. Otherwise, we have no difficulty with clause 5.
221. **The Chairperson:** What is your view on the statutory provisions that already exist for Departments and agencies? The deadline is normally 15 November. That is applicable to all Departments. This is what would happen: your amendment would allow them to go

- beyond what is normally expected statutorily.
222. **Mr Allamby:** I do not have a strong view that the date should be 15 November as opposed to, effectively, 31 December. I want a cut-off point. You do not want to send a message that says, "Get it in on 14 November" or "Get it done on 31 December". You want something that ensures that you know there is an eventual time limit operating.
223. **Mr T Elliott:** The Bill is pretty scarce on what the report must contain. Clause 5(2) states:
- "The annual report must state how the Director has carried out the functions of the office in the financial year."*
224. Do any of the organisations feel that something additional should be in the clause? It seems fairly bland, and there is not much detail. How can we improve on that, if at all?
225. **Mr Allamby:** I will answer very quickly, and I will then pass across to the Legal Services Commission's chief executive. I do not see the need to have that in legislation per se, but I think that it would be useful to get the parameters of what is expected in the report in your exchange of correspondence with the Department. We know what is in the current Legal Services Commission's annual reports. Frankly, I would expect to see at least that level of detail in future reports. I am relaxed about not having it in legislation, but I am keen to see something by way of a clear exchange of correspondence that sets out what will be in the report, if that is helpful.
226. **Mr Andrews:** I go back to your point, Chair, that, if the commission becomes part of the Department and then is an agency of the Department, there are established protocols about the content of annual reports, and those will apply. I think that that goes to Mr Elliott's point. There are governance arrangements that clarify what should be in those reports. The point of the clause is that there is an additional requirement, which is expressly to deal with the independence of decision-making. That is why that is
- the only one that is mentioned, because normal business and protocols will cover the rest of the material. I have no personal difficulty with Mr Allamby's suggestion for a framework to be developed that could provide useful and timely information to those who are interested.
227. **The Chairperson:** We move on to clause 6:
- "Amendment of law relating to legal aid, civil legal services and criminal defence services".*
228. **Mr Gerry Hyland (KRW Law LLP):** There is no issue with exceptional grant funding applications being brought into the mainstream of legal aid. With the two types of exceptional grant, which have traditionally been inquests and non-inquests, we have a concern that there is a risk to independence in decision-making, which my colleague and many other contributors mentioned. You are dealing with very controversial cases on which particular views may be taken by a particular Minister. We would all want to make sure that we have a system that is fit for purpose. There are concerns about the current system. These provisions mirror some provisions in England and Wales, where, one of the submissions notes, only some 5% of applications were approved under the English regime. We have concerns that there is an inherent delay in the current system, and there is no indication that the new system would be any fitter for purpose.
229. Clause 6 is technical in nature and brings forward a number of provisions from the Access to Justice (Northern Ireland) Order 2003. The Bar Council, for example, mentioned that it is seeking a counsel's opinion on some of the provisions. We would welcome the opportunity to comment on that at a later date, if it is made available to the Committee. A number of issues highlight the theme that members have heard at great length: concerns about the independence of the decision-making process under this new regime.
230. **Mr Andrews:** I think that we could take this under schedule 2, because the

- meat of the proposal is in schedule 2 rather than in clause 6, if that is helpful.
231. **The Chairperson:** Go ahead.
232. **Mr Andrews:** Schedule 2 and clause 6 do two different things. Certain provisions for criminal legal aid are being transferred to the 1981 order. These are not speaking to criminal legal aid per se but are to do with the infrastructure — that is to say, the registration of providers and disclosure of information. There is no existing provision for disclosure of information in the 1981 order, so that is essentially trying to bring to bear the same tools for civil legal aid as for criminal legal aid.
233. If I may suggest, for civil legal aid, there are two substantive changes. One is to abolish what was known as the “funding code” in the 2003 order. That will mean that the existing legal aid scheme, with its various tiers, which practitioners know, will continue in the first instance. So that is an “as you were” provision, if I can put it in those terms. The second change is to do with exceptional grant funding. As I said in an earlier observation, the provision effectively leaves the entire responsibility for deciding those cases with the new body. It does not require any referral to Ministers, as is currently the case. As I said, in the access to justice review, it was specifically recommended that that referral would be removed from the system, and the current legislation does that.
234. **The Chairperson:** Let me continue with schedule 2, given that you have invited me to do so. I ask the Law Society for its comments.
235. **Ms A Elliott:** My issue with schedule 2 is an expansion of the independence of the director. I mentioned that clause 3 will put in a minimal safeguard, and the second safeguard is, obviously, the appeals mechanism. For the appeals mechanism to have confidence, it must be seen to be fair, accessible and rigorous. If it is anything less than that, the public will not have confidence in the system, and the only outcome that can be anticipated would, ultimately, be judicial review. I see that the Department has taken on board some representations that were made about the appeals mechanism that was initially proposed. The Bill refers to three panel members at least, but the details are quite light. I ask members to pay close attention to the regulations that will be brought forward in due course. I know that MLAs are not strangers to the current appeals system. I am sure that many Committee members, through their constituency work, have personal knowledge about some of the complex issues in terms of fact and law.
236. Members will also be aware that the appeals mechanism does not attract legal aid. At present, appellants either appear in person or they request that the matters be considered on the papers. Alternatively, they will have a solicitor or barrister attend, usually on a pro bono basis. It should not be assumed, however, that matters to be considered on the papers will always be sufficient. As members will be aware, appellants often have literacy issues, mental health issues and limitations in presenting the facts that might be relevant and addressing areas of the law that would be relevant to the appeals panel.
237. Against the background that I have described, it is imperative that members of the panel who are appointed are externally recruited lawyers who may provide redress or balance to inadequacies or deficiencies for appellants in presenting their case. That is not to say that there is not room for the layperson; there is. A layperson can provide a common-sense view and an expertise outside the law. Those details will be in the regulations. The Committee should be very concerned that the panel should have the ability and the power to make fair determinations, provide reasons and, ultimately, protect the Department from challenge and safeguard the rights of individuals to prosecute in what may be a very difficult case.

238. In a similar vein, it is important that the work of the appeals panel is open and transparent and that it is not carried out in a darkened room somewhere. To expand on the procedures and detail in the Bill, which is very light, natural justice would indicate that appellants should always be allowed to appear in person unless they determine that they do not wish to do so. Appeals panels are often better informed by such oral representations, but there is always a balance to be struck between the demands of natural justice and running a cost-efficient system. The Bill, in its current format, provides for appeal without any oral hearings, unless that may be prescribed. That will come through in regulations.
239. Finally, I ask the Committee to take a careful view of that provision and keep a close watch on the regulations that will eventually be presented.
240. **Mr Hanna:** We entirely endorse the Law Society's comments. I refer members to the Second Stage debate, particularly the comments from Mr Allister and Mr Maginness, in which they discussed the workings that have been going on for a long time as to how legal aid committees function. They function very well in practice. Practitioners usually turn up on a Friday afternoon with their clients. They appear before the committees, and appeals are gone through very vigorously. The system works extremely well because there are qualified solicitors and barristers who are trained to know all the issues with the applications and appeals that they are dealing with.
241. **Mr Caughey:** A point was made about exceptionality provisions. In England and Wales, with comparable provisions, the number of applications has been extremely low, and the number of successful applications has been even lower. I think that it would be useful for the Committee to have an indication from the Department of the number of applications that it thinks that it will receive each year and the number that will be granted.
242. Funding for inquests is not brought within the scope of the mainstream legal aid system by way of the Bill. Individuals will have to continue to apply by way of the exceptional funding arrangement. The Committee should seek an assurance from the Department that requiring individuals to apply by way of that exceptionality provision does not in any way disadvantage them any more than if they were applying through the mainstream system.
243. **The Chairperson:** Did anyone not get an opportunity to speak to clause 6 or schedule 2?
244. **Mr Mulholland:** I have a couple of additional points on schedule 2. We noted that schedule 2 was trying to replicate some of the provisions from the 2003 order that had not yet commenced. Paragraphs 1 to 4 of article 36 in the original 2003 order seem to have been carried across faithfully but article 36(5) does not. That paragraph stated that there was a requirement on the Department to consult:
- "the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland, and ... may undertake such other consultation as appears to him to be appropriate."*
245. That may be an omission, or it may be the intention to deal with that in another way. We would appreciate clarification on that point.
246. We are already mindful of and are working on registration, which is dealt with in schedule 2. However, we would definitely appreciate the opportunity for the Department to conduct a public consultation on the matter.
247. **The Chairperson:** Why is the omission, as you see it, of that paragraph important to the Bar Council?
248. **Mr Mulholland:** We understood that this was intended to give effect to the 2003 order. As I say, it is a point of clarification on whether that is an omission or an intentional change from the 2003 order.

249. **The Chairperson:** Clause 8 deals with the appointment of the presiding coroner.
250. **Mr Caughey:** The Human Rights Commission broadly welcomes the proposal and hopes that it will further strengthen the efforts to address delay in the Coroners' Court, which Mr Murphy set out earlier. Delays in inquests relating to deaths during the conflict in Northern Ireland have once again recently been raised by the European Court of Human Rights in the McCaughey case. The Committee of Ministers continues to monitor measures taken to address delay. This autumn, the UN Human Rights Committee will also consider the matter. We will report to it and keep the Committee up to date.
251. **The Chairperson:** Clause 12 is on commencement.
252. **Mr Andrews:** There is very little for us to say. It is really a matter for the Department following the passage of the legislation. The timing of that will, I am sure, determine what the Department decides should be an appropriate commencement day.
253. **The Chairperson:** Schedule 1 deals with the transfer of assets, liabilities and staff of the commission.
254. **Mr Andrews:** This is a normal provision that you would expect to see when a public body changes its status. There is nothing controversial or exceptional.
255. **Mr McCartney:** With the transfer of staff, are there any issues with equal pay, change of status or change of pension rights?
256. **Mr Andrews:** Any outstanding pay matters have been resolved. So the answer to your question is no.
257. **Mr T Elliott:** Do you see the transfer of staff being perceived by the wider public as rearranging the deck chairs as opposed to providing real change by bringing new people in? It is widely accepted that there have been problems with the Legal Services Commission. If staff transfer, that may be perceived as jobs for the boys.
258. **Mr Spence:** There has already been considerable movement of staff in and out of the organisation with transfers and secondments to the Department. When appropriate, we have been advertising. In future, I think that, with specialist jobs that cannot be filled readily from elsewhere in the Civil Service, the tendency will be to advertise. It is good that the staff movements have been both in and out of the organisation, because some people have been working in the Legal Services Commission for a long time, and the change of status will enable them to try to broaden their careers in the public sector.
259. **Mr T Elliott:** How does the private sector — the Bar Council and the Law Society — view the transfer of staff?
260. **The Chairperson:** If they wish to comment —
261. **Mr Andrews:** I was going to be cheeky and say that most of the staff came from the Law Society to the Legal Services Commission. *[Laughter.]*
262. **Ms A Elliott:** I suspect that Mr Elliott may be quite right in identifying the issue. If I have read the papers correctly, it appears that the cost of the commission at the moment is £7.2 million, and, with the transfer, the cost of the new agency will be £8 million. I do not know whether the issue has been raised about additional capital being put into the new body to deliver all that is promised. Time will tell.
263. **The Chairperson:** We now have the Law Centre on the Attorney General's proposed amendment.
264. **Mr Allamby:** We support the Attorney General's amendment. When we put in our submission, we had not seen the detail of the proposed amendment. We now note that it is confined to health and social care issues. As things stand, the Attorney General has powers to order inquests. Our understanding of the amendment is that it will allow the

- Attorney General to ensure that, in this case, he gets access to the relevant material in a timely and straightforward manner.
265. One of the bases on which you might decide to order an inquest or otherwise might be having all the material before you in order to make a sensible and prudent legal decision. It seems, therefore, to be about straightforward administrative efficiency, openness and transparency. We have examples in recent public inquiries of how difficult it is to get access to the full picture until you get to public inquiry stage. It seems to me that this is one way of ensuring a much more seamless and transparent process. We would have supported an amendment going beyond health and social care because we think that the same principles apply in other cases, but we recognise that that is clearly not what the Attorney General is looking for. I say that in full cognisance of the political sensitivities that go with some of the areas that are dealt with in the inquests that were referred to earlier.
266. **Mr Caughey:** I will reiterate a point in our submission that the state's procedural obligation under article 2 of the European Convention on Human Rights extends to deaths in a medical context.
267. **Mr Murphy:** We welcome the Attorney General's proposed amendment, and, although we accept that it has a principal focus, we consider that it may have a broader effect, especially with article 2 legacy cases. A provision could be made that disclosure of material directly relating to the circumstances of the death of the deceased might be sensibly made automatically to the Attorney General and to the next of kin. The proposed amendment has a medical context, but the principle could be extended to public records.
268. **The Chairperson:** Are there any other comments? If not, that concludes the session. Some clauses were not discussed because nobody wanted to comment on them. I assume that we are content with that.
269. I thank everybody for coming today to share their views. Over the coming days, the transcript of today's event will be circulated to everybody who participated. When that is finalised, it will be published on the Committee web page and included in the Committee report to the Assembly on the Bill. Thank you, everyone, for helping us today.

28 May 2014

Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
 Mr Raymond McCartney (Deputy Chairperson)
 Mr Sydney Anderson
 Mr Tom Elliott
 Mr William Humphrey
 Mr Seán Lynch
 Ms Rosaleen McCorley

Witnesses:

Ms Siobhan Broderick *Department of Justice*
 Mr Pdraig Cullen
 Ms Carol Graham
 Mr Mark McGuckin

270. **The Chairperson:** We will work our way through the Bill clause by clause, asking officials to briefly outline the purpose of each clause and the Department's response to the issues raised. We will then invite questions from members before moving to the next clause.

271. I welcome Mark McGuckin, deputy director of the public legal services division; Siobhan Broderick, deputy director of the civil justice policy and legislation division; Carol Graham, the Bill manager; and Pdraig Cullen, principal legal officer in the public legal services division. You are all welcome to the meeting. As normal, this will be recorded by Hansard and published in due course. I am going to hand over to you to outline briefly clause 1. I am not sure who is taking the lead.

272. **Mr Mark McGuckin (Department of Justice):** Thank you, Chairman. I will take the lead for quite a lot of this.

273. As an overall summary, the purpose of the Bill is to dissolve the Legal Services Commission and to create new arrangements for the delivery of legal aid in Northern Ireland, within the Department of Justice. Clause 1 will dissolve the commission and transfer its functions and staff to the Department. On transfer, it is intended

that an executive agency will be created within the Department to administer the delivery of legal aid services.

274. Clause 1(5) refers to schedule 1 to the Bill, which makes provision for the transfer of "assets, liabilities and staff" from the commission to the Department. The clause is pretty straightforward. I am not sure, Chairman, whether there were too many comments. The Legal Services Commission welcomed the clause. The Bar Council welcomed any improvement to ensure transparency, predictability and accountability, and we believe that the new arrangements will facilitate that.

275. **The Chairperson:** Do members have any questions on clause 1? OK. We will move to clause 2, which is about designation of the director of legal aid casework.

276. **Mr McGuckin:** Clause 2 makes provision for the appointment of a director of legal aid casework. The purpose behind the creation of that statutory position is to help ensure that there will be no ministerial involvement in individual funding decisions on civil legal services. The Minister will be required to designate an individual as the director, and the director's function will be to take decisions on the grant of funding for civil legal services in individual cases. Subsection (2) requires the director to carry out the functions of the office on behalf of the Crown. Subsection (3) provides that the service as the director is service in the Northern Ireland Civil Service, and subsection (4) requires the Department to provide civil servants or other persons to give appropriate assistance to the director.

277. We had a number of comments from the Law Society, the Association of Personal Injury Lawyers and the Bar Council in relation to this clause. The Law Society suggested that it should be an externally recruited figure, preferably somebody with experience in civil justice

- matters. The Association of Personal Injury Lawyers was concerned to ensure that the director of legal aid casework was legally trained, and argued that that would reduce the number of appeals. The Bar Council outlined concerns that there was no requirement for the director to be legally trained or qualified and that that might lead to more challenges through the process. In response to that, the Department says that the director will take each of his decisions individually and independently of any interference. The director will have recourse to independent legal advice as and when required. An awful lot of cases that go through requests for civil legal aid are relatively straightforward, and the majority of them will go through on the first request or after subsequent information has been required. It is only in more difficult circumstances that there is a need for a review process. In taking his decisions, the director of legal aid casework will have access, as required, to legal advice to support that process. The director will require a number of skills in running a large agency with a considerable budget such as this, and legal support is just one of those.
278. **Mr McCartney:** The Law Society said that somebody external to the Department should be recruited. Is that a possibility? Could that happen, or do you feel that it has to be from within?
279. **Mr McGuckin:** It depends on the nature of the appointment. The person who is employed in an agency is normally a civil servant. So, if you appoint somebody from outside the Department or the Civil Service, they will, on appointment, effectively become a civil servant. They could be recruited from outside the Department. For example, it is a Senior Civil Service post, and all those posts at those grades are currently being recruited externally. There is an external competition running now and, ultimately, an external person could go into the post. As I understand it, the Law Society, at one stage — it is going back a number of years — had an individual who had previously been a civil servant running the legal aid department for it.
280. **Mr McCartney:** The Bill states:
“The Department must designate a civil servant in the Department”.
281. I am not saying that that should not be the case, but does it have to be the case? In other words, if someone outside the Department sees this advertised, are we legislating so that they cannot be appointed?
282. **Mr McGuckin:** Not necessarily. Were the person to be recruited, they would be appointed to the Department first, and the Minister would then designate that individual as the director of legal aid casework. So you could run an external competition; it would not be a public appointment as such, but somebody would be recruited to the Department and then designated as the director of legal aid casework.
283. **Mr McCartney:** I do not think that is clear from reading it. It says:
“The Department must designate a civil servant in the Department”.
284. If you were to read that in an advertisement, you might think that if you are not in the Department, you cannot apply.
285. **Mr McGuckin:** If it went to an external recruitment process to fill the post, the process would make clear that your appointment would be first to the Department and, following that, you would be designated as the director of legal aid casework. The Minister would address that issue.
286. **The Chairperson:** Would there be an internal and external competition?
287. **Mr McGuckin:** We do not have any plans to do that at this point. I am not sure that we have looked precisely at what the mechanism is for the transfer of the existing responsibilities. There is an individual who is currently the chief executive of the Legal Services Commission, and we would have to look at what happens to that individual and

- the potential for retaining the expertise over a transition period, then look at how you fill the post again in the future.
288. **The Chairperson:** Taking that transition into account, in the future will there be competitions for this post, or would it just be the Minister designating whoever he wants? Will there always be a competitive process for someone to get this job?
289. **Mr McGuckin:** There would not necessarily always be a competitive process. There are a number of ways in which people get moved around in the Senior Civil Service (SCS). You could have a direct competition into the post; you could have a competition within the existing grades of staff across the SCS in all of the Departments; or you could be looking at a managed move within the Department or, more generally, across the SCS.
290. **Mr Elliott:** On the same topic, I am not comfortable with the way it is written, as Mr McCartney has highlighted:
- “The Department must designate a civil servant in the Department”.*
291. You have indicated, Mark, that were there to be wider recruitment, the person would be recruited into the Department and then be appointed director. However, should it not be the opposite way round? The person should be recruited to the position, and then become a civil servant. To me, that is better. I do not want to discard the opportunity for a civil servant to become director, but I also do not want to discard the opportunity for someone from outside the Civil Service, or certainly the Department, to be appointed.
292. **Mr McGuckin:** Going back to what I said in response to Mr McCartney, there are a number of ways in which this type of post can be filled. Sometimes, it will be done through direct recruitment into a post. When you do that, ordinarily you become a civil servant first and the post-holder second, because you bring with you rights, such as tenure and so on, that are wider than just that post-holder. In most cases, you are recruited into the SCS and then find your way into a particular post.
293. There have been occasions in the past, and they will probably continue, where people are directly recruited into a post, but it is usually through the process of becoming a civil servant in response to that particular post. They then retain the right to be able to move to other posts.
294. **Mr Elliott:** You say that that is the normal way of doing it, but is there anything to stop an open recruitment process that could allow people who are not civil servants, but also people who are civil servants, to apply for that post? Is there a method to do that?
295. **Mr McGuckin:** Yes, there is. It is the same as any open competition. If the post was identified as one for which you wanted to have an open competition, that competition is not just open to people outside the Civil Service but to people internally in the Civil Service. They are not excluded from it. Any competition would be open to both internal and external candidates, if it was an external recruitment process specifically for this post.
296. **The Chairperson:** Clause 3.
297. **Mr McGuckin:** Clause 3 is on the exercise of functions by the director, and it includes a number of safeguards to guarantee and protect the independence of the director and his decisions on the grant of civil legal aid in individual cases. Subsection (1) requires the director to comply with directions given by the Department and to have regard to guidance issued by the Department. Subsection (2)(a) provides that the Department must not give a direction or guidance about the granting of civil legal aid in individual cases, and subsection (2)(b) places a duty on the Department to ensure that the director acts independently of the Department when applying direction or guidance. Subsection (3) requires the Department to publish any directions or guidance, and subsection (4) provides for directions and guidance under the

- section to be revised or withdrawn from time to time.
298. As an overview, the Department can issue guidance and direction about carrying out the director's functions, but not in respect of individual cases. Indeed, the Department is under an obligation to ensure that the director acts independently when applying a direction or guidance in relation to an individual case. To go further, when the director refuses an application for funding or further funding, there is provision elsewhere in the Bill for an independent appeal panel to hear appeals against those decisions.
299. I will look at the comments from the consultation. The Law Society stated that the Department had not taken on board the concerns of the Joint Committee on Human Rights about the designation of a departmental official as the director of legal aid casework. The Committee felt that adherence of such an official in the Civil Service code pledging loyalty to the Minister of State effectively trumped the practical arrangements of the guidance. A number of other concerns were raised by the Joint Committee on Human Rights on the need to ensure compatibility with article 6, and the Law Centre proposed a number of amendments. I do not propose to go through all of those, because they will be in your briefing. However, when we were putting together the safeguarding regime over individual decisions when we were developing the new arrangements, we were very alert to the issues that had been raised by the Joint Committee on Human Rights, and, indeed, the Joint Committee on Human Rights was concerned about the independence of the director of legal aid casework in an environment where there was not access to an independent appeals mechanism. We addressed that in Northern Ireland by making provision in the Bill for an independent appeals mechanism. So the final arbiter, ultimately, if the director of legal aid casework refuses an application for funding or further funding, is that independent appeals panel, which we will talk about later on. I think that we have addressed in the provisions the concerns that some individuals have highlighted, which came from the Joint Committee on Human Rights in Westminster.
300. **Mr McCartney:** In relation to the specifics of the Law Centre's amendments, is there any particular reason why you think they would not strengthen the Bill?
301. **Mr McGuckin:** I am just checking to see whether I have that.
302. **Mr McCartney:** It is on page 8 of Hansard. The reason I ask is that I know that you were at the meeting in the Long Gallery. A number of people there raised issues and concerns about independence and conflict of interest. To me, these two proposals seem to strengthen and militate against those concerns.
303. **The Chairperson:** Have you found them, Mark?
304. **Mr McGuckin:** Yes. I have them here. The Law Centre has suggested the addition —
305. **Mr McCartney:** In relation to clause 3(1) (a) it is:
"comply with directions given by the Department about the carrying out of the Director's functions...save where this compromises the Director's independence".
306. That is the Law Centre's addition there. Have you any particular reason why you do not find it acceptable?
307. **Mr McGuckin:** I do not think that it is necessary. What we are protecting here are decisions on individual cases. Clause 3(2) states that the Department:
"must not give a direction or guidance about the carrying out of those functions in relation to an individual case, and ... must ensure that the Director acts independently"
308. while doing that. I am not sure what is added by the additional element that has been suggested.

309. **Mr McCartney:** I accept that it becomes very explicit about independence and, in a sense, if you do not feel that those words are necessary, then putting them in should not be a burden.
310. **Mr McGuckin:** We looked at this in the broader scheme, and I think that there are some comments which came from wider consideration in Europe about what a legal aid scheme should look like and its dependence. We looked at how the director would apply his function within the broader legislative framework. The director will consider applications, and one of the concerns was about applications for funding to challenge decisions of Government. In all the activities that he undertakes, the director will be bound by the specific requirements of each of the schemes involved, which set out the criteria for taking those decisions, and will do that independently of the Department.
311. The other aspect to that is in regard to drafting. We went through the detail of the Bill as it came up with the legislative draftsman. I am not sure whether there would be any unintended consequences that we cannot identify at this point in time if we added additional wording into the carefully crafted wording of the legislative draftsman.
312. **Mr McCartney:** OK, but just as a sort of proposition, if this became an amendment, it is not something about which you would say, "If you do this, it will result in something that is negative to what we are trying to achieve". I do not expect you to answer that here and now.
313. **Mr McGuckin:** I cannot see it having that impact at this point, but I would like to take it away and look at it.
314. **Mr McCartney:** It is the same with the proposition in relation to clause 3(2). Reading it and from what was said at the presentation in the Long Gallery, it seems to add strength to what you are trying to achieve, particularly when issues of independence and conflict of interest are raised. Can I ask that you come back with a considered view of that? If they were tabled as amendments, what effect would they have?
315. **Mr McGuckin:** Again, I do not think that there is anything there, particularly. I am not sure about the extent to which it actually provides any strength to the clause as it stands or the overall scheme as it stands. I tend to look at this as an overall package of measures to which each of the clauses contributes, in its own way, to pulling together.
316. **Mr Pdraig Cullen (Department of Justice):** If it is of assistance, I wonder whether I might intervene with an additional comment. The letter from the Departmental Assembly Liaison Officer (DALO) before you addresses the potential impact of directions and guidance. If I may, I refer you to the fifth page of the note. We set out there that it may be important to address the issue of the potential impact. Some misunderstanding may perhaps have arisen about the potential impact of directions and guidance. It notes that:
- "it must be emphasised that any direction or guidance issued by the Department cannot override"*
317. relevant legislation, whether that be primary or secondary legislation. The guidance and directions sit under the umbrella of the formal primary legislation and the details of the secondary legislation. I hope that is of assistance to the Committee. You will see that the DALO letter goes on to give two examples: one of a direction and another of guidance that has been issued to date.
318. **Mr McCartney:** Are you saying that those particular amendments apply here?
319. **Mr Cullen:** Yes, in that there is a clear understanding of what directions or guidance can do. They cannot override legislation, whether primary or secondary. Respectfully, in the wealth of material that is before the Committee, that point of detail is clearly articulated by us.
320. **The Chairperson:** We will move to clause 4.

321. **Mr McGuckin:** Clause 4 deals with the delegation of the functions of the director. Subsection (1) allows the director to delegate his functions. That enables the director to delegate, for example, decision-making on the merits of a legal aid application, the application of any relevant merits test for a particular area of work with regard to a legal aid application and the ongoing monitoring of decisions.
322. Subsection (2) provides under clause 3 that the Department may give directions about the delegation of the director's functions. The Department will be able to require the director to delegate or not to delegate particular functions and to give directions about persons to whom the director may or may not delegate those functions.
323. Subsection (3) ensures that the function of the director may be delegated entirely or subject to limitations or conditions. For example, decision-making on the merits and financial eligibility may be delegated to a provider, whether they be solicitors, those in private practice or the voluntary not-for-profit sector, on particular matters or subject to financial limits as to the amount of work that can be carried out on a case before it must be referred to the director for a decision on further legal aid funding.
324. Subsections (4) to (8) make provision about the effect of delegation in the earlier subsections. Subsection (4) provides the power to limit the duration of a delegation and to revoke it. There are a number of other protections as you go through it. The Association of Personal Injury Lawyers suggested that anyone who is considering an application for legal aid, whether it is the director or someone who has functions delegated to them, should be legally qualified and have legal knowledge, experience or training.
325. The Bar Council also talked about the existing system of appeals panels. In effect, the clause is about the ability of the director of legal aid casework to delegate decisions to his staff and outside the organisation; for example, to a solicitor in a particular scheme, to do a certain amount of work. For instance, under the green form scheme, they would be able to do a certain amount of work before having to come for approval to the director of legal aid casework. That is what this facilitates.
326. **Mr Elliott:** Does the director have the authority to delegate at present?
327. **Mr McGuckin:** I believe that he does, yes. Part of this is about easing the process and facilitating decisions to be taken at the right level.
328. **Mr Elliott:** At present, could that be delegated to an outside panel or group of lawyers?
329. **Mr Cullen:** Under the current legislative framework, under secondary legislation, yes. Solicitors deal with initial funding, which is called legal advice and assistance, under what we refer to as the green form scheme. Solicitors apply the financial eligibility test for that and can provide work up to a specified limit. When they reach that limit, they can apply to the Legal Services Commission for an extension of funding. However, in the first instance, the solicitor decides. The solicitor applies the financial eligibility test for the second form of funding under what we call ABWOR — assistance by way of representation — and can apply to the commission for authority to fund the work to go to court for certain types of cases. So, it would be a matter of reproducing that form of arrangement for the lower level of cases. In the County Court or High Court, solicitors must apply to the commission for funding.
330. **The Chairperson:** We will move on to clause 5.
331. **Mr McGuckin:** Clause 5 provides for the production of an annual report by the director of legal aid casework on how he carried out the functions of his office during the financial year. The other provisions are about sending it to the Department and its being laid. The clause has been broadly welcomed, although the Law Centre raised an issue about late publication by the

- Legal Services Commission of its annual reports and accounts. It is fair to say that the situation has improved significantly in the commission, and, generally, the reports are now published in line with the required framework. As I think you pointed out, Chairman, there are other requirements as to the publication of annual reports and accounts.
332. There is a question mark over whether this report would form part of the annual report and accounts or form a separate report. However, we envisage that it would be published in line with the timing of those.
333. **The Chairperson:** OK. If members have no questions, we will move to clause 6.
334. **Mr McGuckin:** Clause 6 introduces schedule 2 to the Bill, which contains a large number of amendments. The main statutory provisions governing legal aid are encompassed in the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and the Access to Justice (Northern Ireland) Order 2003. The 2003 Order will, ultimately, replace the 1981 Order, but large parts of it remain non-commenced, and that has been a complicating factor in bringing forward the Bill.
335. To support the legal aid reform programme, the provisions in articles 10 to 14 and 17 to 20 of the 2003 Order, regarding civil legal services, will be commenced at the same time as the commission is dissolved. Pending commencement of articles 21 to 31 of the 2003 Order, regarding criminal defence services, representation in criminal cases will continue to be provided under Part III of the 1981 Order.
336. As an interim measure, the Bill will also amend Part III of the 1981 Order to replicate some of the provisions in the 2003 Order regarding the assignment of solicitors and counsel, provide for a registration scheme and place restrictions on the disclosure of information in relation to criminal legal aid. Chairman, I am not sure whether
- you want to go into the detail of that now or whether you want to pick it up during the discussion of the schedule.
337. **The Chairperson:** If you are going to cover it in the schedule, we can do it then.
338. **Mr McGuckin:** The only comment was from the Bar Council, which said that it had sought legal advice and that it would revert to you in due course. We would welcome sight of that as well.
339. **The Chairperson:** That is fine. I have no questions on clause 6. Do you want to touch on clause 7? Had you planned to, or will we move on?
340. **Ms Siobhan Broderick (Department of Justice):** I was going to ask whether we can deal with clauses 7 and 8 together, because they are interlinked.
341. **The Chairperson:** Yes.
342. **Ms Broderick:** They both deal with the Coroners' Courts, as you can see. Clause 7 makes the Lord Chief Justice president of the Coroners' Courts by amending section 12(1D) of the Justice (Northern Ireland) Act 2002. That section lists the courts of which the Lord Chief Justice is already president, and it is amended by the addition of the phrase "Coroners' Courts" to the list. The inclusion of that amendment in the Bill makes it subject to cross-community support under section 84 of the Justice (Northern Ireland) Act 2002.
343. Clause 8 requires the Lord Chief Justice to appoint one of the coroners to be presiding coroner, who will have responsibility for the Coroners' Courts and the other coroners. It also provides that the presiding coroner will hold office in accordance with the terms of his or her appointment. If the office becomes vacant, the Lord Chief Justice may then appoint an acting presiding coroner, pending a new appointment. These provisions are consistent with the existing arrangements for the appointment of presiding a County Court judge and a presiding district judge for Magistrates' Courts. Clause 8(3) and (4) provide for some small consequential

- amendments that arise. Two comments were received in respect of those. The Human Rights Commission asked whether the provisions would assist in mitigating delay in the Coroners' Courts. The Policing Board asked a similar question, and asked for more details in respect of the presiding coroner.
344. The changes are intended to assist in the better administration and case management of inquests, including legacy inquests. The role of the presiding coroner will be to facilitate the coordination and management of cases in the inquest system, including legacy cases.
345. **The Chairperson:** There are no questions on that. Thank you, Siobhan. We will move on.
346. **Mr McGuckin:** Clauses 10 and 11 deal with supplementary and incidental provisions and repeals. Are you happy enough with those, Chairman? Shall we just move on to the schedules?
347. **The Chairperson:** Yes. We have no issues with those clauses.
348. **Mr McGuckin:** Schedule 1 is straightforward. It is about transferring the staff of the Legal Services Commission to the new executive agency in the Department of Justice. The Bill provides that:
- "Persons who immediately before the dissolution date are employed by the Commission are transferred on that date to employment in the Northern Ireland civil service".*
349. The Transfer of Undertakings (Protection of Employment) Regulations (Northern Ireland) 2006 will apply, and all staff will move to Northern Ireland Civil Service terms and conditions. That is fairly straightforward. The Information Commissioner identified that he would be in touch regarding the transfer of records from the commission to the Department. We welcome that engagement.
350. **The Chairperson:** Is that everything on schedule 2?
351. **Mr McGuckin:** That is schedule 1.
352. **The Chairperson:** Sorry. We have yet to cover schedule 2.
353. **Mr McGuckin:** Schedule 2 contains a large number of amendments, which I have introduced already when talking about clause 6. I will go through them. The first substantive issue is the assignment of solicitors and counsel. The Bill gives the Department the power to make rules that must grant a legally aided person the right to select any representative — solicitor or counsel — to act on his or her behalf, provided that the representative has not been prohibited from being so assigned by either the Law Society or the Bar Council. There is a rule-making power and the Department could, among other things, prescribe the circumstances where the right to select a representative did not apply or restrict the right to select the representative in place of a representative who was previously selected. Effectively, there is a fundamental right to select your own representatives, but there are occasions when people want to change their representative, and the rules would set out when it is reasonable to make such a change, for example when there is a fundamental breakdown in the relationship between the individual and their legal representative. I am not sure that any comments were raised on that aspect.
354. **The Chairperson:** The Examiner of Statutory Rules raised an issue with the Committee that affirmative resolution initiates a lot of this but that it is subject to negative resolution subsequently. He suggests that it should be affirmative on all occasions. What is the Department's view on why it should be negative resolution?
355. **Mr McGuckin:** I will defer to Pádraig on that. However, to set the context, my understanding is that, with issues like this that are set down in rules and regulations, it is standard practice to allow the Assembly the opportunity to look at the first set and the detail of what is included in those rules and

- regulations and to consider carefully what their intent and practice is. Subsequently, there are minor changes and modifications made to those, and it is normal practice for them to be taken forward by negative resolution, because they are, effectively, reasonably minor changes to an existing framework. Padraig, do you want to add anything?
356. **Mr Cullen:** The Committee may have available to it the supplementary note that the Department submitted upon receipt of the advice of the Examiner of Statutory Rules. We record, as Mark said, our understanding that statutory rules are normally subject to the negative resolution procedure. We also refer to the fact that the current drafting of the clauses reflects the previous approach in the Justice Act (Northern Ireland) 2011, which made two reforms to financial eligibility in respect of criminal legal aid whereby it is provided that the first set of rules will be subject to the draft affirmative procedure but that subsequent rules will be subject to the negative procedure, as the clause is currently drafted. We respectfully note the views expressed by the Examiner of Statutory Rules. If the Justice Committee, together with the Assembly authorities, wants to provide that all the rules should be subject to the draft affirmative procedure, the Department would not wish to argue against that.
357. **Mr McGuckin:** I will continue with schedule 2 and the issue of register of solicitors and counsel eligible to be assigned. The Bill gives the Department the power to make rules in relation to representatives who are eligible to be included in the proposed registration scheme. That will be subject to a further public consultation and affirmative resolution by the Assembly prior to implementation. The scheme is included in the Bill only because the Department is not in a position to commence the criminal defence services provisions in the 2003 Order, and it is necessary for the provisions in relation to the criminal elements of the registration scheme to be re-enacted.
358. The rules could prescribe the code of practice setting out the conditions that must be met by representatives to qualify for registration; require registered representatives to comply with the code; enable compliance with the code to be monitored; and introduce sanctions if representatives are not in compliance with the code. That was in the 2003 Order but was not commenced. In looking at the Legal Services Commission's performance, the Public Accounts Committee was critical of the delay in bringing that forward. We have engaged with the Law Society in developing a code, and we plan to engage with the Bar Council.
359. The Law Society was concerned that there was an element in the 2003 Order that required the Department to consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland and undertake such other consultation as appears to him to be appropriate. There are other provisions in the 1981 Order that require the Department to consult with a number of statutory consultees, including the Lord Chief Justice and the Attorney General. In bringing forward the rules under this rule-making power, in compliance with its obligations, the Department will always consult with the Law Society and the Bar Council. In other words, it was not necessary to prescribe the statutory consultees because they are already covered in the 1981 Order. Furthermore, we have established that we would consult with the Bar and the Law Society on these issues as a matter of good practice.
360. **The Chairperson:** OK. Thank you.
361. **Mr McGuckin:** The Bill includes provision to prevent the disclosure of information in connection with a person seeking criminal legal aid except with his or her consent as permitted under the prescribed rules made by the Department. It brings the schemes for civil and criminal legal aid under the same practice. Effectively, that means that, if information is being disclosed by an applicant in support of their legal aid application, it will not be disclosed

- more generally. However, that does not preclude the publication of information in relation to the amount of funding paid to any person as part of that process. I do not know whether there were any concerns about that.
362. **The Chairperson:** No.
363. **Mr McGuckin:** The next issue relates to the funding of civil legal services by the Department. This is largely about replacing the arrangements for the Commission with the new agency of the Department. The Law Society outlined that, at paragraph 6(11) of schedule 2 —
364. **The Chairperson:** I am sorry for interrupting but, as far as I am aware, we have no further issues with schedule 2, unless members have anything to add. It is just to save some time. You have addressed the issues that we have taken note of.
365. **Mr McGuckin:** Are you happy enough with the issue of appeals panels? Some issues were raised about the composition of appeals panels and so on. Maybe I could take a minute to address that?
366. **The Chairperson:** Around the appeals mechanism and illustrating the independence of it?
367. **Mr McGuckin:** Yes.
368. **The Chairperson:** OK.
369. **Mr McGuckin:** The existing appeals mechanism is a panel of barristers and solicitors who have been nominated by the professional body. They hear appeals against decisions to refuse the granting of legal aid or to refuse further funding. In the Bill, we have made provision for enhancing the existing arrangements, in line with the public appointments process, through a new set of appeal panels to hear those appeals. When we originally consulted on that, we suggested that an appeal could be heard by an individual sitting alone. In response, consultees came back and said that you would get a better outcome if you had a panel of members. Consequently, we agreed to provide for a panel of three members.
370. We were keen to ensure that there was a range of experience on the appeal panels and to open it up to people who have experience in the relevant areas; for example, social care and so on for family matters. Consultees made a very strong argument for having lawyers on the appeal panels and said that the presiding officer of an appeal panel should be a lawyer. We will bring forward regulations to facilitate that. Therefore, appeals against the refusal of civil legal aid or the refusal of additional funding will be heard by a three-person appeal panel, the presiding officer of which will be a practising lawyer. We hope to have some wider experience on the panels, but we expect a number of lawyers to be involved.
371. **Mr Elliott:** Is an appeal panel's decision final?
372. **Mr McGuckin:** An appeal panel's decision is final. It is subject to oversight by the High Court through the judicial review process. Therefore, a decision by an appeal panel can be judicially reviewed, but it will not go back to the director of legal aid casework for ratification. A panel's decision, once taken, is final.
373. **Mr Elliott:** I am just thinking of the Agriculture Department's appeals process, whereby the Department can overturn an appeal decision that finds in favour of an applicant. This is not like that.
374. **Mr McGuckin:** No, it is not like that. To be fair, when we developed our proposals, we looked very carefully at what was happening in England and Wales. The Joint Committee on Human Rights at Westminster voiced concerns about the independence of the overall process. In our view, the independent appeal panel and the construction that we have now will underpin the independence of decision-making.
375. **Mr Anderson:** For clarification, when you say that the independent appeal panel will be a three-person panel, will that involve three specific people or will

- three persons with specific expertise in various areas be chosen? Will three specific people sit on the panel forever and a day until they are replaced, or can you choose from a number of people with expertise in a number of areas?
376. **Mr McGuckin:** We are working up the detail of the proposals, and we will bring those to the Committee as part of the regulations. The intention is, effectively, to have two panels of people. One panel will comprise the chairs or presiding officers of individual appeal panels, and there will be another panel from which to draw members. We hope that, if there were a set of appeals for a specific class of cases, you would try to make sure that you had people with appropriate experience on the panel. We are not seeing a significant number of appeals coming forward. Something like 70% of initial applications are awarded on the first or second pass.
377. We plan to improve the administrative processes so that, when an application is refused, the applicant gets detailed reasons for that refusal. If those reasons amount to a deficiency in the application, they will be able to address those when they make a second application, because they will have been provided with the detail. If an application is refused because it sits outside the remit of the scheme to which they have applied, that will be made clear. Through that process, we hope to reduce the number of cases that are refused and reach the appeal stage. Therefore, the appeals panels will hear a much smaller number of appeals.
378. **Mr Anderson:** So there could be two appeal panels.
379. **Mr McGuckin:** It could be several appeal panels.
380. **Mr Anderson:** A number of people will be appointed to sit on those appeal panels.
381. **Mr McGuckin:** Yes.
382. **Ms Broderick:** The only other issue is the Attorney General's amendment, if you want me to address that.
383. **The Chairperson:** I had not really planned to ask you about it, to be honest.
384. **Ms Broderick:** OK.

28 May 2014

Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
 Mr Raymond McCartney (Deputy Chairperson)
 Mr Sydney Anderson
 Mr Tom Elliott
 Mr William Humphrey
 Mr Seán Lynch
 Ms Rosaleen McCorley

Witnesses:

Mr John Larkin QC *Attorney General for Northern Ireland*

385. **The Chairperson:** I welcome the Attorney General, Mr John Larkin QC, to the meeting. Obviously, you have picked up on some of the Health Minister's issues, and members may also have issues in other contexts. I will hand over to you.

386. **Mr John Larkin (Attorney General for Northern Ireland):** I am very grateful, Chairman. Once again, it is a pleasure to be before the Committee.

387. I draw attention to the letter from Ms McCallion to the Committee Clerk dated 30 April. That sets out a different statutory text from the one that was previously circulated to the Committee. This text makes it clear that it is confined to deaths occurring within a health and social care context. The text seems to me to be largely straight-forward. I note the concerns that you have helpfully reproduced from the Health Minister. For two reasons, it does not strike me that this will create a burden on the health service. The policy context ought to be tolerably clear. It has come to my attention, directly from my experience and from the media, that there is concern about deaths occurring in a hospital context in particular that have not been referred to the coroner. There appears to be a gap in potential investigation for accountability purposes. This is designed to close that gap.

388. Textually, I do not think that this is capable of overreach. The context seems to me to be tolerably clear. The second more pragmatic reason is that, even if I wished, which I do not, I do not have the human resources available to put a burden, as it were, on the health service. That is, of course, in no way, any part of my function. There is a concern, however, that deaths can occur in a hospital context, and at present it is largely the decision of doctors as to whether those matters are referred onwards to the coroner. The amendment will plug that gap. It will be possible to obtain information, for example, about serious adverse incidents that have not been referred to the coroner or, indeed, deaths that may be regarded as suspicious, that give rise to concern or that may not be classed as serious adverse incidents. One concern would be that, if one confined it ab initio only to cases of serious adverse incidents, one might find some elasticity in the definition of "serious adverse incident".

389. With that briefest of outlines, I am happy to respond to questions from the Committee.

390. **The Chairperson:** Some of the evidence that we have heard suggests that the amendment might usefully be applied across the board. Let me cut to the chase: there will be those who want this power to be applicable for investigations into the past, particularly to be used against the state. Could the amendment in any way open the floodgates for those with that agenda?

391. **Mr Larkin:** No. The amendment is textually confined to health or social care, so it could not do that. I understand the argument that this should be a broader power. Indeed, the draft that was submitted earlier — although it was always clear that the policy context was, as far as I was concerned, health or social care

- could have lent itself to broader application. This text does not do so. There is, as we know, a huge debate, to which I have contributed, as to how we deal with our troubled past.
392. I suggest that this is designed to address an issue that is very much alive here and now. At this stage, it is probably not a good idea to give a general power that might be capable of a legacy application, other than in the context of a more global approach to those difficult issues. However, I confirm that this text cannot be used in that way.
393. **Mr Elliott:** You are very welcome, and thanks for the information. The Minister of Health has queried why the Bill is being used to change legislation. What is the reason for that?
394. **Mr Larkin:** The clue is in the title: the Legal Aid and Coroners' Courts Bill. It deals with an aspect of coronial procedures, so it strikes me as falling squarely within the context of the Bill. The issue that the amendment seeks to address is, I dare say, reasonably urgent. We are all familiar with media reports about deaths occurring without being referred to the coroner. This is a timely opportunity to address that important issue.
395. **Mr Elliott:** Do you think that is an easier way than amending the Coroners Act (Northern Ireland) 1959?
396. **Mr Larkin:** This will do that by introducing a new section 14A.
397. **Mr Elliott:** It will amend it directly without going through another Bill?
398. **Mr Larkin:** This introduces a new section 14A —
399. **Mr Elliott:** I know that it does. Could you amend the Act without using this Bill?
400. **Mr Larkin:** You would need a separate Bill for that.
401. **Mr McCartney:** How would it come to your attention to use that power?
402. **Mr Larkin:** That is a very good question. I would explore ways to draw out the information efficiently. I am conscious that the information that tends to come to me is pretty largely Belfast-concentrated. We would probably engage in a number of pilot exercises in hospitals outside Belfast and seek information about serious adverse incidents that had not been referred to the coroner — for example, from Altnagelvin, to take one place of obvious interest to you, Mr McCartney — and see whether the cases that had not been referred that were classed by medical personnel as serious adverse incidents were cases that ought properly to have been investigated by coronial inquisition. I would imagine that I would not direct an inquest in every case, but at least relatives would have the reassurance of knowing that an independent set of eyes — mine and those of my colleagues — had looked at the circumstances involving their relative's death.
403. I mentioned "relative's death". It is all very well if the deceased has people who will speak up for him or her in the context of a broader supportive family. I am equally and possibly more worried about the people who have no one to speak up for them, such as those who die elderly and alone. It would be not only my experience but, I suspect, the experience of very many people that, to put it mildly, the quality of attention that patients get is often supported by the quality of representations that are made by a supportive and plainly engaged family circle.
404. **Mr McCartney:** As regards placing a burden on, say, medical staff, are there circumstances in which a case could be referred to the Coroners' Court unnecessarily?
405. **Mr Larkin:** I certainly would not refer any case to the Coroners' Court that would not be necessary.
406. **Mr McCartney:** What about medical people who could feel that, if they do not refer a case, there would be an extra pair of eyes on them, so to speak?

407. **Mr Larkin:** In my view, it would be a very exceptional case, which medical personnel class as a serious adverse incident, in which the incident was in any way causative of death, which ought not to go to the coroner. However, as we have plainly seen, such cases do exist. This will close that gap. There is, of course, the category of case that is, in the turn of phrase of Donald Rumsfeld, “unknown unknowns”, whereby cases may perhaps properly be classified, or we may think that they ought to be classified, as serious adverse incidents but are not at present.
408. **Mr McCartney:** Thank you.
409. **Mr Elliott:** I have one quick question. Attorney General, I note that the Law Centre states that it would not circumscribe that power to cover only deaths that occur in hospitals in recognition that the principles apply to other deaths that may fall within the Attorney General’s ambit to direct an inquest. Are you confident that the provision would relate only to deaths in hospitals?
410. **Mr Larkin:** It would relate to deaths in hospitals or, for example, residential homes. If there were an example of ill treatment in a residential home, that could certainly fall within the purview of this provision. I am very glad that it would.
411. **Mr Elliott:** It would not, however, apply outside the health remit.
412. **Mr Larkin:** No. It would be within health and social care. Frankly, there are cases that I am looking at that are relative to the past in which it would be very handy to be able to call on the information, but I cannot do that. I am quite clear that this provision cannot be used other than in a health and social care context. There are few enough absolutes in the law, and that is one of them. I am quite certain of that.
413. **Ms McCorley:** Do you foresee that, in the case of someone at risk of suicide who was undergoing counselling, a counsellor could be found to be at fault in being neglectful and, therefore, in some way contributing to a death by suicide?
414. **Mr Larkin:** That would be a matter for the coroner’s inquest to look at. Anecdotally, one knows that there is concern among GPs when they refer patients whom they consider to be suffering from depression, for example, about how some of those cases are dealt with. The kind of cases that you refer to would certainly fall within this provision and the necessary information could be sought about them.
415. **Ms McCorley:** I heard about a case last week in which a person — a schoolchild — had suicidal thoughts, and, apparently, the services of a counsellor would not be available for two weeks. You are talking about burdens on health and social care services, and I hear unofficially from people who work in that environment that there are heavy burdens because of the need for counselling for people with suicidal thoughts. I could see how there might be circumstances in which, because of such heavy burdens, people might end up being seen as neglectful and contributing in some way.
416. **Mr Larkin:** The reassurance that individual counsellors, conscientiously carrying out often very difficult work, have is that the coroner’s inquest does not itself make findings of civil, far less criminal, liability, so it is important to bear that in mind. The function of the coroner’s inquest in health and social care cases is to bring understanding to a family so that they can understand how and in what circumstances their loved one met his or her death, and it is also for us, more broadly as a community, to learn lessons. In different contexts, we are all aware of the need to learn more about the awful affliction of suicide in many communities today.
417. **Ms McCorley:** I think that this may flag up shortfalls in the system.
418. **The Chairperson:** Attorney General, thank you very much.
419. **Mr Larkin:** Chairman, thank you.

4 June 2014

Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
 Mr Raymond McCartney (Deputy Chairperson)
 Mr Sydney Anderson
 Mr Stewart Dickson
 Mr Tom Elliott
 Mr Seán Lynch
 Mr Alban Maginness
 Ms Rosaleen McCorley

420. **The Chairperson:** We will go through each clause and schedule in the order that they appear in the Bill. Members can indicate their views on each clause with the aim of, hopefully, reaching an agreed Committee position that will be reflected in the Committee report. Once all the clauses and schedules have been discussed, there will be an opportunity to consider the Attorney General's proposed amendment. There are two tabled letters from the Department on the Attorney General's amendment and the issues that Mr McCartney raised with the Law Centre's proposed amendments. They arrived just before the Committee meeting started, so members can look at those now.
421. I refer members to clause 1, which deals with the dissolution of the Northern Ireland Legal Services Commission and the transfer of its functions to the Department of Justice. Do members have any views or comments? There are no comments, so I take it that members are content with clause 1 as drafted.
422. **The Chairperson:** Clause 2 is the designation of the director of legal aid casework. Do members have any comments on clause 2? Are members content with clause 2 as drafted?
423. **Mr McCartney:** I think that clause 2(1) could be better worded, but we will come back to that.
424. **The Chairperson:** Do you mean the words "a civil servant"?
425. **Mr McCartney:** Yes.
426. **Mr Elliott:** Sorry, what is that?
427. **The Chairperson:** Issues were raised about whether there is any rationale for specifying that the director should be a civil servant or whether the post should be filled by public appointment.
428. **Mr McCartney:** We might settle on that, but this might read better, "The Department must designate the director of legal aid casework as a civil servant in the Department after his or her appointment." As it reads now, some people might think that someone in the Department must get the job.
429. **Mr A Maginness:** Chair, I am slightly confused. Is it implicit or explicit in the Bill? I am not certain.
430. **Mr McCartney:** I think that it is not clear. That is just me; it may be clear to others.
431. **Mr A Maginness:** Of course, the words "must designate a civil servant" do not preclude the recruitment of somebody from outside who becomes a civil servant.
432. **Mr McCartney:** That is fair, but it is unclear.
433. **Mr A Maginness:** There is clearly an issue with the standing of the caseworker.
434. **The Chairperson:** The officials said that there would not necessarily have to be a competitive process and that there are a number of ways in which the post could be filled. The Department outlined that the person recruited would be appointed to the Department first, and then the Minister would designate that individual as the director. I am content with the clause as drafted. Are you suggesting that you might —
435. **Mr McCartney:** At present, we are OK. I am just expressing a reservation and

- saying that we might amend it, but we will not hold the Committee back at this stage.
436. **The Chairperson:** I am assuming that other parties are content with the clause as drafted.
437. **The Chairperson:** Clause 3 is the exercise of functions by the director. The Law Centre proposed a number of amendments to enhance the safeguards for independence. The Department's response is that it is satisfied that the current draft Bill provides sufficient safeguards. The Department was also concerned that the proposed amendments could have unintended circumstances — those are outlined in its letter to the Committee — that could not currently be identified, and it undertook to consider any potential negative impact of the proposed amendment. Are members content with clause 3 as drafted?
438. **Mr McCartney:** We will come back on the Law Centre amendments, but that will be at another stage.
439. **Mr A Maginness:** An important issue raised by the Law Society and others is that, although the director could exercise his functions independently on an operational basis, policy constraints could impact negatively on the exercise of that independence, because a category or species of cases could be excluded from consideration by the director. There must be safeguards against that.
440. **The Chairperson:** The Department outlined that directions or guidance cannot override the provisions of relevant legislation. That was its comeback on the classes of case issue.
441. **Mr A Maginness:** As a Committee, we need to be satisfied that that is a proper safeguard.
442. **The Committee Clerk:** The Department's response is in your tabled pack, and it outlines the hierarchy of legislative materials and how that would work. Its view is that the guidance comes below the primary and secondary legislation.
443. **The Chairperson:** I am satisfied with clause 3 given the information that the Department has provided that the guidance is secondary to legislation and cannot override what the legislation says.
444. **Mr A Maginness:** I will reserve my position on that, Chair.
445. **The Chairperson:** Are other parties agreed?
- Members indicated assent.*
446. **The Chairperson:** Clause 4 is on the designation of the functions of the director. Concern was expressed that anyone in the Department of Justice who is involved in considering an application for legal aid funding, as well as those in appeals panels, should be legally trained. The Bar Council believes that the current system of practising lawyers considering applications for legal aid and appeals works well and should continue. The Department outlined that any staff involved in considering an application will receive the necessary training to discharge the function effectively and will have recourse to independent legal advice if and when required. Appeals panels will be made up of three people from a range of backgrounds and experience of the types of issues involved, with a lawyer as the presiding officer.
447. Are members content with clause 4 as drafted?
448. **Mr A Maginness:** I am content with the panel of three and certainly content with a lawyer being the chair, but I am not certain whether I am convinced that lay members and non-lawyers bring anything to the evaluation, given that they will deal primarily with legal issues that require a thorough understanding of the law and the facts relating to the law. I am not entirely convinced that laypeople are in the best position to do that. It may well be that a panel consisting exclusively of lawyers might be a better make-up for the panel.
449. **The Chairperson:** We will note your comments. I am content with the

- clause as drafted. You can reserve your position on that aspect of it.
450. Clause 5 is on the annual report of the director. Are members content with that?
- Members indicated assent.*
451. **The Chairperson:** Clause 6 is the amendment of the law relating to legal aid, civil legal services and criminal defence services. Are members content with clause 6?
452. **Mr A Maginness:** Is that a purely technical amendment?
453. **The Chairperson:** Yes.
- Members indicated assent.*
454. **The Chairperson:** Clause 7 provides for the Lord Chief Justice to be president of the coroners' courts. Are members content with that clause?
- Members indicated assent.*
455. **The Chairperson:** Clause 8 makes provision for the presiding coroner. Are members content with clause 8?
- Members indicated assent.*
456. **The Chairperson:** No comments were received about clause 9, which is on issues to do with application to the Crown Court and to the Crown. Are members content with clause 9?
- Members indicated assent.*
457. **The Chairperson:** Clause 10 is about supplementary, incidental or consequential provisions. Are members content with clause 10?
- Members indicated assent.*
458. **The Chairperson:** Clause 11 is on appeals. No comments were received. Are members content with clause 11?
- Members indicated assent.*
459. **The Chairperson:** Clause 12 is commencement. Clauses 12(1) and 12(3) of the Bill provide for the commencement orders. In accordance with normal practice, these are subject to no Assembly procedure. The Examiner of Statutory Rules suggested that it may be more appropriate for clause 12(3), which is about "transitional" and "transitory provisions" to be worked into clause 10, which concerns the supplementary, incidental and consequential provisions. Orders under clause 10 are subject to negative resolution unless they amend or repeal a provision of primary legislation, in which case they are subject to the draft affirmative procedure.
460. So it is a difference in approach. There is no real fundamental issue. Are members content with clause 12?
- Members indicated assent.*
461. **The Chairperson:** Clause 13 is the short title. No comments have been received on clause 13. Are we content?
- Members indicated assent.*
462. **The Chairperson:** Schedule 1 to the Bill is about the transfer of assets, liabilities and staff of the commission. Are members content with schedule 1? There were not a lot of comments on it.
- Members indicated assent.*
463. **The Chairperson:** Schedule 2 is on the appeals panels. Concerns were raised about the manner of appointment and their composition. Only the presiding officer will be legally qualified. The Law Society suggested that the majority should be legal members, with a third member drawn for a relevant background. The Department outlined that its aim was to ensure a multidisciplinary approach, with a range of experience on the appeals panel that will include people who have experience in relevant areas, such as social care for family matters. They will be appointed through a public process. The Department points out that the detail of the proposals for appeals panels will be brought to the Committee as part of the regulations, by way of subordinate legislation.
464. Does the point that you made earlier also apply to appeals panels?

465. **Mr A Maginness:** That really is the same point. So it will be a matter of subordinate legislation in any event.
466. **The Committee Clerk:** Yes, the detail will be in that.
467. **Mr A Maginness:** OK.
468. **The Chairperson:** Appeals are to be considered without any oral hearing unless that is prescribed in regulations. An issue raised was whether appellants should always be allowed to appear in person unless they prefer not to do so. When an application for funding is refused, an outline of the reasons will be provided. The Department outlined that the provision of reasons for refusing an application means that, in most situations, it would be appropriate to deal with an appeal on paper. I am content on the subject of oral hearings. Are members content?
Members indicated assent.
469. **The Chairperson:** Do members have any issues with statutory exceptional grant funding? No.
470. Next is the funding of civil legal services. Do members have any issue with the schedule? No.
471. I will turn to the issues that were touched on earlier and which were raised by the Examiner of Statutory Rules. These were the new articles on legal aid advice and assistance, which make provision for rules for the assignment of solicitor and counsel where a criminal aid certificate has been granted. The first rules made are subject to draft affirmative procedure and subsequent rules to negative resolution.
472. The Examiner of Statutory Rules queried why the powers should be subject to the draft affirmative procedure in the first instance with subsequent rules being subject to negative resolution. In his view, given the significance of the powers, the rules should be subject to the draft affirmative procedure on the first and subsequent exercise of the power.
473. The Department asserted in its written response and in oral evidence that it is standard practice for the first set of rules and regulations to be considered by the Assembly and for minor changes or modifications that take place thereafter to be subject to negative resolution.
474. The Examiner of Statutory Rules has said that he believes that these changes are substantial and should be made by way of affirmative resolution in both instances. I tend to agree.
475. **Mr A Maginness:** That is a good point, Chairperson.
476. **The Chairperson:** If members are content, we will go for the affirmative procedure in both instances.
477. Next is new article 20A of the 2003 order. Is this the same issue?
478. **The Committee Clerk:** It is the same issue of affirmative resolution, but this one deals with the appeals panels. Again, given the significance of the provisions, the view of the Examiner of Statutory Rules is that the rules should always be subject to draft affirmative procedure rather than to draft affirmative procedure for the first rules and negative resolution subsequently. He provided a further note reiterating that, because of the significance of the powers. Having seen the Department's comments on his initial view, he remains of that view.
479. **The Chairperson:** Are members content to go with the draft affirmative procedure on this one?
Members indicated assent.
480. **The Chairperson:** Schedule 3 is repeals. No comments were received. Are members content with schedule 3?
Members indicated assent.
481. **The Chairperson:** I now turn to the Attorney General's proposed amendment. In the context of the powers of the Attorney General, the Minister of Health, Social Services and Public Safety said that he would not have any objection to the Attorney

General having the power to access the information necessary to allow him to discharge his functions. However, the Health Minister questioned the appropriateness of the Bill as the vehicle to make the Attorney General's proposed amendment. The Health Minister, in his initial letter dated 18 April, outlined a concern that a legislative requirement to produce documentation may have an adverse impact on staff coming forward to provide relevant information. Members are familiar with some of the concerns. Do members have any views on the Attorney General's amendment?

482. **Mr A Maginness:** I have just noticed in the responses that some health trusts say that this could provide clarity on their legal position on patient documentation. It is an interesting point. The issues are not clear, and the matter requires further consideration by this Committee, individually and collectively.
483. **The Chairperson:** OK. On the face of it, there is a natural sympathy for it, but there seem to be substantive points that you want to scrutinise further.
484. **Ms McCorley:** It would be hasty.
485. **The Chairperson:** My only issue is that we do not have the time to do that.
486. **Mr McCartney:** When is the faster, fairer justice Bill being introduced?
487. **The Committee Clerk:** It is due to be introduced before the summer recess.
488. **Mr McCartney:** It might be better to ask the Attorney General to consider that.
489. **The Chairperson:** OK. I am happy enough for the Committee to indicate a general sympathy for wanting to pursue this, but we want some more time to scrutinise it. If we can find an alternative vehicle, we may be sympathetic to doing that.
490. Thank you. The formal clause-by-clause consideration will take place on 11 June so that the draft report can be prepared and agreed at our meeting on 18 June.

11 June 2014

Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
 Mr Raymond McCartney (Deputy Chairperson)
 Mr Sydney Anderson
 Mr Tom Elliott
 Mr Seán Lynch
 Mr Alban Maginness
 Ms Rosaleen McCorley
 Mr Patsy McGlone

491. **The Chairperson:** We now move to the formal clause-by-clause consideration of the Bill. A paper outlining the Committee's position on each of the clauses and the Hansard report of the Committee's deliberations at last week's meeting were circulated to members yesterday and copies are in your information packs.

492. As the Attorney General's proposed amendment is not currently part of the Bill, it will not be covered in the formal clause-by-clause consideration. However, the Committee deliberations on the proposed amendment will be reflected in the report on the Bill. If members are clear, I will work through each clause and schedule. I will then put formally the Question on each. Where there are proposed amendments, I will put the Question on the proposed amendment first and then the clause.

Question, That the Committee is content with clause 1, put and agreed to.

Clause 2 (Designation of Director of Legal Aid Casework)

493. **The Chairperson:** Some members expressed the view that clause 2(1) could be better drafted and they may wish to consider this further at a later stage. The views will be reflected in the Committee report.

Question, That the Committee is content with clause 2, put and agreed to.

Clause 3 (Exercise of functions by Director)

494. **The Chairperson:** Some members expressed reservations about the framework in place to ensure the independence of the director regarding decisions in individual cases, whether policy constraints could impact negatively on the exercise of that independence because a category of cases could be excluded from consideration by the director and whether proper safeguards are in place. Some members indicated that they may wish to consider this further at a later stage.

495. Other members were satisfied that any direction issued by the Department could not override the provisions of the relevant primary or secondary legislation and noted that the requirement to follow directions and guidance issued by the Minister already exists. The different views of the Committee will be reflected in the Committee report.

Question, That the Committee is content with clause 3, put and agreed to.

Clause 4 (Delegation of functions of Director)

496. **The Chairperson:** Some comments were made regarding the make-up of the appeals panels, which are covered under schedule 2. No other issues were raised by members in relation to clause 4.

Question, That the Committee is content with clause 4, put and agreed to.

Question, That the Committee is content with clause 5, put and agreed to.

Clause 6 (Amendment of law relating to legal aid, civil legal services and criminal defence services)

497. **The Chairperson:** No issues were raised by members in relation to clause 6, but the Committee agreed to support two amendments to schedule 2, which we will come to in due course.

Question, That the Committee is content with clause 6, put and agreed to.

Question, That the Committee is content with clause 7, put and agreed to.

Question, That the Committee is content with clause 8, put and agreed to.

Question, That the Committee is content with clause 9, put and agreed to.

Question, That the Committee is content with clause 10, put and agreed to.

Question, That the Committee is content with clause 11, put and agreed to.

Question, That the Committee is content with clause 12, put and agreed to.

Question, That the Committee is content with clause 13, put and agreed to.

Question, That the Committee is content with schedule 1, put and agreed to.

Schedule 2 (Amendments)

498. **The Chairperson:** One member expressed some reservations about the proposed make-up of the appeals panel and the intention to include laypersons as well as legally qualified persons. It was noted that the detail of the appeals mechanism, including the make-up and procedures of the panels, will be set out in subordinate legislation, which will be scrutinised by the Committee and the Assembly, with the first set of regulations being subject to the affirmative resolution procedure and subsequent regulations subject to the negative resolution procedure. The Committee discussed the advice provided by the Assembly Examiner of Statutory Rules indicating that the regulation-making power is of some great significance to the Bill and therefore should be subject to draft affirmative procedure on the first and subsequent occasions. The Committee agreed with that assessment and indicated that we would support an amendment to make that change.

499. The Committee also noted the advice provided by the Examiner of Statutory Rules that the rules in respect of the

assignment of solicitor and counsel where a criminal aid certificate has been granted should also be subject to the draft affirmative procedure on the first and subsequent occasions given the significance of the powers. The Committee again agreed with that assessment and indicated that we would support an amendment to make that change.

500. The Department has now written indicating that, in light of the Committee's decision, it will instruct Legislative Counsel to draft the necessary amendments. A copy of the letter has been circulated to members. That saves the Committee from having to draft the amendments, but they will do what we wanted.

501. Is the Committee content with the proposed amendments to be brought forward by the Department of Justice to ensure that all rules made under the provisions in respect of the new article 36A, 36B and 38A provisions in the 1981 Order and article 20A provision in the 2003 Order in respect of appeal panels should be subject to the draft affirmative resolution procedure on the first and subsequent occasions?

Members indicated assent.

Question, That the Committee is content with schedule 2, subject to the proposed amendments, put and agreed to.

502. **Mr Elliott:** Subject to us being agreed to them.

Question, That the Committee is content with schedule 3, put and agreed to.

503. **The Chairperson:** As this is the end of the clause-by-clause consideration of the Bill, the Committee now needs to consider the long title of the Bill.

Question, That the Committee is content with the long title, put and agreed to.

504. **The Chairperson:** OK; thank you. The draft Committee report on the Bill will be prepared for consideration and agreement at next week's meeting.



Northern Ireland
Assembly

Appendix 3

Memoranda and correspondence from the Department of Justice

Memoranda and correspondence from the Department of Justice

10 March 2014	Correspondence from the Department outlining the purpose and contents of the Bill.
9 April 2014	Correspondence from the Department regarding the Coroners' Courts provisions in the Bill.
29 April 2014	Correspondence from the Department providing a copy of the Keeling Schedules for the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and the Access to Justice (Northern Ireland) Order 2013.
22 May 2014	Correspondence from the Department providing its response to the issues raised in the written and oral evidence.
23 May 2014	The Department's response to issues raised by the Assembly Examiner of Statutory Rules on the Delegated Powers contained in the Bill.
4 June 2014	Correspondence from the Department regarding the Attorney General for Northern Ireland's proposed amendment.
4 June 2014	Correspondence from the Department regarding the Law Centre NI's proposed amendments to Clause 3 of the Bill.
11 June 2014	Correspondence from the Department regarding two amendments to Schedule 2 of the Bill to address issues raised by the Assembly Examiner of Statutory Rules.
17 June 2014	Correspondence from the Department regarding proposed amendments to the Bill.

10 March 2014 - Correspondence from the Department outlining the purpose and contents of the Bill

FROM THE OFFICE OF THE JUSTICE MINISTER



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Our ref: SUB/312/2014

From: TIM LOGAN
Date: 10 MARCH 2014
To: CHRISTINE DARRAH

Summary

Business Area: Public Legal Services Division
Issue: Introduction of the Legal Aid and Coroners' Courts Bill
Restrictions: None
Action Required: For information.
Officials Attending: Mark McGuckin, Deputy Director, Public Legal Services Division
Carol Graham, Bill Manager

BRIEFING ON THE LEGAL AID AND CORONERS' COURTS BILL

BACKGROUND

In September 2010, the Minister of Justice commissioned a review of Access to Justice in Northern Ireland, including criminal and civil legal aid. The work has its origins in the provisions of the Hillsborough Castle Agreement 2010. The final report of the Review of Access to Justice was published in September 2011 and following consultation, the Minister announced his response to the Assembly on 2 July 2012.

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2. One of the recommendations was that the body responsible for legal aid delivery should become an Executive Agency of the Department of Justice and that the Chief Executive should be a statutory office holder responsible for decisions on individual civil legal aid applications without any involvement on the part of the Minister, any political institution or staff in the core of the Department.

3. The Minister accepted the Review recommendation that individual decisions should be taken independently of government and instructed the Department to carry out a detailed analysis of the consequences of delivering the administration of civil legal aid through an Executive Agency.

4. The completed analysis endorsed the recommendation, subject to a number of safeguards being put in place to protect the independence of decision making in the granting of civil legal aid. A set of safeguards was developed and consulted on and is now included in the Legal Aid and Coroners' Courts Bill, which will give effect to the change.

5. The Minister is currently in the process of seeking Executive approval to the introduction of the Bill in the Assembly. In advance of that approval, a copy of the draft Bill and the associated Explanatory and Financial Memorandum are attached on an 'in confidence' basis for the Justice Committee's information and consideration.

PURPOSE OF THE BILL

KEY ISSUES

4. The main purpose of the Bill is to dissolve the Northern Ireland Legal Services Commission (NILSC) and transfer its functions and staff to the Department of Justice. It will also set in statute a number of safeguards to protect

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the independence of the individual decisions on the grant of civil legal aid including the appointment of an independent Appeals Panel.

5. Linked to the transfer of the Commission's functions to the newly created Agency within the Department, the Bill will also make a series of amendments to the Access to Justice (NI) Order 2003 ("the 2003 Order") to reflect the fact that the Department, rather than the Commission, will have statutory responsibility for the administration of legal aid. The Bill will also make some consequential amendments to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, ("the 1981 Order").

6. The main statutory provisions governing legal aid are the 1981 Order and the 2003 Order. The 2003 Order will ultimately replace the 1981 Order but large parts of it remain uncommenced. The Bill makes changes to both Orders to reflect the transfer of responsibility from the Commission to the Department.

7. In order to support the legal aid reform programme, the provisions in Articles 10 to 20 (with the exception of Articles 15 and 16 which provide for a Funding Code) of the 2003 Order regarding *civil legal services* will be commenced on the same date that the Commission is dissolved and the Agency is created. This will require a suite of subordinate legislation to be brought forward for Assembly approval.

8. Pending the commencement of the provisions in Article 21 to 31 of the 2003 Order regarding *criminal defence services*, representation in criminal cases will continue to be provided under Part 3 of the 1981 Order. Accordingly, as an interim measure, the Bill will also amend Part 3 of the 1981 Order to replicate some provisions of the 2003 Order regarding the assignment of solicitors and counsel; provide for a registration scheme; and place restriction on the disclosure of information in relation to criminal legal aid applications.

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FROM THE OFFICE OF THE JUSTICE MINISTER



Department of
Justice
www.dojni.gov.uk

9. The transfer of the functions and staff to the Department of Justice is purely administrative and, with two exceptions, the other provisions are technical in nature and are currently covered in existing legislation. The two exceptions (a new appeals panel and the new provision for the grant of exceptional funding) have both been the subject of recent, and separate, consultation exercises. The new appeals process, as one of a number of safeguards included in the Bill to protect the independence of individual decisions on the grant of civil legal aid, was considered by the Justice Committee at its meeting on 20 June 2013.

10. For each of the substantive areas in question (appeals, financial eligibility, costs protection, remuneration, levels of representation, registration scheme etc.) the Department will bring forward secondary legislation, which will be the subject of separate consultation and subject to the Justice Committee and Assembly's scrutiny procedures. Some of the pieces of secondary legislation will involve the Assembly's affirmative resolution procedure.

11. The Bill will also make the Lord Chief Justice the President of the coroners' courts, and require him to appoint a Presiding Coroner, thus formalising his responsibilities in relation to the coroners and the coroners' courts in line with existing arrangements for the other judiciary and courts in Northern Ireland.

12. These provisions follow a recommendation of the Review of the Criminal Justice System in Northern Ireland (2000), that the Lord Chief Justice should have a clearly defined position as head of the judiciary, and that each tier of the judiciary should have a representative in order to facilitate the co-ordination and management of court business and to provide a figurehead. Those recommendations were implemented in the Justice (Northern Ireland) Act 2002, but arrangements for the coroners' courts were not included at that time.

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HUMAN RIGHTS AND EQUALITY

13. All proposals have been screened and are considered to be Convention compliant. Specific reforms which will make use of the new powers have been or will be the subject of fresh scrutiny by officials to ensure compliance.

14. The Bill has been screened out as not having an adverse impact on any of the section 75 categories in the Northern Ireland Act 1998.

NEXT STEPS

15. The next Executive meeting is on 20 March and if the Bill were to receive clearance at this meeting introduction would then take place on 31 March 2014, subject to the Speaker's approval.

A handwritten signature in black ink that reads "Tim Logan".

**TIM LOGAN
DALO**

9 April 2014 - Correspondence from the Department regarding the Coroners' Courts provisions in the Bill

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of
Justice

www.dojni.gov.uk

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Our ref SUB/449/2014

Christine Darrah
Clerk to the Committee for Justice
Northern Ireland Assembly
Room 242
Parliament Buildings
Ballymiscaw
Stormont
BELFAST BT4 3XX

9th April 2014

Dear Christine

LEGAL AID AND CORONERS' COURTS BILL

Thank you for your letter of 1 April in which you confirmed that the Committee has agreed that it is content to support the principles of the Legal Aid and Coroners' Courts Bill.

I note that the Committee seeks an explanation for the delay in bringing forward the provisions in the Bill which will make the Lord Chief Justice the president of the Coroners' Courts, and require him to appoint a Presiding Coroner, given that the changes result from a recommendation of the Review of the Criminal Justice System ('the Review') which published its report in 2000, and that other related changes were made at a much earlier stage.

The Review recommended that the Lord Chief Justice should have a clearly defined position as head of the whole judiciary in Northern Ireland. It also concluded that

FROM THE OFFICE OF THE JUSTICE MINISTER



the Lord Chief Justice might find it helpful to appoint a head or representative of each tier to assist in co-ordination and representational matters.

These changes were brought forward by section 12 of the Justice (Northern Ireland) Act 2002 ('the 2002 Act') which made the Lord Chief Justice the President of all court tiers except the Coroners' Courts, and included provisions for the appointment of a Presiding County Court Judge, a Presiding District Judge (Magistrates' Courts) and a Presiding Lay Magistrate.

While it is not entirely clear why the Coroners' Courts were not included in the relevant provision of the 2002 Act, it seems likely to have been relevant that the 'Luce' Review (a fundamental review of death certification and investigation in England, Wales and Northern Ireland, announced in 2001) and the Shipman Inquiry (2000-2005) were then underway. In this context, it may have been considered that the outcome of those reviews had the potential to raise wider issues, and that it would be more appropriate to deal with all such matters together.

Whatever the reason for not including this change in the 2002 Act, it should be pointed out that alternative non-statutory arrangements were put in place in 2006, whereby a Presiding Judge for the Coroners' Courts was appointed administratively. This initiative, under which a High Court Judge, Mr Justice Weir, became the Presiding Judge, was intended to provide senior judicial leadership for the Coroners' Courts – something which the Legal Aid and Coroners' Courts Bill will now place on a statutory footing.

The matter was raised in December 2012 by the Lord Chief Justice. This Bill, therefore, provides the first opportunity to make the necessary changes since the matter was drawn to the Minister's attention.

I am aware that this issue came to the Committee's attention again, separately, at its meeting on 20 March when my letter, detailing a package of measures being taken to address delay in dealing with legacy inquests, was considered. The Bill's

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provisions were mentioned for inclusion in the UK Government's response to the European Court of Human Rights (in the *Hemsworth*, *McCaughey* and *Grew* cases) as one of the measures that would assist. The Committee agreed to request further information.

I hope that this reply provides sufficient information to answer the Committee's queries arising from both meetings in this regard.

A handwritten signature in black ink that reads "Tim Logan". The signature is written in a cursive style with a long horizontal stroke at the beginning.

TIM LOGAN
DALO

29 April 2014 - Correspondence from the Department providing a copy of the Keeling Schedules for the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and the Access to Justice (Northern Ireland) Order 2013

FROM THE OFFICE OF THE JUSTICE MINISTER



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Our ref SUB/524/2014

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29 April 2014

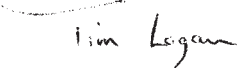
Dear Christine,

LEGAL AID AND CORONERS' COURTS BILL – KEELING SCHEDULES

As you are aware, the Legal Aid and Coroners' Courts Bill is now with the Committee for consideration.

To assist the Committee in its considerations, we have prepared the attached Keeling Schedules for the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and the Access to Justice (Northern Ireland) Order 2003. These show, with tracked changes, the Legal Aid legislation as it would appear following enactment of the Legal Aid and Coroners' Courts Bill. You may wish to draw these schedules to the attention of the Committee.

I would be happy to provide additional information or briefing if required.


TIM LOGAN
DALO

ENC. Keeling Schedules for the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and the Access to Justice (Northern Ireland) Order 2003

Changes to legislation: There are outstanding changes not yet made by the legislation.gov.uk editorial team to Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)

KEELING SCHEDULE SHOWING – IN BOLD, USING UNDERLINING TO DENOTE INSERTIONS – HOW THE 1981 ORDER IS MODIFIED BY THE PROPOSED AMENDMENTS CONTAINED IN THE LEGAL AID AND CORONERS’ COURTS BILL, AS INTRODUCED INTO THE ASSEMBLY ON 31 MARCH 2014.

This Keeling Schedule has been prepared by the Department of Justice. It is intended for illustrative purposes only to assist the reader to understand the proposed amendments to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. While care has been taken in its preparation, it may not be full and complete in every respect.

The Keeling Schedule does not add footnotes to the proposed amendments and footnotes to the existing provisions of the 1981 Order have not been updated.

This document should be read together with the Keeling Schedule that the Department of Justice has prepared in respect of the proposed amendments to the Access to Justice (Northern Ireland) Order 2003 contained in the Legal Aid and Coroners’ Courts Bill.

It is intended that the provisions in Articles 10 to 20A of the 2003 Order regarding *civil legal services* will be commenced on the same date that the Northern Ireland Legal Services Commission is dissolved and its functions are transferred to an Executive Agency within the Department.

TO THAT END, THIS DOCUMENT ALSO SHOWS – IN BOLD, USING STRIKETHROUGH TO DENOTE DELETIONS – THE EFFECT OF THE REPEAL OF THE PROVISIONS IN THE 1981 ORDER REGARDING LEGAL ADVICE AND ASSISTANCE AND CIVIL LEGAL AID.

The repeal of those provisions will be made at the same time that the provisions in the 2003 Order regarding *civil legal services* are commenced. Those changes will be made by way of a commencement order under the 2003 Order.

STATUTORY INSTRUMENTS

1981 No. 228 (NI 8)

Legal Aid, Advice and Assistance
(Northern Ireland) Order 1981

18th February 1981

F1

F2

Annotations:

- F1 Order repealed (prosp.) by Access to Justice (Northern Ireland) Order 2003 (S.I. 2003/435 (N.I. 10)), arts. 1(2), 49(2), Sch. 5 and the repeal being partly in operation, as to which see individual Articles
- F2 functions transferred by SI 1982/159

Modifications etc. (not altering text)

- C1 Order applied (with modifications) (30.4.2007) by Legal Aid (Asylum and Immigration Appeals) (Northern Ireland) Regulations 2007 (S.I. 2007/1318), reg. 7(5)
- C2 Order: functions of Lord Chancellor transferred to Department of Justice (12.4.2010) by Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/976), arts. 1(2), 15(1), Sch. 17 para. 36 (with arts. 15(6), 28-31); S.I. 2010/977, art. 1(2)

PART I

INTRODUCTORY

Title and commencement

1. (1) This Order may be cited as the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.
- (2) Subject to paragraph (3), this Order shall come into operation on the seventh day after the day on which it is made.
- (3) [^{F3}Paragraph 1(b)] of Part I of Schedule 1 shall come into operation on such day as the [^{F4} Lord Chancellor] may by order appoint.

Annotations:

- F3 2002 c. 26
- F4 SI 1982/159

Interpretation

2. (1) The Interpretation Act (Northern Ireland) 1954 shall apply to Article 1 and the following provisions of this Order as it applies to a Measure of the Northern Ireland Assembly.

(2) For the purposes of section 42(2) of the Northern Ireland Constitution Act 1973 (validity of Acts of the Parliament of Northern Ireland), provisions of this Order which re-enact provisions of an Act of the Parliament of Northern Ireland shall be deemed to be provisions of such an Act.

(3) References in this Order to counsel and solicitors shall be construed in accordance with Article 10 of the European Communities (Services of Lawyers) Order 1978 .

(4) In this Order—

“the Department” means the Department of Justice;

“the Director” means the Director of Legal Aid Casework designated under section 2 of the Legal Aid and Coroners’ Courts Act (Northern Ireland) 2014.

PART II

LEGAL ADVICE AND ASSISTANCE, AND LEGAL AID OTHER THAN FREE LEGAL AID AVAILABLE UNDER PART III

Legal advice and assistance

Persons eligible for advice and assistance

3. ~~(1) Advice and assistance to which this Article applies shall, subject to and in accordance with the following provisions of this Part, be available for any person if—~~

~~(a) his disposable income does not exceed^{F5} £234 a week; or~~

~~(b) he is (directly or indirectly) in receipt of^{F6} income support^{F7}, an income-based jobseeker’s allowance (payable under the Jobseekers (Northern Ireland) Order 1995) or an income-related allowance under Part 1 of the Welfare Reform Act (Northern Ireland) 2007 (employment and support allowance);^{F8}~~

~~and in either case his disposable capital does not exceed^{F9} £1,000^{F10} £3,000^{F10};~~

~~(2) Regulations may provide that there shall be substituted—~~

~~(a) for the weekly sum specified in paragraph (1) such other weekly sum as may be prescribed;~~

~~(b) for the capital sum so specified, such other capital sum as may be prescribed.~~

~~{F9} (3) Regulations made by virtue of paragraph (2)(b) may provide for the substitution of different capital sums in relation to—~~

~~(a) advice and assistance other than assistance by way of representation; and~~

~~(b) assistance by way of representation.~~

Annotations:
 F5—Words in art. 3(1)(a) substituted (6.4.2009) by Legal Advice and Assistance (Financial Conditions) Regulations (Northern Ireland) 2009 (S.R. 2009/103), reg. 3
 F6—1986 NI 18
 F7—Words substituted (27.10.2008) by Employment and Support Allowance (Consequential Provisions No. 2) Regulations (Northern Ireland) 2008 (S.R. 2008/412), reg. 3(3) F8—SR 1992/106
 F9—in relation to assistance by way of representation, SR 1986/241
 F10—1986 NI 12

Scope and general conditions of advice and assistance

~~4.—(1) Subject to paragraph (2) and Article 5 and to any prescribed exceptions and conditions, Article 3 applies to any oral or written advice given by a solicitor or, if and so far as may be necessary, counsel—~~

- ~~(a) on the application of Northern Ireland law to any particular circumstances which have arisen in relation to the person seeking the advice; and~~
 - ~~(b) as to any steps which that person might appropriately take (whether by way of settling any claim, bringing or defending any proceedings, making an agreement, will or other instrument or transaction, obtaining further legal or other advice or assistance, or otherwise) having regard to the application of Northern Ireland law to those circumstances;~~
- ~~and applies to any assistance given by a solicitor or, if and so far as may be necessary, by counsel to any person in taking any such steps as are mentioned in sub-paragraph (b); whether the assistance is given by taking any such steps on his behalf or by assisting him in taking them on his own behalf.~~

~~(2) Notwithstanding anything in paragraph (1), Article 3 does not apply to any advice or assistance given to a person in connection with any proceedings before a court or tribunal—~~

~~(a) at a time when a civil aid certificate issued to him in connection with those proceedings is in force;^{F11} or~~

~~{^{F12} at a time when—~~

~~(i) the Commission has informed him that legal aid is available to him in connection with those proceedings under a direction given under Article 10A(1)(a) or an authorisation given under Article 10A(2)(a); or~~

~~(ii) the Lord Chancellor has informed him that legal aid is available to him in connection with those proceedings under an authorisation given under Article 10A(2)(b);~~

~~and he has not been informed by the Commission or the Lord Chancellor that such legal aid has ceased to be so available; or {~~

~~(b) in the case of criminal proceedings, at a time when a criminal aid certificate made in respect of him for the purposes of those proceedings is in force.~~

~~(3) Save as expressly provided by this Part or by regulations made thereunder—~~

~~(a) the fact that the services of counsel or a solicitor are given by way of advice or assistance shall not affect the relationship between or rights of counsel, solicitor and client, or any privilege arising out of such relationship; and~~

~~(b) the rights conferred by this Part on a person receiving advice or assistance shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised.~~

~~(4) In this Article—~~

~~“civil aid certificate” means a certificate required in accordance with regulations made under Article 22 to be obtained as a condition of entitlement to legal aid;~~

~~“criminal aid certificate” means a certificate under Article 28(1), 29(2) or 30(3).~~

Annotations:

F11—prosp. rep. by 2002 c. 26

F12—2005 NI 19

Representation in proceedings

~~5.—(1) In this Part “assistance by way of representation” means any assistance given to a person by taking on his behalf any step in the institution or conduct of any proceedings before a court or tribunal, or of any proceedings in connection with a statutory inquiry, whether by representing him in those proceedings or by otherwise taking any step on his behalf (as distinct from assisting him in taking such a step on his own behalf).~~

~~(2) Without prejudice to Article 4(2) and subject to any prescribed exceptions, Article 3 does not~~

apply to any assistance by way of representation unless it is approved by an appropriate authority in accordance with regulations made for the purposes of this Article.

(2) Regulations may—

- (a) describe the proceedings in relation to which assistance by way of representation may be approved by reference to the court, tribunal or statutory inquiry, to the issues involved, to the capacity in which the person requiring the assistance is concerned, or in any other way;
- (b) specify, in relation to any proceedings so described, the assistance by way of representation which may be approved; and
- (c) preclude the giving of approval in the case of persons who would not be eligible for assistance if sub-paragraph (a) of Article 3(1) were omitted or for the weekly sum specified in that sub-paragraph there were substituted such lower weekly sum as may be prescribed.

(4) Regulations may also make provision—

- (a) as to which committees, courts, tribunals or other persons or bodies of persons are to be appropriate authorities;
- (b) as to the procedure to be followed in applying for approval, the criteria for determining whether approval should be given and the conditions which should or may be imposed; and
- (c) as to the circumstances in which approval may be withdrawn and the effect of its withdrawal.

⁶¹³(4A) Without prejudice to paragraphs (3) and (4), regulations may make provision in relation to assistance by way of representation for purposes corresponding to those of Article 10(5A) to (5E) (legal aid for proceedings under the Children (Northern Ireland) Order 1995).]

(5) Where a person receives any assistance by way of representation in any civil proceedings before a court or any proceedings before a tribunal, then, except in so far as regulations otherwise provide, his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute; and regulations shall make provision as to the court, tribunal or person by whom that amount is to be determined and the extent to which any determination of that amount is to be final.

(6) For the purposes of any inquiry under paragraph (5) as to the means of a person against whom an order for costs has been made, his dwelling house and household furniture and the tools and implements of his trade shall be left out of account except in such cases and to such extent as may be prescribed and except as so prescribed they shall, in all parts of the United Kingdom, be protected from seizure in execution to enforce the order.

Annotations:

4.13—1995-NI-2

Financial limit on prospective cost of advice and assistance

6. (1) Where a person seeks or receives any advice or assistance, then if at any time (whether before or after the advice or assistance has begun to be given) it appears to the solicitor from whom it is sought or received (or, in the case of advice or assistance sought or received from counsel, it appears to the solicitor instructing counsel) that the cost of giving it is likely to exceed the limit applicable under paragraph (2)—

- (a) the solicitor shall determine to what extent that advice or assistance can be given without exceeding that limit; and
- (b) shall not give it (or, as the case may be, not instruct counsel to give it) so as to exceed that limit except with the approval of the appropriate authority.

(2) The limit applicable under this paragraph is ⁶¹⁴£88 or such other sum as may be prescribed.

~~(3) For the purposes of this Article the cost of giving any advice or assistance shall be taken to consist of such of the following as are applicable in the circumstances, that is to say—~~
~~(a) any expenses (including fees payable to counsel) which may be incurred by the solicitor or his firm in, or in connection with, the giving of the advice or assistance; and~~
~~(b) any charges or fees (not being charges for disbursements) which, apart from Article 7, would be properly chargeable by the solicitor or his firm in respect of the advice or assistance;~~
~~and in sub-paragraph (b) "charges for disbursements" means charges in respect of such expenses (including fees payable to counsel) as are mentioned in sub-paragraph (a).~~

~~(4) In sub-paragraph (b) of paragraph (1) the reference to the approval of the appropriate authority shall, in relation to the giving of advice or assistance in any particular case, be construed as a reference to approval given in accordance with regulations by such committee or other person or body of persons as, in accordance with the provisions of regulations and of a scheme, is the appropriate committee, person or body for determining whether approval for the purposes of that sub-paragraph should be given in that case.~~

~~(5) In paragraph (4) "scheme" means a scheme for the time being in force under Article 18.~~

~~Annotations:
 F14—SR 4996/205~~

~~Contributions from persons receiving advice or assistance~~

~~7. (1) In respect of advice or assistance given to any person (in this Article and Article 8 referred to as "a client"), a client shall not, except in accordance with the following provisions of this Article, be required to pay any charge or fee.~~

~~(2) Where a client's disposable income exceeds^{F15} £100 a week and he is not (directly or indirectly) in receipt of^{F16} income support^{F17}, an income-based jobseeker's allowance (payable under the Jobseekers (Northern Ireland) Order 1995) or an income-related allowance under Part 4 of the Welfare Reform Act (Northern Ireland) 2007 (employment and support allowance)}, paragraph (1) shall not exempt him from liability to pay, in respect of the advice or assistance, charges or fees up to, but not in the aggregate exceeding, such amount as may be prescribed.~~

~~(3) Regulations may provide that for the sum specified in paragraph (2) there shall be substituted such other sum as may be prescribed.~~

~~Annotations:
 F15—Words in art. 7(2) substituted (6.4.2009) by Legal Advice and Assistance (Financial Conditions) Regulations (Northern Ireland) 2009 (S.R. 2009/103), reg. 4
 F16—1986 NI 48
 F17—Words in art. 7(2) substituted (27.10.2008) by Employment and Support Allowance (Consequential Provisions No. 2) Regulations (Northern Ireland) 2008 (S.R. 2008/412), reg. 2(d)~~

~~Payment of charges or fees otherwise than through client's contribution~~

~~8. (1) This Article applies to any charges or fees which, apart from Article 7, would be properly chargeable in respect of advice or assistance given to a client, in so far as those charges or fees are not payable by the client in accordance with that Article.~~

~~(2) In the following provisions of this Article "the solicitor"~~

(a) in relation to any advice or assistance given by a solicitor employed by a firm of solicitors, and so given in the course of that employment, or given by counsel on instructions given to him by a solicitor in the course of such employment, means that firm of solicitors; and
 (b) in any other case, means the solicitor by whom any advice or assistance is given or, where it is given by counsel, the solicitor on whose instructions counsel gives it.

(3) Except in so far as regulations otherwise provide, charges or fees to which this Article applies shall constitute a first charge for the benefit of the solicitor—

(a) on any costs which (whether by virtue of a judgment or order of a court or an agreement or otherwise) are payable to the client by any other person in respect of the matter in connection with which the advice or assistance is given; and
 (b) on any property (of whatever nature and wherever situated) which is recovered or preserved for a client in connection with that matter, including his rights under any compromise or settlement arrived at in connection with that matter to avoid or bring to an end any proceedings.

(4) In so far as the charge created by paragraph (3) in respect of any charges or fees to which this Article applies is insufficient to meet them, the deficiency shall, subject to paragraph (5), be payable to the solicitor out of the legal aid fund.

(5) For the purpose of determining what charges or fees would be properly chargeable as mentioned in paragraph (4), and whether there is a deficiency to be payable out of the legal aid fund in accordance with paragraph (4), charges or fees in respect of advice or assistance given to a client shall, in such circumstances as may be prescribed, be taxed or assessed in such manner as may be prescribed.

Legal aid

Persons eligible for legal aid

9. (1) Legal aid to which this Article applies shall, subject to and in accordance with the provisions of this Part, be available for any person whose disposable income does not exceed

(a) where legal aid is sought in connection with taking, defending or being a party to proceedings which include a claim in respect of personal injuries, the yearly sum of ¹¹⁹£10,955; or

(b) in any other case, the yearly sum of ¹²⁰£9,937;

but a person may be refused legal aid if—

(a) his disposable capital exceeds

(i) where legal aid is sought in connection with taking, defending or being a party to proceedings which include a claim in respect of personal injuries, ¹²⁰£8,560; and

(ii) in any other case, ¹²¹£6,750; and

(b) it appears that he can afford to proceed without legal aid.

(2) Regulations may provide that there shall be substituted—

(a) for the yearly sum specified in paragraph (1), such other yearly sum as may be prescribed;

(b) for the capital sum so specified, such other capital sum as may be prescribed.

Annotations:

F18—Words in art. 9(1) (in connection with proceedings involving a personal injury) substituted (6.4.2009) by Legal Aid (Financial Conditions) Regulations (Northern Ireland) 2009 (S.R. 2009/104), reg. 3(a).

F19—Words in art. 9(1) (in any other case) substituted (6.4.2009) by Legal Aid (Financial Conditions) Regulations (Northern Ireland) 2009 (S.R. 2009/104), reg. 3(b).

F20—in connection with proceedings involving a personal injury, SR 1992/107

F21—in any other case, SR 1992/107

Scope and general conditions of legal aid

10. (1) Subject to the following provisions of this Article, Article 9 applies to legal aid in connection with such proceedings before courts and tribunals as—

- (a) are proceedings of a description mentioned in Part I of Schedule 1; and
- (b) are not proceedings of a description mentioned in Part II of that Schedule.

(2) The provisions of Schedule 1 may be varied by regulations and the regulations may (without prejudice to the generality of the foregoing) describe the proceedings to be included or excluded by reference to—

- (a) the court or tribunal;
- (b) the issues involved; or
- (c) the capacity in which a person requiring legal aid is concerned.

(3) Legal aid shall consist of representation, on the terms provided for by this Part, by a solicitor and so far as necessary by counsel, including all such assistance as is usually given by a solicitor or counsel in—

- (a) the steps preliminary or incidental to any proceedings; or
- (b) in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings.

(4) A person shall not be given legal aid in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto.

(5) A person may be refused legal aid if, in the particular circumstances of the case, it appears—

- (a) unreasonable that he should receive it; or
 - (b) more appropriate that he should receive assistance by way of representation;
- and regulations may prescribe the criteria for determining any question arising under sub-paragraph (b).

¹²²(5A) Legal aid shall not be available—

- (a) to any Health and Social Services Board; or
- (b) to any ¹²³Health and Social Care trust; or
- (c) to any other prescribed body; or
- (d) to a guardian ad litem,

for the purposes of any proceedings under the Children (Northern Ireland) Order 1995.

(5B) Regardless of paragraphs (4) and (5) and Articles 9 and 12, legal aid must be granted where a child who is brought before a court under Article 44 of the Children (Northern Ireland) Order 1995 (secure accommodation) is not, but wishes to be, legally represented before the court.

(5C) Subject to paragraph (5A) but regardless of paragraphs (4) and (5) and Articles 9 and 12, legal aid must be granted to the child in respect of whom the application is made, to any parent of such a child and to any person with parental responsibility for him within the meaning of the Children (Northern Ireland) Order 1995 to cover proceedings relating to an application for the following orders under that Order—

- (a) an order under Article 50 (a care or supervision order);
- (b) an order under Article 62 (a child assessment order);
- (c) an order under Article 63 (an emergency protection order); or
- (d) an order under Article 64 (extension or discharge of an emergency protection order).

(5D) Subject to paragraphs (4) and (5) but regardless of Articles 9 and 12, legal aid must be granted to cover proceedings relating to an appeal against an order made under Article 50 of the Children (Northern Ireland) Order 1995 to a person who has been granted legal aid by virtue of paragraph (5C).

(5E) Subject to paragraph (5A) and Articles 9 and 12 but regardless of paragraphs (4) and (5), legal aid must be granted where a person applies to be or has been joined as a party to any of the proceedings mentioned in paragraph (5C).¹

[¹²⁴(5F) Paragraphs (5B), (5C) and (5E) shall not apply to a person where the proceedings mentioned are before a court of summary jurisdiction and in respect of which that person has been granted assistance by way of representation.]

(5G) Subject to paragraphs (4) and (5) but regardless of Articles 9 and 12 legal aid must be granted to cover proceedings relating to an appeal against an order made under Article 50 of the Children (Northern Ireland) Order 1995 to a person who has been granted assistance by way of representation by virtue of regulations made under Article 5(4A).]

Para. (6) rep. by 2005-NI-19

Annotations:

L22—1995-NI-2

L23—Words in Order substituted (1.4.2009) by Health and Social Care (Reform) Act (Northern Ireland) 2009 (c. 1), ss. 32, 34(2), Sch. 6 para. 1(1)(c) (with Sch. 6 para. 1(3)); S.R. 2009/114, art. 3

L34—SR 1996/48

[¹²⁵Exceptional legal aid

Annotations:

L25—2005-NI-19

10A. (1) The Lord Chancellor may by direction require that legal aid is to be available in connection with excluded proceedings in circumstances specified in the direction.

(2) If the Commission requests him to do so, the Lord Chancellor may authorise legal aid to be available in connection with any proceedings (whether excluded proceedings or not)—

- (a) in circumstances specified in the authorisation; or
- (b) in an individual case so specified.

(3) For the purposes of this Article “excluded proceedings” means proceedings before a court or tribunal which are not—

- (a) proceedings of a description mentioned in Part I of Schedule 1;
- (b) proceedings for the purposes of which free legal aid may be given under Part III; or
- (c) proceedings in relation to which assistance by way of representation may be approved under Article 5.

(4) Legal aid under a direction or authorisation under this Article shall consist of such representation, on terms provided for by the direction or authorisation, by a solicitor or by counsel (or by both) as is specified in the direction or authorisation.

(5) In paragraph (4) “representation” includes all such assistance as is usually given by a solicitor or counsel in—

- (a) the steps preliminary or incidental to proceedings; or
- (b) arriving at or giving effect to a compromise to avoid or bring an end to proceedings.

(6) A direction or authorisation under this Article may make provision about financial matters relating to legal aid under the direction (including, in particular, provision about eligibility, contributions, charges, remuneration and costs).

(7) Articles 10(3) to (5A), 11, 12, 13, 16 and 17 and Schedule 2 do not apply to legal aid under a direction or authorisation under this Article, unless they are applied (with or without modification) by the provisions of the direction or authorisation.

(8) A direction or authorisation under this Article may be varied or revoked.

~~(9) The Lord Chancellor must publish, or require the Commission to publish,
(a) directions under paragraph (1) and directions varying or revoking such directions; and
(b) authorisations under paragraph (2)(a) and authorisations varying or revoking such authorisations:~~

~~(10) The Lord Chancellor or the Commission may publish an authorisation under paragraph (2)(b), or an authorisation varying or revoking such an authorisation, if the Lord Chancellor or the Commission considers it appropriate to do so.~~

~~(11) In this Article "the Commission" means the Northern Ireland Legal Services Commission.~~

~~Financial conditions of legal aid~~

~~11. (1) Where a person receives legal aid in connection with any proceedings—
(a) the expenses incurred in connection with the proceedings, so far as they would ordinarily be paid in the first instance by or on behalf of the solicitor acting for him, shall be so paid except where they are paid direct from the legal aid fund as provided by this Part;
(b) his solicitor and counsel shall not take any payment in respect of the legal aid except such payment as is directed by this Part to be made out of the legal aid fund;
(c) he may be required to make a contribution to the legal aid fund in respect of the sums payable out of that fund on his account;
(d) any sums recovered by virtue of an order or agreement for costs made in his favour with respect to the proceedings shall be paid to the legal aid fund;
(e) his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount, if any, which is a reasonable one for him to pay having regard to all the circumstances, including—
(i) the means of all the parties; and
(ii) the conduct of all the parties in connection with the dispute.~~

~~(2) Regulations shall make provision as to—~~

~~(a) the court, tribunal or person by whom the amount referred to in paragraph (1)(e) is to be determined; and
(b) the extent to which any determination of that amount is to be final.~~

~~(3) For the purpose of any inquiry under this Article as to the means of any person against whom an order for costs has been made, his dwelling house and household furniture and the tools and implements of his trade shall be left out of account except in such cases and to such extent as may be prescribed, and except as aforesaid they shall, in all parts of the United Kingdom, be protected from seizure in execution to enforce the order.~~

~~Contributions from persons receiving legal aid and charge on property recovered~~

~~12. (1) Where a person receives legal aid in connection with any proceedings, his contribution to the legal aid fund in respect of those proceedings may include—~~

~~(a) if his disposable income exceeds¹³⁵ £3,355 a year, a contribution in respect of income not greater than¹³⁶ one third of the excess or such other proportion of the excess or such amount as may be prescribed; and
(b) if his disposable capital exceeds¹³⁶ £3,000, a contribution in respect of capital not greater than the excess or such lesser amount as may be prescribed.~~

~~(2) Regulations may provide that there shall be substituted—~~

~~(a) for the yearly sum specified in paragraph (1), such other yearly sum as may be prescribed;
(b) for the capital sum so specified, such other capital sum as may be prescribed.~~

~~(3) A person may be required to make any contribution to the legal aid fund in one sum or by instalments.~~

~~(4) If the total contribution to the legal aid fund made by a person in respect of any proceedings is more than the net liability of that fund on his account, the excess shall be repaid to him.~~

~~(5) Except so far as regulations otherwise provide—~~

~~(a) any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings; and~~

~~(b) if the total contribution is less than the net liability of the legal aid fund on his account, a sum equal to the deficiency; shall be a first charge for the benefit of the legal aid fund on any property (wherever situate) which is recovered or preserved for him in the proceedings.~~

~~(6) The reference in paragraph (5) to property recovered or preserved for any person shall include~~

~~(a) his rights under any compromise arrived at to avoid or bring an end to the proceedings; and~~

~~(b) any sums recovered by virtue of an order for costs made in his favour in the proceedings (not being sums payable into the legal aid fund under Article 11).~~

~~(7) The charge created by paragraph (5) on any damages or costs shall not prevent a court allowing them to be set off against any other damages or costs.~~

~~(8) In this Article references to the net liability of the legal aid fund on any person's account in relation to any proceedings are references to the aggregate amount of—~~

~~(a) the sums paid or payable out of that fund on his account in respect of those proceedings to any solicitor or counsel; and~~

~~(b) if he has received any advice or assistance in connection with those proceedings or any matter to which those proceedings relate, any sums paid or payable out of that fund in respect of that advice or assistance to any solicitor, being sums not recouped to that fund by sums which are recovered by virtue of an order or agreement for costs made in his favour with respect to those proceedings, or by virtue of any right of his to be indemnified against expenses incurred by him in connection with those proceedings.~~

Annotations:

†26—Words in art. 12(1)(e) substituted (6.4.2009) by Legal Aid (Financial Conditions) Regulations (Northern Ireland) 2009 (S.R. 2009/104), reg. 4

†27—SR 1993/421

†28—SR 1988/255

Remuneration of persons giving legal aid

13. (1) ~~Subject to this Part, a solicitor who has acted for a person receiving legal aid shall be paid for so acting out of the legal aid fund, and any fees paid to counsel for so acting shall also be paid out of the legal aid fund.~~

~~(2) Subject to any rules of court made by virtue of^{†29} Article 12(3)(g) of the Family Law (Northern Ireland) Order 1993, the sums payable under paragraph (1) to a solicitor or counsel shall not exceed those allowed under Schedule 2.~~

~~(3) Nothing in this Article shall prejudice^{†30} Article 15A(b), and in particular—~~

~~(a) paragraph (2) shall not affect the sums recoverable by virtue of an order for costs made in favour of a person who had received legal aid or of an agreement for costs so made which provides for taxation; and~~

~~(b) for the purpose of any such order or agreement, the solicitor who acted for the person in whose favour it is made shall be treated as having paid any counsel's fees.~~

~~(4) References in this Article to a solicitor acting for a person receiving legal aid shall be construed in accordance with Article 45(4).~~

~~Annotations:~~

~~F29—1993 NI 6~~

~~F30—2005 NI 19~~

~~Assessment of resources etc.~~

~~Assessment of disposable capital and income and of maximum contribution~~

~~14.—(1) References in this Part to a person's disposable income or disposable capital shall be taken as referring to the rate of his income or amount of his capital after making—~~

~~(a) such deductions as may be prescribed in respect of—~~

~~(i) the maintenance of dependants;~~

~~(ii) interest on loans;~~

~~(iii) income tax;~~

~~(iv) rates;~~

~~(v) rent; and~~

~~(vi) other matters for which the person in question must or reasonably may provide; and~~

~~(b) such further allowances as may be prescribed to take account of the nature of his resources.~~

~~(2) Regulations may make provision as to the manner in which the rate of a person's income and the amount of his capital are to be computed for the purposes of paragraph (1), and in particular for—~~

~~(a) determining whether any resources are to be treated as income or capital; and~~

~~(b) taking into account fluctuations of income.~~

~~(3) The regulations shall include provisions for securing that the resources of a person seeking or receiving legal aid, advice or assistance shall be treated as not including the subject-matter of the dispute.~~

~~(4) Except in so far as the regulations otherwise provide, any resources of a person's⁽¹⁾ spouse or civil partner shall be treated for the purposes of this Article as that person's resources; and the regulations may also make provision, in relation to minors and any other special cases, for taking into account the resources of other persons.~~

~~(5) The regulations may also include, in relation to advice and assistance, provision as to the cases in which a person is for the purposes of Articles 3 and 7 to be taken to be (directly or indirectly) in receipt of⁽²⁾ income support⁽³⁾, an income-based jobseeker's allowance (payable under the Jobseekers (Northern Ireland) Order 1995) or an income-related allowance under Part 4 of the Welfare Reform Act (Northern Ireland) 2007 (employment and support allowance).⁽⁴⁾~~

~~(6) Subject to the provisions of this Article, the disposable income and disposable capital of a person applying for legal aid, and the maximum amount of his contribution to the legal aid fund in respect of any proceedings, shall be determined in accordance with regulations.~~

~~(7) Regulations for the purposes of this Article shall be made with the concurrence of the Treasury.~~

~~Annotations:~~

~~F34—2004 c. 33~~

~~F32—1986 NI 48~~

~~F33—Words in art. 14(5) substituted (27.10.2008) by Employment and Support Allowance (Consequential Provisions) No. 2 Regulations (Northern Ireland) 2008 (S.R. 2008/412), reg. 2(4)~~

Solicitors and counsel

Solicitors and counsel

15. (1) ~~Any practising¹³⁴ barrister shall be entitled to give advice or assistance or to act for persons receiving legal aid, unless¹³⁵ he is for the time being prohibited from doing so by any determination of the General Council of the Bar of Northern Ireland, or by any determination of any such committee as may be established by that Council to determine charges preferred against barristers]~~

~~Para. (2) rep. by 2002 NI 10~~

~~[¹³⁴(2A) Any practising solicitor shall be entitled to give advice or assistance or to act for persons receiving legal aid unless he is for the time being excluded by an order under Article 518(1) or (3) of the Solicitors (Northern Ireland) Order 1976 from selection under paragraph (3).]~~

~~(3) Where a person is entitled to receive legal aid, advice or assistance he himself shall be entitled to select the solicitor to act for him and, if the case requires counsel, his counsel; but this paragraph shall not prejudice the rights of solicitor or counsel where he has good reason to refuse or give up a case or entrust it to another.~~

~~[¹³⁵(4) Notwithstanding paragraph (3), a solicitor who has been selected to act for a person under that paragraph may himself select to act for that person, as the solicitor's agent, any other solicitor who is not for the time being excluded from selection under paragraph (3) by an order under Article 518(1) or (3) of the Solicitors (Northern Ireland) Order 1976.]~~

Annotations:

~~E34—1989 NI 44~~

~~E35—~~

~~[¹³⁶Legal aid not to affect normal rules~~

Annotations:

~~E36—2005 NI 49~~

~~15A. Except as expressly provided by this Part or by regulations made under it—~~

- ~~(a) the fact that the services of counsel or a solicitor are given by way of legal aid does not affect the relationship between or rights of counsel, solicitor and client or any privilege arising out of such a relationship; and~~
- ~~(b) the rights conferred by or under this Part on a person receiving legal aid are not to affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised.†~~

Costs of successful unassisted parties

Power to award costs out of the legal aid fund

~~16. (1) Where a person receives legal aid in connection with any proceedings between him and a person not receiving legal aid (in this Article and Article 17 referred to as "the unassisted party") and those proceedings are finally decided in favour of the unassisted party, the court by which the proceedings are so decided may, subject to the provisions of this Article, make an order for the payment to the unassisted party out of the legal aid fund of the whole or any part of the costs incurred by him in those proceedings.~~

~~(2) An order may be made under this Article in respect of costs if (and only if) the court is satisfied that it is just and equitable in all the circumstances that provision for those costs should be made out of public funds; and before making such an order the court shall in every case (whether or not application is made in that behalf) consider what orders should be made for costs against the person receiving legal aid and for determining his liability in respect of such costs.~~

- ~~(3) Without prejudice to paragraph (2), an order shall not be made under this Article in respect of costs incurred in a court of first instance, whether by that court or by any appellate court, unless—~~
- ~~(a) the proceedings in the court of first instance were instituted by the party receiving legal aid; and~~
 - ~~(b) the court is satisfied that the unassisted party will suffer severe financial hardship unless the order is made.~~
- ~~(4) An order under this Article shall not be made by any court in respect of costs incurred by the unassisted party in any proceedings in which, apart from this Article, an order would not be made for the payment of his costs.~~
- ~~(5) Without prejudice to any other provision restricting appeals from any court, no appeal shall lie against an order under this Article, or a refusal to make such an order, except on a point of law.~~
- ~~(6) In this Article "costs" means costs as between party and party; but the costs in respect of which an order may be made under this Article include the costs of applying for that order.~~
- ~~(7) References in this Article and Article 17 to legal aid include references to assistance by way of representation.~~

~~Provisions supplementary to Article 16~~

- ~~17. (1) Provision may be made by regulations—~~
- ~~(a) for determining the proceedings which are or are not to be treated as separate proceedings for the purposes of Article 16, or as having been instituted by the party receiving legal aid for the purposes of Article 16(3)(a);~~
 - ~~(b) for modifying Article 16(3)(b) in its application to an unassisted party who is concerned in proceedings only in a fiduciary, representative or official capacity; and~~
 - ~~(c) for regulating the procedure to be followed in connection with orders under Article 16.~~
- ~~(2) Regulations made by virtue of paragraph (1)(c) may in particular make provision—~~
- ~~(a) for the reference of applications for orders under Article 16, or of any questions of fact relevant to such applications, for inquiry and report by a statutory officer appointed under section 70 of the Judicature (Northern Ireland) Act 1978;~~
 - ~~(b) for the exercise by a statutory officer of the powers under Article 16 of a judge of the High Court or a county court judge;~~
 - ~~(c) for enabling the Law Society to be heard in connection with any order under Article 16.~~
- ~~(3) Regulations for the purposes of paragraphs (1) and (2), in so far as they relate to statutory officers, shall not be made^{14,17} except after consultation with the Lord Chief Justice.~~
- ~~(4) For the purposes of Article 16 proceedings shall be treated as finally decided in favour of the unassisted party—~~
- ~~(a) if no appeal lies against the decision in his favour;~~
 - ~~(b) if an appeal lies against the decision with leave, and the time limited for applications for leave expires without leave being granted; or~~
 - ~~(c) if leave to appeal against the decision is granted or is not required, and no appeal is brought within the time limited for appeal;~~
- ~~and where an appeal against the decision is brought out of time, the court by which the appeal (or any further appeal in those proceedings) is determined may, if the appeal is allowed, make an order for the repayment by the unassisted party to the legal aid fund of the whole or any part of the sum previously paid to him in respect of those proceedings under Article 16.~~
- ~~(5) Where a court decides any proceedings in favour of the unassisted party and an appeal (with or without leave) against the decision, the court may, if it thinks fit, make or refuse to make an order under Article 16 forthwith, but any order so made shall not take effect—~~
- ~~(a) where leave to appeal is required, unless the time limited for applications for leave to appeal expires without leave being granted;~~

(b) where leave to appeal is granted or is not required, unless the time limited for appeal expires without an appeal being brought.

(6) Where a party begins to receive legal aid in connection with any proceedings after those proceedings have been instituted, or ceases to receive legal aid before they are finally decided, or otherwise receives legal aid in connection with part only of any proceedings, the reference in Article 16(1) to the costs incurred by the unassisted party in those proceedings shall be construed as a reference to so much of those costs as is attributable to that part.

Annotations:

F37—SI-1982/159

Administration and finance

Functions of Law Society

Paras. (1)-(7) rep. by 2003 NI 10

(8) The Law Society shall as soon as possible after the end of each financial year make an annual report to the^{F38} Lord-Chancellor on the operation and finance of this Part during that year.

(9) The^{F38} Lord-Chancellor shall lay before Parliament a copy of each report of the Law Society.

Annotations:

F38—SI-1982/159

Art. 19 rep. by 2003 NI 10

Accounts and audit

20. (1) The Law Society shall keep such accounts with respect to the legal aid fund as the^{F39} Lord-Chancellor may with the approval of the Treasury direct, and shall prepare in respect of each financial year a statement of accounts in such form as may be so directed.

(2) The accounts shall be audited by persons to be appointed in respect of each financial year by the^{F39} Lord-Chancellor and in accordance with a scheme of audit approved by the^{F39} Lord-Chancellor, and the auditors shall be furnished by the Law Society with copies of the said statement and shall report to the^{F39} Lord-Chancellor on the accounts and the said statement.

^{F39}(2) A person shall not be appointed as an auditor in pursuance of paragraph (2) unless he is eligible for appointment as a^{F40} statutory auditor under Part 42 of the Companies Act 2006.]

(4) As soon as the accounts have been audited, the auditors shall send to the^{F40} Lord-Chancellor copies of the statement of accounts and of their report, and the^{F40} Lord-Chancellor shall send a copy of the statement and of the report to the Comptroller and Auditor-General.

(5) The Comptroller and Auditor-General—

(a) shall examine every statement and report sent to him under paragraph (4);

(b) may inspect the accounts kept with respect to the legal aid fund and any records relating thereto; and

(c) shall certify every such statement and lay a copy of it together with his report thereon before Parliament.

Annotations:

F39—SI-1982/159

F40—SR-1993/67

F41—Words in art. 20(2) substituted (6.4.2008) by Companies Act 2006 (Consequential Amendments etc).

Order 2006 (S.I. 2006/948), arts. 2(2), 3(1)(a), Sch. 1 para. 2(e) (with arts. 6, 11, 12)

~~Pension rights of employees~~

~~21. (1) The Law Society shall, with the approval of the^[42] Lord Chancellor, make arrangements for the provision of pensions, allowances or gratuities to or in respect of persons employed by the Society whole-time for the purpose of their functions under this Part, and the arrangements may extend, with any necessary adjustments, to persons employed by the Society part-time for that purpose or (whether whole-time or part-time) for that and other purposes.~~

~~(2) The arrangements may include the establishment and administration, by the Law Society or otherwise, of a pension scheme with or without a pension fund.~~

~~(3) If the^[42] Lord Chancellor so directs, receipts and expenses of the Law Society attributable to their establishment and administration of a pension scheme under this Article shall, notwithstanding anything in Article 19, be dealt with under the scheme instead of being paid into and out of the legal aid fund.~~

~~Annotations:~~

~~[42]—S.I. 1982/159~~

~~Miscellaneous and supplementary~~

~~Regulations~~

~~22. (1) The^[43] Lord Chancellor may make such regulations as appear to him necessary or desirable for giving effect to this Part or for preventing abuses thereof by persons seeking or receiving legal aid, advice or assistance and regulations may make different provision in relation to advice and assistance and in relation to legal aid respectively.~~

~~(2) Without prejudice to paragraph (1) or any other provision of this Order authorising the making of regulations, regulations may—~~

~~(a) make provision as to the proceedings which are or are not to be treated as separate proceedings for the purpose of legal aid, advice or assistance, and as to the apportionment of sums recoverable or recovered by virtue of any order for costs made generally with respect to proceedings treated as separate;~~

~~(b) regulate the procedure of any court or tribunal in relation to legal aid, advice or assistance, and in particular make provision—~~

~~(i) as to the taxation of costs incurred in connection with proceedings not actually begun; and~~

~~(ii) as to the cases in which and the extent to which a person receiving legal aid, advice or assistance may be required to give security for costs, and the manner in which that security may be given;~~

~~(c) make provision as to the information to be furnished by a person seeking or receiving legal aid, advice or assistance;~~

~~(d) make provision as to the cases in which a person may be refused legal aid, advice or assistance by reason of his conduct when seeking or receiving legal aid, advice or assistance (whether in the same or in a different matter);~~

~~(e) make provision for the recovery of sums due to the legal aid fund and for making effective the charge created by this Part on property recovered or preserved for a person receiving legal aid, advice or assistance including provision—~~

~~(i) for the enforcement for the benefit of the legal aid fund of any order or agreement for costs made in favour of a person who has received legal aid, advice or assistance; and~~

~~(ii) for making a solicitor's right to payment out of the legal aid fund wholly or partly dependent on his performance of any duties imposed on him by regulations made for the purposes of this sub-paragraph.~~

- (2) ~~Regulations may also modify any provision of this Part so far as appears to the¹⁴³ Lord Chancellor} necessary to meet the special circumstances where—~~
- (a) ~~a person seeking or receiving legal aid, advice or assistance—~~
- ~~(i) is not resident in Northern Ireland; or~~
 - ~~(ii) is concerned in a representative, fiduciary or official capacity; or~~
 - ~~(iii) is concerned jointly with or has the same interest as other persons, whether receiving legal aid, advice or assistance or not; or~~
 - ~~(iv) has available to him rights or facilities making it unnecessary for him to take advantage of this Part or has a reasonable expectation of receiving financial or other help from a body of which he is a member;~~
- ~~(b) a person seeks legal aid, advice or assistance in a matter of special urgency;~~
- ~~(c) a person begins to receive legal aid, advice or assistance after having consulted a solicitor in the ordinary way with respect to the same matter, or ceases to receive legal aid, advice or assistance before the matter in question is finally settled;~~
- ~~(d) there is any relevant change of circumstances while a person is receiving legal aid, advice or assistance.~~

- (4) ~~Without prejudice to paragraph (3) (a) regulations may also modify the provisions of this Part in any manner for the purposes of the application of those provisions to advice or assistance—~~
- ~~(a) sought or received by a person who is under such age (not exceeding the age of eighteen years) as may be specified in the regulations; or~~
 - ~~(b) sought or received on behalf of any such person by his parents or guardian or other person under whose care he is, or by a person acting for the purposes of any proceedings in Northern Ireland as his next friend or guardian.~~

¹⁴⁴(4A) ~~Without prejudice to the preceding provisions of this Article or any other provision of this Part authorising the making of regulations, regulations may also modify the provisions of, or of any instrument having effect under, this Part (including so much of any of those provisions as specifies a sum of money) for the purposes of the application of those provisions—~~

- ~~(a) in cases where their modification appears to the Lord Chancellor necessary for the purpose of fulfilling any obligation imposed on the United Kingdom or Her Majesty's government therein by any international agreement; or~~
- ~~(b) in relation to proceedings for securing the recognition or enforcement in Northern Ireland of judgments given outside the United Kingdom for whose recognition or enforcement in the United Kingdom provision is made by any international agreement;}~~

(5) ~~The¹⁴⁵ Lord Chancellor} shall, before making regulations as to the procedure—~~

- ~~(a) of the¹⁴⁵ Court of Judicature;}~~¹⁴³ ~~consult the¹⁴⁶ Court of Judicature} Rules Committee;~~
 - ~~(b) of county courts, consult the County Court Rules Committee;~~
 - ~~(c) of magistrates' courts, consult the Magistrates' Courts Rules Committee;~~
 - ~~(d) of any tribunal, consult any rules committee or similar body by whom or on whose advice rules of procedure for the tribunal may be made apart from this Part, or whose consent or concurrence is required for any rules so made.~~
- ~~(6) Regulations shall be subject to¹⁴⁶ negative resolution}.~~

Annotations:

¹⁴³ S.I. 1982/459

¹⁴⁴ 1982 c. 27

¹⁴⁵ Words in art. 22(5)(a) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 59(5), 148(1), Sch. 11 para. 6; S.I. 2009/4604, art. 2(d)

¹⁴⁶ Words in art. 22(6) substituted (12.4.2010) by Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/476), arts. 1(2), 15(5), Sch. 14 para. 130(2) (with arts. 28-31); S.I. 2010/977, art. 1(2)

Advisory committees

23. ^{F47}

Annotations:

F47 Art. 23 repealed (20.3.2006) by Access to Justice (Northern Ireland) Order 2003 (S.I. 2003/435 (N.I. 10)), arts. 1(2), 49(2), Sch. 5 (with transitional provisions and savings in art. 48(2), Sch. 3); S.R. 2006/27, arts. 1, 3

Secrecy

~~24. (1) Subject to paragraph (2), information furnished for the purposes of this Part to the Law Society, or to any committee or person on their behalf, in connection with the case of a person seeking or receiving legal aid, advice or assistance shall not be disclosed otherwise than—~~

~~(a) for the purpose of facilitating the proper performance by any committee, court, tribunal or other person or body of persons of functions under this Part; or~~

~~(b) for the purpose of any criminal proceedings for an offence thereunder or of any report of such proceedings;^{F48} or~~

~~[^{F49}(c) for the purpose of facilitating the proper performance by the Solicitors' Disciplinary Tribunal of its functions under the Solicitors (Northern Ireland) Order 1976 in respect of a complaint made to it under Article 44(1)(g) of that Order or in connection with the making of an order under Article 51B(1) or (3) of that Order.]~~

~~(2) Paragraph (1) shall not prevent the disclosure of information for any purpose with the consent of the person in connection with whose case the information was furnished and, where he did not furnish the information himself, with that of the person or body of persons who did furnish the information.~~

~~(3) A person who, in contravention of this Article, discloses any information obtained by him when employed by or acting on behalf of the Law Society shall be guilty of an offence and be liable on summary conviction to a fine not exceeding ^{F50} level 5 on the standard scale;~~

~~(4) Proceedings for an offence under this Article shall not be brought except by or with the consent of the Attorney General.~~

~~(5) For the avoidance of doubt it is hereby declared that information furnished to counsel or a solicitor as such by or on behalf of a person seeking or receiving legal aid, advice or assistance is not information furnished to the Law Society or a person on their behalf.~~

Annotations:

F48—1989 NI 44

F49—4984 NI 3

Proceedings for misrepresentation etc.

~~25. (1) If any person seeking or receiving legal aid, advice or assistance—~~

~~(a) wilfully fails to comply with any regulations as to the information to be furnished by him; or~~

~~(b) in furnishing any information required by the regulations knowingly makes any false statement or false representation;~~

~~he shall be guilty of an offence and be liable on summary conviction to a fine not exceeding ^{F51} level 5 on the standard scale or to imprisonment for a term not exceeding three months or to both.~~

~~(2) Notwithstanding any statutory provision prescribing the period within which summary proceedings may be commenced, proceedings for an offence under paragraph (1) may be~~

~~commenced at any time within the period of six months from the date on which evidence, sufficient in the opinion of the Attorney General to justify a prosecution for the offence, comes to the knowledge of the Attorney General; or within the period of twelve months after the commission of the offence, whichever period last expires.~~

~~(3) For the purposes of paragraph (2) a certificate, purporting to be signed by the Attorney General as to the date on which such evidence has as aforesaid come to the knowledge of the Attorney General, shall be conclusive evidence thereof.~~

~~(4) A county court notwithstanding any limitation imposed on the jurisdiction of a county court under any other statutory provision shall have jurisdiction to hear and determine any action brought to recover the loss sustained by the legal aid fund by reason of—~~

- ~~(a) the failure of a person seeking or receiving legal aid, advice or assistance to comply with any such regulations as aforesaid; or~~
- ~~(b) a false statement or false representation made by such a person in furnishing information for the purposes of this Part.~~

~~Annotations:
1:50—1984 NI-3~~

~~Adaptation for purposes of Part II of rights to indemnity~~

~~26. (1) This Article shall have effect for the purposes of adapting in relation to this Part any right (however and whenever created or arising) which a person may have to be indemnified against expenses incurred by him.~~

~~(2) In determining for the purposes of any such right the reasonableness of any expenses, the possibility of avoiding them or part of them by taking advantage of this Part shall be disregarded.~~

~~(3) Where a person having any such right to be indemnified against expenses incurred in connection with any proceedings receives legal aid, advice or assistance in connection with those proceedings, then (without prejudice to the effect of the indemnity in relation to his contribution, if any, under Article 7 or 12^{(1)(a)} or a direction or authorization under Article 10A) the right shall inure also for the benefit of the legal aid fund as if the expenses incurred by that fund on behalf of the said person in connection with the legal aid, advice or assistance had been incurred by him.~~

~~(4) Where—~~

~~(a) a person's right to be indemnified against expenses incurred in connection with any proceedings arises by virtue of an agreement and is subject to any express condition conferring on those liable thereunder any right with respect to the bringing or conduct of the proceedings; and~~

~~(b) those liable to have been given a reasonable opportunity of exercising the right so conferred and have not availed themselves of that opportunity;~~

~~the right to be indemnified shall be treated for the purposes of paragraph (3) as not being subject to that condition.~~

~~(5) Nothing in paragraphs (3) and (4) shall be taken as depriving any person or body of persons of the protection of any statutory provision or, save as provided in paragraph (4), as conferring any larger right to recover money for the benefit of the legal aid fund in respect of any expenses than the person receiving legal aid, advice or assistance would have had if the expenses had been incurred by him.~~

~~Annotations:
1:51—2005 NI-19~~

Interpretation of Part II and Schedules 1 and 2

27. In this Part and Schedules 1 and 2—

“advice” and “assistance” mean respectively advice and assistance under this Part;

“assistance by way of representation” has the meaning assigned to it by Article 5(4);

“Law Society” means the incorporated Law Society of Northern Ireland;

“legal aid” means legal aid under this Part;

“order for costs” includes any judgment, order, decree, award or direction for the payment of the costs of one party to any proceedings by another party, whether given or made in those proceedings or not;

“person” does not include a body of persons corporate or unincorporate which is not concerned in a representative, fiduciary or official capacity so as to authorise legal aid, advice or assistance to be given to such a body;

“prescribed” means prescribed by regulations;

“regulations” means regulations made by the¹⁶³ Lord Chancellor under this Part;

“solicitor” means a solicitor of the¹⁶⁴ Court of Judicature;

“statutory inquiry” means an inquiry or hearing held or to be held in pursuance of a duty imposed by any statutory provision;

“statutory provision” has the meaning assigned to it by section 1(1) of the Interpretation Act (Northern Ireland) 1954;

“tribunal” includes an inquiry or proceedings before an arbitrator or umpire, however appointed, whether such inquiry or proceedings take place under a reference by consent or otherwise.

Annotations:

¹⁶³ S.I. 1982/159

¹⁶⁴ Words in art. 27 substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 59(5), 148(1), Sch. 11 para. 6; S.I. 2009/1694, art. 3(d)

PART III

FREE LEGAL AID IN CRIMINAL PROCEEDINGS

Free legal aid in the magistrates' court

28. (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 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^{F54} 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.

^{F55}(2A) The power conferred by paragraph (1) to grant a criminal aid certificate includes power to grant a certificate for a limited period, for the purposes of specified proceedings only or for the purposes of limited aspects of proceedings, and to vary or remove any limitation imposed by a criminal aid certificate.]

(3) An application for free legal aid under paragraph (1) may be made to a magistrates' court by letter, and may be so made by any person arrested or summoned for an offence, as well as by a person charged with an offence before such a court.

- (4) A letter applying for free legal aid by virtue of this Article shall—
- (a) be addressed to the clerk of petty sessions for the relevant petty sessions district;
 - (b) give particulars of the offence charged; and
 - (c) set out the grounds of the application.

(5) Where an application is made by virtue of this Article, any court acting for the relevant petty sessions district shall have the like power exercisable on the like grounds of granting a criminal aid certificate as a magistrates' court would have if the applicant had been charged with the offence before it.

(6) The refusal of a criminal aid certificate made by letter shall not prevent the applicant being granted a criminal aid certificate at the hearing.

(7) Where a criminal aid certificate is granted to any person that person shall be entitled to free legal aid in respect of work reasonably undertaken and properly done by the solicitor assigned to that person in—

- (a) giving notice of appeal to a county court;
- (b) applying for a case to be stated for the opinion of the Court of Appeal;

and in matters preliminary thereto, being work done within the ordinary time for giving the notice or, as the case may be, making the application for the case to be stated.

Annotations:

F54 2002 c. 26

F55 Art. 28(2A) inserted (1.8.2007) by Justice and Security (Northern Ireland) Act 2007 (c. 6), ss. 46, 53(4); S.I. 2007/2045, art. 2(2) (with transitional provisions in art. 3)

^[F56]Free legal aid for diversionary youth conferences

Annotations:

F56 2002 c. 26

28A. (1) Where a diversionary youth conference has been, or is to be, convened with respect to a child, he may make an application for free legal aid to a magistrates' court.

(2) An application under paragraph (1) shall be made—

- (a) by a written statement in the prescribed form addressed to the clerk of petty sessions for a magistrates' court; or
- (b) if an application under sub-paragraph (a) is refused, in person to a magistrates' court.

(3) If, on an application made under paragraph (1), it appears to the court that—

- (a) the means of the child are insufficient to enable him to obtain legal aid; and
- (b) it is desirable in the interests of justice that he should have free legal aid in preparing for and participating in the diversionary youth conference,

the court may grant in respect of him a criminal aid certificate.

(4) A person in respect of whom a criminal aid certificate has been granted under this Article shall be entitled to have—

- (a) a solicitor; and
- (b) subject to paragraph (5), counsel,

assigned to him for that purpose in such manner as may be prescribed by rules made under Article 36.

(5) Free legal aid given for the purposes of any diversionary youth conference shall not include representation by counsel except where—

- (a) the offence with respect to which the diversionary youth conference is convened is an indictable offence; and
- (b) the court is of the opinion that, because of circumstances which make the case unusually grave or difficult, representation by both solicitor and counsel would be desirable.

Free legal aid in the Crown Court

29. (1) Any person returned for trial for an indictable offence^[F57] or in respect of whom a notice of transfer has been given under Article 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988^[F58] (serious and complex fraud) or under Article 4 of the Children's Evidence (Northern Ireland) Order 1995 (certain cases involving children)] shall be entitled to free legal aid in the preparation and conduct of his defence at the trial and to have solicitor and counsel assigned to him for that purpose in such manner as may be prescribed by rules made under Article 36, if a criminal aid certificate is granted in respect of him in accordance with the provisions of this Article.

(2) Subject to the provisions of this Article, a criminal aid certificate may be granted in respect of any person—

- (a) by a magistrates' court, upon his being returned for trial; or
- (b) by the judge of the court before which he is to be tried, at any time after reading the depositions taken at the preliminary investigation or, as the case may be, the written statements tendered, and any depositions taken, at the preliminary enquiry,^[F57] or]

^[F57](c) where a notice of transfer is given under Article 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988, by the magistrates' court before which the person to whom the notice relates is brought or by the Crown Court sitting at the place specified by the notice as the proposed place of trial or at any place substituted for it by a direction mentioned in Article 4(5) of that Order,^[F59] . . .]

(d)^[F58] or]

¹⁵⁸(e) where a notice of transfer is given under Article 4 of the Children's Evidence (Northern Ireland) Order 1995, by the magistrates' court before which the person to whom the notice relates is brought or by the Crown Court sitting at the place specified by the notice as the proposed place of trial or at any place substituted for it by a direction mentioned in paragraph 2(4) of Schedule 1 to that Order.]

and such court or judge is in this Part referred to as "the certifying authority".

(3) A criminal aid certificate shall not be granted in respect of any person unless it appears to the certifying authority that his means are insufficient to enable him to obtain such aid, but where it so appears to the certifying authority, that authority—

- (a) shall grant a criminal aid certificate in respect of any person returned for trial upon a charge of murder; and
- (b) may grant a criminal aid certificate in respect of any person returned for trial upon any other charge if it appears to the certifying authority, having regard to all the circumstances of the case (including the nature of the defence, if any, as may have been set up), that it is desirable in the interests of justice that he should have free legal aid in the preparation and conduct of his defence at the trial.

(4) Where a criminal aid certificate is granted to any person under this Article that person shall be entitled to free legal aid in respect of work reasonably undertaken and properly done by the solicitor assigned to that person in—

- (a) giving notice of appeal to the Court of Appeal or of an application for leave to appeal and in matters preliminary thereto, being work done within the ordinary time for giving the notice or making the application; and
 - (b) obtaining the opinion of the counsel assigned to that person as to the appeal or application or matters connected therewith
- and
- (c) applying to a magistrates' court for bail under section 91 of the Justice Act (Northern Ireland) 2011.

(5) The foregoing provisions of this Article shall apply to persons who appear or are brought before the Crown Court to be dealt with and shall, for the purposes of their application to such persons be amended as follows:—

- (a) in paragraph (1) for the words "returned for trial for an indictable offence" there shall be substituted the words "appearing or brought before the Crown Court to be dealt with" and the words "in the preparation and conduct of his defence at the trial" and "for that purpose" shall be omitted;
- (b) in paragraph (2)(b) for the words from "is to be" onwards there shall be substituted the words "appears or is brought";
- (c) in paragraph (3)(b) for the words "returned for trial upon any other charge" there shall be substituted the words "appearing or brought before it" and the words "in the preparation and conduct of his defence at the trial" shall be omitted.

Annotations:

F57 1988 NI 16

F58 1995 NI 3

F59 - Art. 29(2)(d) and preceding word repealed (4.7.1996) by Criminal Procedure and Investigations Act 1996 (c. 25), s. 46(2), Sch. 5 (as modified in its application to Northern Ireland by Sch. 4 paras. 19, 36)

Free legal aid on appeal to the county court

30. (1) Where a person who has been convicted of an offence or sentenced for an offence by a magistrates' court desires to appeal to a county court against the conviction or the sentence, but has not sufficient means to enable him to obtain legal aid for the purpose, he may make an application for free legal aid to the court by which he was convicted or sentenced, or to any magistrates' court

acting for the same petty sessions district, and where a person so convicted or sentenced has given notice of appeal to a county court, the other party to the appeal, if he has not sufficient means to enable him to obtain legal aid for the purpose of resisting the appeal, may make an application for free legal aid to any magistrates' court acting for that district.

(2) An application made under paragraph (1) may be made either—

- (a) in person to the court; or
- (b) by letter addressed to the clerk of petty sessions for the relevant petty sessions district, setting out the facts of the case and the grounds of the application.

(3) If on an application made under paragraph (1) it appears to the court that—

- (a) the means of the applicant are insufficient to enable him to obtain legal aid; and
- (b) it is desirable in the interests of justice that the applicant should have free legal aid in the preparation and conduct of his appeal, or, as the case may be, in resisting the appeal;

the court may grant in respect of him a criminal aid certificate.

(4) Where, on an application made under paragraph (1), the magistrates' court has refused to grant a criminal aid certificate the applicant may make an application for the same purpose to the court to which the appeal lies either—

- (a) in person to that court; or
- (b) by letter addressed to the chief clerk and setting out the facts of the case and the grounds of the application;

and the court shall have the like power exercisable on the like grounds of granting a criminal aid certificate as the magistrates' court.

(5) Without prejudice to paragraph (4), an application for free legal aid under this Article may be made in person to the court before which the appeal is heard by an applicant who has not made the previous application to a magistrates' court or clerk of petty sessions which is required under this Article; and if the court before which the appeal is heard is satisfied that there were adequate reasons for the applicant not making a previous application as aforesaid it shall deal with his application as if duly made under paragraph (4).

(6) In paragraph (5) the expression "adequate reasons" includes lack of knowledge by the applicant of the law or procedure.

(7) A person in respect of whom a criminal aid certificate has been granted under this Article shall be entitled, subject to paragraph (8), to have a solicitor and counsel assigned to him in the manner prescribed by rules made under Article 36.

(8) Where before the court to which the appeal lies a party may be heard by a solicitor, the court granting the criminal aid certificate may direct that a solicitor only shall be assigned.

(9) A person in respect of whom a criminal aid certificate has been granted shall be entitled to free legal aid—

- (a) in giving notice of appeal to a county court, and in matters preliminary thereto;
- (b) in the preparation and conduct of his appeal or, as the case may be, in resisting the appeal;
- (c) in applying for a case to be stated for the opinion of the Court of Appeal, and in matters preliminary thereto.

(10) Paragraph (9)(a) and (c) shall apply in relation to work reasonably undertaken and properly done by the solicitor assigned to the person to whom a criminal aid certificate has been granted, being work done within the ordinary time for giving the notice of appeal or, as the case may be, making the application for the case to be stated.

(11) Paragraph (9)(a), (b) and (c) shall, where counsel is assigned to the person to whom a criminal aid certificate has been granted, include the obtaining by the solicitor assigned to that person of the counsel's opinion as to the appeal or application or matters connected therewith.

(12) This Article shall, with the necessary modifications, apply to—

- (a) an appeal under^{F60} Article 141(1) of the Magistrates' Courts (Northern Ireland) Order

- 1981] as if the appeal were an appeal against a conviction; and
- (b) an appeal under^{F61} Article 51(4) of the Mental Health (Northern Ireland) Order 1986] as if the appeal were an appeal against sentence.

Annotations:

F60 1981 NI 26

F61 1986 NI 4

Resolution of doubts under Articles 28 to 30

31. If, on a question of granting a person free legal aid under Article 28,^{F62} 28A,] 29 or 30, 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.

Annotations:

F62 2002 c. 26

Statements for purposes of free legal aid

32. (1) Before a person is granted free legal aid under Article 28,^{F63} 28A,] 29 or 30 he may be required to furnish a written statement in the prescribed form about matters relevant for determining whether his means are insufficient to enable him to obtain legal aid, and if a person in furnishing such a written statement as aforesaid (whether required so to do or not) knowingly makes any false statement or false representation he shall be guilty of an offence and be liable on summary conviction to a fine not exceeding^{F64} level 3 on the standard scale] or to imprisonment for a term not exceeding three months or to both.

(2) Notwithstanding any statutory provision prescribing the period within which summary proceedings may be commenced, proceedings for an offence under paragraph (1) may be commenced at any time within the period of six months from the date on which evidence, sufficient in the opinion of the Attorney General to justify a prosecution for the offence, comes to the knowledge of the Attorney General, or within the period of twelve months after the commission of the offence, whichever period last expires.

(3) For the purposes of paragraph (2) a certificate purporting to be signed by the Attorney General as to the date on which such evidence as aforesaid has come to the knowledge of the Attorney General, shall be conclusive evidence thereof.

Annotations:

F63 2002 c. 26

F64 1984 NI 3

Report on means of applicant for free legal aid

33. (1) Where a person has applied for free legal aid and has furnished a statement of means under Article 32(1) the court having power to grant a certificate entitling him to such legal aid may, before or after the granting of the certificate, require the^{F65} Department for Social Development] to arrange for an officer of that Department to enquire into the means of that person and where such a request is made that Department shall comply with it and arrange for the officer to make a report to the court.

(2) Where the court receives a report under paragraph (1) before a certificate is granted, it shall, in determining whether or not to grant the certificate, have regard to the report and where the court receives such a report after a certificate has been granted, it may revoke the certificate if it appears to the court that the person to whom the certificate was granted—

- (a) wilfully withheld material information from the court; or
- (b) knowingly made a false statement in furnishing information to the court; or
- (c) furnished to the court, due to error or mistake, a statement of means which was misleading to a significant extent.

(3) Where a certificate is revoked under paragraph (2), the cost of legal aid incurred to the date of revocation may be recovered from the person to whom the certificate was granted (or if such person was a child or young person, the parent or guardian) as a civil debt due to the Crown and a county court notwithstanding any limitation imposed on its jurisdiction under any statutory provision shall have jurisdiction to hear and determine any action brought to recover such cost.

Annotations:

F65 2005 NI 19

Order to recover costs of legal aid

33A. (1) Where a person has been granted a criminal aid certificate the court may, subject to rules made under Article 36, make an order requiring him to pay some or all of the cost of legal aid incurred to the date of the order unless he is already subject to an action under Article 33(3) to recover that cost.

(2) Rules made under Article 36 may make provision about—

- (a) the descriptions of courts by which, and individuals against whom, an order under paragraph (1) may be made,
- (b) the circumstances in which such an order may be made and the principles to be applied in deciding whether to make such an order and the amount to be paid,
- (c) the persons who may apply to the court for such an order to be made and the circumstances and manner in which that application may be made,
- (d) the determination of the cost of legal aid incurred for the purposes of the making of such an order,
- (e) the manner in which, and persons by whom, an investigation into the means of any person may be carried out for the purposes of making such an order,
- (f) the furnishing of information and evidence to the court or the Northern Ireland Legal Services Commission Director for the purpose of enabling the court to decide whether to make such an order and (if so) the amount to be paid,
- (g) prohibiting persons who are required to furnish information or evidence from dealing with property until they have furnished the information or evidence or until a decision whether to make an order, or as to the amount to be paid, has been made,
- (h) rights of appeal against such an order,
- (i) the person or body to which, and manner in which, payments required by such an order must be made and what that person or body is to do with them,
- (j) the enforcement of such an order (including provision for the imposition of charges in respect of unpaid amounts), and
- (k) such other matters as the Department of Justice considers necessary or appropriate.

Free legal aid for children and young persons

34. The parent or guardian of a child^{F66} . . . may, on behalf of that child^{F67} . . . , make any application for free legal aid under the provisions of this Part, and any written statement of the means of that child. . . required under Article 32(1).

Annotations:

- F66 Words in art. 34 repealed (16.4.2007) by Justice (Northern Ireland) Act 2002 (c. 26), ss. 86, 87, Sch. 13; S.R. 2007/237, art. 2, Sch.
 F67 1998 NI 9

Further provisions as to issue of certificates

35. For the purposes of this Part, the expressions "defence" and "trial" shall be taken as relating not only to proceedings on the issue of the defendant's guilt, but also to proceedings on the question of the sentence to be passed or order to be made; and any power to grant a criminal aid certificate to a person returned for trial or to a person charged with an offence before a magistrates' court shall be exercisable after as well as before that person has pleaded or has been found guilty.

[^{F68}Court-ordered youth conferences

Annotations:

F68 2002 c. 26

35A. (1) In this Part references to—

- (a) the preparation and conduct of a person's defence before a court or at a trial;
- (b) the preparation and conduct of an appeal; and
- (c) resisting an appeal,

include preparation for and participation in any court-ordered youth conference (but not any diversionary youth conference).

(2) In Article 29, as it applies by virtue of paragraph (5) of that Article, references to free legal aid to which a person appearing or brought before the Crown Court to be dealt with is entitled include free legal aid in the preparation for and participation in any court-ordered youth conference (but not any diversionary youth conference).]

Expenses of free legal aid and making of rules

36. (1) In any case where a criminal aid certificate has been granted in respect of any person, the expenses properly incurred in pursuance of that certificate including the fees of a solicitor and, where counsel has been assigned, of counsel, shall be defrayed out of moneys provided by [^{F69}the Assembly], subject nevertheless to any rules made under this Article and to any directions as to the vouching of payments and the keeping of accounts, records or receipts which may be given by the Treasury.

(2) If upon the trial before the Crown Court of a person in respect of whom a criminal aid certificate has not been granted, his defence is undertaken by counsel or solicitor or both at the request of the judge, the cost thereof may be paid as if a criminal aid certificate had been granted to that person.

(3) The [^{F70} Lord Chancellor], after consultation with the Lord Chief Justice, the Attorney General, and, where appropriate the Crown Court Rules Committee, the County Court Rules Committee and the Magistrates' Courts Rules Committee, and with the approval of the Treasury, may make rules generally for carrying this Part into effect and such rules shall in particular prescribe—

- (a) the form of criminal aid certificates;
- (b) the manner in which counsel and solicitors are to be assigned in pursuance of such certificates;
- [^{F71}(bb) the form for the purpose of Article 28A(2)(a);]
- (c) the form for the purpose of Article 32(1); and
- (d) the rates or scales of payment of any fees, costs or other expenses which are payable under this Part.

(4) ~~Rules under this Article shall be subject to [^{F72} negative resolution].~~

(4) Except as provided by paragraph (5), rules under this Article are subject to negative resolution.

(5) The rules to which paragraph (6) applies shall not be made unless a draft of the rules has been laid before, and approved by resolution of, the Assembly.

(6) This paragraph applies to—

- (a) the first rules made under this Article which contain any provision made by virtue of Article 31 (as substituted by section 80 of the Justice Act (Northern Ireland) 2011);
- (b) the first rules made under this Article which contain any provision made by virtue of Article 36A (as substituted by Schedule 2 to the Legal Aid and Coroners' Courts Act (Northern Ireland) 2014);
- (c) the first rules made under this Article which contain any provision made by virtue of Article 36B (as substituted by Schedule 2 to the Legal Aid and Coroners' Courts Act (Northern Ireland) 2014);
- (d) the first rules made under this Article which contain any provision made by virtue of Article 38A (as inserted by Schedule 2 to the Legal Aid and Coroners' Courts Act (Northern Ireland) 2014).

Annotations:

F69 Words in art. 36(1) substituted (12.4.2010) by Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/976), arts. 1(2), 15(5), Sch. 18 para. 130(3)(a) (with arts. 28-31); S.I. 2010/977, art. 1(2)

F70 SI 1982/159

F71 2002 c. 26

F72 Words in art. 36(4) substituted (12.4.2010) by Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/976), arts. 1(2), 15(5), Sch. 18 para. 130(3)(b) (with arts. 28-31); S.I. 2010/977, art. 1(2)

Modifications etc. (not altering text)

C3 Art. 36(1); functions of Treasury or Minister for the Civil Service transferred to Department of Finance and Personnel (12.4.2010) by Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/976), arts. 1(2), 15(4)(e) (with arts. 15(6), 28-31); S.I. 2010/977, art. 1(2)

C4 Art. 36(3); functions of Treasury or Minister for the Civil Service transferred to Department of Finance and Personnel (12.4.2010) by Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/976), arts. 1(2), 15(4)(e) (with arts. 15(6), 28-31); S.I. 2010/977, art. 1(2)

[¹²³Assignment of solicitor excluded from legal aid work

Annotations:

E71 1989 NI 14

~~36A. A solicitor shall not be assigned in pursuance of a criminal aid certificate if he is for the time being excluded from being so assigned by an order under Article 51B(1) or (3) of the Solicitors (Northern Ireland) Order 1976.~~

Assignment of solicitor and counsel

36A.—(1) Rules under Article 36(3)(b) must provide that, subject to paragraphs (2) and (3) and to any provision made by virtue of paragraph (4), a person in respect of whom a criminal aid certificate has been granted may select any solicitor or counsel willing to act for that person to be assigned so to act.

(2) A solicitor shall not be assigned in pursuance of a criminal aid certificate if the solicitor is for the time being prohibited from being so assigned by an order under Article 51B(1) or (3) of the Solicitors (Northern Ireland) Order 1976.

(3) A counsel shall not be assigned in pursuance of a criminal aid certificate if the counsel is for the time being prohibited from being so assigned by a determination of the General Council of the Bar of Northern Ireland, or by any determination of any such committee as may be established by that Council to determine charges preferred against counsel.

(4) Rules under Article 36(3)(b) may—

(a) provide that in prescribed circumstances the right referred to in paragraph (1)—

(i) does not apply in cases of a prescribed description,

(ii) is not to include a right to select a solicitor or counsel of a prescribed description,

(iii) is to select only a solicitor or counsel registered under Article 36B, or only a solicitor or counsel of a prescribed description,

(b) restrict the right to select a solicitor or counsel in place of a solicitor or counsel previously selected.

(5) Rules under Article 36(3)(b) may provide that, in prescribed circumstances, Article 36(1) does not require the Department to defray, or to continue to defray, the expenses incurred by a particular solicitor or counsel (but such provision shall not prejudice any right of a person to select another solicitor or counsel).

(6) The circumstances which may be prescribed by rules under paragraph (4) or (5) include that a determination has been made by a prescribed body or person.

(7) A solicitor or counsel who has been selected to act for a person may select another person to act for that person, as the agent of the solicitor or counsel, if that other person is of such a description that nothing in this Article or Article 36B would prohibit the person selecting that solicitor or counsel to act for that person.

(8) In this Article "prescribed" means prescribed by rules under Article 36(3)(b).

Register of solicitors and counsel eligible to be assigned

36B.—(1) Rules under Article 36(3)(b) may—

(a) make provision for the registration by the Department of counsel and solicitors who are eligible to be assigned in pursuance of criminal aid certificates;

(b) provide that only those counsel or solicitors who are registered may be so assigned; and

(c) require registration of firms with which registered solicitors are connected.

- (2) Those rules may require the Department to prepare a code of practice in relation to—
- (a) the conditions to be complied with in order to qualify for registration, and
 - (b) the carrying out by registered counsel and registered solicitors, and any firm which is registered in connection with a registered solicitor, of their functions with regard to the provision of free legal aid.
- (3) Those rules may—
- (a) require registered counsel and registered solicitors, and any firm which is registered in connection with a registered solicitor, to comply with any such code of practice;
 - (b) require the Department or persons authorised by the Department to monitor compliance with any such code of practice; and
 - (c) make provision about procedures for cases in which—
 - (i) it appears to the Department or a person authorised by the Department that a registered counsel or solicitor, or any firm which is registered in connection with a registered solicitor, may not be complying with any such code of practice, or
 - (ii) a person who holds any judicial office asks the Department to investigate whether a registered counsel or solicitor, or any firm which is registered in connection with a registered solicitor, is complying with any such code of practice, and the sanctions which may be imposed by virtue of this sub-paragraph may include provision for a counsel, solicitor or firm to cease to be registered.
- (4) Those rules—
- (a) may make provision imposing charges;
 - (b) may make provision with respect to the powers of investigation which may be exercised by the Department, or by persons authorised by the Department, for the purpose of monitoring compliance with any code of practice prepared under the rules;
 - (c) may make provision for obstruction of the exercise of powers conferred by virtue of sub-paragraph (b) to be certified to the High Court in prescribed circumstances, and for any power of the High Court in relation to contempt of court to be exercisable in relation to such obstruction.

Remuneration of solicitors and counsel

37. The^{F74} Lord Chancellor] in exercising any power to make rules as to the amounts payable under this Part to counsel or a solicitor assigned to give legal aid, and any person by whom any amount so payable is determined in a particular case, shall have regard^{F75}, among the matters which are relevant, to—

- (a) the time and skill which work of the description to which the rules relate requires;
- (b) the number and general level of competence of persons undertaking work of that description;
- (c) the cost to public funds of any provision made by the rules; and
- (d) the need to secure value for money,

but nothing in this Article shall require him to have regard to any fees payable to solicitors and counsel otherwise than under this Part.]

Annotations:

F74 SI 1982/159

F75 Words in art. 37 substituted (9.3.2005) by Access to Justice (Northern Ireland) Order 2003 (S.I. 2003/435 (N.I. 10)), arts. 1(2), 49(1), Sch. 4 para. 6(3); S.R. 2005/111, art. 3 (with transitional provisions and savings in arts. 4, 5, 6) (as amended (29.8.2009) by S.R. 2009/312, art. 3 (with savings in arts. 4, 5))

Adaptation for purposes of Part III of rights to indemnity

38. (1) This Article shall have effect for the purpose of adapting in relation to this Part any right (however and whenever created or arising) which a person may have to be indemnified against expenses incurred by him.

(2) In determining for the purposes of any such right the reasonableness of any expenses, the possibility of avoiding them or part of them by taking advantage of this Part shall be disregarded.

(3) Where a person having any such right to be indemnified against expenses incurred in connection with any matter in respect of which a criminal aid certificate may be granted—

- (a) is granted such a certificate; or
- (b) has his defence before the Crown Court undertaken by counsel or solicitor or both at the request of the judge;

then the right shall inure also for the benefit of the^{F76} Lord Chancellor] as if any expenses defrayed or cost paid under Article 36 in relation to that certificate or defence had been expenses incurred by that person.

(4) Where—

- (a) a person's right to be indemnified against expenses incurred in connection with any matter in respect of which a criminal aid certificate may be granted arises by virtue of an agreement and is subject to any express condition conferring on those liable thereunder any right with respect to proceedings in relation to that matter; and
- (b) those liable have been given a reasonable opportunity of exercising the right so conferred and have not availed themselves of that opportunity;

the right to be indemnified shall be treated for the purposes of paragraph (3) as not being subject to that condition.

(5) Nothing in paragraphs (3) and (4) shall be taken as depriving any person or body of persons of the protection of any statutory provision or, save as provided in paragraph (4), as conferring any larger right on the^{F76} Lord Chancellor] to recover money in respect of any expenses than the person referred to in paragraph (3) would have had if the expenses had been incurred by him.

Annotations:

F76 SI 1982/159

Restriction of disclosure of information

38A.—(1) Information which is furnished—

- (a) to the Department or to any court, tribunal or other person or body on whom functions are imposed or conferred by or under this Part, and
- (b) in connection with the case of a person seeking free legal aid under this Part,

shall not be disclosed except as permitted by rules under Article 36.

- (2) Paragraph (1) does not limit the disclosure of—
- (a) information in the form of a summary or collection of information so framed as not to enable information relating to any individual to be ascertained from it, or
 - (b) information about the amount of any grant, loan or other payment made to any person or body by the Department.
- (3) Paragraph (1) does not prevent the disclosure of information for any purpose with the consent of the person in connection with whose case it was furnished and, where the person did not furnish it himself or herself, with that of the person or body who did.
- (4) A person who discloses any information in contravention of this Article shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale.
- (5) Proceedings for an offence under this Article shall not be brought except by, or with the consent of, the Director of Public Prosecutions.
- (6) Nothing in this Article applies to information furnished to a person assigned to provide free legal aid under this Part by or on behalf of a person receiving such legal aid.

Interpretation of Part III

39. In this Part—

"the certifying authority" has the meaning assigned to that expression by Article 29(2);

[^{F77}"child" has the meaning given in Article 2(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998 (N.I. 9);]

[^{F77}"court-ordered youth conference" has the meaning assigned to that expression by Article 33A(5) of the Criminal Justice (Children) (Northern Ireland) Order 1998;]

"criminal aid certificate" means a certificate granted under Article 28(1), [^{F77} 28A(3),] 29(2) or 30(3);

[^{F77}"diversionary youth conference" has the meaning assigned to that expression by Article 10A(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998;]

"magistrates' court" has the meaning assigned to that expression by [^{F78} Article 2(2)(b) of the Magistrates' Courts (Northern Ireland) Order 1981];

"relevant petty sessions district" means, in relation to a person charged or to be charged before a magistrates' court, the petty sessions district for which the court acts;

"statutory provision" has the meaning assigned to it by section 1(f) of the Interpretation Act (Northern Ireland) 1954 .

Annotations:

F77 2002 c. 26

F78 1981 NI 26

PART IV
MISCELLANEOUS

Exemption from stamp duty

40. Stamp duty shall not be chargeable in respect of—

- (a) any form of application for legal aid under this Order; or
- ~~(b) any form relating to the offer and acceptance of a certificate pursuant to an application for legal aid under this Order.~~

Applications to Crown

41. This Order shall bind the Crown to the full extent authorised or permitted by the constitutional laws of Northern Ireland.

Amendments, repeals and revocations

Para.(1), with Schedule 3, effects amendments

Para.(2) with Schedule 4, effects repeals

(3) In any other statutory provision for the words "legal aid certificate", "defence certificate" or "appeal aid certificate" wherever they occur there shall be substituted the words "criminal aid certificate".

SCHEDULES

SCHEDULE 1 Article 10.

PROCEEDINGS FOR WHICH LEGAL AID MAY BE GIVEN UNDER ^{(1)(a)} [^{(1)(b)} ARTICLE 9]

Annotations:

- 179 — prosp. subst. by 2002 c. 25
- 180 — 2005 NI 19

PART I

DESCRIPTION OF PROCEEDINGS

1. Proceedings in any of the following courts—

- (a) the ⁽¹⁾ House of Lords in the exercise of its jurisdiction in relation to any appeal from Northern Ireland;
- ⁽²⁾ (b) the Judicial Committee of the Privy Council in the exercise of its jurisdiction in relation to any appeal or reference from Northern Ireland;
- (c) the High Court and the Court of Appeal;
- (d) any county court.

Annotations:

- 184 — prosp. subst. by 2005 c. 4
- 182 — prosp. rep. by 2005 c. 4

4. Proceedings in the Restrictive Practices Court under Part III of the Fair Trading Act 1973, and any proceedings in that court in consequence of an order made or undertaking given to the Court, under that Part of the Act.

Para. 5 rep. by 2002 c. 26

6. Proceedings in the Lands Tribunal for Northern Ireland.

⁽³⁾ 6A. Proceedings before the First-tier Tribunal under—

- (i) Schedule 2 to the Immigration Act 1974;
- (ii) section 40A of the British Nationality Act 1974;
- (iii) Part 5 of the Nationality, Immigration and Asylum Act 2002;
- (iv) regulation 26 of the Immigration (European Economic Area) Regulations 2006.

Annotations:

- 189 — Sch. 4 Pt. 1 para. 6A substituted (15.2.2010) by Legal Aid (Scope) Regulations (Northern Ireland) 2010 (S.R. 2010/9), reg. 3(e)

⁽⁴⁾ 6B. Proceedings before the Upper Tribunal arising out of proceedings within paragraph 6A.

Annotations:

- 190 — Sch. 4 Pt. 1 paras. 6B, 6C inserted (15.2.2010) by Legal Aid (Scope) Regulations (Northern Ireland) 2010 (S.R. 2010/9), reg. 3(d)

~~6C. Proceedings before the Special Immigration Appeals Commission.~~

~~7. Proceedings in the Enforcement of Judgments Office in connection with any proceedings mentioned in the foregoing paragraphs.~~

~~8. Proceedings brought by an individual before a Proscribed Organisations Appeal Commission.~~

Annotations:
 F101-2000 e.44

PART II
EXCEPTED PROCEEDINGS

~~1. Proceedings in respect of which free legal aid may be given under Part III of this Order.~~

~~2. Proceedings wholly or partly in respect of—~~

Sub-para. (a) rep. by 1984 NI 14

~~(b) the loss of the services of a woman or girl in consequence of her rape or seduction.~~

~~3. Proceedings wholly or partly in respect of defamation; but the making of a counterclaim for defamation in proceedings for which legal aid may be given shall not of itself affect any right of a defendant to the counterclaim to legal aid in the proceedings and legal aid may be granted to enable him to defend such counterclaim.~~

~~4. Relator actions.~~

~~5. Election petitions under the⁽¹⁰⁾ Representation of the People Act 1983 or the Electoral Law Act (Northern Ireland) 1962.~~

Annotations:
 F102-1983 e.2

~~6. Proceedings (other than proceedings referred to in paragraph 7 of Part I) for the recovery of a debt (including liquidated damages) which is admitted where the only question to be brought before the court is as to the time and mode of payment of that debt.~~

~~7. Proceedings incidental to any proceedings to which the foregoing paragraphs apply.~~

~~8. ⁽¹⁰⁾ File~~

Annotations:
 F103 Sch. 1 Pt. II paras. 8, 9 added (30.4.2007) by Legal Aid (Scope) Regulations (Northern Ireland) 2007 (S.R. 2007/166), reg. 2
 F104 Sch. 1 Pt. II para. 8 omitted (15.2.2010) by virtue of 2010 (S.R. 2010/9), reg. 4 (with reg. 5)

~~9. ⁽¹⁰⁾ File~~

Annotations:
 F105 Sch. 1 Pt. II para. 9 omitted (15.2.2010) by virtue of Legal Aid (Scope) Regulations (Northern Ireland) 2010 (S.R. 2010/9), reg. 4 (with reg. 5)

SCHEDULE 2 Article 13.

REMUNERATION OF PERSONS GIVING LEGAL AID UNDER PART II OF THIS ORDER

1. (1) ~~The sums allowed to counsel in connection with proceedings in the House of Lords, the Court of Appeal or the High Court, shall be⁽¹⁰⁶⁾ ninety-five per cent, or such larger percentage as may be prescribed, of the amount allowed on taxation of the costs.~~
- (2) ~~The sums allowed to counsel in connection with proceedings in the county court shall—~~
 - (a) ~~where the costs are taxed, be the full amount allowed on taxation of the costs;~~
 - (b) ~~where the costs are not taxed, be such amounts as the⁽¹⁰⁷⁾ Lord Chancellor, after consultation with the County Court Rules Committee, may by order determine.~~
- (3) ~~The sums allowed to counsel in connection with proceedings in courts of summary jurisdiction shall be such amounts as the⁽¹⁰⁷⁾ Lord Chancellor, after consultation with the Magistrates' Courts Rules Committee, may by order determine.~~
- (4) ~~The sums allowed to counsel in any other case shall be such as may be determined in the prescribed manner.~~

Annotations:
 F106 SR 1988/417
 F107 SI 1982/159

2. (1) ~~The sums allowed to a solicitor in connection with proceedings in the House of Lords, the Court of Appeal or the High Court shall be the full amount allowed on taxation of the costs on account of disbursements and⁽¹⁰⁸⁾ ninety-five per cent, or such larger percentage as may be prescribed, of the amount so allowed on account of profit costs.~~
- (2) ~~The sums allowed to a solicitor in connection with proceedings in the county court shall—~~
 - (a) ~~where the costs are taxed, be the full amount allowed on taxation of the costs;~~
 - (b) ~~where the costs are not taxed, be such amounts as the⁽¹⁰⁹⁾ Lord Chancellor, after consultation with the County Court Rules Committee, may by order determine.~~
- (3) ~~The sums allowed to solicitors in connection with proceedings in courts of summary jurisdiction shall be such amounts as the⁽¹⁰⁹⁾ Lord Chancellor, after consultation with the Magistrates' Courts Rules Committee, may by order determine.~~
- (4) ~~The sums allowed to a solicitor in any other case shall be such as may be determined in the prescribed manner.~~

Annotations:
 F108 SR 1988/417
 F109 SI 1982/159

3. ~~For the purpose of sub-paragraphs (1) and (2)(a) of paragraph 1, counsel's fees shall be taxed as if they had been paid by the solicitor, but shall not by reason thereof be treated as disbursements for the purposes of paragraph 2.~~

4. ~~Subject to paragraph 3,⁽¹¹⁰⁾ and to any statutory provision to the contrary, costs shall be taxed for the purposes of this Schedule on the standard basis within the meaning of the Rules of the Supreme Court (Northern Ireland) 1980, but no question shall be raised as to the propriety of any act for which prior approval was obtained as required by regulations.~~

5. ~~Regulations may provide that for the purposes of this Schedule, instead of costs being taxed in the ordinary way, the amount of the costs shall be fixed (whether by an officer of the court or not) by an assessment made without taxation but with a view to allowing as nearly as may be the same amount as on a taxation.~~

~~6. The⁽¹¹¹⁾ Lord-Chancellor] in exercising any power under this Schedule to make an order as to the amounts of the sums allowed to counsel or a solicitor, and in making any regulations relating to such amounts for the purposes of the Schedule, and any person by whom any such amount is determined under any such order or regulations in any particular case, shall have regard⁽¹¹²⁾ to the principle of allowing fair remuneration according to the work reasonably undertaken and properly done.~~

~~Annotations:~~

~~i111—SI 1982/459~~

~~i112—prop. subst. by 2003-NI-40~~

~~7.—Orders under this Schedule shall be subject to⁽¹¹³⁾ negative resolution].~~

~~Annotations:~~

~~i113—Words in Sch. 2 para. 7 substituted (12.4.2010) by Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/976), arts. 4(2), 45(5), Sch. 18 para. 136(4) (with arts. 28-34); S.I. 2010/977, art. 4(2)~~

Schedule 3—Amendments

Schedule 4—Repeals

Changes to legislation:

There are outstanding changes not yet made by the legislation.gov.uk editorial team to Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. Any changes that have already been made by the team appear in the content and are referenced with annotations.

Changes and effects yet to be applied to :

- Sch 1 Pt 1 am (20.12.2001) by 2001 c. 24 s 2(8)
- Sch. 1 Pt. 1 para. 2B inserted by S.R. 2010/9 reg. 3(a)
- Sch. 1 Pt. 1 para. 3(1) inserted by S.R. 2010/9 reg. 3(b)
- Sch. 1 Pt. 1 para. 6B 6C inserted by S.R. 2010/9 reg. 3(d)
- Sch. 1 Pt. 2 para. 8 9 omitted by S.R. 2010/9 reg. 4
- Sch. 1 Pt. 1 para. 6A substituted by S.R. 2010/9 reg. 3(c)
- Sch. 2 para. 7 words substituted by S.I. 2010/976 Sch. 18 para. 130(4)
- art 3 am (prosp) by 2002 c. 21 s 47, Sch 3, paras 4, 5
- art. 3(1) words substituted by 2011 c. 24 (N.I.) s. 82(2)(b)
- art. 3(1)(b) words repealed by 2010 c. 13 (N.I.) Sch. 4 Pt. 1
- art. 3(1)(c) and word inserted by 2011 c. 24 (N.I.) s. 82(2)(a)
- art 7 am (prosp) by 2002 c. 21 s 47, Sch 3, paras 4, 6
- art. 7(2) words inserted by 2011 c. 24 (N.I.) s. 82(3)
- art. 7(2) words repealed by 2010 c. 13 (N.I.) Sch. 4 Pt. 1
- art 14 am (prosp) by 2002 c. 21 s 47, Sch 3, paras 4, 7
- art. 14(5) words inserted by 2011 c. 24 (N.I.) s. 82(4)
- art. 14(5) words repealed by 2010 c. 13 (N.I.) Sch. 4 Pt. 1
- art. 14(7) words substituted by S.I. 2012/2595 art. 5
- art. 22(6) words substituted by S.I. 2010/976 Sch. 18 para. 130(2)
- art 24 ext in pt by 2001 c. 24 s 17, Sch 4, Pt 2, para 57
- art. 28(7) words inserted by 2011 c. 24 (N.I.) s. 83(2)(b)
- art. 28(7)(c) inserted by 2011 c. 24 (N.I.) s. 83(2)(a)
- art. 29(4)(c) and word added by 2011 c. 24 (N.I.) s. 83(3)
- art. 31 substituted by 2011 c. 24 (N.I.) s. 80(2)
- art. 33(1) words substituted by 2011 c. 24 (N.I.) s. 80(3)
- art. 33(4) inserted by 2011 c. 24 (N.I.) s. 81(3)
- art. 36(1) transfer of functions by S.I. 2010/976 art. 15(4)(e)
- art. 36(1) words substituted by S.I. 2010/976 Sch. 18 para. 130(3)(a)
- art. 36(3) transfer of functions by S.I. 2010/976 art. 15(4)(e)
- art. 36(4) art. 36(5) (6) substituted for art. 36(4) by 2011 c. 24 (N.I.) s. 80(4)
- art. 36(4) words substituted by S.I. 2010/976 Sch. 18 para. 130(3)(b)

Changes and effects yet to be applied to the whole Order associated Parts and Chapters:

- Order power to amend conferred by 2011 c. 24 (N.I.) s. 90(2)(b)
- Order power to amend conferred by 2011 c. 24 (N.I.) Sch. 5 para. 5(a)
- Order transfer of functions by S.I. 2010/976 Sch. 17 para. 36

Whole provisions yet to be inserted into this Order (including any effects on those provisions):

- art. 33A inserted by 2011 c. 24 (N.I.) s. 81(2)

Commencement Orders yet to be applied to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981

Commencement Orders bringing legislation that affects this Order into force:

- S.R. 2012/142 art. 2 commences (2011 c. 24 (N.I.))
- S.R. 2012/214 art. 2-5 commences (2011 c. 24 (N.I.))
- S.R. 2012/449 art. 2 commences (2011 c. 24 (N.I.))

Changes to legislation: There are outstanding changes not yet made by the legislation.gov.uk editorial team to Access to Justice (Northern Ireland) Order 2003. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)

KEELING SCHEDULE SHOWING – IN BOLD, USING UNDERLINING TO DENOTE INSERTIONS AND STRIKETHROUGH TO DENOTE DELETIONS – HOW THE 2003 ORDER IS MODIFIED BY THE PROPOSED AMENDMENTS CONTAINED IN THE LEGAL AID AND CORONERS’ COURTS BILL, AS INTRODUCED INTO THE ASSEMBLY ON 31 MARCH 2014.

This Keeling Schedule has been prepared by the Department of Justice. It is intended for illustrative purposes only to assist the reader to understand the proposed amendments to the Access to Justice (Northern Ireland) Order 2003. While care has been taken in its preparation, it may not be full and complete in every respect.

The Keeling Schedule does not add footnotes to the proposed amendments and footnotes to the existing provisions of the 2003 Order have not been updated.

STATUTORY INSTRUMENTS

2003 No. 435 (N.I. 10)

Access to Justice (Northern Ireland) Order 2003

27th February 2003

PART I

CITATION, COMMENCEMENT AND INTERPRETATION

Citation and commencement

1. (1) This Order may be cited as the Access to Justice (Northern Ireland) Order 2003.
- (2) Except as provided by paragraph (3), this Order shall come into operation on such day or days as the Lord Chancellor may by order appoint.
- (3) The following provisions come into operation on the expiration of one month from the date on which this Order is made—
 - (a) this Part,
 - (b) Article 45,
 - (c) Article 46(4) to (6), and
 - (d) Article 48(1).

Annotations:

Subordinate Legislation Made

- P1** Art. 1(2) power partly exercised: 28.7.2003 and 1.11.2003 appointed for specified provisions by S.R. 2003/344, arts. 2-4, Schs. 1, 2 (as amended by S.R. 2003/439, art. 2); 2.11.2003 appointed for specified provisions by S.R. 2003/440, art. 3, Sch. (with transitional provisions in art. 4); 9.3.2005 appointed for specified provisions by S.R. 2005/111, art. 3 (with savings and transitional provisions in arts. 4-6 and art. 4 revoked by S.R. 2009/312, art. 3); 9.11.2005 appointed for specified provisions by S.R. 2005/503, art. 2; 20.3.2006 appointed for specified provisions by [S.R. 2006/27], arts. 2, 3

Interpretation

2. (1) The Interpretation Act (Northern Ireland) 1954^{F1} shall apply to Article 1 and the following provisions of this Order as it applies to an Act of the Northern Ireland Assembly.
- (2) In this Order—

“advice” means any oral or written advice—

 - (a) on the application of the law to any particular circumstances that have arisen in relation to the individual seeking the advice; and

(b) as to any steps which that person might appropriately take, having regard to the application of the law to those circumstances;

“assistance” means any assistance (other than advocacy) to any individual in taking any of the steps which an individual might take, including steps with respect to proceedings, having regard to the application of the law to any particular circumstances that have arisen in relation to him, whether the assistance is given by taking such steps on his behalf or by assisting him in taking them on his own behalf;

“child” has the meaning given by Article 2(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998^{F2};

“civil legal services” has the meaning given by Article 10;

“the Commission” means the Northern Ireland Legal Services Commission;

“court-ordered youth conference” has the meaning given by Article 33A(5) of the Criminal Justice (Children) (Northern Ireland) Order 1998;

“criminal defence services” has the meaning given by Article 21(1);

“the Department” means the Department of Justice;

“the Director” means the Director of Legal Aid Casework designated under section 2 of the Legal Aid and Coroners’ Courts Act (Northern Ireland) 2014;

“diversionary youth conference” has the meaning given by Article 10A(2) of the Criminal Justice (Children) (Northern Ireland) Order 1998;

“the Law Society” means the Law Society of Northern Ireland;

“magistrates’ court” has the meaning assigned to that expression by Article 2(2)(b) of the Magistrates’ Courts (Northern Ireland) Order 1981^{F3};

“prescribed” means prescribed by regulations;

“regulations” means regulations made by the Lord Chancellor;

“relevant proceedings” has the meaning given by Article 25;

“representation” means representation for the purposes of proceedings and includes—

(a) all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings;

(b) in the case of civil proceedings, all such assistance as is usually so given in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings;

“solicitor” means a solicitor of the^{F4}Court of Judicature];

“statutory provision” has the meaning assigned to it by section 1(f) of the Interpretation Act (Northern Ireland) 1954^{F5};

“tribunal” includes an inquiry or proceedings before an arbitrator or umpire, however appointed, whether such inquiry or proceedings take place under a reference by consent or otherwise.

(3) References to counsel and solicitors shall be construed in accordance with Article 10 of the European Communities (Services of Lawyers) Order 1978^{F6} and regulation 14 of the European Communities (Lawyer’s Practice) Regulations 2000^{F7}.

Annotations:

F1 1954 c. 33 (NI)

F2 1998 NI 9

F3 1981 NI 26

F4 Words in Order substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 59(5), 148(1), Sch. 11 para. 6; S.I. 2009/1604, art. 2(b)(d)

F5 1954 c. 33 (NI)

F6 SI 1978/1910

F7 SI 2000/1119

~~PART 11~~
~~NORTHERN IRELAND LEGAL SERVICES~~
~~COMMISSION~~

~~Northern Ireland Legal Services Commission~~

- ~~3. (1) There shall be a body known as the Northern Ireland Legal Services Commission (in this Order referred to as "the Commission").~~
- ~~(2) The Commission shall have such functions as are conferred or imposed on it by the provisions of this Order or any other statutory provision.~~
- ~~(3) The Commission shall exercise its functions for the purpose of—~~
- ~~(a) securing (within the resources made available, and priorities set, in accordance with this Part) that individuals have access to civil legal services that effectively meet their needs, and promoting the availability to individuals of such services; and~~
 - ~~(b) securing that individuals involved in criminal investigations or relevant proceedings have access to such criminal defence services as the interests of justice require.~~
- ~~(4) Schedule 1 (which makes further provision about the Commission) has effect.~~

PART 2
CIVIL LEGAL SERVICES AND CRIMINAL DEFENCE SERVICES

Functions of the Department: general

Exercise of functions of the Department under this Part

3. The Department shall exercise its functions under this Part for the purpose of—
- (a) securing (within the resources made available, and priorities set, in accordance with this Part) that individuals have access to civil legal services that effectively meet their needs, and promoting the availability to individuals of such services; and
 - (b) securing that individuals involved in criminal investigations or relevant proceedings have access to such criminal defence services as the interests of justice require.

Membership of the Commission

- ~~4. (1) The Commission shall consist of—~~
- ~~(a) a member who is to chair it;~~
 - ~~and~~
 - ~~(b) not fewer than six, nor more than ten, other members;~~
- ~~but the Lord Chancellor may by order substitute for either or both of the numbers for the time being specified in sub-paragraph (b) such other number or numbers as he thinks appropriate.~~
- ~~(2) Both the member who is to chair the Commission, and the other members, shall be appointed by the Lord Chancellor.~~
- ~~(3) In appointing persons to be members of the Commission the Lord Chancellor shall have regard to the desirability of securing that the Commission includes members who (between them) have experience in or knowledge of—~~

- ~~(a) the provision of services which the Commission can fund as civil legal services or criminal defence services,~~
- ~~(b) the work of the courts,~~
- ~~(c) consumer affairs,~~
- ~~(d) social conditions, and~~
- ~~(e) management.~~

~~(4) The Lord Chancellor may by order amend paragraph (3) by adding, omitting or substituting areas of experience or knowledge.~~

~~(5) In making appointments under this Article, the Lord Chancellor shall as far as practicable secure that the members of the Commission, as a group, are representative of the community in Northern Ireland.~~

Power to replace Commission with two bodies

~~5. (1) The Lord Chancellor may by order establish in place of the Commission two bodies~~

- ~~—(a) one to have functions relating to civil legal services, and~~
- ~~(b) the other to have functions relating to criminal defence services.~~

~~(2) An order under paragraph (1) shall include amendments of—~~

- ~~(a) any provisions of, or amended by, this Order which refer to the Commission, and~~
- ~~(b) any other statutory provisions which so refer,~~

~~to replace references to the Commission with references to either or both of the bodies established by the order.~~

Planning

~~6. (1) The Commission Department shall inform itself about—~~

- ~~(a) the need for, and the provision of, civil legal services and criminal defence services, and~~
- ~~(b) the quality of the services provided.~~

~~(2) ~~The Commission~~ The Department shall plan what can be done towards meeting that need by the performance by ~~the Commission of its functions~~ the Department and the Director of their relevant functions.~~

~~(3) The Commission Department may co-operate with such authorities and other bodies and persons as it considers appropriate in facilitating the planning of what can be done by them to meet that need by the use of any resources available to them.~~

~~(3A) In this Article and Article 7 “relevant functions” means—~~

- ~~(a) in relation to any time after the coming into operation of Article 21, functions under this Order; and~~
- ~~(b) in relation to any time before the coming into operation of Article 21, functions under this Order and under Part 3 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.~~

~~(4) The Commission shall notify the Lord Chancellor of what it has done under this Article.~~

~~(5) The Lord Chancellor may by order require the Commission to discharge the functions in paragraphs (1) to (4) in accordance with the order.~~

Powers of Commission

~~7. (1) Subject to the provisions of this Part and Article 41, the Commission Department may do anything which it considers—~~

- ~~(a) is necessary or appropriate for, or for facilitating, the discharge of its functions relevant~~

~~functions, or~~

(b) is incidental or conducive to the discharge of ~~its those~~ functions.

(2) In particular, the ~~Commission shall have power~~ Department shall have power under paragraph (1)---

(a) to enter into any contract,

(b) to make grants (with or without conditions),

(c) to make loans,

(d) to invest money,

(e) to promote or assist in the promotion of publicity relating to ~~its functions~~ relevant functions,

(f) to undertake any inquiry or investigation which it may consider appropriate in relation to the discharge of any of ~~its functions~~ relevant functions, and

(g) ~~to give to the Lord Chancellor any advice which it may consider appropriate in relation to matters concerning any of its functions.~~

(3) Paragraphs (1) and (2) do not confer on the ~~Commission~~ Department power to borrow money.

~~(4) The Commission may make such arrangements as it considers appropriate for the discharge of its functions, including the delegation of any of its functions.~~

~~(5) The Lord Chancellor may by order require the Commission---~~

~~(a) to delegate any function specified in the order or to delegate any function so specified to a person (or person of a description) so specified;~~

~~(b) not to delegate any function so specified or not to delegate any function so specified to a person (or person of a description) so specified; or~~

~~(c) to make arrangements such as are specified in the order in relation to the delegation of any function so specified.~~

(6) In considering any question as to the remuneration of persons or bodies providing civil legal services or criminal defence services (whether in individual cases, or by reference to the provision of such services in specified numbers of cases), the ~~Commission~~ Department or the Director shall have regard, among the matters which are relevant, to---

(a) the time and skill which the provision of services of the description to which the question relates requires;

(b) the number and general level of competence of persons providing those services;

(c) the cost to public funds of the remuneration of persons or bodies providing those services; ~~and~~

(d) the need to secure value for money.

(7) Where the ~~Commission~~ Department sets fees which are to be paid to persons or bodies in respect of the provision of services by them, nothing in paragraph (6) requires it to have regard to any fee payable, otherwise than in accordance with this Order, in respect of the provision of such services.

Guidance

~~3. (1) The Lord Chancellor may give guidance to the Commission as to the manner in which he considers it should discharge its functions.~~

~~(2) The Commission shall take into account any such guidance when considering the manner in which it is to discharge its functions.~~

~~(3) Guidance may not be given under this Article in relation to individual cases.~~

~~(4) The Lord Chancellor shall either---~~

~~(a) publish, or~~

~~(b) require the Commission to publish any guidance given under this Article.~~

Northern Ireland law and foreign law

9. (1) ~~The Commission Department may not fund—~~

- (a) ~~civil legal services, or~~
- (b) ~~criminal defence services,~~

~~relating to any law other than that of Northern Ireland, unless any such law is relevant for determining any issue relating to the law of Northern Ireland.~~

~~(2) But the Lord Chancellor may, if it appears to him necessary to do so for the purpose of fulfilling any obligation imposed on the United Kingdom by any international agreement, by order specify that such civil legal services or criminal defence services as are specified in the order, relating to the application of such other law as may be so specified, may be funded by the Commission Department.~~

~~(3) For the purposes of the application of paragraph (2) in the case of an obligation to provide for the transmission to other countries of applications for public funding of legal services under their laws, the reference to civil legal services or criminal defence services relating to the application of other laws includes a reference to advice or assistance for the purposes of making and transmitting such an application.~~

Civil legal services

Civil legal services

~~10. (1) For the purposes of this Order "civil legal services" means advice, assistance and representation other than advice, assistance or representation which the Commission is required to fund as criminal defence services.~~

~~(1) For the purposes of this Order "civil legal services" means—~~

- ~~(a) in relation to any time after the coming into operation of Article 21, advice, assistance and representation, other than advice, assistance or representation which the Department is required to fund as criminal defence services; and~~
- ~~(b) in relation to any time before the coming into operation of Article 21, advice, assistance and representation other than representation in proceedings for the purposes of which free legal aid may be given under Part 3 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.~~

~~(2) The Lord Chancellor may by order provide that "civil legal services" is to include services (other than advice, assistance and representation) which—~~

- ~~(a) are specified in the order,~~
- ~~(b) fall within any of the descriptions specified in paragraph (3), and~~
- ~~(c) are not services which the Commission Department is required to fund as criminal defence services.~~

~~(3) The descriptions of services referred to in paragraph (2) are—~~

- ~~(a) the provision of general information about the law and legal system and the availability of legal services,~~
- ~~(b) the provision of help by the giving of advice as to how the law applies in particular circumstances,~~

- (c) the provision of help in preventing, or settling or otherwise resolving, disputes about legal rights and duties,
 - (d) the provision of help in enforcing decisions by which such disputes are resolved, and
 - (e) the provision of help in relation to legal proceedings not relating to disputes.
- (4) An order under paragraph (2) may make provision, including provision amending this Order
- (a) about financial matters relating to services specified in the order (including, in particular, provision about eligibility, contributions, charges, remuneration and costs);
 - (b) modifying the application of Articles 11 to 20 in relation to such services.
- (5) Every person who exercises any function relating to civil legal services shall have regard to the desirability of exercising it, so far as is reasonably practicable, so as to—
- (a) promote improvements in the quality of those services and in the ways in which they are made accessible to those who need them,
 - (b) secure that the services provided in relation to any matter are appropriate having regard to its nature and importance, and
 - (c) achieve the swift and fair resolution of disputes without unnecessary or unduly protracted proceedings in court.

Funding of services

11. ~~(1) The Commission shall establish and maintain a fund from which it shall fund civil legal services.~~
- ~~(2) The Lord Chancellor—~~
- ~~(a) shall pay to the Commission the sums which he determines are appropriate for the funding of civil legal services by the Commission, and~~
 - ~~(b) may determine the manner in which and times at which the sums are to be paid to the Commission and may impose conditions on the payment of the sums.~~
- ~~(3) In making any determination under paragraph (2) the Lord Chancellor shall take into account (in addition to such other factors as he considers relevant) the need for civil legal services as notified to him by the Commission under Article 6(4).~~
- ~~(4) The Lord Chancellor shall lay before each House of Parliament a copy of every determination under paragraph (2)(a).~~
- ~~(5) In funding civil legal services the Commission shall aim to obtain the best possible value for money.~~
- ~~(6) Subject to regulations, the Commission shall pay into the fund established under paragraph (1)—~~
- ~~(a) sums received from the Lord Chancellor under paragraph (2);~~
 - ~~(b) sums received by the Commission by virtue of regulations under Articles 17 and 20;~~
 - ~~(c) sums received by the Commission by virtue of an order by a court under Article 19(7);~~
 - ~~and~~
 - ~~(d) such other receipts of the Commission as the Lord Chancellor may, with the concurrence of the Treasury, determine.~~
- ~~(7) The Commission shall pay out of the fund established under paragraph (1) any costs payable under a court order under Article 19(2) or under regulations under Article 20(2)(d).~~
- ~~(8) Where the Commission considers that the amount in the fund established under paragraph (1) significantly exceeds the amount which will be paid out before the next payment by the Lord Chancellor under paragraph (2), it shall—~~
- ~~(a) inform the Lord Chancellor, and~~
 - ~~(b) if he so directs, pay to the Lord Chancellor so much of the excess as is specified in the direction.~~

~~(9) The Lord Chancellor—~~

~~(a) may by direction impose requirements on the Commission as to the descriptions of services to be funded from any specified amount paid into the fund established under paragraph (1);~~

~~(b) may by order require the Commission to establish and maintain two funds in place of the fund established under paragraph (1), being—~~

~~(i) a fund from which the Commission shall fund civil legal services in connection with any such matter as is specified in the order, and~~

~~(ii) a fund from which the Commission shall fund other civil legal services.~~

~~(10) An order under paragraph (9)(b) may make such amendments to this Order as the Lord Chancellor considers appropriate in consequence of the establishment of two funds in place of the fund established under paragraph (1).~~

Funding of civil legal services by Department

11.—(1) Civil legal services shall be funded by the Department out of moneys appropriated for that purpose by Act of the Assembly.

(2) In funding civil legal services the Department shall aim to obtain the best possible value for money.

Services which may be funded

12. (1) The Commission ~~Department~~ shall set priorities in its funding of civil legal services, and the priorities shall be set—

~~(a) in accordance with any directions given by the Lord Chancellor, and~~

~~(b) after taking into account the need for such services.~~

(2) The Commission ~~Department~~ may fund civil legal services by—

~~(a) entering into contracts with persons or bodies for the provision of services by them,~~

~~(b) making payments to persons or bodies in respect of the provision of services by them,~~

~~(c) making grants or loans to persons or bodies to enable them to provide, or facilitate the provision of, services,~~

~~(d) establishing and maintaining bodies to provide, or facilitate the provision of, services,~~

~~(e) making grants or loans to individuals to enable them to obtain services,~~

~~(f) itself providing services, or~~

~~(g) doing anything else which it considers appropriate for funding services,~~

but this paragraph is subject to Article 41.

~~(3) The Lord Chancellor may by order require the Commission to discharge the function in paragraph (2) in accordance with the order.~~

(3) The Department may by order make provision about the payment of remuneration by the Department to persons who provide civil legal services.

(4) The Commission ~~Department~~ may fund different civil legal services, or civil legal services provided by different means—

~~(a) in relation to different areas in Northern Ireland, and~~

~~(b) in relation to different descriptions of cases.~~

~~(5) The Commission Except as provided by Article 12A, the Department may not fund as civil legal services any of the services specified in Schedule 2.~~

~~(6) Regulations may amend Schedule 2 by adding new services or omitting or varying any services; and regulations under this paragraph may, in particular, describe the services which are not~~

to be funded as civil legal services by reference to—

- (a) the court or tribunal before which proceedings are to take place,
- (b) the issues involved, or
- (c) the capacity in which a person seeking a service is concerned.

(7) If the effect of regulations amending Schedule 2 under paragraph (6) is that no advice or assistance of any description is to be funded as regards any area, then, so long as Schedule 2 so provides, Article 14(2)(b), 3(b), (6) and (7), and the words "advice, assistance and" in Article 10(1), shall not have effect.

Paras. (8)-(11) rep. by 2005 NI 19

^[13] Exceptional funding

~~12A. (1) The Lord Chancellor—~~

- ~~(a) may by direction require the Commission to fund the provision of any of the services specified in Schedule 2 in circumstances specified in the direction, and~~
- ~~(b) may authorise the Commission to fund the provision of any of those services in circumstances specified in the authorisation or, if the Commission requests him to do so, in an individual case so specified.~~

~~(2) A direction or authorisation under paragraph (1) may impose limitations on the funding of a service specified in Schedule 2, and may, in particular, require or authorise the Commission to fund the service for a limited period, for the purposes of specified proceedings only, or for the purposes of limited aspects of proceedings.~~

~~(3) Articles 13 to 20 do not apply to civil legal services funded under a direction or authorisation under paragraph (1) unless they are applied (with or without modifications) by the provisions of the direction or authorisation.~~

~~(4) The Lord Chancellor shall either~~

- ~~(a) publish, or~~
 - ~~(b) require the Commission to publish,~~
- ~~any authorisation under paragraph (1)(b), unless it relates to an individual case (in which case he or the Commission may publish it if appropriate).~~

Annotations:

Rep. by 2005 NI 19

Exceptional funding

12A.—(1) The Department is to fund the provision of any of the services specified in Schedule 2 to an individual if paragraph (2) or (4) is satisfied.

(2) This paragraph is satisfied if the Director—

- (a) has determined that the individual satisfies the requirements of regulations under Article 13 in relation to the services, and
- (b) has made an exceptional case determination in relation to the individual and the services,

(and has not withdrawn either determination).

(3) An exceptional case determination is a determination—

- (a) that it is necessary to make the services available to the individual under this Order because failure to do so would be a breach of—

- (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or
- (ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or
- (b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.

(4) This paragraph is satisfied if---

- (a) the services consist of representation in proceedings at an inquest under the Coroners Act (Northern Ireland) 1959 into the death of a member of the individual's family,
- (b) the Director has made a wider public interest determination in relation to the individual and the inquest, and
- (c) the Director has determined that the individual satisfies the requirements of regulations under Article 13 in relation to the services,
(and neither determination has been withdrawn).

(5) A wider public interest determination is a determination that, in the particular circumstances of the case, the provision of representation for the individual for the purposes of the inquest is likely to produce significant benefits for a class of person, other than the individual and the members of the individual's family.

(6) For the purposes of this Article an individual is a member of another individual's family if---

- (a) they are relatives (whether of the full blood or half blood or by marriage or civil partnership),
- (b) they are cohabittees (as defined in Article 3(1) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998), or
- (c) one has parental responsibility for the other.

(7) Articles 14 to 20 do not apply to civil legal services funded under this Article unless they are applied (with or without modification) by an exceptional case determination or a wider public interest determination.

Individuals for whom services may be funded

13. (1) The ~~Commission Department~~ may only fund civil legal services for an individual if his financial resources are such that, under regulations, he is an individual for whom the services may be funded by the ~~Commission Department~~.

(2) Regulations may provide that, in prescribed circumstances and subject to any prescribed conditions, services of a prescribed description may be funded by the ~~Commission Department~~ for individuals without reference to their financial resources.

(3) Regulations under this Article may include provision requiring the furnishing of information.

Decisions about provision of funded services

14. (1) The services which the ~~Commission Department~~ may fund as civil legal services are those which the ~~Commission Department~~ considers appropriate (subject to Article 12(5) and the priorities set under Article 12(1)).

(2) Any decision as to whether to fund civil legal services for an individual shall---

- (a) in the case of representation, be taken—
 - (i) by the ~~Commission Director~~, or
 - (ii) in prescribed circumstances, by such person as may be prescribed;
- (b) in the case of advice and assistance, be taken by the person from whom the advice or assistance is sought.

~~(2A) A grant of representation for an individual for the purposes of proceedings—~~

~~(a) shall not be made unless the individual shows there are reasonable grounds for taking, defending or being a party to the proceedings; and~~

~~(b) may be refused if, in the particular circumstances of the case, it appears unreasonable that representation should be granted.~~

~~(2B) Guidance given to the Director under section 3 of the Legal Aid and Coroners' Courts Act (Northern Ireland) 2014 may, in particular, include guidance as to the criteria according to which any decision is to be taken by the Director under paragraph (2A).~~

(3) The grant of representation for the purposes of proceedings includes any such advice and assistance as to an appeal—

- (a) as may be specified by the ~~Commission Director~~, or
- (b) as may be prescribed in relation to representation granted by virtue of paragraph (2)(a)(ii).

(4) ~~The Commission Department~~ may fund representation for an individual for a limited period, for the purposes of specified proceedings only, or for the purposes of limited aspects of proceedings, and may amend, withdraw or revoke the representation, or vary or remove any limitation imposed on the representation.

(5) Without prejudice to the generality of paragraph (4), the grant of representation may be limited under that paragraph as regards the persons who may represent the individual to representation only in pursuance of a contract made with the ~~Commission Department~~.

(6) Regulations may—

- (a) prohibit the giving of advice or assistance without the approval of the ~~Commission Director~~ to the extent that the costs of giving it exceed such limit as may be prescribed;
- (b) prohibit the funding of advice or assistance by the ~~Commission Department~~ except where it is provided by a person in pursuance of a contract made with the ~~Commission Department~~.

(7) No decision may be taken under this Article to fund advice and assistance for an individual in connection with any proceedings at a time when he has been granted a right to representation in respect of those proceedings under any provision of this Part (but this does not affect paragraph (3) or any assistance included in representation).

Funding code

~~15 (1) The Commission shall prepare a code setting out the criteria according to which any decision is to be taken as to—~~

- (a) whether to fund (or continue to fund) civil legal services for an individual for whom they may be funded by the Commission, and
- (b) if so, what services are to be funded for him.

~~(2) In settling the criteria to be set out in the code the Commission shall consider the extent to which they ought to reflect the following factors—~~

- (a) the likely cost of funding the services and the benefit which may be obtained by their being provided;
- (b) the availability of sums in the fund established under Article 11(1) for funding civil legal services and (having regard to present and likely future demands on that fund) the appropriateness of applying them to fund the services;

- ~~(c) the importance of the matters in relation to which the services would be provided for the individual;~~
 - ~~(d) the availability to the individual of services not funded by the Commission and the likelihood of his being able to avail himself of them;~~
 - ~~(e) if the services are sought by the individual in relation to a dispute, the prospects of his success in the dispute;~~
 - ~~(f) the conduct of the individual in connection with civil legal services funded by the Commission (or an application for funding) or in, or in connection with, any proceedings;~~
 - ~~(g) the public interest; and~~
 - ~~(h) such other factors as the Lord Chancellor may by order require the Commission to consider.~~
- ~~(3) The code shall seek to secure that, where more than one description of service is available, the service funded is that which (in all the circumstances) is the most appropriate having regard to the criteria set out in the code.~~
- ~~(4) The code shall also specify procedures for the making of decisions about the funding of civil legal services by the Commission, including --~~
- ~~(a) provision about the form and content of applications for funding;~~
 - ~~(b) provision imposing conditions which must be satisfied by an individual applying for funding;~~
 - ~~(c) provision requiring applicants to be informed of the reasons for any decision to refuse an application;~~
 - ~~(d) provision for the giving of information to individuals whose applications are refused about alternative ways of obtaining or funding services; and~~
 - ~~(e) provision establishing procedures for reviews of decisions about funding and for the giving of information about those procedures.~~
- ~~(5) The Commission may from time to time prepare a revised version of the code.~~
- ~~(6) Before preparing the code the Commission shall undertake such consultation as appears to it to be appropriate; and before revising the code the Commission shall undertake such consultation as appears to it to be appropriate unless it considers that it is desirable for the revised version to come into force without delay.~~
- ~~(7) The Lord Chancellor may by order require the Commission to discharge its functions relating to the code in accordance with the order.~~

Regulations as to procedures for funding decisions

15. The Department may make regulations as to the procedures for the making of decisions about the funding by the Department of civil legal services, including --

- (a) provision about the form and content of applications for funding;
- (b) provision imposing conditions which must be satisfied by an individual applying for funding;
- (c) provision requiring applicants to be informed of the reasons for any decision to refuse an application;
- (d) provision for the giving of information to individuals whose applications are refused about alternative ways of obtaining or funding services; and
- (e) provision establishing procedures for reviews of decisions about funding and for the giving of information about those procedures.

Procedure relating to funding code

~~16. (1) After preparing the code or a revised version of the code, the Commission shall send a copy to the Lord Chancellor.~~

~~(2) If he approves it he shall lay it before each House of Parliament.~~

~~(3) The Commission shall publish—~~

~~(a) the code as first approved by the Lord Chancellor; and~~

~~(b) where he approves a revised version, either the revisions or the revised code as appropriate.~~

~~(4) The code as first approved by the Lord Chancellor shall not come into force until it has been approved by a resolution of each House of Parliament.~~

~~(5) A revised version of the code which does not contain changes in the criteria set out in the code shall not come into force until it has been laid before each House of Parliament.~~

~~(6) Subject as follows, a revised version of the code which does contain such changes shall not come into force until it has been approved by a resolution of each House of Parliament.~~

~~(7) Where the Lord Chancellor considers that it is desirable for a revised version of the code containing such changes to come into force without delay, he may (when laying the revised version before Parliament) also lay before each House a statement of his reasons for so considering.~~

~~(8) In that event the revised version of the code—~~

~~(a) shall not come into force until it has been laid before each House of Parliament; and~~

~~(b) shall cease to have effect at the end of the period of 120 days beginning with the day on which it comes into force unless a resolution approving it has been made by each House (but without that affecting anything previously done in accordance with it).~~

Terms of provision of funded services

17. (1) An individual for whom civil legal services are funded by the ~~Commission~~ Department shall not be required to make any payment in respect of the services except where regulations otherwise provide.

(2) Regulations may provide that, in prescribed circumstances, an individual for whom civil legal services are so funded shall—

(a) pay a fee of such amount as is fixed by or determined under the regulations,

(b) if his financial resources are, or relevant conduct is, such as to make him liable to do so under the regulations, pay the cost of the services or make a contribution in respect of the cost of the services of such amount as is so fixed or determined, or

(c) if the services relate to a dispute and he has agreed to make a payment (which may exceed the cost of the services) only in specified circumstances, make in those circumstances a payment of the amount agreed, or determined in the manner agreed, by him;

and in sub-paragraph (b) "relevant conduct" means conduct in connection with the services (or any application for their funding) or in, or in connection with, any proceedings in relation to which they are provided.

(3) The regulations may include provision for any amount payable in accordance with the regulations to be payable by periodical payments or one or more capital sums, or both.

(4) The regulations may also include provision for the payment by an individual of interest (on such terms as may be prescribed) in respect of—

(a) any loan made to him by the ~~Commission~~ Department in connection with civil legal services,

(b) any payment in respect of the cost of services required by the regulations to be made by him later than the time when the services are provided, or

- (c) so much of any payment required by the regulations to be made by him which remains unpaid after the time when it is required to be paid.
- (5) The regulations shall include provision for the repayment to an individual of any payment made by him in excess of his liability under the regulations.
- (6) The regulations may—
 - (a) include provision requiring the furnishing of information, and
 - (b) make provision for the determination of the cost of services for the purposes of the regulations.
- (7) Except so far as regulations otherwise provide, where civil legal services have been funded by the ~~Commission~~ Department for an individual, sums expended by the ~~Commission~~ Department in funding the services (except to the extent that they are recovered under Articles 18 to 20), and other sums payable by the individual by virtue of regulations under this Article, shall constitute a first charge—
 - (a) on any costs which (whether by virtue of a judgment or order of a court or an agreement or otherwise) are payable to him in respect of the matter in connection with which the services are provided, and
 - (b) on any property (of whatever nature and wherever situated) which is recovered or preserved by him (whether for himself or any other person) in connection with that matter, including any property recovered or preserved in any proceedings and his rights under any compromise or settlement arrived at to avoid or bring to an end any proceedings.
- (8) Regulations may make provision about the charge, including—
 - (a) provision as to whether it is in favour of the ~~Commission~~ Department or the body or person by whom the services were provided, and
 - (b) provision about its enforcement.

Costs orders against assisted parties

18. (1) Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including—
- (a) the financial resources of all parties to the proceedings, and
 - (b) their conduct in connection with the dispute to which the proceedings relate;
- and for this purpose proceedings, or a part of proceedings, are funded for an individual if civil legal services relating to the proceedings or part are funded for him by the ~~Commission~~ Department.
- (2) In assessing for the purposes of paragraph (1) the financial resources of an individual for whom civil legal services are funded by the ~~Commission~~ Department, his clothes and household furniture and the tools and implements of his trade shall not be taken into account, except so far as may be prescribed.

Costs of successful unassisted parties

19. (1) This Article applies to proceedings—
- (a) to which an individual, for whom civil legal services relating to the proceedings, or to a part of the proceedings, are funded by the ~~Commission~~ Department, is a party, and
 - (b) which are finally decided in favour of a party for whom such services are not so funded ("the unassisted party").
- (2) In any proceedings to which this Article applies the court by which the proceedings were so decided may, subject to paragraphs (3) and (4), make an order for the payment by the ~~Commission~~ Department to the unassisted party of the whole or any part of the costs incurred by him in the proceedings.
- (3) Before making an order under this Article, the court shall consider what orders should be made for costs against the party for whom civil legal services relating to the proceedings, or to a

part of the proceedings, are funded by the ~~Commission-Department~~ and for determining his liability in respect of such costs.

(4) An order under this Article in respect of any costs may only be made if—

- (a) an order for costs would be made in the proceedings apart from this Order;
- (b) as respects the costs incurred in a court of first instance, those proceedings were instituted by the party for whom civil legal services relating to the proceedings, or to a part of the proceedings, are funded by the ~~Commission-Department~~ and the court is satisfied that the unassisted party will suffer financial hardship unless the order is made; and
- (c) in any case, the court is satisfied that it is just and equitable in all the circumstances of the case that provision for the costs should be made out of public funds.

(5) Without prejudice to any other provision restricting appeals from any court, no appeal shall lie against an order under this Article, or against a refusal to make such an order, except on a point of law.

(6) In this Article “costs” means costs as between party and party, and includes the costs of applying for an order under this Article.

(7) For the purposes of this Article proceedings shall be treated as finally decided in favour of the unassisted party—

- (a) if no appeal lies against the decision in his favour,
- (b) if an appeal lies against the decision with leave, and the time limited for applications for leave expires without leave being granted, or
- (c) if leave to appeal against the decision is granted or is not required, and no appeal is brought within the time limited for appeal,

and where an appeal against the decision is brought out of time the court by which the appeal (or any further appeal in those proceedings) is determined may make an order for the repayment by the unassisted party to the ~~Commission-Department~~ of the whole or any part of any sum previously paid to him under this Article in respect of those proceedings.

(8) Where a court decides any proceedings in favour of the unassisted party and an appeal lies (with or without leave) against that decision, the court may, if it thinks fit, make or refuse to make an order under this Article forthwith, but if an order is made forthwith it shall not take effect—

- (a) where leave to appeal is required, unless the time limited for applications for leave to appeal expires without leave being granted;
- (b) where leave to appeal is granted or is not required, unless the time limited for appeal expires without an appeal being brought.

(9) Where a party begins to receive civil legal services after the proceedings have been instituted, or ceases to receive such services before they are finally decided, or otherwise receives such services in connection with part only of the proceedings, the reference in paragraph (2) to the costs incurred by the unassisted party in the proceedings shall be construed as a reference to so much of those costs as is attributable to that part.

(10) For the purposes of this Article “court” includes a tribunal.

Regulations about costs in funded cases

20. (1) Subject to Articles 18 and 19, regulations may make provision about costs in relation to proceedings in relation to which, or to a part of which, civil legal services are funded for any of the parties by the ~~Commission-Department~~.

(2) The regulations may, in particular, make provision—

- (a) specifying the principles to be applied in determining the amount of any costs which may be awarded against a party for whom civil legal services are funded by the ~~Commission-Department~~,
- (b) limiting the circumstances in which, or the extent to which, an order for costs may be enforced against such a party,

- (c) as to the cases in which, and extent to which, such a party may be required to give security for costs and the manner in which it is to be given,
- (d) requiring the payment by the ~~Commission~~ Department of the whole or part of any costs incurred by a party for whom civil legal services are not funded by the ~~Commission~~ Department,
- (e) specifying the principles to be applied in determining the amount of any costs which may be awarded to a party for whom civil legal services are funded by the ~~Commission~~ Department,
- (f) requiring the payment to the ~~Commission~~ Department, or the person or body by which the services were provided, of the whole or part of any sum awarded by way of costs to such a party, and
- (g) as to the court, tribunal or other person or body by whom the amount of any costs is to be determined and the extent to which any determination of that amount is to be final.

Appeal panels

20A.—(1) The Department must by regulations make provision for—

- (a) the constitution and procedure of appeal panels; and
- (b) appeals to such a panel against prescribed decisions taken in the exercise of functions conferred or imposed on the Director by or under Articles 12A to 26.

(2) The regulations may in particular—

- (a) provide for an appeal panel to consist of—
 - (i) a presiding member, selected in the prescribed manner from a list of persons appointed by the Department to act as presiding members of appeal panels; and
 - (ii) a prescribed number of other members, selected in the prescribed manner from a list of persons appointed by the Department to act as other members of appeal panels;
- (b) prescribe qualifications for appointment to a list mentioned in sub-paragraph (a);
- (c) provide for disqualifying prescribed persons or persons of prescribed descriptions for membership of an appeal panel;
- (d) provide for two or more appeal panels to sit at the same time;
- (e) provide for appeal panels to sit in private, except in such circumstances as may be specified in, or determined in accordance with, the regulations;
- (f) provide for the decision on an appeal to be taken without hearing any oral representations, except in such cases as may be prescribed;
- (g) provide for the powers of an appeal panel on determining an appeal;
- (h) require an appeal panel to give reasons in writing for its decision on an appeal;
- (i) provide for a decision of the appeal panel on an appeal to be final;
- (j) provide that all matters relating to the procedure of an appeal panel on an appeal which are not specifically regulated by the regulations are to be determined by the presiding member;
- (k) contain such other provision as appears to the Department necessary or expedient for the efficient and effective working of the appeal panels.

(3) The Department—

- (a) may make payments to the members of an appeal panel of amounts or at rates not exceeding such amounts or rates, and on such conditions, as the Department may determine;
- (b) shall arrange for the provision to appeal panels of such facilities, staff and assistance as the Department considers appropriate;

(c) shall meet any other costs properly incurred by such panels.

Criminal defence services

Criminal defence services

- ~~21.—(1) The Commission shall establish and maintain a fund from which it shall fund—~~
~~(a) advice and assistance in accordance with Article 23, and~~
~~(b) representation in accordance with Articles 24 and 30,~~
~~and in this Order services which can be so funded are referred to as “criminal defence services”.~~
- ~~(2) The Lord Chancellor shall pay to the Commission such sums as are required to meet the costs of any criminal defence services funded by the Commission.~~
- ~~(3) The Lord Chancellor may—~~
~~(a) determine the manner in which and times at which the sums referred to in paragraph (2) shall be paid to the Commission, and~~
~~(b) impose conditions on the payment of the sums.~~
- ~~(4) In funding criminal defence services the Commission shall aim to obtain the best possible value for money.~~
- ~~(5) The Commission shall pay into the fund established under paragraph (1)—~~
~~(a) sums received from the Lord Chancellor under paragraph (2),~~
~~(b) sums received by the Commission by virtue of an order by a court under Article 31,~~
~~(c) sums received by the Commission by virtue of an order by a court under section 4 or 6 of the Costs in Criminal Cases Act (Northern Ireland) 1968¹⁹, and~~
~~(d) such other receipts of the Commission as the Lord Chancellor may, with the concurrence of the Treasury, determine.~~
- ~~(6) Where the Commission considers that the amount in the fund established under paragraph (1) significantly exceeds the amount which will be paid out before the next payment by the Lord Chancellor under paragraph (2), it shall—~~
~~(a) inform the Lord Chancellor, and~~
~~(b) if he so directs, pay to the Lord Chancellor so much of the excess as is specified in the direction.~~

Annotations:

~~19.— 1968 c. 10 (NI)~~

Funding of criminal defence services by Department

- ~~21.—(1) The Department shall, out of moneys appropriated for that purpose by Act of the Assembly, fund—~~
~~(a) advice and assistance in accordance with Article 23, and~~
~~(b) representation in accordance with Articles 24 and 30,~~
~~and in this Order services which can be so funded are referred to as “criminal defence services”.~~
- ~~(2) In funding criminal defence services the Department shall aim to obtain the best possible value for money.~~

Criminal defence services: code of conduct

~~22. (1) The Commission shall prepare a code of conduct to be observed by employees of the Commission, and employees of any body established and maintained by the Commission, in the provision of criminal defence services.~~

~~(1) The Department shall prepare a code of conduct to be observed by—~~

- ~~(a) the Department and the Director, and~~
- ~~(b) the employees of any body established and maintained by the Department, in the provision of criminal defence services.~~

~~(2) The code shall include—~~

- ~~(a) duties imposed in accordance with any scheme made by the Commission-Department under Schedule 9 to the Northern Ireland Act 1998¹⁰ (equality schemes),~~
- ~~(b) duties to protect the interests of the individuals for whom criminal defence services are provided;~~
- ~~(c) duties to the court,~~
- ~~(d) duties to avoid conflicts of interest, and~~
- ~~(e) duties of confidentiality,~~

~~and duties on employees mentioned in paragraph (1)(b) who are members of a professional body to comply with the rules of the body.~~

~~(3) The Commission-Department may from time to time prepare a revised version of the code.~~

~~(4) Before preparing or revising the code the Commission-Department shall consult the Law Society and the General Council of the Bar of Northern Ireland and such other bodies or persons as it considers appropriate.~~

~~(5) After preparing the code or a revised version of the code the Commission shall send a copy to the Lord Chancellor.~~

~~(6) If he approves it he shall lay it before each House of Parliament.~~

~~(7) The Commission shall publish—~~

- ~~(a) the code as first approved by the Lord Chancellor, and~~
- ~~(b) where he approves a revised version, either the revisions or the revised code as appropriate.~~

~~(8) The code, and any revised version of the code, shall not come into force until it has been approved by a resolution of each House of Parliament.~~

Annotations:

F10 1998 c. 47

~~(5) The Department shall—~~

- ~~(a) publish the code and any revised version of the code;~~
- ~~(b) lay the code and any revised version of the code before the Assembly.~~

~~(6) The code as first published by the Department, and any revised version of the code, shall not come into operation until it has been approved by resolution of the Assembly.~~

Advice and assistance

23. (1) The ~~Commission-Department~~ shall fund such advice and assistance as it considers appropriate—
- (a) for individuals who are arrested and held in custody at a police station or other premises, and
 - (b) in prescribed circumstances, for individuals who—
 - (i) are not within sub-paragraph (a) but are involved in investigations which may lead to relevant proceedings,
 - (ii) are before a court or other body in such proceedings, or
 - (iii) have been the subject of such proceedings.
- (2) The ~~Commission-Department~~ may comply with the duty imposed by paragraph (1) by—
- (a) entering into contracts with persons or bodies for the provision of advice or assistance by them,
 - (b) making payments to persons or bodies in respect of the provision of advice or assistance by them,
 - (c) making grants or loans to persons or bodies to enable them to provide, or facilitate the provision of, advice or assistance,
 - (d) establishing and maintaining bodies to provide, or facilitate the provision of, advice or assistance,
 - (e) making grants to individuals to enable them to obtain advice or assistance,
 - (f) employing persons to provide advice or assistance, or
 - (g) doing anything else which it considers appropriate for funding advice and assistance.
- ~~(3) The Lord Chancellor may by order require the Commission to discharge the function in paragraph (2) in accordance with the order.~~
- (3) The Department may by order make provision about the payment of remuneration by the Department to persons who provide advice and assistance in accordance with this Article.
- (4) The ~~Commission-Department~~ may fund advice and assistance by different means—
- (a) in different areas in Northern Ireland, and
 - (b) in relation to different descriptions of cases.

Representation

24. (1) The ~~Commission-Department~~ shall fund representation to which an individual has been granted a right in accordance with Articles 25 to 29.
- (2) Subject to the following provisions, the ~~Commission-Department~~ may comply with the duty imposed by paragraph (1) by—
- (a) entering into contracts with persons or bodies for the provision of representation by them,
 - (b) making payments to persons or bodies in respect of the provision of representation by them,
 - (c) making grants or loans to persons or bodies to enable them to provide, or facilitate the provision of, representation,
 - (d) establishing and maintaining bodies to provide, or facilitate the provision of, representation,
 - (e) making grants to individuals to enable them to obtain representation,
 - (f) employing persons to provide representation, or
 - (g) doing anything else which it considers appropriate for funding representation.

- (3) The Lord Chancellor—
- (a) shall by order make provision about the payments which may be made by the ~~Commission~~ Department in respect of any representation provided by non-contracted private practitioners, and
 - ~~(b) may by order make any other provision requiring the Commission to discharge the function in paragraph (2) in accordance with the order.~~
- (4) For the purposes of paragraph (3)(a) representation is provided by a non-contracted private practitioner if it is provided, otherwise than pursuant to a contract entered into by the ~~Commission~~ Department, by a person or body which is neither—
- (a) a person or body in receipt of grants or loans made by the ~~Commission~~ Department under paragraph (2), nor
 - (b) the ~~Commission~~ Department itself or a body established or maintained by the ~~Commission~~ Department.
- (5) The provision which the Lord Chancellor is required to make by order under paragraph (3)(a) includes provision for reviews of, or appeals against, determinations for the purposes of the order.
- (6) The ~~Commission~~ Department may fund representation by different means—
- (a) in different areas in Northern Ireland, and
 - (b) in relation to different descriptions of cases.

Individuals to whom right to representation may be granted

25. (1) A right to representation may be granted—
- (a) for the purposes of any kind of proceedings specified in paragraph (2), to an individual such as is mentioned in that paragraph in relation to that kind of proceedings;
 - (b) to an individual for the purposes of enabling him to resist an appeal in proceedings specified in paragraph (2) otherwise than in an official capacity;
 - (c) for the purposes of a diversionary youth conference, to a child with respect to whom the conference has been, or is to be, convened,
 - (d) to an individual for the purposes of proceedings concerning him which are of such a kind, and are before such court or other body, as may be prescribed,

and in this Order proceedings mentioned in paragraphs (a) to (d) are referred to as “relevant proceedings”.

- (2) The proceedings referred to in paragraph (1)(a) and (b) are—
- (a) proceedings before any court for dealing with an individual accused of an offence,
 - (b) proceedings before—
 - (i) any court, or
 - (ii) the [F11]Parole Commissioners for Northern Ireland],
 for dealing with an individual convicted of an offence (including proceedings in respect of a sentence or order),
 - [F12](c) proceedings for dealing with an individual under Part I or II of the Extradition Act 2003 (c.41);
 - (d) proceedings for binding an individual over to keep the peace or to be of good behaviour under Article 127 of the Magistrates' Courts (Northern Ireland) Order 1981, and for dealing with an individual who fails to comply with an order under that Article,
 - (e) proceedings on an appeal brought by an individual under section 47A of the Criminal Appeal (Northern Ireland) Act 1980^{F13},
 - (f) proceedings for contempt committed, or alleged to have been committed, by an individual in the face of a court, and
 - (g) proceedings for dealing with an individual in respect of whom an application has been

made under—

(i) Article 44 or 45 of the Police and Criminal Evidence (Northern Ireland) Order 1989^{F14}, or

(ii) paragraph 29 or 36 of Schedule 8 to the Terrorism Act 2000^{F15},

but do not include any proceedings for a writ of habeas corpus or other prerogative remedy.

[^{F12}(h) proceedings under Part XIII A of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 (No. 8).]

Annotations:

F11 Words in art. 25(2)(b)(ii) substituted (15.5.2008) by Criminal Justice (Northern Ireland) Order 2008 (S.I. 2008/1216 (N.I. 1)), arts. 1(4), 102(1), Sch. 5 para. 11; S.R. 2008/217, art. 2, Sch. paras. 16, 18(e) (subject to art. 3)

F12 2005 NI 15

F13 1986 c. 47

F14 1989 NI 12

F15 2000 c. 11

Grant of right to representation by court

26. (1) A court before which any relevant proceedings take place, or are to take place, has power to grant a right to representation in respect of those proceedings except in such circumstances as may be prescribed.

(2) Where a right to representation is granted for the purposes of relevant proceedings then, subject to paragraph (5)—

(a) it includes the right to representation for the purposes of any related bail proceedings, any related court-ordered youth conference, and any preliminary or incidental proceedings; and regulations may make provision specifying whether any proceedings are or are not to be regarded as preliminary or incidental; and

(b) it includes the right to such advice and assistance, as to any appeal, as may be prescribed.

(3) A court also has power to grant a right to representation for the purposes of relevant proceedings before another court in such circumstances as may be prescribed.

(4) A magistrates' court also has power to grant a right to representation for the purposes of a diversionary youth conference.

(5) A court has power to grant representation for a limited period, for the purposes of specified proceedings only or for the purposes of limited aspects of proceedings, and to vary or remove any limitation imposed on representation.

(6) Regulations may make provision—

(a) as to the form of any application for a grant of a right to representation under this Article;

(b) as to the information which must be supplied with any such application;

(c) as to the form of any grant of a right to representation under this Article;

(d) requiring the court granting a right to representation under this Article to indicate the grounds on which the right was granted.

(7) Before making any regulations under paragraph (6) the Lord Chancellor shall consult the Lord Chief Justice.

(8) The refusal of a right to representation before a hearing shall not prevent the applicant being granted a right to representation at the hearing.

(9) A right to representation in respect of proceedings may be withdrawn—

(a) by any court before which the proceedings take place, or

(b) in the case of a diversionary youth conference, by a magistrates' court;

and a court must consider whether to withdraw a right to representation in such circumstances as may be prescribed.

(10) In this Article "court" includes any body before which relevant proceedings take place.

Grant of right to representation by ~~Commission~~Director

27. (1) Regulations may provide that the ~~Commission-Director~~ shall have power to grant rights to representation in respect of any one or more of the descriptions of proceedings prescribed under Article 25(1)(d), and to withdraw any rights to representation granted ~~by it by the Director~~.

(2) Regulations under paragraph (1) may provide that the ~~Commission-Director~~ shall have power to grant representation for a limited period or for the purposes of specified proceedings only or for the purposes of limited aspects of proceedings, and to vary or remove any limitation imposed on representation.

(3) Regulations under paragraph (1) may make provision—

- (a) as to the form of any application for a grant of a right to representation under those regulations;
- (b) as to the information which must be supplied with any such application;
- (c) as to the form of any grant of a right to representation under those regulations;
- (d) requiring the ~~Commission-Director~~ to indicate the grounds on which any right to representation is granted under those regulations.

Financial eligibility for grant of right to representation

27A.— (1) Power under Article 26 or 27 to grant a right to representation may only be exercised in relation to an individual whose financial resources appear to the court or (as the case may be) the ~~Commission-Director~~ to be such that, under regulations, he is eligible to be granted such a right.

(2) Power under Article 26(9) or 27(1) to withdraw a right to representation shall be exercised in relation to an individual if it appears to the court or ~~Commission-Director~~—

- (a) that his financial resources are not such that, under regulations, he is eligible to be granted such a right, or
- (b) that he has failed, in relation to the right, to comply with regulations under this Article about the furnishing of information.

(3) Regulations may make provision for exceptions from paragraph (1) or (2).

(4) Regulations under this Article may include—

- (a) provision requiring the furnishing of information;
- (b) provision for the notification of decisions about the application of—
 - (i) paragraph (1) or (2), or
 - (ii) regulations under paragraph (3);
- (c) provision for the review of such decisions.

(5) The provision which may be made under paragraph (4)(c) includes provision prescribing circumstances in which the person or body reviewing a decision may refer a question to the High Court for its decision.

(6) Section 35 of the Judicature (Northern Ireland) Act 1978 (c. 23) (appeals to the Court of Appeal from the High Court) shall not apply to decisions of the High Court on a reference under regulations under this Article.

Appeals

28. Except where regulations otherwise provide, an appeal shall lie to such court or other person or body as may be prescribed against a decision—

- (a) to refuse a right to representation in respect of relevant proceedings;
- (b) to impose or vary a limitation on such a right;
- (c) not to extend such a right; or
- (d) to withdraw such a right.

Criteria for grant of right to representation

29. (1) Any question as to whether a right to representation should be granted or extended, or whether a limitation on representation should be imposed, varied or removed, shall be determined according to the interests of justice.

(2) 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.

(3) The Lord Chancellor may by order amend paragraph (2) by adding new factors or varying any factor.

(4) A right to representation shall always be granted in such circumstances as may be prescribed.

Selection of representative

30. (1) An individual who has been granted a right to representation in accordance with Articles 25 to 29 may, subject to Article 35, select any representative or representatives willing to act for him; and, where he does so, the ~~Commission~~ Department is to comply with the duty imposed by Article 24 by funding representation by the selected representative or representatives.

(2) Regulations may provide that in prescribed circumstances—

- (a) the right conferred by paragraph (1) is not to apply in cases of prescribed descriptions,
- (b) an individual who has been provided with advice or assistance funded by the ~~Commission~~ Department under Article 23 by a person whom he chose to provide it for him is to be taken to have selected that person as his representative pursuant to that right,
- (c) that right is not to include a right to select a representative of a prescribed description,
- (d) that right is to select only a registered person within the meaning of Article 36, or only a representative of a prescribed description,
- (e) that right is to select not more than a prescribed number of representatives to act at any one time,
- (f) that right is not to include a right to select a representative in place of a representative previously selected.

(3) Regulations under paragraph (2)(b) may prescribe circumstances in which an individual is to be taken to have chosen a person to provide advice or assistance for him.

(4) Regulations under paragraph (2) may not provide that only a person ~~employed by~~ employed in the ~~Commission~~ Department, or by a body established and maintained by the ~~Commission~~ Department, may be selected.

(5) Regulations may provide that in prescribed circumstances the ~~Commission-Department~~ is not required to fund, or to continue to fund, representation for an individual by a particular representative (but such provision shall not prejudice any right of the individual to select another representative).

(6) The circumstances which may be prescribed by regulations under paragraph (2) or (5) include that a determination has been made by a prescribed body or person.

(7) A representative who has been selected to act for an individual under this paragraph may select another person to act for that individual, as the agent of the representative, if that other person is of such a description that nothing in Article 35 would prohibit the individual selecting him as his representative.

Terms of provision of funded services

31. (1) An individual for whom criminal defence services are funded by the ~~Commission-Department~~ shall not be required to make any payment in respect of the services except where paragraph (2) applies.

(2) Where representation for an individual in respect of relevant proceedings in any court is funded by the ~~Commission-Department~~ under Article 24, the court may, subject to regulations under paragraph (3), make an order requiring him to pay some or all of the cost of any representation so funded for him (in proceedings in that or any other court, or in any related court-ordered youth conference).

(3) Regulations may make provision about—

- (a) the descriptions of courts by which, and individuals against whom, an order under paragraph (2) may be made,
- (b) the circumstances in which such an order may be made and the principles to be applied in deciding whether to make such an order and the amount to be paid,
- (c) the determination of the cost of representation for the purposes of the making of such an order,
- (d) the furnishing of information and evidence to the court or the ~~Commission-Department~~ for the purpose of enabling the court to decide whether to make such an order and (if so) the amount to be paid,
- (e) prohibiting individuals who are required to furnish information or evidence from dealing with property until they have furnished the information or evidence or until a decision whether to make an order, or the amount to be paid, has been made,
- (f) rights of appeal against such an order,
- (g) the person or body to which, and manner in which, payments required by such an order must be made and what that person or body is to do with them, and
- (h) the enforcement of such an order (including provision for the imposition of charges in respect of unpaid amounts).

Supplementary

Restriction of disclosure of information

32. (1) Information which is furnished—

- (a) to the ~~Commission-Department~~ or any court, tribunal or other person or body on whom functions are imposed or conferred by or under this Part, and
- (b) in connection with the case of an individual seeking or receiving civil legal services or criminal defence services funded by the ~~Commission-Department~~,

shall not be disclosed except as permitted by regulations.

(2) Paragraph (1) does not limit the disclosure of—

- (a) information in the form of a summary or collection of information so framed as not to enable information relating to any individual to be ascertained from it, or

(b) information about the amount of any grant, loan or other payment made to any person or body by the ~~Commission Department~~.

(3) Paragraph (1) does not prevent the disclosure of information for any purpose with the consent of the individual in connection with whose case it was furnished and, where he did not furnish it himself, with that of the person or body who did.

(4) A person who discloses any information in contravention of this Article shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(5) Proceedings for an offence under this Article shall not be brought except by or with the consent of the Attorney General.

(6) Nothing in this Article applies to information furnished to a person providing civil legal services or criminal defence services funded by the ~~Commission Department~~ by or on behalf of an individual seeking or receiving such services.

Misrepresentation etc.

33. (1) Any person who—

- (a) intentionally fails to comply with any requirement imposed by virtue of this Part as to the information to be furnished by him, or
- (b) in furnishing any information required by virtue of this Part makes any statement or representation which he knows or believes to be false,

shall be guilty of an offence.

(2) A person guilty of an offence under paragraph (1) is liable on summary conviction to—

- (a) a fine not exceeding level 4 on the standard scale, or
- (b) imprisonment for a term not exceeding three months,

or to both.

(3) Notwithstanding any statutory provision prescribing the period within which summary proceedings may be commenced, proceedings in respect of an offence under paragraph (1) may be commenced at any time within the period of six months beginning with the date on which evidence, sufficient in the opinion of the Attorney General to justify a prosecution for the offence, comes to his knowledge.

(4) But paragraph (3) does not authorise the commencement of proceedings for an offence at a time more than two years after the date on which the offence was committed.

(5) For the purposes of paragraph (3) a certificate purporting to be signed by the Attorney General as to the date on which evidence such as is mentioned in that paragraph has come to his knowledge, shall be conclusive evidence thereof.

(6) A county court shall, notwithstanding any limitation imposed on the jurisdiction of a county court under any other statutory provision, have jurisdiction to hear and determine any action brought by the ~~Commission Department~~ to recover loss sustained by reason of—

- (a) the failure of any person to comply with any requirement imposed by virtue of this Part as to the information to be furnished by him, or
- (b) a false statement or false representation made by any person in furnishing any information required by virtue of this Part.

Position of service providers and other parties etc.

34. (1) Except as expressly provided by regulations, the fact that civil legal services or criminal defence services provided for an individual are or could be funded by the ~~Commission Department~~, shall not affect—

- (a) the relationship between that individual and the person by whom they are provided or any privilege arising out of that relationship, or
- (b) any right which that individual may have to be indemnified, in respect of expenses incurred by him, by any other person.

(2) A person who provides civil legal services or criminal defence services funded by the ~~Commission Department~~ shall not take any payment in respect of the services apart from—

- (a) that made by way of that funding, and
- (b) any authorised by the ~~Commission Department~~ to be taken.

(3) Where civil legal services funded by the ~~Commission Department~~ are provided in connection with any proceedings, any expenses incurred in connection with the proceedings, so far as they would ordinarily be paid in the first instance by or on behalf of the person providing the services, shall be so paid except where they are paid by the ~~Commission Department~~.

(4) The withdrawal of a right to representation previously granted to an individual shall not affect the right of any person who has provided to him civil legal services or criminal defence services funded by the ~~Commission Department~~ to remuneration for work done before the date of the withdrawal.

(5) Except as expressly provided by regulations, any rights conferred by or by virtue of this Part on an individual for whom civil legal services or criminal defence services are funded by the ~~Commission Department~~ in relation to any proceedings shall not affect—

- (a) the rights or liabilities of other parties to the proceedings, or
- (b) the principles on which the discretion of any court or tribunal is normally exercised.

(6) Regulations may make provision about the procedure of any court or tribunal in relation to civil legal services or criminal defence services funded by the ~~Commission Department~~.

(7) Regulations made under paragraph (6) may in particular authorise the exercise of the functions of any court or tribunal by any member or officer of that or any other court or tribunal.

Solicitors and barristers

35. (1) The ~~Commission Department~~ shall not fund any civil legal services or criminal defence services provided by a solicitor who is for the time being prohibited from providing such services by an order under Article 51B(1) or (3) of the Solicitors (Northern Ireland) Order 1976^{F16}.

(2) The ~~Commission Department~~ shall not fund any civil legal services or criminal defence services provided by a barrister who is for the time being prohibited from providing such services by any determination of the General Council of the Bar of Northern Ireland, or by any determination of any such committee as may be established by that Council to determine charges preferred against barristers.

(3) The ~~Commission Department~~—

- (a) may make a complaint to the Law Society about the provision of civil legal services or criminal defence services by a solicitor;
- (b) may refer to the Law Society any complaint which is made to the ~~Commission Department~~ about the provision of such services by a solicitor;
- (c) may make a complaint to the General Council of the Bar of Northern Ireland about the provision of civil legal services or criminal defence services by a barrister; and
- (d) may refer to the General Council of the Bar of Northern Ireland any complaint which is made to the ~~Commission Department~~ about the provision of such services by a barrister.

(4) Any right conferred on an individual by virtue of this Part to select a person to provide civil legal services or criminal defence services for him shall not prejudice the law and practice relating to the conduct of proceedings by a solicitor or barrister or the circumstances in which a solicitor or counsel may refuse or give up a case or entrust it to another.

Annotations:

F16 1976 NI 12

Register of persons providing services

36. (1) Regulations may---

- (a) make provision for the registration by the ~~Commission~~ Department of persons who are eligible to provide civil legal services or criminal defence services funded by the ~~Commission~~ Department;
- (b) provide that only those persons who are registered ("registered persons") may provide such services; and
- (c) require registration of firms or organisations with which registered persons are connected.

(2) Regulations may require the ~~Commission~~ Department to prepare a code of practice in relation to---

- (a) the conditions to be complied with in order to qualify for registration, and
- (b) the carrying out by registered persons, and any firm or organisation which is registered in connection with a registered person, of their functions with regard to civil legal services or criminal defence services funded by the ~~Commission~~ Department.

(3) Regulations---

- (a) may require registered persons, and any firm or organisation which is registered in connection with a registered person, to comply with any such code of practice;
- (b) may require the ~~Commission~~ Department or persons authorised by the ~~Commission~~ Department to monitor compliance with any such code of practice; and
- (c) may make provision about procedures for cases in which--
 - (i) it appears to the ~~Commission~~ Department or a person authorised by the ~~Commission~~ Department that a registered person, or any firm or organisation which is registered in connection with a registered person, may not be complying with any such code of practice, or
 - (ii) a person who holds any judicial office asks the ~~Commission~~ Department to investigate whether a registered person, or any firm or organisation which is registered in connection with a registered person, is complying with any such code of practice,

and the sanctions which may be imposed under this sub-paragraph may include provision for a person, firm or organisation to cease to be registered.

(4) Regulations under this Article---

- (a) may make provision imposing charges;
- (b) may make provision with respect to the powers of investigation which may be exercised by the ~~Commission~~ Department, or by persons authorised by the ~~Commission~~ Department, for the purpose of monitoring compliance with any code of practice prepared under the regulations;
- (c) may make provision for obstruction of the exercise of powers conferred by virtue of sub-paragraph (b) to be certified to the High Court in prescribed circumstances, and for any power of the court in relation to contempt of court to be exercisable in relation to such obstruction.

(5) Before making any regulations under this Article the Lord Chancellor---

- (a) shall consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland, and
- (b) may undertake such other consultation as appears to him to be appropriate.

PART III
OTHER FUNDING OF LEGAL SERVICES

Conditional fee and litigation funding agreements

Interpretation of Part III

37. (1) In this Part—

“advocacy services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide;

“a conditional fee agreement” is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances;

“a litigation funding agreement” is an agreement under which—

- (a) a person (“the funder”) agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person (“the litigant”); and
- (b) the litigant agrees to pay, in addition to any fee payable on the making of the agreement, a sum to the funder in specified circumstances;

“litigation services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide;

“proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated;

“a right of audience” means the right to appear before and address a court including the right to call and examine witnesses;

“a right to conduct litigation” means the right—

- (c) to issue proceedings before any court, and
- (d) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions).

(2) For the purposes of this Part, a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.

Conditional fee agreements

38. (1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this Article shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to paragraph (4)) any other conditional fee agreement shall be unenforceable.

(2) The following conditions are applicable to every conditional fee agreement—

- (a) it must be in writing;
- (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and
- (c) it must comply with such requirements (if any) as may be prescribed.

(3) The following further conditions are applicable to a conditional fee agreement which provides for a success fee—

- (a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;
- (b) it must state the percentage by which the amount of fees which would be payable if it were

not a conditional fee agreement is to be increased; and

(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor.

(4) If a conditional fee agreement is an agreement to which Article 71A of the Solicitors (Northern Ireland) Order 1976^{F17} (non-contentious business agreements between solicitor and client) applies, paragraph (1) shall not make it unenforceable.

Annotations:

F17 1976 NI 12

Conditional fee agreements: supplementary

39. (1) The proceedings which cannot be the subject of an enforceable conditional fee agreement are—

- (a) criminal proceedings; and
- (b) family proceedings.

(2) In paragraph (1) “family proceedings” means proceedings under any one or more of the following—

- (a) the Matrimonial Causes (Northern Ireland) Order 1978^{F18}; (b) the Domestic Proceedings (Northern Ireland) Order 1980^{F19}; (c) the Adoption (Northern Ireland) Order 1987^{F20};
- (d) Part IV of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989^{F21};
- (e) Parts II, III, V and XV of the Children (Northern Ireland) Order 1995^{F22};
- (f) the Family Homes and Domestic Violence (Northern Ireland) Order 1998^{F23};
- ^{F24}(g) Chapter 2 of Part 4 of, or Schedules 15, 16 or 17 to the Civil Partnership Act 2004,]
- ^{F25}(h) Schedule 1 to the Forced Marriage (Civil Protection) Act 2007,]

and the inherent jurisdiction of the High Court in relation to children.

(3) The Lord Chancellor may by regulations amend paragraph (1) or (2) by adding proceedings or omitting or varying any proceedings; and regulations under this paragraph may, in particular, describe the proceedings which cannot be the subject of an enforceable conditional fee agreement by reference to the court or tribunal before which proceedings are to take place, or the issues involved.

(4) The requirements which the Lord Chancellor may prescribe under Article 38(2)(c)—

- (a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and
- (b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).

(5) Before making an order under Article 38(3), the Lord Chancellor—

- (a) shall consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland, and
- (b) may undertake such other consultation as appears to him to be appropriate.

(6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of fees payable under a conditional fee agreement which provides for a success fee.

(7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee).

Annotations:

F18 1978 NI 15

F19 1980 NI 5

- ~~F20~~ 1987 NI 22
~~F21~~ 1989 NI 4
~~F22~~ 1995 NI 2
~~F23~~ 1998 NI 6
~~F24~~ 2004 c. 33
~~F25~~ Art. 39(2)(b) inserted (25.11.2008) by Forced Marriage (Civil Protection) Act 2007 (c. 20), ss. 3(1), 4(4), Sch. 2 para. 5; S.R. 2008/446, art. 2(b)(e)

Litigation funding agreements

40. (1) A litigation funding agreement which satisfies all of the conditions applicable to it by virtue of this Article shall not be unenforceable by reason only of its being a litigation funding agreement.

(2) The following conditions are applicable to a litigation funding agreement—

- (a) the funder must be a prescribed person or a person of a prescribed description;
- (b) the agreement must be in writing;
- (c) the agreement must not relate to proceedings which by virtue of Article 39(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of any such description as may be prescribed;
- (d) the agreement must comply with such requirements (if any) as may be prescribed;
- (e) any fee payable on the making of the agreement must not exceed such amount as may be prescribed;
- (f) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates, together with an amount calculated—
 - (i) in prescribed circumstances, by reference to the funder's anticipated expenditure in funding the provision of the services; and
 - (ii) in prescribed circumstances, by reference to any damages recovered by the litigant in the proceedings; and
- (g) the amount calculated in accordance with sub-paragraph (f)(i) or (ii) must not exceed such limit (whether expressed as a figure, as a percentage of the anticipated expenditure or damages mentioned in that sub-paragraph, or otherwise) as may be prescribed in relation to proceedings of the description to which the agreement relates.

(3) Regulations under paragraph (2)(a) may require a person to be approved by the Lord Chancellor or by a prescribed person.

(4) The requirements which may be prescribed under paragraph (2)(d) include requirements for the funder to have provided prescribed information to the litigant before the agreement is made.

(5) Before making regulations under this Article, the Lord Chancellor—

- (a) shall consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland, and
- (b) may undertake such other consultation as appears to him to be appropriate.

Litigation funding agreements: the ~~Commission~~Department

41. The ~~Commission~~Department, and any body established or maintained by the

~~Commission~~Department, may not—

- (a) fund services under a litigation funding agreement, or
- (b) make any payment to any person for the purpose of enabling services to be funded under a litigation funding agreement.

Litigation funding agreements: costs

42. (1) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any amount payable under a litigation

funding agreement.

(2) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a litigation funding agreement.

(3) In any proceedings—

- (a) to which an individual, for whom advocacy or litigation services relating to the proceedings, or to a part of the proceedings, are funded under a litigation funding agreement, is a party, and
- (b) which are finally decided in favour of a party for whom such services are not so funded (“the unfunded party”),

the court by which the proceedings were so decided may, subject to paragraph (4), make an order for the payment by the funder to the unfunded party of the whole or any part of the costs incurred by the unfunded party in the proceedings.

(4) An order under paragraph (3) in respect of any costs may only be made if an order for costs would be made in the proceedings apart from this Order.

(5) Without prejudice to any other provision restricting appeals from any court, no appeal shall lie against an order under paragraph (3), or against a refusal to make such an order, except on a point of law.

(6) In this Article “costs” means costs as between party and party, and includes the costs of applying for an order under paragraph (3).

(7) For the purposes of this Article proceedings shall be treated as finally decided in favour of the unfunded party—

- (a) if no appeal lies against the decision in his favour,
- (b) if an appeal lies against the decision with leave, and the time limited for applications for leave expires without leave being granted, or
- (c) if leave to appeal against the decision is granted or is not required, and no appeal is brought within the time limited for appeal,

and where an appeal against the decision is brought out of time the court by which the appeal (or any further appeal in those proceedings) is determined may make an order for the repayment by the unfunded party to the funder of the whole or any part of any sum previously paid to the unfunded party under this Article in respect of those proceedings.

(8) Where a court decides any proceedings in favour of the unfunded party and an appeal lies (with or without leave) against that decision, the court may, if it thinks fit, make or refuse to make an order under paragraph (3) forthwith, but if an order is made forthwith it shall not take effect—

- (a) where leave to appeal is required, unless the time limited for applications for leave to appeal expires without leave being granted;
- (b) where leave to appeal is granted or is not required, unless the time limited for appeal expires without an appeal being brought.

(9) Where a party begins to receive advocacy or litigation services funded by the funder after the proceedings have been instituted, or ceases to receive advocacy or litigation services so funded before they are finally decided, or otherwise receives advocacy or litigation services so funded in connection with part only of the proceedings, the reference in paragraph (3) to the costs incurred by the unfunded party in the proceedings shall be construed as a reference to so much of those costs as is attributable to that part.

(10) For the purposes of this Article “court” includes a tribunal.

Costs

Recovery of insurance premiums by way of costs

43. Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the

premium of the policy.

Recovery where body undertakes to meet cost liabilities

44. (1) This Article applies where a body of a prescribed description undertakes to meet (in accordance with arrangements satisfying prescribed conditions) liabilities which members of the body or other persons who are parties to proceedings may incur to pay the costs of other parties to the proceedings.

(2) If in any of the proceedings a costs order is made in favour of any of the members or other persons, the costs payable to him may, subject to paragraph (3) and (in the case of court proceedings) to rules of court, include an additional amount in respect of any provision made by or on behalf of the body in connection with the proceedings against the risk of having to meet such liabilities.

(3) But the additional amount shall not exceed a sum determined in a prescribed manner; and there may, in particular, be prescribed as a manner of determination one which takes into account the likely cost to the member or other person of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings.

(4) Regulations under paragraph (1) may, in particular, prescribe as a description of body one which is for the time being approved by the Lord Chancellor or a prescribed person.

PART IV SUPPLEMENTARY

Application to Crown

45. This Order binds the Crown to the full extent authorised or permitted by the constitutional laws of Northern Ireland.

Orders, regulations and directions

~~46. (1) Any direction given by the Lord Chancellor to the Commission under Part II may be varied or revoked.~~

~~(2) No directions may be given by the Lord Chancellor to the Commission under Part II in relation to individual cases.~~

~~(3) The Lord Chancellor shall either—~~

~~(a) publish, or~~

~~(b) require the Commission to publish, any directions given by him under Part II.~~

(4) Any order or regulations made by the Lord Chancellor under this Order may contain such incidental, supplemental, consequential, saving or transitional provisions as the Lord Chancellor thinks fit; and, without prejudice to section 17(5) of the Interpretation Act (Northern Ireland) 1954²²⁶, any power conferred by this Order to make regulations or orders includes power to make different provision for different areas.

(5) No order shall be made under Article ~~4(4), 5, 40(2), 41(9)(b), 45(7), 10(2), 29(3) or 38(3)~~ and no regulations shall be made under Article 12(6), 18(1), 20(2)(b) or (d), 28, 30(2)(a) or (5), 32(1), 36 or 39(3) unless a draft of the order or regulations has been laid before, and approved by resolution of, each House of Parliament.

~~(5A) The first regulations under Article 20A shall not be made unless a draft of the regulations has been laid before, and approved by resolution of, the Assembly.~~

(6) Any other order or regulations made by the Department under this Order, other than an order under Article 1(2) or ~~48 or paragraph 2(6) of Schedule 3~~, shall be subject to annulment in pursuance of a resolution of either House of Parliament in like manner as a statutory instrument and section 5 of the Statutory Instruments Act 1946²²⁷ shall apply accordingly.

Annotations:

- F26 1954 c. 33 (NI)
- F27 1946 c. 36

Remuneration orders

47. (1) When making any remuneration order the Lord Chancellor shall have regard, among the matters which are relevant, 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.

(2) Before making any remuneration order, the Lord Chancellor—

- (a) shall consult the Lord Chief Justice, the Law Society, the General Council of the Bar of Northern Ireland and, if the remuneration order relates to criminal defence services, the Director of Public Prosecutions, and
- (b) may undertake such other consultation as appears to him to be appropriate.

(3) When the Lord Chancellor is making provision in a remuneration order which prescribes fees which are to be paid to persons or bodies in respect of the provision of services by them, nothing in paragraph (1) requires him to have regard to any fee payable, otherwise than in accordance with a remuneration order, in respect of the provision of such services.

(4) In paragraphs (1) to (3) "remuneration order" means an order under Article 12(3), 23(3) or 24(3) which relates to the payment by the ~~Commission~~ Department of remuneration—

- (a) for the provision of services by persons or bodies in individual cases, or
- (b) by reference to the provision of services by persons or bodies in specified numbers of cases.

(5) Until the Attorney General is a person appointed under section 22(2) of the Justice (Northern Ireland) Act 2002²⁸, the reference in paragraph (2) to the Director of Public Prosecutions shall be construed as a reference to the Attorney General.

Annotations:

- F28 2002 c. 26

Transitional provisions and savings

48. (1) The Lord Chancellor may by order make such transitional provisions and savings as he considers appropriate in connection with the coming into operation of any provision of this Order.

~~(2) Schedule 3 (transitional provisions and savings) shall have effect.~~

~~(3) Nothing in Schedule 3 limits paragraph (1) or the operation of sections 28 and 29 of the Interpretation Act (Northern Ireland) 1954.~~

Article 49—Amendments and repeals

SCHEDULES

SCHEDULE 1 Article 3(4)

NORTHERN IRELAND LEGAL SERVICES COMMISSION

Incorporation and status

1. (1) The Commission shall be a body corporate.
(2) Subject to the provisions of this Order, section 49 of the Interpretation Act (Northern Ireland) 1954 shall apply to the Commission.

2. The Commission shall not be regarded—

- (a) as the servant or agent of the Crown, or
- (b) as enjoying any status, immunity or privilege of the Crown;

and the Commission's property shall not be regarded as property of, or held on behalf of, the Crown.

Tenure of members

3. (1) Subject to paragraphs 4 and 5, any member of the Commission shall hold and vacate office in accordance with the terms of his appointment.

(2) But a person shall not be appointed a member of the Commission for a period of more than five years.

4. (1) A member of the Commission may resign office by giving notice in writing to the Lord Chancellor.

(2) A person who ceases to be a member of the Commission shall be eligible for re-appointment.

5. The Lord Chancellor may terminate the appointment of a member of the Commission if satisfied that—

- (a) he has become bankrupt or made a composition or arrangement with his creditors;
- (b) he is unable to carry out his duties as a member of the Commission by reason of illness;
- (c) he has been convicted of a criminal offence;
- (d) he has been absent from meetings of the Commission for a period longer than six consecutive months without the permission of the Commission; or
- (e) he is otherwise unable or unfit to discharge the functions of a member of the Commission.

6. (1) Subject to sub-paragraphs (2) to (5), the member appointed to chair the Commission shall hold and vacate office as such in accordance with the terms of his appointment.

(2) If the person appointed to chair the Commission ceases to be a member of the Commission, he shall cease to chair it.

(3) A member appointed to chair the Commission may at any time resign from office as such by giving notice in writing to the Lord Chancellor.

(4) A member so appointed shall be eligible for re-appointment on ceasing to hold office as such (if still a member of the Commission).

~~(5) When a member is appointed to chair the Commission or ceases to hold office as such, the Lord Chancellor may vary the terms of the member's appointment as a member of the Commission so as to alter the date of cessation of membership.~~

Members' interests

~~7. (1) Before appointing a person to be a member of the Commission, the Lord Chancellor shall satisfy himself that that person will have no such financial or other interest as is likely to affect prejudicially the exercise or performance by him of his functions as a member of the Commission.~~

~~(2) The Lord Chancellor shall from time to time satisfy himself with respect to every member of the Commission that he has no such interest as is referred to in sub-paragraph (1).~~

~~(3) Any person whom the Lord Chancellor proposes to appoint as, and who has consented to be, a member of the Commission, and any member of the Commission shall (whenever requested by the Lord Chancellor to do so) supply him with such information as the Lord Chancellor considers necessary for the performance by the Lord Chancellor of his duties under this paragraph.~~

~~8. (1) A member of the Commission who is in any way directly or indirectly interested in an individual contract entered into or proposed to be entered into, or an individual grant, loan or other payment made or proposed to be made, by the Commission shall disclose the nature of his interest at a meeting of the Commission; and—~~

- ~~(a) the disclosure shall be recorded in the minutes of the Commission; and~~
- ~~(b) the member shall not take any part in any deliberation or decision of the Commission with respect to that contract or grant, loan or other payment.~~

~~(2) For the purposes of sub-paragraph (1), a general notice given at a meeting of the Commission by a member of the Commission to the effect—~~

- ~~(a) that he is a person with whom a contract may be entered into, or to whom a grant, loan or other payment may be made, by the Commission; or~~
- ~~(b) that he is a member of a specified body with which a contract may be entered into, or to which a grant, loan or other payment may be made, by the Commission,~~

~~shall be regarded as a sufficient disclosure of his interest in relation to any contract subsequently entered into with, or grant, loan or other payment made to, him or the body.~~

~~(3) A member of the Commission need not attend in person at a meeting of the Commission in order to make any disclosure which he is required to make under this paragraph if he takes reasonable steps to secure that the disclosure is made by a notice which is brought up and read out at the meeting.~~

Remuneration

~~9. (1) The Commission may—~~

- ~~(a) pay to its members such remuneration; and~~
- ~~(b) make provision for the payment of such pensions, allowances or gratuities to or in respect of its members;~~

~~as the Lord Chancellor may determine.~~

~~(2) Where a person ceases to be a member of the Commission otherwise than on the expiry of his term of office, and it appears to the Lord Chancellor that there are special circumstances which make it right for that person to receive compensation, the Lord Chancellor may require the Commission to make that person a payment of such amount as the Lord Chancellor may determine.~~

Staff

~~10. (1) The Commission shall appoint a person to be the chief executive of the Commission~~

who shall be responsible to the Commission for the exercise of its functions.

~~(2) The Commission may appoint such other employees as it thinks fit.~~

~~(3) The Commission may only appoint a person to be—~~

~~(a) its chief executive, or~~

~~(b) the holder of any other employment of a description specified by the Lord Chancellor by direction given to the Commission,~~

after consultation with, and subject to the approval of, the Lord Chancellor.

~~(4) An appointment under this paragraph may be made on such terms and conditions as the Commission, with the approval of the Lord Chancellor, may determine.~~

~~11—(1) The Commission shall make, in respect of such of its employees as, with the approval of the Lord Chancellor, it may determine, such arrangements for providing pensions, allowances or gratuities, including pensions, allowances or gratuities by way of compensation for loss of employment, as it may determine.~~

~~(2) Arrangements under sub-paragraph (1) may include the establishment and administration, by the Commission or otherwise, of one or more pension schemes.~~

~~(3) If an employee of the Commission—~~

~~(a) becomes a member of the Commission, and~~

~~(b) was by reference to his employment by the Commission a participant in a pension scheme established and administered by it for the benefit of its employees,~~

the Commission may determine that his service as a member shall be treated for the purposes of the scheme as service as an employee of the Commission whether or not any benefits are to be payable to or in respect of him by virtue of paragraph 9.

~~(4) Where the Commission exercises the power conferred by sub-paragraph (3), any discretion as to the benefits payable to or in respect of the member concerned which the scheme confers on the Commission shall be exercised only with the approval of the Lord Chancellor.~~

Funding of costs relating to administration etc.

~~12—(1) The Lord Chancellor shall pay to the Commission such sums as he may determine as appropriate for—~~

~~(a) the exercise by the Commission of functions in relation to civil legal services other than the funding of services, and~~

~~(b) the administrative costs of the Commission.~~

~~(2) The Lord Chancellor may—~~

~~(a) determine the manner in which and times at which the sums mentioned in sub-paragraph (1) are to be paid to the Commission; and~~

~~(b) impose conditions on the payment of those sums.~~

Proceedings

~~13—(1) Subject to anything in any instrument made under this Part, the Commission may regulate its own proceedings.~~

~~(2) Committees—~~

~~(a) may be appointed, and may be dissolved, by the Commission; and~~

~~(b) may include, or consist entirely of, persons who are not members of the Commission;~~

but the Lord Chancellor may by direction require the Commission to make such provision relating to committees as is specified in the direction.

~~(3) A committee shall act in accordance with such instructions as the Commission may from time to time give; and the Commission may provide for anything done by a committee to have~~

effect as if it had been done by the Commission.

(4) ~~The Commission may pay to the members of any committee such fees and allowances as the Lord Chancellor may determine.~~

(5) ~~Where a committee is to consider an individual contract entered into or proposed to be entered into, or an individual grant, loan or other payment made or proposed to be made, by the Commission, any member of the committee who is in any way directly or indirectly interested in the contract or the grant, loan or other payment shall disclose the nature of his interest at a meeting of the committee; and—~~

~~(a) the disclosure shall be recorded in the minutes of the committee, and~~

~~(b) the member shall not take any part in any deliberation or decision of the committee with respect to that contract or grant, loan or other payment.~~

(6) ~~For the purposes of sub-paragraph (5), a general notice given at a meeting of a committee by a member of the committee to the effect—~~

~~(a) that he is a person with whom a contract may be entered into, or to whom a grant, loan or other payment may be made, by the Commission, or~~

~~(b) that he is a member of a specified body with which a contract may be entered into, or to which a grant, loan or other payment may be made, by the Commission,~~

shall be regarded as a sufficient disclosure of his interest in relation to any contract subsequently entered into with, or grant, loan or other payment made to, him or the body.

(7) ~~A member of a committee need not attend in person at a meeting of the committee in order to make any disclosure which he is required to make under this paragraph if he takes reasonable steps to secure that the disclosure is made by a notice which is brought up and read out at the meeting.~~

(8) ~~The validity of any proceedings of the Commission or of any committee appointed by the Commission shall not be affected by any vacancy among its members or by any defect in the appointment of any member.~~

Provision of information

14. (1) ~~The Commission shall provide the Lord Chancellor with such information as he may require relating to its property and to the discharge or proposed discharge of its functions.~~

~~(2) The Commission shall—~~

~~(a) permit any person authorised by the Lord Chancellor to inspect and make copies of any accounts or documents of the Commission; and~~

~~(b) provide such explanation of them as any such person, or the Lord Chancellor, may require.~~

Annual report

15. (1) ~~The Commission shall provide to the Lord Chancellor, as soon as possible after the end of each financial year, a report on how it has during that year—~~

~~(a) funded civil legal services; and~~

~~(b) funded criminal defence services; and~~

~~(c) exercised its other functions.~~

~~(2) The Lord Chancellor may by direction require the Commission to deal with the matters specified in the direction in reports, or a particular report, under this paragraph.~~

(3) ~~The Lord Chancellor shall lay before each House of Parliament a copy of each report provided to him under this paragraph and the Commission shall publish a report once it has been so laid.~~

~~(4) In this paragraph and paragraphs 16 and 17² financial year² means—~~

~~(a) the period beginning with the day on which the Commission is established and~~

- ending with the next 31st March, and
(b) each subsequent period of twelve months ending with 31st March.

Annual plan

~~16. (1) The Commission shall, before the beginning of each financial year (other than that specified in paragraph 15(3)(a)), prepare a plan setting out how it intends in that year—~~

- ~~(a) to fund civil legal services;~~
~~(b) to fund criminal defence services; and~~
~~(c) to exercise its other functions;~~

~~and the plan shall include a summary of what the Commission has ascertained in the exercise of its functions under Article 6(4).~~

~~(2) The Lord Chancellor may by direction require the Commission to deal with the matters specified in the direction in plans, or a particular plan, under sub-paragraph (1).~~

~~(3) The Commission shall send a copy of each plan prepared under sub-paragraph (1) to the Lord Chancellor.~~

~~(4) If the Lord Chancellor approves it, he shall lay a copy before each House of Parliament and the Commission shall publish the plan once it has been so laid.~~

~~(5) If he does not approve it, he shall by direction require the Commission to revise it in accordance with the direction; and the direction shall include the Lord Chancellor's reasons for not approving the plan.~~

~~(6) When the Commission has revised the plan, it shall send the Lord Chancellor a copy of the revised plan, and he shall lay a copy before each House of Parliament, and the Commission shall publish the revised plan once it has been so laid.~~

Accounts and audit

~~17. (1) The Commission shall keep accounts and shall prepare in respect of each financial year a statement of accounts.~~

~~(2) The accounts shall be kept, and the statement of accounts shall be prepared, in such form as the Lord Chancellor may, with the approval of the Treasury, specify by direction given to the Commission.~~

~~(3) The Commission shall send a copy of the statement of accounts in respect of each financial year to the Lord Chancellor and to the Comptroller and Auditor General within such period after the end of the financial year to which it relates as the Lord Chancellor may specify by direction given to the Commission.~~

~~(4) The Comptroller and Auditor General shall—~~

- ~~(a) examine, certify and report on each statement of accounts received by him under sub-paragraph (3); and~~
~~(b) send a copy of his report to the Commission.~~

~~(5) The Commission shall lay before each House of Parliament—~~

- ~~(a) a copy of each statement of accounts prepared under sub-paragraph (1); and~~
~~(b) a copy of each report received from the Comptroller and Auditor General under sub-paragraph (4)(b).~~

Instruments

~~18. (1) The fixing of the seal of the Commission shall be authenticated by a member of the Commission or by some other person authorised either generally or specially by the Commission to act for that purpose.~~

~~(2) A document purporting to be duly executed under the seal of the Commission or to be signed on the Commission's behalf—~~

- (a) shall be received in evidence, and
- (b) unless the contrary is proved, shall be deemed to be so executed or signed.

SCHEDULE 2

Article 12(5)

CIVIL LEGAL SERVICES: EXCLUDED SERVICES

1. ~~The Commission~~ ~~The Department~~ may not fund services consisting of the provision of advice (beyond the provision of general information about the law and the legal system and the availability of legal services) or assistance in relation to—
 - (a) conveyancing,
 - (b) boundary disputes,
 - (c) the making of wills,
 - (d) matters of trust law,
 - (e) defamation or malicious falsehood,
 - (f) matters of company or partnership law, or
 - (g) other matters arising out of the carrying on of a business.

2. ~~The Commission~~ ~~The Department~~ may not fund services consisting of representation in any proceedings, except, subject to paragraph 4, such proceedings as are specified in sub-paragraphs (a) to (j)—
 - (a) proceedings in—
 - (i) the ^{F29}Supreme Court in the exercise of its jurisdiction in relation to any appeal from Northern Ireland,
 - (ii) ^{F30}
 - (iii) the Court of Appeal,
 - (iv) the High Court, or
 - (v) any county court.
 - (b) proceedings before any person to whom a case is referred (in whole or in part) in any proceedings within sub-paragraph (a),
 - (c) proceedings in the Crown Court under the Proceeds of Crime Act 2002^{F31} to the extent specified in paragraph 3,
 - (d) proceedings in a court of summary jurisdiction—
 - (i) for or relating to an order under the Summary Jurisdiction (Separation and Maintenance) Act (Northern Ireland) 1945^{F32} or the Domestic Proceedings (Northern Ireland) Order 1980^{F33} or the Family Homes and Domestic Violence (Northern Ireland) Order 1998^{F34}^{F35} or Schedule 16 to the Civil Partnership Act 2004,
 - (ii) under section 22 of the Maintenance Orders Act 1950^{F36} or section 13 of the Maintenance and Affiliation Orders Act (Northern Ireland) 1966^{F37},
 - (iii) under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972^{F38} relating to a maintenance order made by a court of a country outside the United Kingdom,
 - (iv) such as are referred to in paragraph (i) and are brought by virtue of Part II of the Maintenance Orders (Reciprocal Enforcement) Act 1972,
 - (v) which are debt or ejectment proceedings within the meaning of Part VI of the Magistrates' Courts (Northern Ireland) Order 1981^{F39}, other than proceedings under Article 62(2) of that Order,
 - (vi) under section 97, 143 or 144(1) of the Children and Young Persons Act (Northern Ireland) 1968^{F40} or the Children (Northern Ireland) Order 1995^{F41},
 - (vii) under Article 101 of the Health and Personal Social Services (Northern Ireland) Order 1972^{F42} or section 101 of the Social Security Administration (Northern Ireland) Act 1992^{F43},

- (viii) which are appeals under Article 22 of the Child Support (Northern Ireland) Order 1991^{F44}, so far as such appeals are to be made to a court of summary jurisdiction by virtue of Article 2 of the Child Support Appeals (Jurisdiction of Courts) Order (Northern Ireland) 1993^{F46},
- (ix) under Article 28 of the Child Support (Northern Ireland) Order 1991,
Sub para. (x) rep. by 2003 c. 42
- (xi) for an order or direction under paragraph 3, 5, 6, 9 or 10 of Schedule 1 to the Anti-Terrorism, Crime and Security Act 2001^{F46, F47} . . .
- (xii) for an order or direction under section 295, 297, 298, 301 or 302 of the Proceeds of Crime Act 2002,^[F48 or]
- ^[F48](xiii) under section 89, 90, 97, 100, 104, 108, 109, 114, 118, 123, 125 or 126 of the Sexual Offences Act 2003,]
- (e) proceedings in any devolution issue (within the meaning of Schedule 10 to the Northern Ireland Act 1998, Schedule 8 to the Government of Wales Act 1998^{F49} or Schedule 6 to the Scotland Act 1998^{F50}) before any court in Northern Ireland,
- (f) proceedings brought by an individual before the Proscribed Organisations Appeal Commission,
- (g) proceedings before the Mental Health Review Tribunal,
- (h) proceedings in the Lands Tribunal for Northern Ireland,
- ^[F51](hh) proceedings under Article 3 or 4 of the Anti-social Behaviour (Northern Ireland) Order 2004,]
- ^[F52](i) proceedings before the Asylum and Immigration Tribunal or the Special Immigration Appeals Commission,]
- (j) proceedings in the Enforcement of Judgments Office in connection with any proceedings mentioned in sub-paragraphs (a) to (i).
- (k) ^{F53}

Annotations:

- F29** Words in Sch. 2 para. 2(a)(i) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 148, Sch. 9 para. 84; S.I. 2009/1604, art. 2(a)(d)
- F30** Sch. 2 para. 2(a)(ii) repealed (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 146, 148, Sch. 18 Pt. 5; S.I. 2009/1604, art. 2(f)
- F31** 2002 c. 29
- F32** 1945 c.14 (NI)
- F33** 1980 NI 5
- F34** 1998 NI 6
- F35** 2004 c. 33
- F36** 1950 c. 37
- F37** 1966 c. 35 (NI)
- F38** 1972 c. 18
- F39** 1981 NI 26
- F40** 1968 c. 34 (NI)
- F41** 1995 NI 2
- F42** 1972 NI 14
- F43** 1992 c. 8
- F44** 1991 NI 23
- F45** SR 1993/104
- F46** 2001 c. 24
- F47** 2003 c. 42
- F48** 2003 c. 42
- F49** 1998 c. 38
- F50** 1998 c. 46

- F51** Sch. 2 para. 2(hh) inserted (8.6.2008) by Criminal Justice (Northern Ireland) Order 2008 (S.I. 2008/1216 (N.I. 1)), arts. 1(3)(a), 84(1)
- F52** 2004 c. 19
- F53** Sch. 2 para. 2(k) repealed (8.6.2008) by Criminal Justice (Northern Ireland) Order 2008 (S.I. 2008/1216 (N.I. 1)), arts. 1(3)(b), 102(2), Sch. 6 Pt. 2

3. (1) These are the proceedings under the Proceeds of Crime Act 2002 referred to in paragraph 2(c)—

- (a) proceedings which relate to a direction under section 202(3)^{F54} . . . as to the distribution of funds in the hands of a receiver;
- (b) applications under section 210 relating to action taken or proposed to be taken by a receiver;
- (c) applications under section 211 to vary or discharge an order under any of sections 196 [F55 to 199] for the appointment of or conferring powers on a receiver;
- (d) applications under section 220 or 221 for the payment of compensation;
- (e) applications under sections 351(3), 362(3), 369(3) or 375(2) to vary or discharge certain orders made under Part 8.

(2) But sub-paragraph (1) does not authorise the funding of the provision of services to a defendant (within the meaning of Part 4 of the Proceeds of Crime Act 2002) in relation to—

- (a) proceedings mentioned in [F56 head (a)] of that sub-paragraph, or
- (b) an application under section 221 of that Act for the payment of compensation if the confiscation order was varied under section 179.

Annotations:

- F54** Words in Sch. 2 para. 3(1)(a) repealed (1.4.2008) by Serious Crime Act 2007 (c. 27), ss. 74(2), 92, 94(1), Sch. 8 para. 163(2), Sch. 14; S.I. 2008/755, art. 2(1)(a)(e)(d) (subject to arts. 3-14)
- F55** Words in Sch. 2 para. 3(1)(c) substituted (1.4.2008) by Serious Crime Act 2007 (c. 27), ss. 74(2), 94(1), Sch. 8 para. 163(3); S.I. 2008/755, art. 2(1)(a) (subject to arts. 3-14)
- F56** Words in Sch. 2 para. 3(2)(a) substituted (8.6.2008) by Criminal Justice (Northern Ireland) Order 2008 (S.I. 2008/1216 (N.I. 1)), arts. 1(3)(a), 85(1)

4. Subject to paragraph 5, the following services may not be funded by the ~~Commission~~ Department as civil legal services, even where they fall within the descriptions specified in paragraphs 2(a) to (j)—

- (a) representation in proceedings in respect of which representation may be granted as a criminal defence servlee;
- (b) representation wholly or partly in respect of defamation;
- (c) representation in relator actions;
- (d) representation in relation to election petitions under the Representation of the People Act 1983^{F57} or the Electoral Law Act (Northern Ireland) 1962^{F58};
- (e) representation in proceedings (other than proceedings referred to in paragraph 2(j)) for the recovery of a debt (including liquidated damages) which is admitted where the only question to be brought before the court is as to the time and mode of payment of that debt;
- (f) representation in proceedings incidental to any proceedings mentioned in sub-paragraphs (a) to (e).

Annotations:

- F57** 1983 c. 29
- F58** 1962 c. 14 (NI)

5. Notwithstanding paragraph 4, the making of a counterclaim for defamation in proceedings for which representation may be granted shall not of itself affect any right of a defendant to the

counterclaim to representation in the proceedings and representation may be granted to enable him to defend such counterclaim.

SCHEDULE 3 Article 48(2)

TRANSITIONAL PROVISIONS AND SAVINGS

Interpretation

1. In this Schedule—

“the 1981 Order” means the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981⁽⁵⁹⁾;

“the first appointed day” means the day appointed by the Lord Chancellor under Article 1(2) for the coming into operation of Article 3(1);

“the Old Fund” has the meaning given by paragraph 3;

“the second appointed day” means the day appointed by the Lord Chancellor under Article 1(2) for the coming into operation of Article 14(1).

Annotations:

ISS—1981.21.3

Rights, obligations and property

2. (1) Subject to paragraphs 3 and 9, on the first appointed day all rights, obligations and property of the Law Society which are referable to its functions under the 1981 Order shall become rights, obligations and property of the Commission.

(2) Any payments which are required to be made into or out of the Old Fund in connection with legal aid or advice or assistance under the 1981 Order shall, on and after the first appointed day, be paid to or by the Commission.

(3) Anything which, immediately before the first appointed day, is in the process of being done by or in relation to the Law Society may, if it relates to anything transferred by sub-paragraph (1), be continued by or in relation to the Commission.

(4) Anything done (or having effect as if done) by or in relation to the Law Society before the first appointed day for the purpose of, or in connection with, anything transferred by sub-paragraph (1) shall, so far as is required for continuing its effect after that time, have effect as if done by or in relation to the Commission.

(5) Any reference in any document, including any statutory provision, constituting or relating to anything transferred by sub-paragraph (1)—

(a) to, or to the Council of, the Law Society, or

(b) to the Legal Aid Committee, certifying committee or any other committee or tribunal established by the Law Society under Part II of the 1981 Order, or

(c) to any member or office-holder of such a committee or tribunal,

shall, so far as is required for giving effect to that sub-paragraph, be construed as a reference to the Commission, or in relation to a function exercisable by any individual or committee under arrangements made by the Commission under Article 7(4) of this Order, as a reference to that individual or committee.

(6) The Lord Chancellor may by order make any consequential, incidental, supplementary or transitional provisions, and any savings, which appear to him to be appropriate in consequence of or otherwise in connection with the transfers effected by sub-paragraph (1).

(7) An order under sub-paragraph (6) may include provisions in the form of amendments or repeals of this Schedule or any other statutory provision.

The Legal Aid Fund

3. (1) On the first appointed day the legal aid fund (“the Old Fund”) maintained by the

Law Society under Article 19 of the 1981 Order shall be wound-up.

(2) If, as at the first appointed day, after taking account of all receipts and expenses of the Law Society attributable to its functions under the 1981 Order, there is in relation to the Old Fund any surplus or deficit—

- (a) such surplus shall be paid by the Law Society to the Lord Chancellor; and
- (b) such deficit shall be made-up by payment to the Law Society by the Lord Chancellor of the amount of the deficit.

(3) The Law Society shall, as soon as possible after the first appointed day, prepare a report in accordance with Article 18(8) of the 1981 Order—

- (a) in relation to the last financial year ending before the first appointed day (if it has not done so before then); and
- (b) in relation to the period between the end of that financial year and the first appointed day (as if that period were a financial year).

(4) The Law Society shall, as soon as possible after the first appointed day, prepare a statement of accounts in accordance with Article 20 of the 1981 Order—

- (a) in relation to the last financial year ending before the first appointed day (if it has not done so before then); and
- (b) in relation to the period between the end of that financial year and the first appointed day (as if that period were a financial year).

(5) Paragraphs (2) to (5) of Article 20 of the 1981 Order shall, on and after the first appointed day, apply in relation to—

- (a) the preparation of a statement under sub-paragraph (4)(a) or (b); and
- (b) the auditing of accounts kept under that Article for the periods mentioned in sub-paragraphs (4)(a) and (b).

(6) Notwithstanding its repeal by this Order, Article 19(5) of the 1981 Order shall continue to have effect for the purposes of any determination as to the expenses or receipts of the Law Society.

(7) The Lord Chancellor shall meet the costs of remunerating auditors and any other costs incurred by the Law Society in connection with the exercise of any of its functions under this paragraph.

Part II of the 1981 Order

4. (1) The provisions of this paragraph shall have effect if the first appointed day falls before the second appointed day.

(2) With effect from the first appointed day until the second appointed day it shall be the responsibility of the Commission—

- (a) to establish and maintain a fund, which shall be deemed for all purposes of the 1981 Order to be the legal aid fund;
- (b) subject to the provisions of Part II of the 1981 Order and this Schedule, to make arrangements with the approval of the Lord Chancellor and the concurrence of the Treasury for securing that legal aid, advice and assistance are available as required by Part II of the 1981 Order;
- (c) to monitor the conduct of solicitors and barristers advising or assisting or acting for persons entitled to receive advice or assistance or legal aid under the 1981 Order and, where it considers it appropriate to do so—
 - (i) to make a complaint about the conduct of a person so advising or assisting or acting to the Law Society (in the case of a solicitor) or to the General Council of the Bar of Northern Ireland (in the case of a barrister); or
 - (ii) to refer any complaint which is made to the Commission about the conduct of a person so advising or assisting or acting to the Law Society (in the case of a

- solicitor) or to the General Council of the Bar of Northern Ireland (in the case of a barrister), and
- (d) generally to administer Part II of the 1981 Order
- (3) In relation to any time from the first appointed day to the second appointed day, any reference in Part II of the 1981 Order or in any statutory provision made or treated as made, under that Part—
- (a) to, or to the Council of, the Law Society, or
- (b) to the Legal Aid Committee, certifying committee or any other committee or tribunal established by the Law Society under that Part, or
- (c) to any member or office holder of such a committee or tribunal,
- shall, so far as is required to enable the Commission to exercise its functions under sub-paragraph (2), and subject to sub-paragraph (4), be construed as a reference to the Commission, or in relation to a function exercisable by any individual or committee under arrangements made by the Commission under Article 7(4) of this Order, as a reference to that individual or committee.
- (4) Sub-paragraph (3) shall not apply to Article 23 or 24 of the 1981 Order, but instead in Article 24—
- (a) any reference to the Law Society shall, in relation to any time from the first appointed day to the second appointed day, be deemed to include a reference to the Commission; and
- (b) paragraph (1) shall have effect as if there were inserted after sub-paragraph (c)—
- "or
- (d) for the purpose of facilitating the proper performance by the Law Society or the General Council of the Bar of Northern Ireland of their functions in relation to complaints made or referred to them by the Commission;"
- (5) The Commission shall pay into the fund established under sub-paragraph (2)(a)—
- (a) sums received from the Lord Chancellor under sub-paragraph (7),
- (b) any receipts of the Commission attributable to Part II of the 1981 Order, and
- (c) such other receipts of the Commission as the Lord Chancellor may, with the concurrence of the Treasury, determine.
- (6) All expenses of the Commission attributable to Part II of the 1981 Order shall be paid out of the fund established under sub-paragraph (2)(a).
- (7) The Lord Chancellor shall pay to the Commission out of money provided by Parliament such sums as are required (after allowing for sums received apart from this sub-paragraph) to meet the payments which, under sub-paragraph (6), are to be paid by the Commission out of the fund established under sub-paragraph (2)(a).
- (8) The Lord Chancellor may, with the approval of the Treasury—
- (a) determine the manner in which and times at which the sums referred to in sub-paragraph (7) shall be paid to the Commission; and
- (b) impose conditions on the payment of the sums referred to in sub-paragraph (7).
- (9) Estimates of the sums required as mentioned in sub-paragraph (7) shall from time to time be submitted to the Lord Chancellor by the Commission.
- (10) An estimate shall be submitted under sub-paragraph (9)—
- (a) at least once in the period beginning with the first appointed day and ending with the next 31st March, and
- (b) at least once in each subsequent period of twelve months ending with 31st March, at such time as the Lord Chancellor may, with the approval of the Treasury, direct.
- (11) An estimate under sub-paragraph (9) shall be in such form and shall give such particulars as may be so directed.

~~(12) Any provision of Part II of the 1981 Order requiring anything to be paid into or out of the fund established under sub-paragraph (2)(a) is not to be taken as requiring the making of an actual payment, so as to prevent the obligation to make it being satisfied in whole or in part by an allowance on account or in any other way; and in that Part references to payments, to sums paid or payable or to receipts and similar references shall be construed accordingly.~~

~~(13) Where a fund is established under sub-paragraph (2)(a), that fund shall, with effect from the second appointed day, be treated as if it were established under Article 11(1).~~

Part III of the 1981 Order

~~5. (1) The provisions of this paragraph shall have effect if the first appointed day falls before the day appointed by the Lord Chancellor under Article 1(2) for the coming into operation of Article 21.~~

~~(2) With effect from the first appointed day until the day appointed by the Lord Chancellor under Article 1(2) for the coming into operation of Article 21, in any case where a criminal aid certificate is granted under Part III of the 1981 Order in respect of any person, the expenses properly incurred in pursuance of the certificate, including the fees of a solicitor and, where counsel has been assigned, of counsel, shall be paid—~~

- ~~(a) by the Lord Chancellor; or~~
- ~~(b) by the Commission;~~

~~as the Lord Chancellor may direct.~~

~~(3) Sub-paragraph (2) is subject to any rules made under Article 36 of the 1981 Order and to any directions given under that Article.~~

~~(4) The Commission shall establish and maintain a fund from which it shall make any payments which, under sub-paragraph (2), are to be paid by the Commission.~~

~~(5) The Commission shall pay into the fund established under sub-paragraph (4)—~~

- ~~(a) sums received from the Lord Chancellor under sub-paragraph (6); and~~
- ~~(b) such other receipts of the Commission as the Lord Chancellor may, with the concurrence of the Treasury, determine.~~

~~(6) The Lord Chancellor shall pay to the Commission out of money provided by Parliament such sums as are required (after allowing for sums received apart from this sub-paragraph) to meet the payments which, under sub-paragraph (2), are to be paid by the Commission.~~

~~(7) The Lord Chancellor may, with the approval of the Treasury—~~

- ~~(a) determine the manner in which and times at which the sums referred to in sub-paragraph (6) are to be paid to the Commission; and~~
- ~~(b) impose conditions on the payment of the sums referred to in sub-paragraph (6).~~

~~(8) Estimates of the sums required as mentioned in sub-paragraph (6) shall from time to time be submitted to the Lord Chancellor by the Commission.~~

~~(9) An estimate shall be submitted under sub-paragraph (8)—~~

- ~~(a) at least once in the period beginning with the first appointed day and ending with the next 31st March; and~~
- ~~(b) at least once in each subsequent period of twelve months ending with 31st March, at~~

~~such time as the Lord Chancellor may, with the approval of the Treasury, direct.~~

~~(10) An estimate under sub-paragraph (8) shall be in such form and shall give such particulars as may be so directed.~~

~~(11) Where a fund is established under sub-paragraph (4), that fund shall, with effect from the day appointed by the Lord Chancellor under Article 1(2) for the coming into operation of Article 21, be treated as if it were established under Article 21(1).~~

Commission's annual plan and annual report

~~6. (1) Where the Commission exercises any functions by virtue of paragraph 4(2) or 5(2) during any financial year, it shall deal with how it has exercised those functions during that year in the report which it is required to provide to the Lord Chancellor in relation to that year under paragraph 15 of Schedule 1.~~

~~(2) Where the Commission proposes to exercise any functions by virtue of paragraph 4(2) or 5(2) during any financial year, it shall deal with how it intends to exercise those functions during that year in the plan which it is required to prepare in relation to that year under paragraph 16 of Schedule 1.~~

~~(3) In this paragraph "financial year" has the meaning given by paragraph 15 of Schedule 1, but does not, in relation to any plan prepared under paragraph 16 of that Schedule, include the year specified in paragraph 15(4)(a) of that Schedule.~~

Grants and approvals under the 1981 Order

~~7. (1) Any grant of legal aid under Part II of the 1981 Order which is in force immediately before the second appointed day shall, on and after that day, have effect as a decision of the Commission to fund representation as a civil legal service.~~

~~(2) Any approval given in connection with the grant of legal aid under Part II of the 1981 Order which is in force immediately before the second appointed day shall, on and after that day, have effect as a decision of the Commission to fund representation as a civil legal service.~~

~~(3) Any approval given in connection with the grant of assistance by way of representation under Part II of the 1981 Order which is in force immediately before the second appointed day shall, on and after that day, have effect as a decision of the Commission to fund representation as a civil legal service.~~

~~(4) Any approval given in connection with the grant of advice or assistance under Part II of the 1981 Order which is in force immediately before the second appointed day shall, on and after that day, have effect as an approval by the Commission in connection with the funding of advice or assistance as a civil legal service.~~

Chief Executive of the Commission

~~8. (1) Notwithstanding anything in paragraph 10 of Schedule 1, the first appointment of a chief executive of the Commission shall be made by the Lord Chancellor.~~

~~(2) Any appointment under this paragraph shall be made on such terms and conditions as the Lord Chancellor may determine.~~

The Commission: transfers of employment

~~9. (1) The Commission shall make, not later than such date as the Lord Chancellor may determine, an offer of employment by the Commission to such of the persons employed immediately before that date by the Law Society for the purpose of its functions under the 1981 Order as fall within such descriptions as the Lord Chancellor designates for the purposes of this paragraph or are persons whom the Commission wishes to employ.~~

~~(2) The terms of the offer shall be such that they are, taken as a whole, not less favourable to the person to whom the offer is made than the terms on which he is employed on the date on which the offer is made.~~

~~(3) An offer made in pursuance of this paragraph shall not be revocable during the period of 3 months commencing with the date on which it is made.~~

~~10. (1) Where a person becomes an employee of the Commission on acceptance of an offer made under paragraph 9, then, for the purposes of the Employment Rights (Northern Ireland) Order 1996⁽⁶⁶⁾, his period of employment with the Law Society shall count as a period of employment by the Commission, and the change of employment shall not break the continuity of the period of employment.~~

~~(2) Where an offer is made under paragraph 9 to any person, none of the agreed redundancy procedures applicable to employees of the Law Society shall apply to him.~~

~~(3) Where a person employed by the Law Society ceases to be so employed—~~

~~(a) on becoming a member of the staff of the Commission on accepting an offer under paragraph 9, or~~

~~(b) having unreasonably refused such an offer,~~

~~Part XII of the Employment Rights (Northern Ireland) Order 1996 shall not apply to him and he shall not be treated for the purposes of any scheme in force under Article 21 of the 1981 Order as having been retired on redundancy.~~

~~(4) Where a person to whom an offer under paragraph 9 has been made continues in employment in the Law Society after having not unreasonably refused that offer he shall be treated for all purposes as if no offer under paragraph 9 had been made to him.~~

Annotations:

E60—1996 NI 16

~~11—(1) Any dispute as to whether an offer purporting to be made under paragraph 9 complies with that paragraph shall be referred to and be determined by an industrial tribunal.~~

~~(2) An industrial tribunal shall not consider a complaint referred to it under sub-paragraph (1) unless the complaint is presented to the tribunal before the end of the period of 3 months beginning with the date of the offer of employment or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of 3 months.~~

~~(3) Except as provided by Article 22 of the Industrial Tribunals (Northern Ireland) Order 1996⁵⁶¹, no appeal shall lie from the decision of an industrial tribunal under this paragraph.~~

Annotations:

E61—1996 NI 18

Pensions

~~12—Any arrangements made by the Law Society under Article 21 of the 1981 Order in respect of any pension shall be treated on and after the first appointed day (so far as may be necessary to preserve their effect) as having been made under paragraph 11(1) of Schedule 1 to this Order, and any pension scheme administered by the Law Society immediately before the first appointed day shall be deemed to be a pension scheme established and administered by the Commission under that paragraph and shall continue to be administered accordingly.~~

Assistance with functions

~~13—(1) The Law Society shall give to the Commission all the information, prepare all the documents and do all other things which appear to the Commission appropriate for the purpose of facilitating—~~

~~(a) the carrying into effect of the transfers effected by paragraph 2(1), and~~

~~(b) the exercise of any functions conferred or imposed on the Commission by this Order; and the Law Society may do anything else which appears to it appropriate for that purpose.~~

~~(2) From the first appointed day, the Commission shall make available to the Law Society such facilities as it may reasonably require for exercising its functions under this paragraph or paragraph 3.~~

Schedule 4—Amendments

Schedule 5—Repeals

Changes to legislation:

There are outstanding changes not yet made by the legislation.gov.uk editorial team to Access to Justice (Northern Ireland) Order 2003. Any changes that have already been made by the team appear in the content and are referenced with annotations.

Changes and effects yet to be applied to :

- Sch. 1 para. 15(3) words substituted by S.I. 2010/976 Sch. 18 para. 157
- Sch. 1 para. 16(4) words substituted by S.I. 2010/976 Sch. 18 para. 157
- Sch. 1 para. 16(6) words substituted by S.I. 2010/976 Sch. 18 para. 157
- Sch. 1 para. 17 words substituted by S.I. 2010/976 Sch. 18 para. 160(a)
- Sch. 1 para. 17 words substituted by S.I. 2010/976 Sch. 18 para. 160(c)
- Sch. 1 para. 17(2) words substituted by S.I. 2010/976 Sch. 18 para. 160(b)
- Sch. 1 para. 17(5) words substituted by S.I. 2010/976 Sch. 18 para. 160(d)
- Sch. 2 para. 2(ba)(bb) inserted by 2011 c. 24 (N.I.) s. 86(2)
- Sch. 2 para. 2(d)(xvi)-(xix) inserted by 2011 c. 24 (N.I.) s. 86(4)
- Sch. 2 para. 2(d)(ia) (ib) inserted by 2011 c. 24 (N.I.) s. 86(6)
- Sch. 2 para. 2(d)(xiv)(xv) inserted by 2009 c. 26 Sch. 7 para. 96(2)(b)
- Sch. 2 para. 3(ea) inserted by 2009 c. 26 Sch. 7 para. 96(3)
- Sch. 2 para. 2(d)(xii) word inserted by 2011 c. 24 (N.I.) s. 86(3)
- Sch. 2 para. 2(d)(xii) word inserted by 2009 c. 26 Sch. 7 para. 96(2)(a)
- Sch. 2 para. 2(d)(xii) word repealed by 2009 c. 26 Sch. 8 Pt. 4
- Sch. 2 para. 2(d)(xii) words inserted by 2009 c. 26 Sch. 7 para. 112
- Sch. 2 para. 2(d)(i) words repealed by 2011 c. 24 (N.I.) s. 86(5) Sch. 8 Pt. 3
- Sch. 3 power to amend conferred by 2011 c. 24 (N.I.) Sch. 5 para. 5(b)
- Sch. 3 para. 4(2)(b) transfer of functions by S.I. 2010/976 art. 15(4)(k)
- Sch. 3 para. 4(5)(c) transfer of functions by S.I. 2010/976 art. 15(4)(k)
- Sch. 3 para. 4(8) transfer of functions by S.I. 2010/976 art. 15(4)(k)
- Sch. 3 para. 4(10) transfer of functions by S.I. 2010/976 art. 15(4)(k)
- Sch. 3 para. 5(5)(b) transfer of functions by S.I. 2010/976 art. 15(4)(k)
- Sch. 3 para. 5(7) transfer of functions by S.I. 2010/976 art. 15(4)(k)
- Sch. 3 para. 5(9) transfer of functions by S.I. 2010/976 art. 15(4)(k)
- Sch. 3 para. 4(7) words substituted by S.I. 2010/976 Sch. 18 para. 161(a)
- Sch. 3 para. 5(6) words substituted by S.I. 2010/976 Sch. 18 para. 161(b)
- Sch. 4 para. 15 coming into force by S.R. 2006/27 art. 2
- Sch. 5 coming into force by S.R. 2006/27 art. 2
- art. 4(1)(b) word substituted by S.R. 2013/214 art. 2(a)
- art. 4(1)(b) word substituted by S.R. 2013/214 art. 2(b)
- art. 7(1) words repealed by 2011 c. 24 (N.I.) Sch. 8 Pt. 3
- art. 11(4) words substituted by S.I. 2010/976 Sch. 18 para. 157
- art. 11(6)(d) transfer of functions by S.I. 2010/976 art. 15(4)(j)
- art. 12(2) words repealed by 2011 c. 24 (N.I.) Sch. 8 Pt. 3
- art. 16(2) words substituted by S.I. 2010/976 Sch. 18 para. 157
- art. 16(4) words substituted by S.I. 2010/976 Sch. 18 para. 157
- art. 16(5) words substituted by S.I. 2010/976 Sch. 18 para. 157
- art. 16(6) words substituted by S.I. 2010/976 Sch. 18 para. 157
- art. 16(7) substituted by S.I. 2010/976 Sch. 18 para. 158(a)
- art. 16(8)(a) words substituted by S.I. 2010/976 Sch. 18 para. 157
- art. 16(8)(b) words substituted by S.I. 2010/976 Sch. 18 para. 158(b)
- art. 21(5)(d) transfer of functions by S.I. 2010/976 art. 15(4)(j)
- art. 22(6) words substituted by S.I. 2010/976 Sch. 18 para. 157
- art. 22(8) words substituted by S.I. 2010/976 Sch. 18 para. 157
- art. 29(1) words substituted by 2011 c. 24 (N.I.) s. 84(3)(a)
- art. 29(4) substituted by 2011 c. 24 (N.I.) s. 84(3)(b)
- art. 41 repealed by 2011 c. 24 (N.I.) s. 85 Sch. 8 Pt. 3
- art. 46(5) words substituted by S.I. 2010/976 Sch. 18 para. 157
- art. 46(5A) inserted by 2011 c. 24 (N.I.) s. 84(4)
- art. 46(6) words substituted by S.I. 2010/976 Sch. 18 para. 159

Changes and effects yet to be applied to the whole Order associated Parts and Chapters:

- Order power to amend conferred by 2011 c. 24 (N.I.) s. 90(2)(c)
- Order transfer of functions by S.I. 2010/976 Sch. 17 para. 53
- Order words substituted by 2009 c. 1 (N.I.) Sch. 6 para. 1(1)(a)
- Order words substituted by 2009 c. 1 (N.I.) Sch. 6 para. 1(1)(b)

Whole provisions yet to be inserted into this Order (including any effects on those provisions):

- art. 27A inserted by 2011 c. 24 (N.I.) s. 84(2)

Commencement Orders yet to be applied to the Access to Justice (Northern Ireland) Order 2003

Commencement Orders bringing provisions within this Order into force:

- S.R. 2009/312 art. 2 amendment to earlier commencing SR 2005/111 art. 4

Commencement Orders bringing legislation that affects this Order into force:

- S.R. 2012/214 art. 2-5 commences (2011 c. 24 (N.I.))
- S.R. 2012/449 art. 2 commences (2011 c. 24 (N.I.))

22 May 2014 - Correspondence from the Department providing its response to the issues raised in the written and oral evidence

FROM THE OFFICE OF THE JUSTICE MINISTER



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Our ref SUB/649/2014

From: Tim Logan
Date: 22 May 2014
To: Christine Darrah

Summary

Business Area: Public Legal Services Division

Issue: Justice Committee consultation on the Legal Aid and Coroners' Courts Bill

Restrictions: None

Action Required: For consideration

Officials Attending: Mark McGuckin, Deputy Director, Public Legal Services Division
Siobhan Broderick, Deputy Director, Civil Justice Policy Division
Carol Graham, Bill Manager, PLSD
Padraig Cullen, PLSD

BACKGROUND

The Legal Aid and Coroners' Courts Bill is currently with the Justice Committee for scrutiny as part of the Bill's passage through the Assembly. The Committee has recently consulted on the Bill, receiving both written and oral evidence. The Committee requested the Department's views on the summary of the issues raised and an updated version taking account of the oral evidence is attached at Annex A. The Department's officials have also been invited to attend the Committee meeting on 28 May 2014 to provide further comment on both the clauses in the Bill and on the issues arising from the Committee's consultation.

FROM THE OFFICE OF THE JUSTICE MINISTER



DISCUSSION

The Department has noted, from both the written responses to the consultation and from the oral evidence session in the Long Gallery on 14 May 2014, that the main issues of concern with dissolving the Northern Ireland Legal Services Commission and the setting up of a new Agency within the Department are around: (a) the operational independence and professional qualifications / experience of the Director of Legal Aid Casework, and (b) the new independent Appeal Panels. The views expressed in relation to the Attorney General's proposed amendment have also been noted.

In preparation for meeting the Committee on 28 May 2014 the Department has set out below further information on the key issues raised.

OVERVIEW

The current position is that the Bill envisages that the Director will be (or, potentially, will become) a civil servant who will be designated to undertake a number of statutory functions. The functions will be set out in both primary and secondary legislation and relate, centrally, to the award of funding by way of civil legal services. In undertaking these functions, the Director will be applying the relevant primary / secondary legislation – in broadly the same manner as the Northern Ireland Legal Services Commission under the current scheme. Crucially, the Director will also attract the protections in the Bill. These include that the Department can issue guidance and directions about the carrying out of the Director's functions, but not in respect of individual cases. Indeed, the Department is under an obligation to ensure that the Director acts independently when applying a direction or guidance in relation to an individual case. When the Director refuses an application for funding, or further funding, there is provision in the Bill for an appeal to independent Appeal Panel.

FROM THE OFFICE OF THE JUSTICE MINISTER



DIRECTOR OF LEGAL AID CASEWORK

Some consultees expressed the view that the Director of Legal Aid Casework should be legally qualified. As is currently the case with the NILSC, the Director will have access to independent legal advice if, and when, required and will receive all the necessary training to effectively discharge the functions. Consequently, we do not believe that it is essential that the Director is legally qualified.

The intention to designate a civil servant as the Director was also challenged with the suggestion that the post should be filled by a public appointment. Public appointments do not normally apply to Departments or their Executive Agencies but to appointments made to a public body listed in the Commissioner for Public Appointments (Northern Ireland) Order. The Director will be protected by the safeguards set out in the legislation and the designation of his or her role.

SAFEGUARDS INCLUDED IN THE BILL

There is a range of safeguards which the Department has already built into the Bill, most of which were specifically designed to address concerns that the Department anticipated and / or were expressed during our initial consultation in February 2013 (see Annex B). Key among these is the mandatory requirement for independent Appeal Panels, which the Department developed in response to the comments in England and Wales when the Legal Aid, Sentencing and Punishment of Offenders Bill was being brought forward, and which we have enhanced following the comments received during our earlier consultation. In particular, the Joint Human Rights Committee expressed concern about the independence of the Director of Legal Aid Casework in the absence of a right of appeal to an independent appeals body.

The Appeals Panel mechanism we have developed will be entirely independent and will be entirely free from any possible suggestion of undue influence. In addition, there will be the option of judicial review if funding (or further funding) is still refused in a specific case.

FROM THE OFFICE OF THE JUSTICE MINISTER



The contribution that the Appeal Panels can make to the independence of the overall scheme should not be understated, not least since it has been specifically designed to address in Northern Ireland the concerns which had been expressed elsewhere and goes directly to the concerns of the Human Rights Committee, which are now being quoted by some consultees, but without recognition that the Department has addressed the key issues.

The Department has also noted and responded to the concerns expressed about the panel not being made up of lawyers. The intention is that the Appeal Panels will consist of three people and the Presiding Officer will be a lawyer. We expect that the members of the panels will be drawn from the legal profession, but with the option of including suitably qualified lay persons which will introduce a multidisciplinary approach to decision making thereby strengthening the process.

As currently drafted, the Bill provides a series of safeguards which, in combination, should provide a very high level of reassurance as to the actual (and perceived) operational independence of the Director. Briefly listed, these are as follows:

- (1) the office holder will be formally designated as such by the Department, in a transparent fashion – clause 2(1)
- (2) the Department must not give a direction or guidance about the carrying out of the Director's functions in relation to an individual case – clause 3(2)(a)
- (3) the Department must ensure that the Director acts independently of the Department when applying a direction or guidance in relation to an individual case – clause 3(2)(b)
- (4) any directions or guidance given under section 3 must be published – clause 3(3)
- (5) there will be a statutory mechanism providing for the right of appeal to an independent appeal panel¹ on applications for *civil legal services* funding – clause 6, with paragraph 6(22) of Schedule 2

¹ It is proposed that the appeal panel members will be appointed through a public appointments process

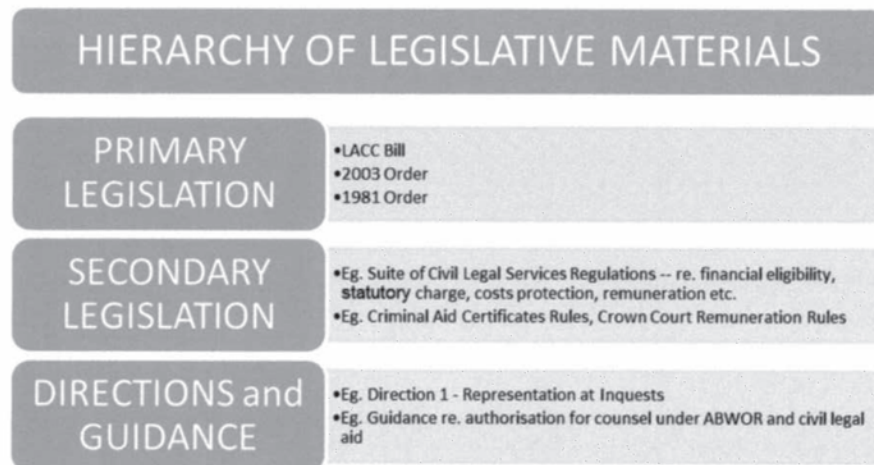
FROM THE OFFICE OF THE JUSTICE MINISTER



(6) the Director must prepare an annual report stating how he has carried out his functions, which will be laid before the Assembly and published – clause 5.

POTENTIAL IMPACT OF DIRECTIONS AND GUIDANCE

It is also important to address the issue of the potential impact of directions and guidance, where some misunderstanding may have arisen.



Firstly, it must be emphasised that any direction or guidance issued by the Department cannot override the provisions of the relevant legislation (primary or secondary). Secondly, the requirement to follow directions and guidance issued by the Minister already exists and can be illustrated by two examples.

The first relates to the award of exceptional grant funding for inquests where the Lord Chancellor issued a direction under Article 10A(1) of the 1981 Order requiring the Commission to fund the representation of the immediate family of the deceased at an inquest into a death occurring in police or prison custody or during the course of police arrest / shooting etc. That direction has remained in operation post-devolution.

A more recent and local example, is the guidance which has recently been issued to the Commission in respect of the authorisation of counsel under Assistance by Way

FROM THE OFFICE OF THE JUSTICE MINISTER



of Representation (ABWOR) and civil legal aid. This sets out the expectation that the Minister has concerning the appropriate level of representation at each court tier in, for example, private law family cases. The focus of the guidance is to ensure that representation is available as required, but that it is set at the most appropriate level. The guidance sets the expectation but does not in any way fetter the independence of the decision-maker in any specific case, and provision for exceptionality is built in. The guidance on levels of representation was subject to extensive consultation and detailed scrutiny by the Justice Committee.

Article 12(5) of the 2003 Order, together with Schedule 2 to the Order, prescribes the services which the Director of Legal Aid Casework may not fund as *civil legal services*. Article 12(6) of the Order provides that regulations may amend Schedule 2 by adding new services or omitting or varying any of the services listed. Furthermore, Article 46(5) of the 2003 Order provides that any regulations made under Article 12(6) are subject to Assembly control by way of the draft affirmative procedure. Accordingly, it would not be possible for the Department to give a direction or guidance to the Director of Legal Aid Casework regarding the scope of cases which may be funded by way of legal aid – that is, adding new services or omitting or varying the services listed in Schedule 2 to the 2003 Order.

ATTORNEY GENERAL'S AMENDMENT

The Attorney had raised the question of an amendment with the Department earlier this year, when preparation for the Bill's introduction was at an advanced stage. We had responded to say that we had no objection to considering his request in principle, but that it would require further consideration, and might be better examined in the context of a wider review of coronial law. We note that the Attorney subsequently wrote to the Committee with his request, and has since submitted an amendment to his original request.

The Committee will be aware that the Department has now given a commitment to review the coronial law as part of the Package of Measures put forward to the Committee of Ministers in Strasbourg on 16 April 2014 to help address the issues of

FROM THE OFFICE OF THE JUSTICE MINISTER



delay in legacy inquests. We are considering how the review might be taken forward: One option would be to refer the matter to the Law Commission.

Agreeing this approach would facilitate proper consideration of the problems the Attorney has encountered, and the most appropriate solution in the context of coronial law generally.

The Committee may wish to be aware that the proposed amendment may be technically outside the scope of the Bill. The Bill, as regards the coroners' courts, is restricted to providing for the Lord Chief Justice to be the president of the coroners' courts and for the appointment of a Presiding Coroner. This is, however, ultimately a matter for the Speaker.

It is also the Department's view that this request raises cross-cutting issues, particularly for the Department of Health, Social Services and Personal Services, and so is a matter which should be determined by the Executive.

We note the comments in support of the proposal which have been received by the Committee, and the Department agrees that the Attorney should be able to discharge his functions effectively, however, in light of the foregoing, the Department is not convinced that this Bill is the appropriate legislative vehicle for the Attorney's request.

NEXT STEPS

The Department welcomes the opportunity to discuss these issues further with the Justice Committee on 28 May 2014.

A handwritten signature in black ink that reads "Tim Logan".

**TIM LOGAN
DALO**

LEGAL AID AND CORONERS' COURTS BILL**Annex A**

Responses have been received from the organisations listed below:

- The Minister for Health, Social Services and Public Safety
- The Lord Chief Justice
- The Law Society
- The Law Centre (NI)
- The Association of Personal Injury Lawyers
- KRW LLP
- Castlereagh Borough Council
- The Information Commissioner's Office
- The Northern Ireland Legal Services Commission
- The Northern Ireland Judicial Appointments Commission
- The Northern Ireland Local Government Association
- The Northern Ireland Human Rights Commission
- The Probation Board for Northern Ireland
- The South Eastern Health and Social Care Trust
- The Southern Health and Social Care Trust
- Victim Support NI
- The Public Prosecution Service
- The Bar Council
- The Northern Ireland Policing Board
- The Children's Law Centre

Clause	Summary	Issues Raised	Department's Comments
<p>Clause 1 Dissolution of the Northern Ireland Legal Services Commission and transfer of its functions to the Department of Justice.</p>	<p><i>Respondents were generally supportive of Clause 1.</i></p>	<ul style="list-style-type: none"> • <u>The Chair of the Northern Ireland Legal Services Commission</u> responded to indicate that that the Commission believes that bringing responsibility for policy and delivery together within the Department will provide a more appropriate framework. The Commission believes that this approach will, in particular, help to increase transparency, accountability and efficiency. • The Commission believes that the changes will assist in achieving better management of the challenges in forecasting legal aid spending and resourcing that spending. It also believes the creation of an agency will provide improved career opportunities for staff currently employed by the Commission and assist in securing specific additional skills which the Agency may require to implement reforms to the legal aid arrangements. 	<p>Increasing transparency, accountability and efficiency is one of the strategic drivers for the change in status of the Northern Ireland Legal Services Commission (NILSC).</p> <p>Improved financial modelling, monitoring and forecasting is another of the strategic drivers for the change in status.</p> <p>The transfer to the Northern Ireland Civil Service (NICS) will open career and development opportunities for staff. As part of the NICS the staff will have the opportunity of broadening their experience (thus enhancing their career prospects) and to become exposed to different ideas and ways of doing things. They would also be free, subject to line management agreement, to express an interest or apply for posts in the wider NICS. Overall there will be greater integration with the wider NICS and the Agency will have greater access to a wide range of skills.</p>

Clause	Summary	Issues Raised	Department's Comments
		<ul style="list-style-type: none"> • The Bar Council welcomes any improvements in this area to ensure transparency, predictability and accountability. 	<p>Increasing transparency, accountability and efficiency is one of the strategic drivers for the change in status of the NILSC.</p>
<p>Clause 2 Designation of Director of Legal Aid Casework</p>	<p><i>Two respondents raised concerns regarding the qualifications and training of the Director of Legal Aid Casework.</i></p>	<ul style="list-style-type: none"> • The Law Society suggests that the Director should be an externally recruited figure, preferably someone with experience in civil justice matters. • The Association of Personal Injury Lawyers states that it remains concerned that there is no provision in the Bill to ensure that the Director of Legal Aid Casework is legally trained. A legally trained Director of Legal Aid Casework will have more experience when it comes to making decisions on individual cases. Decisions being made by a Director who is not legally trained could face a lot more challenges through the appeals process, which would lead to an increase workload and costs. 	<p>The Director will have recourse to independent legal advice if, and when, required and receive all necessary training to effectively discharge the functions.</p> <p>As has been the case with the NILSC and the Legal Aid Department of the Law Society the Department do not consider that it is essential for the Director to be legally qualified. We accept, and have referred elsewhere, to the Director receiving all necessary training. Independent legal advice will be available if, and when, required.</p> <p>Robust arrangements will be introduced to consider applications for funding in civil cases. Decisions on the award of funding (or further funding) will be taken based on the relevant statutory provisions and the requirements of the scheme. This will include a review process and when applications for funding (or further funding) are refused, clear reasons will be given. If the decision is appealed it will be subject to</p>

Clause	Summary	Issues Raised	Department's Comments
		<ul style="list-style-type: none"> • The Bar Council also outlines concerns that there remains no provision to require that the Director of Legal Aid Casework is legally trained or qualified and that this may lead to more challenges through the appeals process. • The Bar Council outlines that the granting of legal aid must be awarded on a case by case basis, and only awarded based on the merits of a case, without credence to any budgetary or political agenda. • The Bar Council welcomes the assurances within the explanatory 	<p>further consideration to see if approval can be granted before going to the Appeal Panel. As a result of these arrangements, the Department anticipates that the quality of the applications for funding will improve and the number of appeals will reduce. The new arrangements will be more transparent than the current process.</p> <p>The Department does not consider that it is essential for the Director to be legally qualified. We accept, and have referred elsewhere, to the Director receiving all necessary training. Independent legal advice will be available if, and when, required.</p> <p>The Department recognises these imperatives, which will be underpinned by the primary and secondary legislation. All applications for civil legal services will be dealt with individually with the decisions being taken on the merits of the case and not influenced by political or budgetary considerations. Provision has been taken to ensure that the Director acts independently when taking decisions in each individual case.</p> <p>The provisions in the Bill specifically exclude the Minister from giving guidance</p>

Clause	Summary	Issues Raised	Department's Comments
		<p>and financial memorandum of no ministerial involvement in individual decisions on civil legal aid funding but states that the practical detail of how the Department will ensure this is the case remains unknown.</p> <ul style="list-style-type: none"> The Bar Council suggests that the Committee should review the scrutiny undertaken by the Westminster Select Committee who previously considered similar provisions contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. 	<p>and directions in relation to individual decisions, and the Department is under a duty to ensure that the Director acts independently when applying general guidance or directions</p> <p>One of the key issues raised during the consideration of this legislation was the guarantees of the independence of the Director of Legal Aid Casework, in particular in the absence of a right of appeal to an independent body. In Northern Ireland we have addressed this concern by making provision for independent Appeal Panels to hear appeals against the decisions of the Director.</p>
<p>Clause 3 Exercise of functions by Director</p> <p>Clause 3 (2) contains safeguards to protect the independence of the Director in decision making in individual cases.</p>	<p>The following issues were raised by a number of respondents:</p> <ul style="list-style-type: none"> The need to consider concerns 	<ul style="list-style-type: none"> The Law Society states that the Department has not taken on board the concerns of the Joint Committee on Human Rights in England and Wales about the designation of a Departmental official as Director of Legal Aid Casework. The Committee felt that the adherence of such an official to 	<p>The Joint Committee on Human Rights expressed concern about the designation of a civil servant as Director of Legal Aid Casework in the context of the absence of the right of appeal to an independent appeals body. We have addressed this through making provision for independent Appeal Panels. In addition, the legislation sets out a number of safeguards to protect</p>

Clause	Summary	Issues Raised	Department's Comments
<p>3(2) (a) Provides that the Department must not give a direction or guidance about the carrying out of those functions in relation to an individual case.</p> <p>3(2)(b) The Department also has a duty to ensure that the Director acts independently of the Department when applying a direction or guidance under this section in relation to an individual case.</p>	<p><i>which were raised by the Joint Committee on Human rights when similar legislation was enacted in England and Wales regarding the independence of the Director and the potential for a conflict of interest.</i></p> <ul style="list-style-type: none"> <i>The need to ensure compatibility with Article 6 of the European Court of Human Rights and that a scheme governing eligibility for legal aid must contain sufficient guarantees against arbitrariness.</i> <i>The potential for</i> 	<p>the Civil Service Code pledging loyalty to the Minister of State effectively trumped the practical arrangements for independence.</p> <ul style="list-style-type: none"> The Law Society outlines that Clause 3 (1) of the draft Bill places the Director under a statutory duty to comply with directions and have regard to guidance given by the Department, subject to clause 3 (2) which provides that there must not be directions about decisions in individual cases. The clause is silent however in relation to attempts to influence decision making in classes of cases. The Law Society states that this is important as it is vital in terms of securing independence that the Bill prevents the potential for political interference in the patterns and norms of decision-making in 	<p>the independence of the individual decisions on the grant of civil legal services. In taking these decisions the Director will act independently of the Department and the Minister. The Department or Minister may issue guidance and directions on how the Director carries out his functions, and any guidance and directions must be published. However, the Bill expressly provides that the Department and Minister are prohibited from issuing guidance or direction in respect of individual decisions.</p> <p>Any directions and guidance issued by the Minister / Department must be published. This clear mandatory requirement will ensure transparency, and will provide a robust protection against any attempt to influence the Director's decision-making in an inappropriate manner. Direction or guidance issued by the Department cannot override the provisions of the relevant legislation. In addition, there is a duty imposed on the Department to ensure that the Director acts independently when applying a direction or guidance to individual cases. Furthermore, in the normal manner, any funding decision by the Director will be subject to appeal to independent Appeal Panels and then, as necessary, to the exercise of the High</p>

Clause	Summary	Issues Raised	Department's Comments
	<p><i>interference in decision making in relation to classes of cases.</i></p> <ul style="list-style-type: none"> • <i>The Law Centre has proposed a number of amendments in order to provide further safeguards to the independence of the Director.</i> 	<p>respect of legal aid.</p> <ul style="list-style-type: none"> • The Law Society states that it is also questionable whether the requirement for the Director to comply with guidance requires to be set out explicitly on the face of the Bill. Drafting the Bill where this appears as the first clause arguably places the primary duty of the Director as obedience to Departmental direction, rather than to the impartial application of consistent principles in relation to legal aid decision making. The Society considers that this arrangement removes the judicious distance provided by separation of the legislative power to determine broad principles of decision making from the operational responsibility for providing legal aid in a just manner which preserves access to justice for all. • The Law Society suggests that the importance of independence is of more than theoretical significance and outlines a case in the 	<p>Court's supervisory jurisdiction by way of an application for judicial review.</p> <p>The Department has developed a number of safeguards to protect the independence of individual decisions by the Director on the granting of funding in civil cases, and consulted widely on these before the preparation of the Bill.</p> <p>It is not the Department's intention to place the primary duty of the Director as obedience to Departmental direction. All the safeguards are of equal importance.</p> <p>The Minister / Department is committed to ensuring access to justice for all.</p> <p>With regard to the reference to the ECtHR decision in <i>Del Sol v. France</i>, our legal aid scheme encompasses much more than the administrative arrangements which are covered by this Bill. Rather, the quality of</p>

Clause	Summary	Issues Raised	Department's Comments
		<p>European Court of Human Rights 'Del Sol V France'¹, in which it was alleged that a refusal to grant legal aid constituted an infringement of the applicant's rights to a fair hearing under Article 6 (1) ECHR. Although it dismissed the application in the particular circumstances of that case, the Court said the following about the administration of legal aid:</p> <p>"...the Court considers it important to have due regard to the <i>quality of a legal aid scheme within a State</i>. The scheme set up by the French legislature offers individuals <i>substantial guarantees to protect them from arbitrariness</i>."²</p> <ul style="list-style-type: none"> The Law Society asserts that the above judgment demonstrates that the qualities of a legal aid scheme, including the degree of independence and provision for effective appeals against decisions taken are relevant to the compliance of that scheme with Article 6 ECHR. 	<p>our scheme also includes all of the other relevant statutory provisions making up the substantive content of the scheme – many details of which will be included in secondary legislation.</p> <p>Under the proposed new arrangements, the independence of the Director's decision-making in any individual case will be no less than the independence of the Commission's decision-making under the current arrangements. The Minister / Department is satisfied that the new arrangements will be fully compatible with ECHR Article 6(1). In addition, appeals will be heard by an independent Appeal Panel,</p>

¹ [2002] App Nr 46800/99.

² Ibid at paras 25 & 26

Clause	Summary	Issues Raised	Department's Comments
		<ul style="list-style-type: none"> The Society is of the view that the Department and the Committee may wish to look at amendments to this clause to ensure compliance with the ECHR. The Law Centre (NI) also point to the concerns of the Joint Committee on Human Rights outlining that it reported that it was not satisfied that the legislation in Britain provided sufficient institutional guarantees that the independence of the proposed director of legal aid casework would not be compromised. In particular, the Joint Committee was concerned about preventing any conflict of interest arising when making decisions about the availability of legal aid to challenge decisions of the government. These concerns were subsequently rejected by the government. The Law Centre shares two concerns about the independence of the director of legal aid casework. The first is around challenges to government and the second is around cases which may have significant financial consequences 	<p>the members of which will be appointed through a public appointment process, in line with the principles set out by the Commissioner for Public Appointments in Northern Ireland (CPANI).</p> <p>The Joint Committee on Human Rights was concerned about the independence of the Director of Legal Aid Casework in the context of the absence of a right of appeal to an independent body. The Department was alert to the concerns expressed and this helped inform the development of the safeguards, in particular the appointment of independent Appeal Panels which will hear appeals against refusal of the Director of Legal Aid Casework to award funding for legal aid services.</p> <p>The Director will consider applications for funding to challenge decisions of the government in accordance with the provisions in the legislation and the requirements of the scheme. Any published directions or guidance cannot override the provisions of the relevant</p>

Clause	Summary	Issues Raised	Department's Comments
		<p>to the legal aid fund (for example, a lead public interest case where many other cases may follow). The provisions as drafted provide that the Director is legally obliged to comply with directions given by the Department, while the Department must not provide a direction or guidance in relation to an individual case. This does not appear to preclude any direction on a class of cases. At the same time, the Department must ensure that the Director acts independently when applying a direction or guidance in relation to an individual case.</p> <ul style="list-style-type: none"> The Law Centre suggests that there appears to be no impediment to the Department instructing the Director of Legal Aid Casework in a way which restricts decision-making across a class of cases which will impact indirectly on a particular case without addressing the specific case itself. 	<p>legislation. The robust, transparent arrangements provided for under the Bill will ensure there is no conflict of interest.</p> <p>All applications for civil legal services will be dealt with individually with the decisions being taken on the merits of the case and not influenced by political or budgetary considerations.</p> <p>It is necessary to understand the issue of the potential impact of directions and guidance. Firstly, any direction or guidance issued by the Department cannot override the provisions of the relevant legislation (primary or secondary). Secondly, the requirement for the Director of Legal Aid Casework to follow directions and guidance issued by the Minister already exists – eg Representation at inquests' and guidance re authorisation of counsel under ABWOR and civil legal aid.</p> <p>Any directions or guidance cannot override the provisions of the relevant legislation. Any directions and guidance given by the Minister / Department must be published and may be challenged in the courts. This clear mandatory requirement will ensure transparency, and will provide a robust protection against any attempt to influence the Director's decision-making in an</p>

Clause	Summary	Issues Raised	Department's Comments
		<ul style="list-style-type: none"> The Law Centre has proposed a number of amendments in order to provide further safeguards to the independence of the Director of Legal Aid Casework. 	<p>inappropriate manner. The safeguards included in the legislation will also be reflected in the Agency's Framework Document, which will also be published.</p> <p>Furthermore, in the normal manner, any funding decision by the Director will be subject to <u>appeal to independent Appeal Panels and then, as necessary, to the exercise of the High Court's supervisory jurisdiction by way of an application for judicial review.</u></p> <p>The Department has considered the Law Centre's suggested amendments and are satisfied that the safeguards provided under the current draft Bill provide sufficient assurance. We confirm that all guidance and directions will be published, for example, on the Agency internet and will also be reported on in the Annual Report. The Justice Committee will be engaged on these issues in line with established practice. The Department will ensure that all such guidance and directions are fully accessible in the public domain, which will help ensure transparency for applicants and their legal representatives.</p>

Clause	Summary	Issues Raised	Department's Comments
		<ul style="list-style-type: none"> • The Northern Ireland Human Rights Commission (NIHRC) also points to the concerns of the Joint Committee on Human Rights regarding the independence of the Director and the potential conflict of interest as similar legislation passed through Parliament. • The NIHRC also highlights the case of <i>Del Sol</i> in the European Court of Human Rights and the need for legal aid to contain sufficient guarantees against arbitrariness. • The NIHRC advises the Committee to request that the Department set out how it will ensure the institutional independence of the Legal Aid Agency and the Director to ensure full compliance with Article 6. • KRW LLP suggest that the Committee takes note of the many concerns expressed when similar 	<p>The Department was alert to the concerns expressed which were in the context of the absence of a right of appeal to an independent body and this helped inform the development of the safeguards, in particular the appointment of independent Appeal Panels.</p> <p>The independence of the Appeal Panels is provided for in the Bill. Schedule 2, paragraph 6(22) requires the Department to make regulations that will provide for Appeal Panels to determine appeals and for the decisions of the Appeal Panels to be final.</p> <p>The Bill imposes a duty on the Department to ensure that the Director acts independently of the Department when applying any guidance or direction to an individual case. The safeguards set out in the legislation will also be included in the Agency's Framework Document.</p> <p>Any guidance or direction issued by the Minister will be published and open to challenge <u>by way of judicial review, where appropriate.</u></p>

Clause	Summary	Issues Raised	Department's Comments
		<p>legislation was introduced to create the Office of the Director of Legal Aid Casework of the Legal Aid Agency for England and Wales.</p> <ul style="list-style-type: none"> • KRW LLP state that it is not clear how the independence of the Director of Legal Aid Casework will be achieved and requests that the Committee clarify with the Department the protocols, procedures and systems to ensure rigorous independence. • KRW LLP suggest that there is nothing in the Bill to prevent the Minister of Justice from issuing such guidance or direction in categories of cases, for example, judicial review, in which the NI Executive and Assembly would clearly have a direct interest thus giving rise to a potential conflict. • KRW LLP assert that it will be important that the NI Executive maintains a policy that in 	<p>The draft Bill sets out a number of safeguards to protect the independence of the individual decisions on the grant of civil legal services. In taking these decisions the Director will act independently of the Department and the Minister. The Director will be required to make decisions based on the statutory provisions and the requirement of the scheme. If the application is refused, the Director/Agency will set out the reasons for the refusal.</p> <p>Any guidance or direction cannot override the provisions of the relevant legislation and must be published and may be challenged in the courts. This is covered in the Bill.</p> <p>The Bill imposes a duty on the Department to ensure that the Director acts independently of the Department when applying any guidance or direction to an individual case.</p> <p>The Director will consider applications for funding to challenge decisions of the government in accordance with the</p>

Clause	Summary	Issues Raised	Department's Comments
		<p>proceedings where the litigant is seeking to hold the state to account by judicial review, provisions will be retained within the scope of civil legal aid to enable such a litigation and that the Director of Legal Aid Casework be required to determine whether an individual qualifies for funding based on the Bill and relevant financial eligibility and any published guidance and directions.</p> <ul style="list-style-type: none"> • The Bar Council does not believe that the provisions contained within Clause 3 will provide the operational independence required in making individual decisions on the granting of legal aid and are not sufficiently robust as to enable the Director to challenge directions from the Department. • The Bar Council welcomes the inclusion that "the Department must not give a direction or guidance about the carrying out of those functions in relation to an individual case" but believes it remains possible to compromise an individual decision, for example, through a budgetary or financial 	<p>provisions in the legislation and the requirements of the scheme, including any published directions or guidance. The robust, transparent arrangements provided for under the Bill will ensure there is no conflict of interest.</p> <p>The Department refers to its comments above in relation to the issues raised by other consultees on this clause.</p> <p>It is necessary to understand the issue of the potential impact of directions and guidance. Firstly, any direction or guidance issued by the Department cannot override the provisions of the relevant legislation (primary or secondary). Secondly, the requirement for the Director of Legal Aid Case work to follow directions and guidance issued by the Minister already exists – eg. 'Direction 1 – Representation at inquests' and 'Guidance re. Authorisation of counsel under ABWOR and civil legal aid.</p> <p>Furthermore, in the normal manner, any</p>

Clause	Summary	Issues Raised	Department's Comments
		<p>guidance in relation to a certain class or type of legal case. The Bar Council recommends the inclusion of a caveat at clause 3(1(a) which allows the Director to, whilst acting in a reasonable manner, initially challenge and ultimately if necessary to choose not to comply where the direction compromises the independence of decision making.</p> <ul style="list-style-type: none"> In relation to 3(2), the Bar Council requests more detail on what would happen or what sanctions are available should the Department fail to comply. It would be useful to know what reporting mechanism will be available to the Director of Legal Casework in circumstances where he or she is concerned as to the direction or involvement of the Department. 	<p>funding decision by the Director will be subject to appeal to independent Appeal Panels and then, as necessary, to the exercise of the High Court's supervisory jurisdiction by way of an application for judicial review.</p> <p>If, contrary to the clear provision in clause 3(2)(a) of the Bill, the Department purported to give a direction to the Director of Legal Aid Casework out the carrying out of his / her functions in relation to an individual case, that would be liable to be quashed by the High Court on an application for judicial review. See, for example, <i>Re Application by Michael McKevitt for Judicial Review</i> [2005] NIQB 56</p> <p>Furthermore, it is expected that the Annual Report prepared by the Director of Legal Aid Casework under clause 5 of the Bill will include a list of all directions and guidance issued to him / her by the Department that year.</p>

Clause	Summary	Issues Raised	Department's Comments
<p>Clause 3(3) requires the Department to publish any guidance</p>	<p><i>Respondents were generally supportive of the requirement to publish guidance</i></p>	<ul style="list-style-type: none"> • <u>The Information Commissioner's Office</u> welcomes the transparency afforded by the statutory requirement for the Department of Justice to publish directions and guidance given to the Director of Legal Aid Casework in respect of its functions as laid out in Clause 3(3). • <u>The Law Centre (NI)</u> welcomes the Department's commitment to publish any directions or guidance but suggests that the Committee obtain an unambiguous assurance as to where the directions and guidance will be published so that it is clear that such directions and guidance are made widely available and accessible to interested parties. • <u>The Bar Council</u> requests that the commitment to publish any guidance and direction is clarified to ensure that the publication will be publicly available to all interested parties. 	<p>All directions and guidance issued to the Director will be published, for example on the Agency's webpage. They will also be reported on in the Agency's Annual Reports, which will themselves be published and laid before the Assembly. The Department will ensure that all such guidance and directions are fully accessible in the public domain, which will help to ensure transparency for applicants and their legal representatives.</p> <p>As above.</p>
<p><u>Clause 4</u> Delegation of functions of Director</p>		<ul style="list-style-type: none"> • <u>The Association of Personal Injury Lawyers</u> states that it is 	<p>The Director and any staff involved in considering an application for civil legal</p>

Clause	Summary	Issues Raised	Department's Comments
<p>Clause 4 of the Bill deals with the delegation of the functions of the Director and allows the Director to delegate his or her functions.</p> <p>Clause 4(2) provides that a direction given by the Department may require the director to authorise or not authorise a person to carry out specific functions.</p>		<p>important that anyone in the Department of Justice who is involved in considering an application for legal aid funding, as well as those people on appeals panels, should be legally trained.</p> <ul style="list-style-type: none"> • The Bar Council believes that the current system of panels of practicing lawyers works well in the context of considering an application for legal aid funding and outlines that it is important that in moving forward, we continue to constitute the appeal panels with suitably qualified, presently practicing legal representatives who have experience in the area of law under consideration. 	<p>services will receive the necessary training to discharge the function effectively and will have recourse to independent legal advice if, and when, required.</p> <p>Following consultation the Department changed from its original position of having appeals considered by 1 person to being considered by a panel of 3 with the presiding officer a lawyer. Opening membership of Appeal Panels up to lay persons will introduce a multidisciplinary approach to decision making thereby strengthening the process. Applications for the role of panel member will be welcomed from lawyers as well as lay persons.</p> <p>The Department's intention is to seek individuals from a range of professional backgrounds including legally qualified individuals and practising lawyers (solicitors and barristers) with experience of the types of issues involved who will be able to bring this experience to the appeals process. They will be appointed through a public appointments process in line with the principles set out by the Commissioner of Public Appointments Northern Ireland. The decision to move to a panel of 3 persons, rather than 1, means that each appeal can be heard by individuals from a range of backgrounds. An explicit</p>

Clause	Summary	Issues Raised	Department's Comments
			<p>requirement in the Appeal Regulations will be for the presiding officer to be a lawyer. Unlike now the Appeal Panel will provide reasons if an appeal is unsuccessful. The new process will be more transparent.</p>
<p>Clause 5 Annual report of Director At the end of each financial year the Director must send a copy of the report to the Department.</p>		<ul style="list-style-type: none"> • The Association of Personal Injury Lawyers welcomes the requirement for the Director to produce an Annual Report to be laid before the Assembly. • The Law Centre (NI) states that the annual reports of the Legal Services Commission have regularly been published more than 12 months after the end of the relevant financial year covered by the report. As a result, the Law Centre suggests an amendment to clause 5 line one after the word practicable add "and in any event within nine months". This will copper fasten the commitment to provide a timely report. 	<p>The Annual Report and Accounts of the Northern Ireland Legal Services Commission have been up to date and in line with the Department of Justice timetable since July 2013.</p> <p>The Department suggests that an amendment to clause 5 is not required. There are statutory obligations to lay the Departmental, including Agency, Annual Report and Accounts in the NI Assembly. These are covered under the Government Resources and Accounts Act (Northern Ireland) 2001 (GRAANI). The statutory deadline is 15 November, however, most Departments and Agencies lay their accounts on the final day before the summer recess.</p> <p>As above.</p>
		<ul style="list-style-type: none"> • The Bar Council outlines that the 	

Clause	Summary	Issues Raised	Department's Comments
<p>Clause 6 Amendment of law relating to legal aid, civil legal services and criminal Defence services (Consequential amendments to The Legal Aid Advice and Assistance (Northern Ireland) Order 1981 and The Access to Justice (Northern Ireland) Order 2003.</p>		<p>publication of the Annual report of the Northern Ireland Legal Services Commission has been fraught with many challenges and difficulties in recent years. The Bar Council welcomes the provisions in expectation that the report and the information contained within will improve in content and accuracy. The Bar Council suggests that the Committee may wish to consider the inclusion of a time limit for the laying of a copy before the Assembly to ensure timely receipt of a completed report.</p>	
		<ul style="list-style-type: none"> • The Bar Council has requested a legal opinion to ascertain the impact of the amendments relating to the legal aid, civil legal services and criminal defence services which it is content to share the opinion with the Committee on receipt. 	<p>If the Department is also provided with a copy of the opinion, it will be happy to provide its comments on same.</p>

Clause	Summary	Issues Raised	Department's Comments
<p>Clause 7 Lord Chief Justice to be president of the coroners' courts</p> <p>Clause 7 of the bill amends Section 12 (2) of the Justice (Northern Ireland) Act 2002 to include the Coroners' Court as one of the courts of which the Lord Chief Justice is president.</p>	<p><i>Respondents were generally supportive of Clause 7.</i></p>	<ul style="list-style-type: none"> • The Northern Ireland Human Rights Commission (NIHRC) advises the Committee to enquire if the new proposed arrangement is likely to have any positive implications for addressing delay in the Coroners' Court. 	<p>The new arrangements are intended to assist with the administration of the Coroners' Courts generally, and in particular will allow the Lord Chief Justice to introduce improved judicial case management in those courts.</p> <p>The Committee will be aware that these new powers have also been referred to as part of a package of measures put forward to the Committee of Ministers in Strasbourg on 16 April 2014 specifically directed at helping to address delay in legacy inquests.</p>
<p>Clause 8 Presiding Coroner</p> <p>Clause 8 (2) inserts a new section 2A of the Coroners' Act (NI) 1959 on the appointment of the Presiding coroner. The provision enables the Lord Chief Justice to appoint one of the coroners to be Presiding coroner.</p>	<p><i>Respondents were generally supportive of Clause 8.</i></p>	<ul style="list-style-type: none"> • The Northern Ireland Policing Board requests further information in relation to the role and remit of the Presiding Coroner and whether he/she will be responsible for managing the ongoing issue of delay in relation to legacy inquests. 	<p>The role of the Presiding Coroner will be to facilitate the co-ordination and management of business in the coroners' courts, and to provide a figurehead.</p> <p>The finer detail of the role will be a matter for the Lord Chief Justice and Presiding Coroner to decide in due course. For non-legacy cases it might include setting targets, for example, for the time between a death being</p>

Clause	Summary	Issues Raised	Department's Comments
			<p>reported and the decision to hold (or not to hold) an inquest; or for the time between a decision to hold an inquest and the opening of the inquest.</p> <p>The appointment of a Presiding Coroner is not seen as the solution to issue of delay in legacy inquests, but, as mentioned above, has been referred to as one of the package of measures put forward to the Committee of Ministers in Strasbourg on 16 April 2014 to help address delay. In this context, the presiding coroner's role might involve identifying what remains to be done in all legacy cases and scheduling timescales. The package of measures also includes the establishment of a legacy inquest unit and a review of coronial law.</p>
<p><u>Clause 9 – Clause 13</u> Supplementary clauses Clause 10 (1) of the Bill provides Department may by order make supplementary, incidental or</p>	<p><i>No comments received.</i></p>		

Clause	Summary	Issues Raised	Department's Comments
<p>consequential provision as it considers appropriate for the purposes of or to give effect to the Act. Clause 10 (3) provides that orders under this section which amend or repeals a provision of an Act of Parliament or Northern Ireland legislation have to be laid in draft and approved by resolution of the Assembly. Any other order under this section is subject to negative resolution.</p> <p>Clause 12 – Commencement</p>			

Clause	Summary	Issues Raised	Department's Comments
<p><u>Schedule 1</u> Transfer of Assets, Liabilities and Staff of Commission</p>		<ul style="list-style-type: none"> • The Information Commissioner's Office (ICO) states that there are practical matters related to the transfer of records from the Commission to the Department which need to be considered in advance of the dissolution date. The ICO will contact both the Commission and the Department regarding this and will provide advice as necessary. 	<p>A Project Board and Team have been established to oversee the transfer of staff and functions of the Commission to the Department and are currently considering the transfer of records and information. The Commission and the Department will welcome any advice provided by the Information Commissioners Office (ICO) as necessary.</p>
<p><u>Schedule 2</u> Legal Aid, Advice and Assistance (Northern Ireland) Order 1981</p>	<p>Comments were received in relation to aspects of Schedule 2 as follows:</p> <ul style="list-style-type: none"> • Two respondents raised concerns regarding decision making in inquest/legacy cases and compliance with human rights legislation. • The Law Society raised a number of concerns regarding the 	<p><u>Statutory Exceptional Grant Funding</u></p> <ul style="list-style-type: none"> • The Law Society states, in relation to the Statutory Exceptional Grant funding provision, the importance of independence in decision making is paramount. • The Law Society outlines concerns raised in its initial response to the Department's consultation that caution should be taken in ensuring the effective operational independence of decision making in inquest/legacy cases and civil actions in terrorist cases. The Society asserts that this is particularly the case in a post conflict society in which the application of clear, consistent and 	<p>The proposed amendment to Article 12A of the 2003 Order – contained in paragraph 6(13) of Schedule 2 to the Bill – is to give effect to the recommendation of the Access to Justice Review that the Department/Minister should have no role in the decision-making on applications for exceptional funding.</p> <p>The general appeals process which is to be provided in relation to applications for civil legal services will also apply to applications for exceptional funding.</p>

Clause	Summary	Issues Raised	Department's Comments
	<p><i>composition, background and training of appeals panel members as well as provisions for oral appeals.</i></p> <ul style="list-style-type: none"> • <i>The Law Society raised concerns regarding 'Funding of Civil Legal Services by the Department'</i> 	<p>impartial legal principles to some controversial cases is necessary to ensure widespread confidence in the administration of justice.</p> <ul style="list-style-type: none"> • <u>The Northern Ireland Human Rights Commission (NIHRC)</u> advises the Committee to seek estimates of the number of cases which the Department envisages will be funded by way of the exceptionality provision each year and that these should be categorised. • The NIHRC advises the Committee to seek an assurance from the Department that the requirement on a family member, seeking legal assistance in inquest proceedings, to apply for legal aid by way of the exceptionality provisions will not unnecessarily burden them. 	<p>Legal aid is demand led and, there are no 'targets' for the number of cases which are to be funded each year – whether by way of ordinary civil legal aid or exceptional legal aid. Accordingly, the Department does not envisage there being any such target(s) under the proposed new arrangements</p> <p>However, the Department notes the point raised by the NIHRC regarding the categorisation of funding decisions. This will be considered as part of governance arrangements with the new Agency.</p> <p>The Department is to give oral evidence before the Justice Committee on 11 June regarding the outcome of the consultation on the review of the current scheme. This matter will be addressed further at that point – and any views expressed by the Committee will be incorporated into the new arrangements to be introduced under the 2003 Order.</p>

Clause	Summary	Issues Raised	Department's Comments
		<ul style="list-style-type: none"> • KRW LLP response focuses on prospective litigation around conflict related legacy cases and potential compliance with Human Rights legislation. The response states that the Committee should reflect on the particular circumstances of Northern Ireland in relation to litigation issued, pending and proposed in relation to the conflict related legacy cases both of the families of the deceased victims of the conflict and those surviving as the injured of the conflict. • KRW LLP states that the legacy of conflict related violence is specific to Northern Ireland and a mirror Bill to England and Wales should not pass without intense scrutiny including broader political consideration as to how to litigate the past. • KRW LLP outlines the need for effective resourcing to ensure 	<p>The Northern Ireland Courts and Tribunals Service, which provides administrative support for the Coroners Service, is developing proposals to establish a Legacy Inquest Unit (LIU). The LIU will be organised along the lines of the inquest into the London bombings on 7 July 2005, and comprise: Senior Coroners assigned to Article 2 cases; specialist investigative support (e.g. Coroner's Investigators, medical examiners, etc.), to support the Coroner's investigation; dedicated legal support – including in-house legal and para-legal staff; and dedicated administrative support, including a secure IT platform for managing sensitive material. Subject to securing the necessary resources, the Department expects to start putting these steps in place later this year.</p> <p>In relation to other investigations, in April 2012 the Department approved a business case for an additional £10m funding for OPONI, bringing the total funding to £13m for OPONI's Historical Investigations Directorate. OPONI has a budget of £9.348m for 2013/14, of which £2.087m is for historical investigations.</p> <p>Proposals for a LIU and other measures designed to reduce delay in legacy</p>

Clause	Summary	Issues Raised	Department's Comments
		<p>access to justice particularly in conflict related legacy cases.</p> <ul style="list-style-type: none"> • KRW LLP raise concerns that exceptional funding decisions made by the Director of Legal Aid Casework may not be prompt and also suggest that they may be subject to interference because of policy guidance compliance structures or directions as issued by the Department of Justice. • <u>The Public Prosecution Service</u> outlines that the recent proposals around Legacy Inquest investigations and the pressures that could be generated on PPS resources if large numbers of cases are sent to the PPS to reconsider are areas where the PPS would wish to comment at the appropriate time. <p><u>Appeals Panels</u></p> <ul style="list-style-type: none"> • The Law Society states that paragraph 6 (22) of Schedule 2 amends the 2003 Order to provide powers for the Department to make 	<p>inquests are contained in an action plan that was submitted to the Committee of Ministers in Strasbourg on 16 April 2014. The action plan that was submitted to the Committee of Ministers in Strasbourg on 16 April 2014. The action plan is available on the Council of Europe website.</p> <p>The Department's intention is to seek individuals from a range of professional backgrounds including legally qualified individuals and practising lawyers</p>

Clause	Summary	Issues Raised	Department's Comments
		<p>Regulations for the composition of a multi-member appeals panel with a Presiding Member. It does not state that such panels will be composed of externally recruited lawyers, considered by the Commission as a vital safeguard in terms of independence. Such indications as the Department has given are that the Presiding Member or Chair will be legally qualified but that the other members may be lay in a mixed panel.</p> <ul style="list-style-type: none"> The Law Society states that given the need for knowledge of the legal issues involved in legal aid appeals and the failure to require that the Director has a background in civil justice affairs, the new arrangements may be lacking in the expertise and distance necessary to create a balanced, arms-length relationship between the Department and the new agency. The Society is of the view that paragraph 6 (22) of Schedule 2 should specify that appeals panels will be made up of a majority of legal members, with provision for 	<p>(solicitors and barristers) with experience of the types of issues involved who will be able to bring this experience to the appeals process. They will be appointed through a public appointments process following the principles set out by the Commissioner for Public Appointments Northern Ireland. The decision to move to a panel of 3 persons, rather than 1, means that each appeal can be heard by individuals from a range of backgrounds. An explicit requirement in the Appeal Regulations will be for the presiding officer to be a lawyer.</p> <p>The Department will ensure that the Director has the right skills and experience to do the job and both the legislation and supporting Framework and Governance arrangements will ensure this. The Director will also have recourse to independent legal advice.</p> <p>This will be considered further as part of the process for bringing forward the Appeal Regulations which will be subject to the Assembly's control by way of the draft affirmative procedure.</p>

Clause	Summary	Issues Raised	Department's Comments
		<p>the third member of that panel to be drawn from other relevant backgrounds.</p> <ul style="list-style-type: none"> Paragraph 6 (22) of Schedule 2 also contains a provision stating that oral appeals will be available only in circumstances to be prescribed in the Regulations to follow under the proposed new Article 20A (2) (f) of the 2003 Order. The Society stated in its response to the initial NILSC Consultation that provision should be made for oral appeals when it is considered that the complexity of the circumstances render this appropriate. A clause that was redrafted in this way would provide greater flexibility than a prescriptive list of hurdles, which is a more narrowly exceptional approach. The Society believes that the proposed new Article 20A (2) (f) should be redrafted to remove the phrase "except in such cases as may be prescribed" in favour of a phrase along the lines "except in cases where the complex issues of law or fact requires an oral appeal". 	<p>Robust arrangements will be introduced to consider applications for civil legal services. This will include a review process and when an application for funding (or further funding) is refused, clear reasons will be given. If the decision is appealed, it will be subject to further consideration to see if approval can be granted before going to an Appeal Panel. As a result of these arrangements, we anticipate that the quality of the applications for funding will improve and the number of appeals will reduce. The provision of reasons (which an appellant will be required to address in writing as part of the appeal process) means that, in most situations, it will be appropriate to deal with the appeal on paper. Under the current arrangements, a large number of appeals are dealt with on paper. However, the Appeal Regulations will include provision for oral representation in appropriate cases. The criteria for allowing oral hearings will be set out in the Regulations, which will be subject to the Assembly's control by way of the draft affirmative procedure. This will be addressed in the Appeal Regulations which will come before the</p>

Clause	Summary	Issues Raised	Department's Comments
		<ul style="list-style-type: none"> • The Northern Ireland Human Rights Commission suggests that the Committee may wish to consider whether the right of appeal is sufficiently robust. <p><u>Funding of Civil Legal Services by the Department (Schedule 2 Paragraph 6 (11))</u></p> <ul style="list-style-type: none"> • The Law Society outlines that at paragraph 6 (11) of Schedule 2 of the draft Bill under the heading "Funding of civil legal services by the Department", the Department propose a revised Article 11 of the 2003 Order to provide the Department with an explicit aim to "obtain the best possible value for money" in funding civil legal services. The Society believes that this provision should be clarified in statute. 	<p>Assembly.</p> <p>The Department believes that the right of appeal is sufficiently robust. All applicants will retain the right of appeal if their application for civil legal services is refused.</p> <p>Applicants will be given reasons if their application for civil legal services is refused and they will have the opportunity to address those reasons before and when going to appeal.</p> <p>Substantively, there is no change being made to the provision in Article 11 (funding of services) of the 2003 Order. The proposed change is simply to reflect the change of status, with the dissolution of the NILSC and the transfer of its functions to an Executive Agency within the Department.</p> <p>Specifically, the provision in the new Article 11(2) – "In funding civil legal services the Department shall aim to obtain the best possible value for money" – reproduces the provision contained in Article 11(5) of</p>

Clause	Summary	Issues Raised	Department's Comments
		<ul style="list-style-type: none"> The Society argues that this phrase is not defined or qualified in any way, nor is its relationship to other clauses in the 2003 Order set out in the subsequent sections, leaving its meaning vague and open to interpretation. The Society appreciates the importance of focusing resources on cases of merit, but we would caution that this clause has the potential to tip the balance of decision-making priorities over the long term towards cost-cutting rather than ensuring access to justice as the core principle. There are various accountability mechanisms built into the framework of legal aid governance which have the effect of rationing resources to cases of genuine need, such as the means and merits tests. These tests ensure that resources are targeted to those most deserving in circumstance and in need financially. The operation of these tests strikes a balance between preserving access to justice for meritorious cases and applicants in socio-economic need 	<p>the 2003 Order, as originally made.</p> <p>In taking decisions in individual cases, the Director of Legal Aid Casework will be applying the relevant primary and secondary legislation relating to the specific scheme.</p>

Clause	Summary	Issues Raised	Department's Comments
		<p>under Article 6 ECHR with the reality of scarce resources.</p> <ul style="list-style-type: none"> • A broad 'value for money' clause cannot avoid these public law requirements. • If the Department is committed to proceed with this clause, the Society would suggest to the Committee that the clause is clarified to include matters to be taken into account. • Such an amendment would place the new clause on a consistent footing with long-held principles of civil legal aid provision, which is to ensure access to justice for those in genuine need whilst requiring that those who are in a financial position to pay their own legal costs do so. • The Information Commissioner's Office (ICO) notes the statutory bar on the disclosure of information contained within draft Article 38A. The bar will not apply where the consent of the person who provided the information has been obtained or unless permitted by rules made under Article 36. 	<p>As with all other secondary legislation, the Disclosure of Information Regulations to be made under Article 32 of the 2003 Order – and also any corresponding Disclosure of Information Rules made under Article 38A of the 1981 Order – will be published and laid before the Assembly.</p>

Clause	Summary	Issues Raised	Department's Comments
		<p>Information which is contained in an anonymised form and information relating to grants, loans and payments made to any person or body is also exempted from this bar.</p> <ul style="list-style-type: none"> The ICO recommends that unless otherwise contained in the legislation, the Bill is amended to require that the rules made under Article 36 be published. The Bar Council notes that the draft Bill replicates 36(1)-(4) of the 2003 Order but unfortunately 36(5) has not been transferred. This requires the Department to "<i>consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland and undertakes such other consultation as appears to him to be appropriate</i>". It is important that the profession and key stakeholders have a role in the development of any registration scheme and the Bar Council asks the Committee to propose the replication of 36(5) within the draft Bill. 	<p>The amendment referred to – which is contained in paragraph 1(5) of Schedule 2 to the Bill – is to insert a new Article 36B provision into the 1981 Order. It is to provide for a register of solicitors and counsel eligible to be assigned under criminal legal aid.</p> <p>The new provision refers, in Article 36B(1), to rules under the existing general rule-making power in Article 36(3) of the 1981 Order.</p> <p>In its current form, Article 36(3) of the 1981 Order prescribes a number of statutory consultees, including the Lord Chief Justice and the Attorney General.</p> <p>When bringing forward rules under this rule-making power, in compliance with its obligation under common law, the Department has always – without fail – consulted with both the Law Society and</p>

Clause	Summary	Issues Raised	Department's Comments
		<ul style="list-style-type: none"> The Bar Council outlines that the Department has yet to discuss the matter of registration in detail with the Bar and would welcome the opportunity. However, the Bar Council notes that the Department is preparing a public consultation on this matter. 	<p>the Bar Council. On that basis, it is not necessary to make the amendment proposed by the Bar Council.</p> <p>The Department will separately bring formal proposals for a registration scheme and will be consulting with the Bar Council as a key stakeholder.</p>
<p>Attorney General's proposed amendment</p> <p>A proposed amendment to the Coroners' Act (Northern Ireland) 1959 to confer a power on the Attorney General to obtain papers.</p>	<p><i>A number of respondents have indicated that they wish to have sight of the exact wording of the Attorney General's proposed amendment.</i></p> <p><i>The Minister for Health, Social Services and Public Safety raised a number of concerns regarding the proposed amendment including further detail on how it would be used in practice and what the wider implications</i></p>	<ul style="list-style-type: none"> The Lord Chief Justice responded that it would be helpful if, as in England and Wales, the Attorney General made an application to direct an inquest through the High Court – to assist Coroners in understanding why an inquest was directed. The Minister for Health, Social Services and Public Safety has responded outlining that he has not seen the exact wording of the Attorney General's proposal and that it would be important to consider whether the proposal would meet the Attorney General's policy intent and if it meets data 	<p>The Attorney General had raised the question of this amendment with the Department when preparation for the Bill's Introduction was at an advanced stage. We had responded to say that we had no objection to considering his request in principle, but that it would require further consideration, and might be better examined in the context of a wider review of coronial law. In that regard, the Committee will be aware that the Department has given a commitment to such a review as part of the Package of Measures put forward to the Committee of Ministers in Strasbourg on 16 April 2014 to help address the issues of delay in legacy inquests. The Department remains of this view.</p>

Clause	Summary	Issues Raised	Department's Comments
	<p><i>would be. The Minister also suggests that the proposals may be required to be considered by the Executive.</i></p> <p><i>The Lord Chief Justice and the Law Society also suggests that any proposed new arrangement should provide for the Attorney General to make an application to the High Court as is the case in England and Wales.</i></p> <p><i>The Law Centre states that it would not circumscribe this power to cover only deaths which occur in hospital in recognition that the principles apply in other deaths which may fall within the Attorney General's ambit to direct an inquest.</i></p>	<p>protection requirements.</p> <ul style="list-style-type: none"> The Minister states that if the Attorney General's proposal, as suggested, related purely to the deaths that occur in hospital or where there is otherwise a suggestion that medical error may have occurred, the Minister would wish to see the detail of the proposed amendment, along with a clear indication of how it would be used in practice and what the wider implications would be. The Minister outlines that the Department promotes a culture of learning, openness and transparency. The Minister has initial concerns that a legislative requirement to produce documentation may have an adverse impact on staff coming forward to provide relevant information which in turn could damage the potential to identify and share learning from serious adverse incidents or deaths in hospital. Without knowing the specific detail the Minister does not wish to comment any further at this stage. 	<p>The Committee may wish to be aware that the proposed amendment may not be within the scope of the Bill. The Bill, as regards the coroners' courts, is restricted to providing for the Lord Chief Justice to be the president of the coroners' courts and for the appointment of a Presiding Coroner. This is, however, ultimately a matter for the Speaker.</p> <p>It is also the Department's view that this request raises cross-cutting issues, and we note that the policy underpinning the proposal has not been agreed by the Executive.</p> <p>In light of the foregoing, the Department is not convinced that this Bill is the appropriate legislative vehicle for the Attorney General's request.</p>

Clause	Summary	Issues Raised	Department's Comments
		<ul style="list-style-type: none"> The Minister asserts that as the Executive has agreed the policy to inform the Bill as introduced to the Assembly on 31 March 2014 and as the proposals would have an impact on as at least two Departments it would need to be considered by the Executive. There is also the issue of whether the proposed amendment will fall within the scope of the Bill which will be a matter to be considered by the Minister of Justice and the Speaker. The Law Society considers that in order to allow for full consideration of the proposed amendment we would need to see a draft clause. Effective scrutiny of any clause would examine how it interacts with other clauses in this legislation and any other relevant legislation or Regulations. The Society does however agree in principle that in order for the Attorney General (AG) to take reasonable decisions under the <i>Wednesbury</i> standard in respect of directing an Inquest under Section 14 of the Coroners' Act 1959, he 	

Clause	Summary	Issues Raised	Department's Comments
		<p>must have adequate powers in order to provide him with sufficient information to take such decisions.</p> <ul style="list-style-type: none"> Given that the proposed amendment to the draft Bill by the AG is apparently designed to provide the AG with a power to compel the surrender of documents and computer records with respect to NHS Trusts regarding deaths in care, it is within the above criteria. In particular, without this additional power, the AG has stated that the Trusts maintain an understandable reluctance to disclose such documents on grounds of confidentiality. Given that the legislation proposes to install the Lord Chief Justice as President of the Coroners' Courts and to create a Presiding Coroner, any such amending clause should clarify the procedures between the AG and the Courts. Consequently, there is a need to look at any new powers in detail to ensure that they are procedurally appropriate and clear. Doing so would ensure that any clause operates as a safety valve to provide for exceptional 	

Clause	Summary	Issues Raised	Department's Comments
		<p>circumstances or circumstances in which it would be in the public interest for the AG to exercise his powers under the 1959 Act.</p> <ul style="list-style-type: none"> • On the basis of the information provided and the broad scope of the power being sought, the Society would argue that any proposed new arrangements should provide for the AG to make application to the High Court to exercise such discretion to call for evidence. • There is a similar provision provided for the AG of England and Wales in directing Inquests under Section 13 of the Coroners' Courts act 1988 in England and Wales. This brings the jurisdiction of the AG within the supervision of the court and guarantees a collaborative, 'joined up' approach to policy on Inquests. • Castlereagh Borough Council indicated that the proposed amendment would be welcome as it would put in place a more structured process for dealing with medical errors which result in 	

Clause	Summary	Issues Raised	Department's Comments
		<p>death. The Council's registrar is of the view that it adds to the bereaved relatives' pain when an acknowledgement of medical mistakes is not forthcoming and that greater transparency in the process is a positive step.</p> <ul style="list-style-type: none"> • <u>The South Eastern Health and Social Care Trust</u> has no objection to the amendment suggested by the Attorney General. The Trust states that the proposed amendment is to provide a clear statutory basis for disclosure of papers to assist the Attorney General in relation to direction of an inquest under Section 14(1) of the Coroner's Act (Northern Ireland) 1959. The proposed amendment would assist the Trust where required to be clear about what documentation could be released to the Attorney General. • <u>The Southern Health and Social Care Trust</u> states that, in principle, it considers that, where the Coroner has decided not to hold an inquest, it would be necessary for the Attorney General to have 	

Clause	Summary	Issues Raised	Department's Comments
		<p>access to relevant information in order for him to reach an informed decision as to whether to direct an inquest in a particular case. It would be important that the legislation clearly sets out what information the Attorney General is entitled to access.</p> <ul style="list-style-type: none"> • However, if the Attorney General were to exercise the power to request information while the death is still under investigation by the Coroner and a decision to hold an inquest has not yet been taken by the Coroner, the Trust would be concerned about duplication of processes and the consequent impact on resources. • Association of Personal Injury Lawyers state that it is important that inquests are conducted thoroughly and concluded as quickly as possible so that a bereaved family can rebuild their lives following the loss of a loved one. While it is difficult to comment fully on the Attorney General's proposal without sight of the amendment, in principle we support any measures which ensure that those families are able 	

Clause	Summary	Issues Raised	Department's Comments
		<p>to have all the answers to their questions as to why their loved ones needlessly died.</p> <ul style="list-style-type: none"> <p>Information Commissioner's Office state that although a substantial amount of the information sought by the Attorney general will relate to deceased persons and be of no relevance under the Data Protection Act, other information may be personal data relating to family and friends of the deceased as well as to medical staff. Given the public interest involved and the difficulties which the Attorney General has found in obtaining the papers or other information, it would appear appropriate to invest an explicit power on him and provide a statutory basis for disclosure. However, consideration should be given to limiting such power solely to cases involving deaths which have occurred in hospital or where medical error is thought to have led to a death.</p> <p>Law Centre (NI) supports the proposal of the Attorney General to provide an additional power to</p> 	

Clause	Summary	Issues Raised	Department's Comments
		<p>access documents. Deaths in hospital or after treatment are cases that regularly proceed to inquests. The recent experience of public enquiries has been that it is not always easy to access all relevant material in a timely and straightforward manner. In the interests of openness, administrative and financial efficiency we would support a clause enabling the Attorney General as an independent law officer to obtain all papers. The Law Centre would not circumscribe this power to cover only deaths that occur in hospital in recognition of the fact that the principles enunciated above apply in other deaths that may fall within the ambit of the Attorney General's powers to direct an inquest.</p> <ul style="list-style-type: none"> • The Northern Ireland Human Rights Commission notes that the Attorney General has raised specific concerns regarding deaths in which there is a suggestion that a medical error has occurred and advises that the procedural obligation under Article 2 of the European Court of Human Rights extends to deaths in a medical 	

Clause	Summary	Issues Raised	Department's Comments
		<p>context.</p> <ul style="list-style-type: none"> <p>KRW LLP support the Attorney general's proposal and requests that that should an Article be drafted to legislate the proposal of the Attorney-General or amend the existing legislation then there should be provisions in place that disclosure of material directly relating to the deceased is automatically made to the families of the bereaved being so considered for a new inquest by the Attorney-General to comply with the next of kin participation requirement of the Article 2 procedural investigatory obligation arising following a breach. This would be in the form of a presumption of disclosure following an Article 2 assessment of risk by the Attorney-General.</p> <p>The NI Policing Board requests further clarity on whether the proposed amendment would enable the Attorney General to obtain only certain types of documents, such as medical records, and only in respect of</p> 	<p>This is something for the Committee to take up with the Attorney General.</p>

Clause	Summary	Issues Raised	Department's Comments
		<p>certain types of cases, such as medical cases, or would he be empowered to obtain any document connected with any death in respect of which the Attorney General is considering directing an inquest.</p>	

Annex B

Safeguards to protect the individual decisions on the granting of civil legal aid

Statutory Office Holder

Provision is made in the Legal Aid and Coroners' Courts Bill for the appointment of a Statutory Office Holder – the “Director of Legal Aid Casework”. All decisions on the granting of funding for civil legal services will be taken by the Statutory Office Holder; a civil servant designated by the Department to undertake a number of statutory functions and consideration will be given to whether this will be the Chief Executive or another official of the Agency. The statutory functions will be set out in both primary and secondary legislation and relate, centrally, to the award of funding by way of civil legal aid services.

The Director will receive a letter from the Minister confirming his or her designation. The letter will set out the requirements of the office, the period of appointment and most importantly the Department's obligation to ensure that the Director acts independently when applying a direction or guidance in relation to an individual case. It will also reinforce the Civil Service values of integrity, honesty, objectivity and impartiality.

The purpose behind the creation of this Statutory Office Holder is to ensure that there is no Ministerial involvement in individual civil legal services funding decisions. Robust arrangements will be introduced to ensure decisions on the award of funding (or further funding) will be taken based on the relevant statutory provisions (some details of which will be included in secondary legislation) and the requirements of the scheme. In undertaking these functions, the Director will of course be applying the relevant primary/secondary legislation in broadly the same manner as the Commission do under the current structure. However, unlike the current process this will include a review process and when applications for funding (or further funding) are refused, clear reasons will be

14/120956

given. If the decision is appealed it will be subject to further consideration to see if approval can be granted before going to the independent Appeal Panel.

The new arrangements will be more transparent than the current process. As a result, the Department anticipates that the quality of the applications for funding will improve and the number of appeals will reduce.

In addition to the legislation the roles and responsibilities of the Minister, Director and Department will be set out in detail in the Agency's Framework Document.

Ministers to provide general guidance and direction on legal aid policy

Ministers are responsible for the policy and legislation and putting in place the Framework to enable the efficient and effective delivery of legal aid and to facilitate access to justice. The Minister will set, as he currently does, the overarching guidance, procedures and criteria for the award of civil legal services which the Statutory Office Holder will apply in taking individual funding decisions.

A requirement for any guidance and direction given by the Minister to be published

The Minister will be required to publish any guidance or directions issued to the Director. These will be published, for example on the Agency's webpage. They will also be reported on in the Agency's Annual Reports, which will themselves be published and laid before the Assembly. The Department will ensure that all such guidance and directions are fully accessible in the public domain, which will help to ensure transparency for applicants and their legal representatives.

This clear mandatory requirement will ensure transparency, and will provide a robust protection against any attempt to influence the Director's decision-making in an inappropriate manner. The Director will also be required to produce a Director of Legal Aid Casework annual report as soon as reasonably

14/120956

practicable after the end of each financial year, stating how he or she has carried out the functions of the office in the financial year.

Ministers will be specifically prevented from issuing guidance on or direction about the discharge of the Statutory Office Holder's functions in relation to individual cases

The decisions taken by the Director in respect of individual cases need to be fully protected. This is particularly important when taking decisions about the availability of legal aid to challenge decisions taken by Government. To achieve this, the legislation specifically prevents the Minister from issuing such directions or guidance about the carrying out of the Director's functions in relation to individual cases. This will protect individual decisions from any interference. In addition, as the legislation will require the Minister to publish any general guidance or directions that he does issue, there will be transparency in respect of content of guidance or directions so helping ensure there is no perception of interference.

A robust and independent appeals mechanism will be established to consider appeals against individual decisions

The independence of decisions on individual cases will be further enhanced by putting in place a robust mechanism for appealing the decisions of the Director. We propose putting in place an independent panel of suitably qualified individuals appointed on a fixed term basis through the public appointments process. The panel members will be drawn from a range of backgrounds with experience of the types of issues involved and will be able to bring this experience to the decision making process. Taking on board feedback from our consultation we have agreed that the Chairperson of each panel will always be legally qualified

Panel members will not be employees of the new Agency. The Panel will obtain administrative support from the Agency but would take its decisions entirely independently. The decisions of the Appeals Panel will only be challengeable

14/120956

through the Judicial Review Process. As public appointments, the panel members will be required to uphold the seven principles of public life and be alert to any possibility of conflict of interest in the appeals that they consider. If there is any potential for conflict of interest, they will be required to declare this and excuse themselves from the appeal.

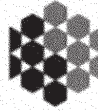
It is proposed that appeals will be paper based and will be considered, without a hearing, by a three member panel who has the recognised competence in the area of the appeal. Only in exceptional cases will oral representation by the appellant or Agency be required.

The appeal decision will be made objectively against a set of criteria that require both adherence to rules and the reasonable and impartial exercise of discretion. Unlike the current process the outcome of the appeal will be written up setting out the reasons for the decision. The appeals unit within the new Agency will monitor these decisions to identify any apparent diversity of approach or contradictory decisions. The Appeal Panel decision may not be overturned by the Director, Minister or Department and may only be challenged by Judicial Review.

14/120956

23 May 2014 - The Department's response to issues raised by the Assembly Examiner of Statutory Rules on the Delegated Powers contained in the Bill

FROM THE OFFICE OF THE JUSTICE MINISTER



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Our ref: SUB/642/2014

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23 May 2014

Dear Christine,

LEGAL AID AND CORONERS' COURTS BILL - ADVICE BY THE ASSEMBLY EXAMINER OF STATUTORY RULES ON THE DELEGATED POWERS CONTAINED IN THE BILL

Thank you for your letter of 15 May in which you have asked for the Department's response to the issues highlighted by the Examiner of Statutory Rules regarding the powers and proposed Assembly controls contained in the Bill.

The Department's response is attached. Officials would be happy to provide additional information or briefing if required.

**TIM LOGAN
DALO**

Enc.

LEGAL AID AND CORONERS' COURTS BILL
DELEGATED POWERS MEMORANDUM – SUPPLEMENTARY NOTE
Prepared by the Department of Justice

Introduction

1. This note has been prepared by the Department of Justice to supplement its Delegated Powers Memorandum which was forwarded to the Committee for Justice on 8 April 2014. It is intended to address the matters raised by the Assembly Examiner of Statutory Rules in the advice which he has provided to the Committee on the delegated powers contained in the Legal Aid and Coroners' Courts Bill.

New Articles 36A, 36B and 38A(1) of the 1981 Order

2. In respect of each of the new rule-making powers provided under the above provisions, the Examiner of Statutory Rules has queried why the powers should be subject to the draft affirmative procedure on first exercise and negative resolution thereafter. Instead, in respect of each of these new rule-making powers, the Examiner has advised that the rules made should be subject to the draft affirmative procedure on the first and subsequent exercises of the power. He states that, in respect of each of the rule-making powers involved, the Department has not fully addressed this point in its Memorandum.
3. Before focussing on that, it may be useful to provide some further detail as to the function which the respective rule-making powers are intended to deliver.
4. Article 36A(1), (4) and (5) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order"), as inserted by the Bill, will make provision for rules in respect of the assignment of solicitor and counsel where a criminal aid certificate has been granted. Such rules could regulate the circumstances in which a person who had been granted a criminal aid certificate and had selected a solicitor or counsel to represent them could 'dismiss' that representative(s) and then select a new solicitor or new counsel to represent them.
5. Article 36B of the 1981 Order will provide for a registration scheme, whereby all firms, bodies and individuals who wish to provide publicly-funded legal services by

way of criminal legal aid must be registered and comply with a code of practice. Only firms, bodies and individuals who satisfy the quality mechanisms involved will be entitled to provide publicly-funded legal services. As noted by the Examiner, the intention is to replicate the provision in Article 36 of the Access to Justice (Northern Ireland) Order 2003 ("the 2003 Order") pending the implementation of *criminal defence services* in the 2003 Order. The Department has given a commitment to the Assembly's Public Accounts Committee to introduce a registration scheme – covering both civil and criminal legal aid – as soon as possible.

6. Article 38A of the 1981 Order will regulate the disclosure of information which is furnished to the Department or any court in connection with the case of a person seeking criminal legal aid. It provides that such information shall not be disclosed except as permitted by rules made by the Department. The new provision will replicate a provision in Article 32 of the 2003 Order.

Department's response

7. Our understanding is that, in terms of the Assembly's control mechanisms for the passage of subordinate legislation, the 'norm' is to make SRs subject to the negative resolution procedure. With regard to each of the new rule-making powers involved here, we also acknowledge that – in relation to their respective 'matching provisions' in the 2003 Order – they are subject to the Assembly's control by way of the draft affirmative procedure throughout.
8. However, the draft clauses involved here follow the approach adopted in respect of the relevant amendments made to our legal aid legislation by the Justice Act (Northern Ireland) 2011. See section 80(4) of that Act, with regard to rules made under the 1981 Order on decisions as to eligibility for criminal legal aid; and again at section 84(4), with regard to regulations made under the 2003 Order on financial eligibility for the grant of right to representation.

<http://www.legislation.gov.uk/nia/2011/24/part7>

9. As currently drafted, in respect of each of the new rule-making powers, the new clause gives the Assembly a say in the initial setting up of the relevant regime, but does not require every minor or technical amendment to that regime to be subject to

debate in the Assembly. Subsequent adjustments to the regime are subject to the negative procedure.

10. At the same time, the Department respectfully notes the views expressed by the Examiner of Statutory Rules in relation to each of these new rule-making powers. Accordingly, if the Justice Committee is minded to report that they each be made subject to the Assembly's control by way of the draft affirmative procedure throughout, mindful of the respective roles of the Committee and the Assembly in the management of the Assembly's full secondary legislative programme, the Department would not wish to argue against that.

New Article 20A of the 2003 Order

11. The Bill inserts a new provision, Article 20A, into the 2003 Order. As one of the safeguards to protect the independence of individual decisions on the grant of *civil legal services*, Article 20A provides that the Department must make regulations for the constitution and procedure of appeal panels. Such regulations may, in particular, prescribe the qualifications for appointment to the appeal panels; provide that the decision on an appeal is to be taken without hearing any oral representations, except in such cases as may be prescribed; require an appeal panel to give reasons in writing for its decisions and provide for such decisions to be final.
12. The Examiner of Statutory Rules states that some of the most significant provisions in the new Article 20A provision could conceivably have been placed on the face of the Bill rather than by way of regulations. However, he concludes by stating that it does not seem to be an inappropriate delegation given the overall structure of the 2003 Order into which this provision fits.
13. In respect of this regulation-making provision, again the Examiner of Statutory Rules has queried why the power should be subject to the draft affirmative procedure on first exercise and negative resolution thereafter. Instead, the Examiner has advised that the regulations made should be subject to the draft affirmative procedure on the first and subsequent exercises of the power. He states that the Department has not fully addressed this point in its Memorandum.

Department's response

14. This is an important function which the Department wished to include in the primary legislation (as Article 20A), but the regulations will be very detailed and include provisions relating to operational matters.
15. The Department notes the conclusion expressed by the Examiner of Statutory Rules regarding whether all of the regulation-making powers contained in Article 20A of the 2003 Order should be left to subordinate legislation rather than being included on the face of the Bill. Unless the Justice Committee wishes it to do so, the Department has no further comments to offer on this specific matter.
16. In relation to the Assembly's control mechanisms for the passage of subordinate legislation, as referred to at paragraph 7 above, the Department's understanding is that the 'norm' is to make SRs subject to the negative resolution procedure. However, when bringing forward this Bill, because the issue of the appeals process was highlighted by a number of consultees when the Department issued its initial policy documents in February 2013, we thought it appropriate and helpful that the first set of regulations to be made under the proposed new Article 20A provision should be subject to the draft affirmative procedure.
17. Furthermore, as noted at paragraph 8 above, we note that this follows the approach adopted in respect of the relevant amendments made to our legal aid legislation by the Justice Act (Northern Ireland) 2011.
18. As currently drafted, the new clause gives the Assembly a say in the initial setting up of the relevant regime, but does not require every minor or technical amendment to that regime to be subject to debate in the Assembly. Subsequent adjustments to the regime are subject to the negative procedure.
19. At the same time, the Department respectfully notes the views expressed by the Examiner of Statutory Rules in relation to these regulation-making powers. Accordingly, if the Justice Committee is minded to report that they be made subject to the Assembly's control by way of the draft affirmative procedure throughout,

mindful of the respective roles of the Committee and the Assembly in the management of the Assembly's full secondary legislative programme, the Department would not wish to argue against that.

Clauses 10 and 12 of the Bill

20. The Examiner of Statutory Rules has also raised an issue regarding the 'cross-over' between the provisions in clause 10 (supplementary, incidental or consequential provision) and clause 12 (commencement). Clause 12(1) and (3) of the Bill provide for commencement orders. In accordance with normal practice, these are subject to no Assembly procedure. However, the Examiner has advised that what is provided in clause 12(3) about transitional and transitory provisions should be worked into clause 10 instead. Orders under clause 10 are subject to negative resolution unless they amend or repeal a provision of primary legislation, in which case they are subject to the draft affirmative procedure.
21. We have referred this technical issue to Legislative Counsel who drafted the Bill, and have completed this response with the benefit of his input.
22. Legislative Counsel has noted that it is extremely common for commencement orders to contain transitional or saving provisions. Furthermore, he has expressed the view that it would be difficult to deal with transitional issues in a separate SR subject to approval, since it is often not clear until the commencement order is being drafted what is needed by way of transitional provisions. Furthermore, he has noted that commencement orders are usually made very close to the actual commencement date.
23. Commencement and transitional provisions go together and complement each other, and it is helpful to the reader to find them in the same document. It would be odd if, for example, you had to look at the commencement order to find out what date something came into force and then look at a separate document to see to what extent the new provision applied to transactions which had begun but not finished on that date, or whether, and if so how, the provision applied to events which happened before commencement.

24. Clause 10 is really a safety net, and may well not be needed. But again, Legislative Counsel has advised that such clauses are fairly common against the possibility that after Royal Assent some more substantive provisions are discovered to be required for effective implementation of the bill. As noted by the Examiner of Statutory Rules, if such an order requires to amend primary legislation it is subject to approval in draft; otherwise it is subject to the negative procedure.

25. The Department respectfully notes the views expressed by the Examiner of Statutory Rules in relation to the powers to make subordinate legislation contained in these two clauses. We respectfully submit that the Assembly control provided for each power is appropriate.

4 June 2014 - Correspondence from the Department regarding the Attorney General for Northern Ireland's proposed amendment

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Our ref SUB/685/2014

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Clerk to the Committee for Justice
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4 June 2014

Dear Christine,

The Attorney General briefed members of the Justice Committee on his proposed amendment to the Legal Aid and Coroners' Courts Bill at last week's meeting on 28th May.

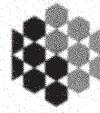
This letter is intended to provide the Committee with information in respect of the existing statutory framework to assist in its consideration of the amendment requested by the Attorney General.

Duty to report deaths to the coroner

Section 7 of the Coroners Act (Northern Ireland) 1959 provides a continuing and extensive duty to report deaths to the coroner where it is believed that the death occurred, either directly or indirectly, as a result of:

- violence or misadventure or by unfair means;
- negligence or misconduct or malpractice on the part of others;

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- any cause other than natural illness or disease for which he had been seen and treated by a registered medical practitioner within twenty-eight days prior to his death; or
- in such circumstances as may require investigation (including death as the result of the administration of an anaesthetic).

The duty applies to:

- medical practitioners;
- registrars of deaths;
- funeral undertakers;
- occupiers of houses or mobile dwellings; and
- every person in charge of any institution or premises in which a deceased person was residing.

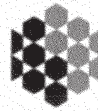
Failure to comply with the duty is an offence under section 10 of the 1959 Act.

In his text book "Coroners' Law and Practice in Northern Ireland", the Senior Coroner illustrates the extensive nature of this duty by reference to a case where a 17 year old girl had died following a severe and sustained asthma attack. An ambulance was called but was delayed, and medical evidence suggested there was a good chance that the girl would not have died if she had arrived at the hospital earlier. Mr Lecky comments that such a death must be reported to a coroner as there would have been reason to believe that the deceased had died at least indirectly from a cause other than natural illness, or that she had died in such circumstances as may require investigation.

Attorney General's Power to Order an Inquest

As the Committee will be aware, the Attorney General for Northern Ireland may direct an inquest under section 14 of the 1959 Act, where he has reason to believe

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this may be advisable, and he now seeks an additional power to require information from health or social care providers when exercising this power.

Under section 24 of the Coroners Act 1962, the position in Ireland is almost identical to the current position here; the coroner may direct an inquest where he has reason to believe that a person died in circumstances which, in his opinion, make the holding of an inquest advisable.

The power of the Attorney General for England and Wales (AGEW) differs slightly, in that, under section 13 of the Coroners Act 1988, the AGEW may apply to the High Court for an order that an inquest (or another inquest) be held.

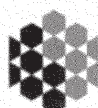
In neither of those jurisdictions is there a specific ancillary power for the Attorney General to require information. Nor is there an intention to introduce such a power.

I hope the Committee finds this information helpful in its consideration of the proposed amendment by the Attorney General.

TIM LOGAN
DALO

4 June 2014 - Correspondence from the Department regarding the Law Centre NI's proposed amendments to Clause 3 of the Bill

FROM THE OFFICE OF THE JUSTICE MINISTER



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Our ref SUB/693/2014

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4 June 2014

Dear Christine

LEGAL AID AND CORONERS' COURTS BILL

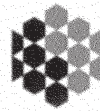
Following the Department's oral briefing to the Committee on the Legal Aid and Coroners' Courts Bill last week, we have, in response to comments made by Committee Members, reflected further on the potential implications if the two amendments to clause 3 of the Bill proposed by the Law Centre (NI) were adopted.

The two amendments propose the insertion of the words in bold in clause 3(1)(a) and (2)(a) set out below.

"Exercise of functions by Director

3. (1) The Director must—

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- (a) comply with directions given by the Department about the carrying out of the Director's functions **save where this compromises the Director's independence**, and
 - (b) have regard to guidance given by the Department about the carrying out of those functions.
- (2) But the Department—
- (a) must not give a direction or guidance about the carrying out of those functions in relation to an individual case **or to a class of cases where it unreasonably impinges on the Director's ability to act independently in an individual case**, and
 - (b) must ensure that the Director acts independently of the Department when applying a direction or guidance under this section in relation to an individual case."

Proposed amendment to clause 3(1)(a)

The purpose of Part 1 of the of the Bill is to create the statutory office of the Director of Legal Aid Casework and to provide protection for this office when taking decisions in respect of individual cases. For this reason the concept of independence in clause 3 – specifically, in clause 3(2)(b) – is limited to the Director of Legal Aid Casework's decision-making in individual cases.

The proposed amendment would widen the scope of the Director's independence considerably and would go beyond individual decisions in respect of civil legal aid. For this reason we believe that the amendment could have unforeseen/unintended consequences, and should not be considered. We have a concern that the proposed amendment is ill-defined in its extent and would lead to uncertainty in the law. We additionally conclude that the amendment is unnecessary as the appropriate protection already exists through the provision of clause 3(2)(b).

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Proposed amendment to clause 3(2)(a)

We would also have concerns that this proposed amendment is ill-defined and could lead to uncertainty. The purpose of the clause, as currently set out in the Bill, is to preclude the Department from giving a direction or guidance to the Director of Legal Aid Casework in relation to an individual case. However, as is currently the case, it is intended that a direction or guidance may be given in other aspects of the Director's work, including in relation to a class of cases. Any such direction or guidance is already limited by the provisions of the legislation governing the specific legal aid scheme to which it refers.

An example of the guidance which has been given by the Department to the Northern Ireland Legal Services Commission is the guidance in respect of the authorisation of counsel under Assistance by Way of Representation (ABWOR) and civil legal aid.

<http://www.dojni.gov.uk/index/legalservices/northern-ireland-legal-services-commission-legal-profession.htm>

The Bill as currently drafted (clause 3(2)(a)) precludes the Department from giving a direction or guidance in respect of individual cases. The proposed amendment appears to seek to manage the risk that the Department would give a direction to the Director of Legal Aid Casework impinging on the Director's ability to act independently in a class of cases, resulting in inappropriate Departmental interference in the Director's decisions in individual cases within that class. The shape of the present law means that such a concern would be misplaced.

The only way to restrict the availability of funding in relation to a class of cases is by way of an amendment to the 2003 Order, which must be done by regulations¹.

¹ As referred to in my previous letter to the Committee dated 22 May 2014, Article 12(6) of the 2003 Order provides that regulations may amend Schedule 2 to the Order by adding new services or omitting or varying any of the services listed in Schedule 2 (Civil Legal Services: Excluded Services).

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Any such regulations are subject to control by the Assembly by way of the draft affirmative procedure².

In short, it is not possible to restrict the availability of funding for particular classes of case by Departmental direction, but only by regulations subject to the full scrutiny and control of the affirmative procedure in the Assembly.

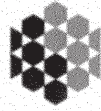
Accordingly, the Department affirms that, under the Bill as currently drafted, it would not be possible for the Department to give a direction or guidance to the Director of Legal Aid Casework regarding the scope of cases which may be funded by way of *civil legal services*.

In relation to whether directions or guidance of some other kind relating to a class of cases could constrain the Director's independent decision-making in an individual case, we would draw the Committee's attention to the drafting of the clause. Two separate protections for the Director's independence are included. The first is that, in the case of guidance, the requirement under clause 3(1)(b) is simply that the Director "have regard to" any such guidance. In relation to both directions and guidance, a duty is placed on the Department to ensure that the Director acts independently in applying them to an individual case. This formulation places a justiciable onus on the Department not to interfere unduly with the Director's independence.

Furthermore, the right of appeal to an independent appeal panel – to be established under the new Article 20A provision in the Access to Justice (Northern Ireland) Order 2003 – will operate as a residual, and ultimate, safeguard to uphold the requirement that the Director acts independently of the Department when deciding individual cases. Decisions of the appeal panel will in turn be subject to the supervisory jurisdiction of the High Court.

² Article 46(5) of the 2003 Order

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I hope the Committee finds this information helpful.

If any additional information or clarification is required, the Department will be happy to appear before the Justice Committee again to discuss these issues further.

A handwritten signature in black ink, appearing to read 'Tim Logan'.

TIM LOGAN
DALO

11 June 2014 - Correspondence from the Department regarding two amendments to Schedule 2 of the Bill to address issues raised by the Assembly Examiner of Statutory Rules

FROM THE OFFICE OF THE JUSTICE MINISTER



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Our ref: JCP\14\124

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11th June 2014

Dear Christine,

Legal Aid & Coroners' Courts Bill

Further to our telephone conversation, I am writing to confirm our position in respect of the advice to the Committee from the Examiner of Statutory Rules in respect of the arrangements for new rules.

The Committee has indicated its support for the Examiner's advice that all rules made under the provisions in Schedule 2 in respect of the new Article 36A, 36B and 38A provisions in the 1981 Order, and also the Article 20A provision in the 2003 Order in respect of appeal panels, should be made under the draft affirmative resolution procedure for both the initial rules and any subsequent changes. The Bill is drafted on the basis that the first set of rules should be affirmative and subsequent changes negative resolution.

In light of the Committee's decision, the Department will now adopt the same approach and will instruct Legislative Counsel to draft the necessary amendments to be brought forward at the appropriate stage.

TIM LOGAN
DALO

17 June 2014 - Correspondence from the Department regarding proposed amendments to the Bill

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Our ref JCP\14\165

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17th June 2014

Dear Christine,

LEGAL AID AND CORONERS' COURTS BILL: ADVICE BY THE ASSEMBLY EXAMINER OF STATUTORY RULES

At the Committee's formal clause-by-clause consideration of the Legal Aid and Coroners' Courts Bill on Wednesday 11 June, the Committee confirmed that they will support the Examiner of Statutory Rules' advice that all rules made under certain new rule-making powers contained in the Bill should be subject to the draft affirmative resolution procedure. The rule-making powers concerned are those contained in the new Article 36A, 36B and 38A provisions which are to be inserted into the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, together with the new Article 20A provision which is to be inserted into the Access to Justice (Northern Ireland) Order 2003.

As advised in my letter dated 23 May 2014, the Department has accepted this. Accordingly, I confirm that the Minister will move the necessary amendments to the Bill at Consideration Stage.

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of
Justice
www.dojni.gov.uk

I attach for the Committee's information a copy of the proposed amendments.

I hope this is helpful.

Tim Logan.

TIM LOGAN
DALO

Enc: Proposed Amendments

17 June 2014

Legal Aid and Coroners' Courts Bill
Amendments to be moved at Consideration Stage
By the Minister of Justice

Schedule 2, Page 9, Line 12

Leave out 'the first'

Schedule 2, Page 9, Line 15

Leave out 'the first'

Schedule 2, Page 9, Line 18

Leave out 'the first'

Schedule 2, Page 9, Line 21

Leave out 'the first'

Schedule 2, Page 12, Line 19

Leave out paragraph 5 and insert—

'5. In section 46(1) for paragraph (hb) substitute—

“(hb) the Legal Services Agency Northern Ireland.”'

Schedule 2, Page 19

Leave out lines 16 to 19 and insert 'and after “20(2)(b) or (d),” insert “20A.”'

Schedule 2, Page 21, Line 3

At end insert—

'The Justice Act (Northern Ireland) 2011 (c. 24)

9A. In section 84 for subsection (4) substitute—

“(4) In Article 46(5) after “20A,” insert “27A.”'

Schedule 3, Page 21

Leave out lines 18 and 19



Northern Ireland
Assembly

Appendix 4

Written Submissions

Written Submissions

1. Association of Personal Injury Lawyers
2. Bar Council of Northern Ireland
3. Castlereagh Borough Council
4. Children's Law Centre
5. Information Commissioner's Office
6. KRW LLP
7. Law Centre (NI)
8. Law Society of Northern Ireland
9. Lord Chief Justice's Office
10. Northern Health and Social Care Trust
11. Northern Ireland Human Rights Commission
12. Northern Ireland Judicial Appointments Commission
13. Northern Ireland Legal Services Commission
14. Northern Ireland Local Government Association
15. Northern Ireland Policing Board
16. PSNI
17. Probation Board for Northern Ireland
18. Public Prosecution Service
19. South Eastern Health and Social Care Trust
20. Southern Health and Social Care Trust

Association of Personal Injury Lawyers

Paul Givan MLA Chairperson
Committee for Justice
Room 242, Parliament Buildings
Ballymiscaw
Stormont
Belfast BT4 3XX



16 April 2014

Dear Mr Givan

Call for evidence: Legal Aid and Coroners' Courts Bill The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our membership comprises principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has more than 4,000 members in the UK and abroad who represent hundreds of thousands of injured people a year.

APIL welcomes the opportunity to submit evidence to the Committee for Justice, having previously responded to the Department of Justice consultation Safeguards to protect the individual decisions on the granting of civil legal aid, which in part has led to the Legal Aid and Coroners' Courts Bill. The future of civil legal aid for personal injury cases in Northern Ireland is currently uncertain, and although this particular issue is not covered in this Bill, we would like to take this opportunity to support the availability of legal aid for the most vulnerable people in personal injury cases.

APIL welcomes the assurance in the explanatory and financial memorandum that there will be no ministerial involvement in individual decisions on civil legal aid funding. Legal aid should always be awarded on a case by case basis, and funding should be awarded based on the merits of a case, and not based on a political agenda. Clause 2 of the Bill states that the Department of Justice "must designate a civil servant in the Department as the Director of Legal Aid Casework". We remain concerned, however, that there is no provision in the Bill to ensure that the Director of Legal Aid Casework is legally trained. A legally trained Director of Legal Aid Casework will have more experience when it comes to making decisions on individual cases. Decisions being made by a director who is not legally trained could face a lot more challenges through the appeals process, which would lead to an increase workload and costs.

Clause 4 gives the power to the Director of Legal Aid Casework to delegate functions to other individuals in the Department of Justice, while regulations under schedule two will create appeal panels. It is important that anyone in the Department of Justice who is involved in considering an application for legal aid funding, as well as those people on the appeal panels, should be legally trained.

The letter from the committee clerk, dated 4 April, includes a proposal from the Attorney General for Northern Ireland to amend the Bill to address his concern that he has problems obtaining documents in relation to inquests. In the letter, it says that the Attorney General's principle focus is deaths that occur in hospital.

It is important that inquests are conducted thoroughly, and concluded as quickly as possible, so a bereaved family can rebuild their lives following the loss of a loved one. Whilst it is difficult to comment fully on the Attorney General's proposal without sight of the amendment,

in principle we support any measures which ensure that those families are able to have all the answers to their questions as to why their loved ones needlessly died.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Ellis', with a long horizontal flourish extending to the right.

Sam Ellis

Parliamentary Officer

Association of Personal Injury Lawyers

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Nottingham

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Email: sam.ellis@apil.org.uk

Telephone: 0115 943 5426

Bar Council of Northern Ireland

The Legal Aid and Coroners Court Bill Committee Stage - Written Submissions

Introduction

The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

Representing the views of members who provide advocacy and representation in cases across the broad spectrum of legal practice, the Bar Council serves to ensure and maintain an independent and quality source of specialist legal advocacy.

General Points

The Bar Council welcomes the opportunity to respond to the call for evidence from the Committee of Justice on the proposed Legal Aid and Coroners Court Bill.

The Bar Council previously responded to the public consultation conducted by the Department of Justice on safeguards to protect the individual decisions on the granting of civil legal aid and a copy has been included at Appendix A.

Part 1: Legal Aid

Clause 1

Clause 1 provides for the formal dissolution of the Northern Ireland Legal Services Commission. The Bar Council notes the stated impetus behind the Bill and the redesignation of the Legal Services Commission from a Non Departmental Public Body to an Executive Agency is largely due to failings on the part of the Commission to manage its processes, budget and forecasting on legal aid expenditure. Any improvements which can be made in this area to ensure transparency, predictability and accountability are to be welcomed.

Clause 2

Clause 2 provides for the designation of the Director of Legal Aid Casework. We note that the provision to designate a director of legal aid casework is identical to provisions contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced in England and Wales.

The primary concern in relation to the Bill relates to the independence of decision making. In becoming an Executive Agency, the Commission is more susceptible to Ministerial, Departmental and political influence. The granting of legal aid must be awarded on a case by case basis, and only awarded based on the merits of a case, without credence to any budgetary or political agenda. The assurances contained within the explanatory and financial memorandum of no ministerial involvement in individual decisions on civil legal aid funding are welcome. However, the practical detail of how the Department will ensure this is the case remains unknown.

The Committee for Justice should review the scrutiny undertaken by the Westminster Select Committee who previously considered similar provisions in the provisions contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Committee remained unconvinced that the legislation in England and Wales provided sufficient institutional safeguards to protect the independence of the proposed Director of legal aid casework. Of particular concern to the Committee was the prevention of any conflict of interest arising when making decisions relating to the availability of legal aid in challenging government decisions, such as in judicial review cases.

Within the Bill, Clause 2 states that the Department of Justice “must designate a civil servant in the Department as the Director of Legal Aid Casework”. The Bar Council is concerned that there remains no provision to require that the Director of Legal Aid Casework is legally trained or qualified. It should be accepted that a legally trained Director of Legal Aid Casework would have the requisite experience, understanding and knowledge to make decisions on individual cases. Decisions being made by a director without legal training may lead to more challenges through the appeals process, thereby increasing administrative workload and costs.

Clause 3

Clause 3 relates to the exercise of functions by the Director of Legal Casework.

The Bar Council does not believe that the provisions contained within Clause 3 will provide the operational independence required in making individual decisions on the granting of legal aid and are not sufficiently robust as to enable the Director to challenge directions from the Department.

We welcome the inclusion that “*the Department must not give a direction or guidance about the carrying out of those functions in relation to an individual case*”. However, it remains possible to compromise an individual decision, for example, through a budgetary or financial guidance in relation to a certain class or type of legal case. We would recommend the inclusion of a caveat at clause 3(1(a) which allows the Director to, whilst acting in a reasonable manner, initially challenge and ultimately if necessary to choose not to comply where the direction compromises the independence of decision making.

In relation to 3(2), the Bar Council would request more detail on what would happen or what sanctions are available should the Department fail to comply. It would be useful to know what reporting mechanism will be available to the Director of Legal Casework in circumstances where he or she is concerned as to the direction or involvement of the Department.

We welcome the commitment by the Department to publish any directions and guidance given. We would request that this is clarified to ensure that the publication will be publicly available to all interested parties.

Clause 4

Clause 4 provides the power to the Director of Legal Aid Casework to delegate functions to other individuals in the Department of Justice, while regulations under schedule two provide for the creation of appeal panels.

The Bar Council believes that the current system of panels of practicing lawyers works well in the context of considering an application for legal aid funding. It is important that in moving forward, we continue to constitute the appeal panels with suitably qualified, presently practicing legal representatives who have experience in the area of law under consideration.

Clause 5

The publication of the Annual report of the Northern Ireland Legal Services Commission has been fraught with many challenges and difficulties in recent years. The Bar Council welcomes the provisions in expectation that the report and the information contained within will improve

in content and accuracy. The Committee may wish to consider the inclusion of a time limit for the laying of a copy before the Assembly to ensure timely receipt of a completed report.

Clause 6

The Bar Council has requested a legal opinion to ascertain the impact of the amendments relating to the legal aid, civil legal services and criminal defence services. We will be happy to share the opinion with the Committee on receipt.

Part 2: Coroners Court

Clause 7

The Bar Council welcomes the formal designation of the Lord Chief Justice as President of the Coroners' Court.

Schedule 2: Amendments

Schedule 2 proposes a number of amendments, one of which relates to the register of solicitors and counsel eligible to be assigned to a criminal legal aid certificate.

The Bar Council appreciates that the intention behind the inclusion within Schedule 2 is to replicate the provisions in the 2003 Order which have not yet commenced. The Bar Council notes that the draft Bill replicates 36(1)-(4) of 2003 Order but unfortunately 36(5) has not been transferred. This requires the Department to "*consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland and undertakes such other consultation as appears to him to be appropriate*". It is important that the profession and key stakeholders have a role in the development of any registration scheme and we would ask the Committee to propose the replication of 36(5) within the draft Bill.

The Department has yet to discuss the matter of registration in detail with the Bar and we would welcome the opportunity. However, we understand that the Department is preparing a public consultation on this matter.

Conclusion

Legal aid has a defining role in upholding access to justice. It affords many individuals access to justice, enabling them to defend themselves and to enforce their legal rights. The administration of the system and its independent decision making processes are vitally important and require robust protection from any form of interference.

As the representative body, the Bar Council would welcome the opportunity to meet with the Committee to further elaborate on this response and the issues contained therein.

Contact for more information:

Victoria Taylor

Research & Policy

The Bar Library

Tel: 028 90562596

Ext: 2596

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Safeguards to Protect the Individual Decisions on the Granting of Civil Legal Aid

Consultation Response

The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

Together with the various specialist Bar Associations, the Bar Council welcomes the opportunity to respond to this consultation which details proposals to alter the status and role of the Northern Ireland Legal Services Commission.

General Points

Legal aid has a defining role in upholding access to justice. It provides many individuals with access to justice, enabling them to defend themselves and to enforce their legal rights. The provision of legal aid is an integral part of an accessible, trusted and effective justice system. Undoubtedly, the present system is facing real challenges, both in terms of expenditure and demand.

The Bar Council agrees that the present system of administering legal aid could benefit from reform to modernise and improve efficiency. The motivation of such reform must be to consider how the system can best be structured so it delivers effective legal services to those who most need them, in a way that is cost-effective and sustainable.

We note from the consultation that the Department undertook a Feasibility Study which involved a detailed analysis of the consequences of a change in status including cost and would welcome the opportunity to review its findings in detail.

The Bar Council recognises the contribution of Executive Agencies in the delivery of executive functions by a well-defined business unit within a framework of accountability to Ministers. However, the Bar Council strongly believes that where there is responsibility for determining the citizen's eligibility for legal aid, it is imperative that such decisions are fair, transparent and entirely independent of government.

If such a change in the current status of the Legal Services Commission is deemed necessary, the Department must ensure that the safeguards currently proposed do not merely have the appearance of but in practice robustly reflect independent decision making.

Do you agree that the proposals in this paper provide adequate safeguards over the award of civil legal aid by an agency of the Department of Justice?

1. Statutory Office Holder

The Bar Council agrees that a reasonable safeguard is ensuring individual decisions are taken by a statutory office holder. However, we would raise issues about the designated role in relation to scrutiny and accountability. Currently, the Chief Executive is accountable to the Commission, which is made up of independent public appointees. As an Executive Agency, the Chief Executive is appointed and reports directly to the Minister and Permanent Secretary. Independence on paper is much easier than independence in practice and under this structure; it is difficult to determine whether true independence from the influence of the Minister and the Department is achievable.

In order to comment further, we require the further detail on how the Statutory Office Holder will undertake determinations for the award of civil legal aid and the measures to guarantee

and protect the independence of the Statutory Office Holder, in particular setting out the specific responsibilities of Ministers.

2. Ministers to provide general guidance and direction on legal aid policy

The Bar Council recognises the role and responsibility of the Minister in setting the policy and legislative context within which the Statutory Office Holder must operate.

3. A requirement for any guidance and direction given by the Minister to be published

The Bar Council agrees that all guidance and direction issued by the Minister must be published. We would welcome the opportunity to discuss how the Department intends to engage with the representative bodies of the legal profession who can be of assistance. The Northern Ireland Legal Services Commission has previously engaged and consulted with the profession prior to the implementation of any new or amended policy, guidance or procedure. The Bar Council would strongly encourage that the input of practitioners is sought and recognised as important in delivering the effective administration of legal aid.

4. Ministers will be specifically prevented from issuing guidance on or direction about the discharge of the Statutory Office Holder's functions in relation to individual cases

This proposal represents a starting point in terms of what would be expected to protect decisions in individual cases. However, the Bar Council is not convinced that this is sufficient to manage the inherent risks and conflicts of interest. It is entirely reasonable that the Statutory Office Holder will be placed in a position where he or she must determine whether an applicant can avail of legal aid to challenge legislation or policy introduced by the Minister on the provision or adequacy of legal aid.

5. A robust and independent appeals mechanism will be established to consider appeals against individual decisions

The Bar Council strongly supports the introduction of a robust and independent appeals mechanism. However, whilst recognising the value in the contribution of lay persons, we strongly recommend that these panels consist of legally qualified individuals. It is vitally important that the membership of such panels consist of currently practicing practitioners who are aware of the developments and trends within their area of law.

Feedback from members has indicated that in the past two years, the current panels were reduced from seven in size to five and the pool of expertise and knowledge has been reduced by these actions. For example there is only one member with family expertise in one panel, whilst the quorum is three so there is a serious risk that the dilution of expertise will result in erroneous results.

The current system in which a generic decision of refusal is given would be much improved if applicants were given some form of proper, reasoned explanation for refusal. A proper written refusal would most likely reduce the number of appeals as many applicants may accept same if given a coherent reason for refusal. It may also speed up those appeals which eventually take place as appellants would have focused in advance on the relevant reasons of refusal and are prepared to address those at the appeal.

The Bar Council does not agree that appeal hearings should automatically be on the papers as this provides no opportunity to interrogate the reasons for refusal or elaborate on the grounds for appeal. It is in the public interest that an appellant should be able to request an oral hearing if the appellant considers same necessary.

It is not stated within the consultation paper whether under these proposals the Department would intend to provide any special appeal mechanisms when the application relates to the challenge of an government decision or more specifically, a challenge of a Department of Justice decision.

Conclusion

There are a number of issues within the consultation which would benefit from further discussion in terms of their practical outworking and we would welcome the opportunity to meet with the Department in due course.

We are aware that this change in status has recently taken place in England and Wales with the Legal Aid Agency becoming an executive agency of the Ministry of Justice from 1 April 2013, following the enactment of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. It may be useful to monitor whether these proposals work in operation before proceeding with the change in this jurisdiction.

The Bar Council recognises the potential benefits for the Department in the reduction in corporate costs and improvement in efficiency which may be derived from changing the status of the Legal Services Commission. However, the provision of adequate safeguards which not only preserve independence but publicly demonstrate independence is fraught with difficulties. The Bar Council is not convinced that sufficient safeguards exist so as to give the public and the profession confidence that the decision making and administration of legal aid is suitably independent.

Castlereagh Borough Council



Joan McCoy MBA
Acting Chief Executive

Castlereagh Borough Council

Stye Braes o Ulidia Burgh Council

Civic & Administrative Offices
Bradford Court, Upper Galwally
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Ms Christine Darrah
The Committee Clerk
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

9 April 2014

Our Ref: 01/CEP090414/02

Dear Ms Darrah

Legal Aid and Coroners' Court Bill

I refer to your letter of 4 April 2014 regarding the above.

Having consulted with the Council's Registrar, the Council would be of the view that the proposed amendment to the above bill would be welcome as it would put in place a more structured process for dealing with medical errors which result in death. Our Registrar is of the view that it adds to the bereaved relative's pain when an acknowledgement of medical mistakes is not forthcoming and that greater transparency in the process is a positive step.

If you require any additional information then please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Joan McCoy'.

Joan McCoy
Acting Chief Executive

Cc: Registrar; Administration Manager; Acting Director of Administration and Community Services

Children's Law Centre

Dear Ms Darragh,

Further to your letter of 4th April 2014 I am writing to advise you that the Children's Law Centre gave detailed consideration to your request for written submissions to the Committee for Justice regarding the Legal Aid and Coroner's Bill.

We reviewed the Draft Legislation and Explanatory Memorandum as well as the summary of responses provided by the DOJ in respect of a previous consultation around the inclusion of safeguards to protect decision making by the Director of the Executive Agency on individual grants of legal aid. Having considered this information, CLC is satisfied that the legislation reflects the independent role of the Executive Agency from the Department in considering individual legal aid applications and also note that an Appeals procedure has been developed within the legislation, introducing a panel of 3, including one legally qualified member. This appeal procedure appears to be reflective of the recommendations of the Access to Justice Review team.

We have not identified any other aspects of this Bill that require particular scrutiny or commentary by CLC and therefore CLC wishes to decline your invitation to make written submissions to the Committee for Justice in this instance.

We thank you for the opportunity to respond to this draft legislation.

Yours sincerely,

Kathryn

Kathryn Stevenson

Head of Legal Services

Children's Law Centre
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Fax: 044 28 90 245 679

Information Commissioner's Office



Upholding information rights

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Tel. 0303 123 1114
www.ico.org.uk

Ms Christine Darrah
Clerk to the Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

24 April 2014

Dear Ms Darrah

The Legal Aid and Coroners' Courts Bill introduced into the Northern Ireland Assembly on 31 March 2014 ('the Bill')

The Information Commissioner regulates, inter alia, the Data Protection Act 1998 (the DPA) and the Freedom of Information Act 2000. On his behalf, I am pleased to provide a written submission to the Justice Committee in relation to the above Bill and also a response to the proposal highlighted from the Attorney General in Northern Ireland. The comments below are limited to aspects of the Bill which relate to information rights in general and to our regulatory responsibilities in particular.

The Bill

The Bill provides for the dissolution of the NI Legal Services Commission and for its functions to be transferred to the Department of Justice and to a Director of Legal Aid Casework designated by the Department. The transparency afforded by the statutory requirement for the Department of Justice to publish directions and guidance given to the Director of Legal Aid Casework in respect of his functions as laid out in s3(3) is welcomed. The requirement under s4(1) for the Director to produce an Annual Report to be laid before the Assembly is also welcomed.

The Schedules to the Bill cover matters relating to the transfer of assets, liabilities and staff of the Commission to the Department (Schedule 1), various amendments to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (NI 8) (Schedule 2) and a number of repeals (Schedule 3).

Information Commissioner's Office (Head Office)
Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF
Tel. 0303 123 1113 Fax. 01625 524510



Schedule 1 - Transfer of Assets, Liabilities and Staff of Commission

I have no comment to make on the proposals contained in Schedule 1 other than to welcome the requirement under Section 4 for the Department to lay before the Assembly, and thereafter publish, a report on how the Commission carried out its functions in the final period.

There are practical matters related to the transfer of records from the Commission to the Department which need to be considered in advance of the dissolution date. The ICO will contact both the Commission and the Department regarding this and will provide advice as necessary.

Schedule 2 -Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (NI 8)

The statutory bar on the disclosure of information contained within draft Article 38A of the Order is noted. The bar will not apply where the consent of the person who provided the information has been obtained or unless permitted by rules made under Article 36. Information which is contained in an anonymised form and information relating to grants, loans and payments made to any person or body is also exempted from this bar.

It is recommended that unless otherwise contained in legislation, the Bill is amended to require that the rules made under Article 36 be published.

Amendment proposed by the Attorney General

It is noted that the Attorney General for Northern Ireland has proposed that the Bill should be amended to extend his powers under the Coroner's Act (Northern Ireland) 1959 to allow him to obtain papers relevant to exercising his existing power to direct an inquest where he considers it advisable to do so. The Attorney General has indicated that his principle focus would be in relation to deaths which occur in hospital or where medical error may have occurred.



Although a substantial amount of the information sought by the Attorney General will relate to deceased persons and be of no relevance under the DPA, other information may be personal data relating to family and friends of the deceased as well as to medical staff. Given the public interest involved and the difficulties which the Attorney General has found in obtaining the papers or other information, it would appear appropriate to invest an explicit power on him and provide a statutory basis for disclosure. However, consideration should be given to limiting such power solely to cases involving deaths which have occurred in hospital or where medical error is thought to have led to a death.

I trust you find this submission helpful and please do not hesitate to contact me should you wish to discuss it in any more detail.

Yours sincerely



Dr Ken Macdonald
Assistant Commissioner for Scotland & Northern Ireland

KRW LLP

LEGAL AID AND CORONERS' COURT BILL (33/11-15)

Submissions made by KRW LLP

1. KRW LLP make the following submissions in response to the call for evidence made by the Committee for Justice of the Northern Ireland Assembly in its scrutiny of the Legal Aid and Coroners' Court Bill 2014 (33/11-15).
2. Our submissions concern the provisions of the Bill in relation to the dissolution of the Northern Ireland Legal Services Commission (NILSC) and the creation instead of a Director of Legal Aid Casework within the Department of Justice. Therefore, we limit the scope of our submissions to Part 1 of the Bill.
3. Our submissions are in two parts. First, regarding the schema proposed in the Bill and issues of independence and human rights compliance in relation to the creation of the new office of the Director of Legal Aid Casework within the Department of Justice. Second, regarding the schema proposed in the Bill and the specific matter of the conflict related legacy cases particular to aspects of litigation in Northern Ireland as part of dealing with the past in Northern Ireland in accordance with human rights compliance jurisprudence.
4. We note that Part 1 of the Bill mirrors in part those provisions in relation to the creation of the office of the Director of Legal Aid Casework of the Legal Aid Agency for England and Wales within the Ministry of Justice introduced through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LAPSO).
5. We request that the Committee of Justice take note of the many concerns expressed when that legislation was being processed through the Houses of Parliament and reflect on these concerns in its scrutiny of the proposed Legal Aid and Coroners' Bill for Northern Ireland as many of those concerns are similar to those we hold.
6. We request also that the Committee of Justice further reflect on the particular circumstances of Northern Ireland in relation to litigation issued, pending and proposed in relation to the conflict related legacy cases both of the families of the deceased victims of the conflict and those surviving as the injured of the conflict.
7. At this juncture we point out that the juridical mechanisms for dealing with the past in the Northern Ireland – the legacy cases of conflict related deaths and injury – have been and continue to be subject to judicial challenge to ensure human rights compliance and common law probity. We specifically draw your attention to the 'package of measures' accepted by the Council of Ministers of the European Union following the *McKerr* group of judgments of the European Court of Human Rights (ECtHR): OPONI, PSNI HET, the coronial process and inquiries. This is out with any future proposed mechanism which may be legislated for including the Historical Investigations Unit as proposed to the Northern Ireland Executive (NIE)/OFMDFM by the Panel of Parties (Haass) in its Proposed Agreement of 31st December 2013.
8. The legacy of conflict related violence is, as the Committee of Justice is acutely aware, specific to Northern Ireland and a mirror Bill to legal aid provision arrangements in England and Wales – which was not passed without criticism and opposition – should not pass

without intense scrutiny including broader political considerations as to how to litigate the past in the Northern Ireland and how this can be achieved with appropriate systems and resources in a human rights compliant manner which offers truth and justice to both all the bereaved families of the victims and survivors of the conflict who are forced to resort to litigation in the absence of agreed political alternatives which are human rights compliant.

The Dissolution of the NILSC and the creation of the Director of Legal Aid Casework

9. The Bill proposes the dissolution of the NILSC and the creation of a Director of Legal Aid Casework within the Department for Justice of Northern Ireland similar to the Director of Legal Aid Casework (the Legal Aid Agency) within the Ministry of Justice of England and Wales.
10. Provisions on the administration of legal aid and litigation funding engage serious issues of access to justice. We recognise that access to justice is a fundamental human right recognised in common law, the European Convention on Human Rights (ECHR), the EU Charter of Fundamental Rights and in other international human rights instruments. An understanding of the context of access to justice within a society is therefore essential to any policy or legislative consideration of how access to justice can be secured for all and efficiently financed and appropriately resourced.
11. We are not blind to the economic drivers at work in political decision making relating to the legal aid budget in Northern Ireland but we are aware that resource arrangements must be balanced by human rights considerations and jurisprudential obligations within that balance. This is particularly so in litigation around the conflict related legacy cases. We note that, as the Committee of Justice will be aware, much conflict related litigation has been bought about because of state failings to expedite dealing with the past through the mechanisms available or through its own mindful deliberation to create a conflict related litigation surplus.
12. In Northern Ireland in relation to the conflict related cases it is especially pertinent that those affected by the conflict and seeking access to justice should have the financial provisions available to do so if they do not have independent means to do so for themselves. We would add the caveat that all those affected by the conflict no matter of what means should receive the support of the state and that the relevant institutions of the state should be effectively resourced so to discharge the investigatory procedural obligations arising under Article 2 (right to life) and Article 3 (prohibition of torture, inhuman and degrading treatment) of the ECHR. Without effective resourcing of the means to investigate the conflict related legacy cases of the dead and injured then litigation when systems fail will be an inevitable consequence thus further delaying truth and justice. This was most recently addressed in the judgement of Stephens J in *Jordan* [2014] NIQB 11 at paragraph 125 (o) (v).
13. We would specifically identify the coronial process in Northern Ireland and the litigation resource surplus generated by state failings to engage with it or to resource it so that it can discharge its functions in a human rights compliant manner including the demand for openness, promptness and with victim participation. Our point is that an adequately resourced office such as that of the Coroners Service for Northern Ireland able to prosecute its duties promptly, efficiently and inclusively would avoid generating further legally aided challenges for its failings. Similar arguments would apply to the Historical Directorate of

OPONI. The state's insistence on defending all judicial review challenges in this area of the legacy of conflict related deaths and injuries serves to generate further budgetary strain on the allocation of legal aid (if policing the past in Northern Ireland is estimated to be £30 million by the Northern Ireland Criminal Justice Inspectorate then the question must be asked of the Northern Ireland Executive – and the Secretary of State for Northern Ireland – what is cost of defending all legacy related litigation across the spectrum?) The proposed Bill does nothing to allay this problem and in fact may exacerbate it for reasons we lay out below.

14. The NILSC is a non-departmental public body. It therefore has the importance of being independent from the executive arm of the state. The Bill abolishes the NILSC and transfers to the Department of Justice the day-to-day administration of legal aid allocation decisions in Northern Ireland. In practice this function will be carried out by civil servants in an executive agency of the Department of Justice. The Department of Justice, in effect the Minister of Justice, is placed under a duty to secure that legal aid is made available in accordance with the provisions in the Bill. Decisions on legal aid in individual cases will be taken by a civil servant designated by the Minister of Justice as the Director of Legal Aid Casework.
15. Under the Bill Article 3(a) and (b), the Minister of Justice has the power to issue guidance and directions to the Director of Legal Aid Case Work about the carrying out of the Director's functions, and the Director is under a duty to comply with the directions and to have regard to the guidance. Although the Bill expressly prevents such guidance and directions from being issued in relation to individual cases (Article 2(a) and (b)) there is nothing in the Bill to prevent the Minister of Justice from issuing such guidance or directions in relation to categories of cases, for example, judicial review, in which the Northern Ireland Executive and Assembly would clearly have a direct interest thus giving rise, in our opinion, to a conflict.
16. During the passage of LAPSO, the Law Society of England and Wales commented on this lack of independence in the following terms which we consider apposite to the proposed Bill for Northern Ireland: "a gatekeeper who is answerable to the Secretary of State does not have sufficient impartiality to enable their decisions as to the grant of legal aid to comply with Article 6 ECHR" (letter from the President of the Law Society of England and Wales to the Chair of the Joint Committee on Human Rights (JCHR) 10 November 2011 and cited in the JCHR Legislative Scrutiny Report of the LAPSO Bill: see: [JCHR](#)) Article 6 of the ECHR is the right to a fair trial and due process thereon.
17. It is not clear how the independence of the Director of Legal Aid Casework will be achieved given the proposed schema and we request that the Committee of Justice request clarification from the Department of Justice and at least achieve some minimal level of assurance as to practical protocols, procedures and systems to maintain the necessary degree of rigorous independence required for this key law office post in Northern Ireland.
18. Regarding the potential for a conflict of interest in judicial review cases it will be important, if the Bill proceeds in its present form, that the Northern Ireland Executive maintains a policy that in proceedings where the litigant is seeking to hold the state to account by judicial review, provisions will be retained within the scope of civil legal aid to enable such litigation and that the Director of Legal Aid Casework be required to determine whether an individual

qualifies for funding for a judicial review in accordance with the provisions in the Bill and applying the relevant financial eligibility and merits criteria, and in line with any published guidance and directions.

19. However, even if the Northern Ireland Executive were to adhere to such a policy in relation to judicial review (and in terms of the conflict related legacy cases this would be further complicated when respondent notice parties in litigation could include the Secretary of State for Northern Ireland, the Ministry of Defence *and others*) the problem remains that the Director of Legal Aid Casework will be a civil servant bound by the Northern Ireland Civil Service Code of Ethics which sets out the constitutional framework within which he/she works. Civil servants owe their loyalty to the duly constituted Executive and are accountable to the Minister responsible for their Department. The same consideration will apply to the Department of Justice civil servants who will be provided to the Director of Legal Aid casework: even if accountable to the Director when exercising functions delegated to them by the Director, they are ultimately accountable to the Minister for Justice, and will, moreover remain directly accountable to the Minister for Justice in respect of all their other functions as civil servants.
20. Notwithstanding our concerns about the lack of institutional independence of the Department of Justice civil servant who will be responsible for administering the legal aid scheme in Northern Ireland, the Bill does not contain any right of appeal to an independent body against a determination by the Director of Legal Aid Casework of whether a person qualifies for legal aid. We are concerned that the absence of such a provision when a legal aid decision which may lay against the state, for example in terms of a breach of an Article 2 conflict related legacy case when state collusion is in issue, has been *ipso facto* determined as not eligible by the state, out with any equality of arms issue, may be incompatible with Article 6 of the Convention: see *MAK and RK v UK* (45901/05 and 40146/06 (23 March 2010)).
21. *MAK and RK v UK* makes clear that there must be sufficient guarantees against arbitrariness in the legal regime governing determinations of entitlement to legal aid in order for that regime to be compatible with Article 6. We are of the view that in the absence of requisite independence in the proposed office of the Director of Legal Aid Casework and in the absence of an independent appeal mechanism against an individual legal aid eligibility decision the proposed system is compromised by arbitrariness ultimately vested in the Executive arm of the Northern Ireland constitutional arrangement.
22. Under the Scheduled of Amendments to existing legislation (Section 6 of the Bill), The Access to Justice (Northern Ireland) Order 2003 (NI 10) Article 12A is amended to bring into the proposed Bill matters relating to exceptional funding provisions. It will be recalled that the state has a responsibility to ensure that legal aid is available to secure access to justice for those with insufficient resources (we note our caveat on this resource issue above regarding the conflict related legacy cases) in relation to legally complex disputes including matters of human rights (Article 12A (3) (a) (i) (ii) (b)) specifically regarding legal representation at inquests).
23. We are not convinced that under the proposed scheme exceptional funding decisions made by the Director of Legal Aid Casework within the Department of Justice will be necessarily prompt and fair given the compromised nature of the position (for example in themed or

linked applications relating to the conflict related legacy cases) or subject to interference because of policy guidance compliance strictures or directions as issued by the Department as proposed under Article 3 (a) and (b) of the Bill. We address this concern further below in relation to the particular circumstances of Northern Ireland and the conflict related legacy cases.

24. We note that in relation to exceptional funding Article 10(A) (2) (b) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 remains in force: "10A. (1) The Lord Chancellor may by direction require that legal aid is to be available in connection with excluded proceedings in circumstances specified in the direction. (2) If the Commission requests him to do so, the Lord Chancellor may authorise legal aid to be available in connection with any proceedings (whether excluded proceedings or not) — (a) in circumstances specified in the authorisation; or (b) in an individual case so specified." This decision now taken by the Minister of Justice under devolved powers would remain challengeable by way of judicial review as it is an Executive decision.
25. Regarding the particular circumstances of Northern Ireland it will have become clear from the thrust of these submissions on the Bill that we are concerned that the provisions of the Bill are unsatisfactory when considered in relation to the conflict related legacy cases and prospective litigation thereon in the absence of alternative human rights compliant mechanisms of truth recovery, justice and accountability. We forward this as a reason to oppose the Bill on the following points:
- Recent events in Northern Ireland including the failure to secure the political consensus of the main political parties on the Proposed Agreement of the Panel of Parties (Haass) on dealing with the legacy of the past in Northern Ireland, the recent judgment in *Jordan* [2014] NIQB 11 (see: *Jordan*) and the revisiting of controversial On the Run (OTR) policy in the wake of the *Downey* judgment (see: *Downey*) judgment make us minded to venture that conflict related legacy litigation is a key aspect in the present dealing with the past matrix for many bereaved families and victim survivors.
 - Recent comments by the Attorney-General and a previous Secretary of State for Northern Ireland regarding conflict related prosecutions compound our concerns particularly since the comments of the Attorney-General and his refusal in a number of section 14 new inquest applications into collusion/British army killing cases appear to be a fettering of his own jurisdiction and ousting the authority of the Public Prosecution Service.
 - The most recent comments of the incumbent Secretary of State for Northern Ireland (16 04 14) raise further concerns regarding the state's acceptance of its role in the conflict, specifically in terms of collusion/shoot-to-kill and its apparent derogation of its procedural investigatory obligations under Article 2 of the ECHR.
 - This being the case we cannot advance support for a Bill which in effect brings legal aid decision making, so crucial to those victims and survivors who want to litigate about the past to obtain truth, justice and accountability, into the sphere of the Executive without proper independent accountability or an acceptable independent mechanism to appeal against its decisions.
 - To establish the office of Director of Legal Aid Casework within the Department of Justice, accountable as a civil servant and charged with compliance with directions

and having regard to guidance from the Department of Justice will, in our opinion, give rise to a conflict of interest.

This will be particularly so when the Department of Justice is joined as a respondent in conflict related legacy litigation. We envisage that when Article 2 (right to life) of the ECHR is engaged, as in many conflict related legacy cases, and the state is tasked with discharging its procedural obligations to investigate following such a breach/violation in compliance with both domestic and Strasbourg jurisprudence, then legal aid funding decisions as a part of a matrix of public resource policy (and there could be multiple such applications depending on the complexity of the case, taking account of themed/systemic/linked applications including state collusion, public interest disclosure and PII challenges and so forth) will be a key point of contest and to ensure probity and fairness the office making these key legal aid funding decisions must be independent from the Executive arm of the state.

We are minded to remind the Committee of Justice of the problems around independence which surround the operation of the PSNI HET and which have manifestly undermined its credibility as a conflict related legacy case review mechanism.

- The devolution of policing and criminal justice to Northern Ireland following the Hillsborough Agreement of 2010 (excluding matters of national security) is a relatively recent constitutional development as part of the Belfast/GFA 1998. We are of the opinion that this Bill has been proposed too early for the Assembly in light of the continuing debate regarding dealing with the legacy of the conflict including recent events noted above. Victims of the conflict, the bereaved and survivors, who want to undertake publically funded litigation including against the state, must be able to do so secure in the knowledge that their applications for legal aid are being decided by a rigorously independent authority given the severity of the issues for themselves and for society in post conflict Northern Ireland, distinguishable from political, constitutional and economic factors applying to England and Wales. We therefore oppose the introduction of Part 1 of the Legal Aid and Coroners' Bill.

KRW LLP

LEGAL AID AND CORONERS' COURT BILL (33/11-15)**Supplementary Submissions made by KRW LLP**

1. We note from the Committee of Justice website the following request made to the Committee on the foot of the Legal Aid and Coroners' Bill (33/11-15) by the Attorney-General:

“The Committee has also received a proposal from the Attorney General for Northern Ireland for a potential amendment to the Bill. The Attorney General has the power under section 14(1) of the Coroners Act (Northern Ireland) 1959 to direct an inquest where he considers it ‘advisable’ to do so but has no powers to obtain papers or information that may be relevant to the exercise of that power. He has experienced some difficulty in recent years in securing access to documents that he has needed and the proposed amendment to the 1959 Act would confer a power on the Attorney General to obtain papers and provide a clear statutory basis for disclosure. He has indicated that the principle focus of his concern is deaths that occur in hospital or where there is otherwise a suggestion that medical error may have occurred. The Committee would also welcome views on the inclusion of such a provision in the Bill.”
2. Whilst the proposal of the Attorney-General has a principal focus we consider that it has broader effect especially in relation to the conflict related legacy cases. We note that when considering whether to order a fresh inquest under section 14 (1) of the Act those bereaved victims in a conflict related application for a fresh inquest (compliant with Article 2 (right to life) of the ECHR) are assisted if they can furnish the Attorney-General with the original inquest papers which can inform his decision.
3. We therefore support the proposal of the Attorney-General on the proviso, as he suggests, of a clear statutory basis for disclosure. Our request is that should an Article be drafted to legislate the proposal of the Attorney-General or amend the existing legislation then there should be provisions in place that disclosure of material directly relating to the deceased is automatically made to the families of the bereaved being so considered for a new inquest by the Attorney-General to comply with the next of kin participation requirement of the Article 2 procedural investigatory obligation arising following a breach. This would be in the form of a presumption of disclosure following an Article 2 assessment of risk by the Attorney-General.

KRW LLP



ROSALIND JOHNSTON LLB
SOLICITOR TO THE CORONERS FOR NORTHERN IRELAND

Mr David Ford MLA
Minister for Justice
Department of Justice
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Stormont Estate
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6th May 2014

Dear Minister

Re: Stalker/Sampson Related Inquests

Thank you for your letter of 8th January. The Senior Coroner is grateful to you for taking the time to consider his stated observations and requests. You correctly detected a not inconsiderable amount of frustration on the part of the Senior Coroner. He has been endeavouring to hold these Inquests for many years. It should be viewed as an enormous source of embarrassment to the State that these Inquests have not been held. He instructs me that he has done his best to cajole and persuade those who, at one level, hold the key to the holding of the Inquests - PSNI and Court Service - to provide the necessary resources in terms of funding, personnel and practical arrangements. Ultimately, the question of their (and his) resourcing lies with you, at least in as far as National Security is not being asserted. In that regard, resourcing clearly becomes a matter for central government and the Coroner would wish to be assured that you have pursued this with the Secretary of State and/or other individuals with particular responsibility in respect of the assurance of Article 2 compliance. The Senior Coroner, himself, intends to pursue this matter directly with central government as a means of assuring that sufficient resourcing will be provided to allow him to fulfil his obligation to hold Article 2 compliant Inquests in these matters.

The Senior Coroner is of the view that the Inquests are being funded on a drip feed basis and that there is no demonstrable commitment to ensure that these Inquests are properly resourced and otherwise facilitated so that they can take

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place timeously. In the meantime, the families of the deceased and the witnesses age, and many have already died without these Inquests having been heard. The delay for the families of the deceased and for many of the witnesses involved must be nothing short of intolerable. Neither is the public interest, more broadly, served by the state of affairs which has been allowed to pertain.

The Senior Coroner has also asked me to make the following points arising from your most recent correspondence:

(a) Your correspondence stated that the PSNI has carried out a review of the resourcing structure for the Legacy Support Unit and has identified additional resources. It remains the Senior Coroner's view, however, that the additional resourcing indicated to date is inadequate for the task in hand. The disclosure exercise, in respect of the currently presented PSNI Stalker Sampson archive, even with the additional resources in place, will apparently still not be complete for a number of months and, at the current rate of progress, the final timescale, judging from past experience, remains uncertain. In terms of trying to book Courthouses, to ensure witness availability and to address all of the attendant issues that fall to be considered by this office, this is a wholly unsatisfactory position.

(b) The current arrangements that exist for the sharing of information between Senior and Junior Counsel for the Senior Coroner is wholly inadequate. The position that we have at present is that Junior Counsel is working on a full time basis and this is essential work which shall continue. At a point in time Senior Counsel will be required to commit full-time to the preparation and presentation of the Inquests. This point will only be reached when we are sufficiently far on with the disclosure issues and can meaningfully identify a point in time when the Inquests shall take place. In the meantime, Senior Counsel has continued with his other work and advises the Senior Coroner and his team strategically as well as conducting reading as time allows. However, it should not be his role to duplicate the work of Junior Counsel, particularly in relation to the reading of disclosure. He needs, however, to be briefed by Junior Counsel as to the unredacted content of the disclosure and to advise both as to the content of material and strategically. It is this point of communication that is impossible on a practical basis as the permitted level of contact between them, given the restrictions imposed by classification of this material as Top Secret, does not take account at all of the method by which Junior and Senior Counsel must work in order to do their work in an efficient and cost effective manner. In the context of the efficient use of budgetary resources, the present attitude of the PSNI to the classification of the Stalker/Sampson material is only serving to drive up costs, not reduce

them. This problem has been longstanding, and has been raised with PSNI, who advise they can declassify no faster than the disclosure exercise allows. The Senior Coroner will bring this issue up again with the Head of the LIU, as you suggest, but you do need to be aware of the problem.

(c) The Senior Coroner remains deeply frustrated by the absence of an appointed Investigator. It is essential that this role is filled as early as possible. In the context of Article 2 compliant Inquests, there is no scope for any argument over budgetary constraints. The Senior Coroner has been actively seeking the appointment of an Investigator for going on three years and, while he appreciates the need for any appointment to follow a transparent and fair process, the reality is that he needs to ensure that all the evidence has been reviewed in light of modern day policing standards and this cannot happen until the Investigator is appointed. This Office has indicated the need for such an appointment for several years now and resources should have been in place to allow me to move directly to this appointment at the point it was required. Instead, the process currently embarked upon is highly bureaucratic and overly attenuated, with the practical effect being that we are still some considerable way from a substantive appointment – with a lack of clarity still hanging over the appropriate method to be deployed for the appointment process itself. This situation is clearly untenable, and meanwhile, valuable time is being wasted and evidence likely deteriorating further.

(d) You have raised budgetary issues and value for money issues and it is appreciated that money is not plentiful currently. It has to be stressed, however, that the obligation of the Senior Coroner's office is to satisfy an unconditional obligation imposed on the United Kingdom to carry out an Article 2 Investigation into the circumstances of these deaths. It is not a task that can be avoided because there is no or insufficient money. Nor can judicial directions in terms of ensuring compliance with this obligation be deemed subject to a business case to the point of becoming lost in a mess of bureaucratic wrangling. Money has to be prioritised to the completion of these Inquests. Otherwise, the further sanction of the European Court of Human Rights awaits. The Senior Coroner is determined to ensure that if an enquiry into the conduct of those responsible for the discharge of the State's obligation occurs, there can be no doubt that he has set out continuously his dissatisfaction over the resourcing and other issues which have prevented such Inquests occurring before now.

The Senior Coroner has asked that you take these observations and expressed deep concerns into account in ensuring that your Department provides the necessary resources to the PSNI and to Court Service and to the Legal Services

Commission to enable these important Inquests to take place timeously, and also that you press central government to address relevant issues which come within their purview in these and other regards.

He awaits your further assurances such as to indicate that real progress is being facilitated.

Yours faithfully

Cathy McGrann

Cathy McGrann
Solicitor

CC:

Interested Persons

Mr Justice Weir

Ms Laurene McAlpine, OLCJ

Ms Jacqui Durkin, NICTS

Mr Peter Luney, NICTS

Brian Grzymek, DOJ

Dr Jane Holmes, Coroners Service

Law Centre (NI)

Les/Email/2014/email to committee for justice – 25 Apr 2014
Email to committee.justice@niassembly.gov.uk

For the attention of Christine Darrah

Dear Christine

Thank you for your letter dated 4 April 2014 seeking comments on the Legal Aid and Coroners' Courts Bill. I have set out the Law Centre's comments below:-

Legal Aid Part 1

The provision to designate a director of legal aid casework is identical to provisions contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced in England and Wales. The Westminster joint committee on human rights reported that it was not satisfied that the legislation in Britain provided sufficient institutional guarantees that the independence of the proposed director of legal aid casework would not be compromised. In particular, the committee was concerned about preventing any conflict of interest arising when making decisions about the availability of legal aid to challenge decisions of the government. These concerns were subsequently rejected by the government.

We share two concerns about the independence of the director of legal aid casework. The first is around challenges to government and the second is around cases which may have significant financial consequences to the legal aid fund (for example, a lead public interest case where many other cases may follow). The provisions as drafted provide that the Director is legally obliged to comply with directions given by the Department, while the Department must not provide a direction or guidance in relation to an individual case. This does not appear to preclude any direction on a class of cases. At the same time, the Department must ensure that the Director acts independently when applying a direction or guidance in relation to an individual case.

On our reading of the legislation there appears to be no impediment to the Department instructing the Director of Legal Aid Casework in a way which restricts decision-making across a class of cases which will impact indirectly on a particular case without addressing the specific case itself.

We would therefore suggest the following amendments.

To clause 3 line 27 by adding after functions the words
'save where this compromises the director's independence'
to clause 3 line 32 after the word case add the words
'or to a class of cases where it unreasonably impinges on the Director's ability to act independently in an individual case'.

These amendments should provide further safeguards to the independence of the Director of casework.

We welcome the Department's commitment to publish any directions or guidance. Nonetheless, we would suggest that the committee obtain an unambiguous assurance as to where the directions and guidance will be published so that it is clear that such directions and guidance are made widely available and accessible to interested parties.

The annual reports of the Legal Services Commission have regularly been published more than 12 months after the end of the relevant financial year covered by the report. As a result, we would suggest an amendment to clause 5 line one after the word practicable add

"and in any event within nine months'.

This will copper fasten the commitment to provide a timely report.

Coroners' Courts

We welcome the clause to make the Lord Chief Justice the President of the coroners' court.

We would also support the proposal of the Attorney General to provide an additional power to access documents. Deaths in hospital or after treatment are cases that regularly proceed to inquests. The recent experience of public enquiries has been that it is not always easy to access all relevant material in a timely and straightforward manner. In the interests of openness, administrative and financial efficiency we would support a clause enabling the Attorney General as an independent law officer to obtain all papers. We would not circumscribe this power to cover only deaths that occur in hospital in recognition of the fact that the principles enunciated above apply in other deaths that may fall within the ambit of the Attorney General's powers to direct an inquest.

I hope this submission is of some assistance to the committee in their deliberations.

Yours sincerely

Les Allamby

Director

Law Centre(NI)

The Law Society of Northern Ireland



Committee for Justice: Call for Comments on the Draft Legal Aid and Coroners' Courts Bill

Response of the Law Society of Northern Ireland

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Introduction

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

The Society represents over 2,600 solicitors working in some 530 firms, based in over 74 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients in legal matters, government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

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

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

April 2014

Introductory Remarks

- 1.1 The Society welcomes the invitation from the Committee for Justice to make comments on the draft provisions of the Legal Aid and Coroners' Courts Bill. This is an important piece of legislation and the Society aims to make a constructive contribution to the Committee's deliberation on the issues raised by the draft Bill and subsequent Regulations bringing its provision into force. The Society has a number of concerns and observations about the proposed new legal aid arrangements as described in the draft Bill and Schedules set out and we address each of these below.

Independence of the Director of Legal Aid Casework

- 2.1 The Society made representation in its response to the initial consultation on the conversion of the NILSC into an Executive Agency that the statutory safeguards concerning the independence of decision-making by the new Director of Legal Aid Casework did not go far enough.

- 3.1 In respect of clause 2, the Department has not taken on board the concerns of the Joint Committee on Human Rights in England and Wales about the designation of a Departmental official as Director of Legal Aid Casework. It was felt that the adherence of such an official to the Civil Service Code pledging loyalty to the Minister of State effectively trumped the practical arrangements for independence. In that regard, it is disappointing that the Department did not consider giving this role to an externally recruited figure, preferably someone with experience in civil justice matters.
- 4.1 Clause 3 (1) of the draft Bill places the Director under a statutory duty to comply with directions and have regard to guidance given by the Department, subject to clause 3 (2) which provides that there must not be directions about decisions in individual cases. The clause is silent however in relation to attempts to influence decision making in classes of cases. This is important as it is vital in terms of securing independence that the Bill prevents the potential for political interference in the patterns and norms of decision-making in respect of legal aid.
- 5.1 It is also questionable whether the requirement for the Director to comply with guidance requires to be set out explicitly on the face of the Bill. Drafting the Bill where this appears as the first clause arguably places the primary duty of the Director as obedience to Departmental direction, rather than to the impartial application of consistent principles in relation to legal aid decision making. The Society considers that this arrangement removes the judicious distance provided by separation of the legislative power to determine broad principles of decision making from the operational responsibility for providing legal aid in a just manner which preserves access to justice for all.
- 6.1 The importance of independence is of more than theoretical significance. The European Court of Human Rights in the *Del Sol V France*¹ case heard a case in which it was alleged that a refusal to grant legal aid constituted an infringement of the applicant's rights to a fair hearing under Article 6 (1) ECHR. Although it dismissed the application in the particular circumstances of that case, the Court said the following about the administration of legal aid:
- "...the Court considers it important to have due regard to the quality of a legal aid scheme within a State. The scheme set up by the French legislature offers individuals substantial guarantees to protect them from arbitrariness."*²
- 7.1 The above judgment demonstrates that the qualities of a legal aid scheme, including the degree of independence and provision for effective appeals against decisions taken are relevant to the compliance of that scheme with Article 6 ECHR. Given the potential deficiencies in terms of the preservation of independent decision-making identified above, the Society is of the view that the Department and the Committee may wish to look at amendments to this clause to ensure compliance with the ECHR.

Statutory Exceptional Grant Scheme

- 8.1 In the case of the Statutory Exceptional Grant funding provision, which is covered in the Schedule to the Bill under the proposed new Article 12A of the Access to Justice (NI) Order 2003 (the 2003 Order), the importance of independence in decision-making is paramount. The Society stated in its response to the initial consultation by the Department on these issues that caution should be taken in ensuring the effective operational independence of decision making in Inquest/legacy cases and civil actions in terrorist cases. This is particularly the case in a post-conflict society in which the application of clear, consistent and impartial legal principles to some controversial cases is necessary to ensure widespread confidence in the administration of justice.

1 [2002] App Nr 46800/99

2 Ibid at paras 25 & 26

Legal Aid Appeals Panels

- 9.1 The Society welcomes the fact that the Department has moved away from the original proposal for a single member appeals process proposed in the initial NILSC consultation, in line with the Society's concerns at the time. We considered that a single member panel was more vulnerable to accusations of bias and arbitrariness than a multi-member panel and this safeguard is welcome.
- 10.1 Paragraph 6 (22) of Schedule 2 amends the 2003 Order to provide powers for the Department to make Regulations for the composition of a multi-member appeals panel with a Presiding Member. It does not state that such panels will be composed of externally recruited lawyers, considered by the Commission as a vital safeguard in terms of independence. Such indications as the Department has given are that the Presiding Member or Chair will be legally qualified but that the other members may be lay in a mixed panel.
- 11.1 Given the need for knowledge of the legal issues involved in legal aid appeals and the failure to require that the Director has a background in civil justice affairs, the new arrangements may be lacking in the expertise and distance necessary to create a balanced, arms-length relationship between the Department and the new agency. The Society is of the view that paragraph 6 (22) of Schedule 2 should specify that appeals panels will be made up of a majority of legal members, with provision for the third member of that panel to be drawn from other relevant backgrounds.
- 12.1 Paragraph 6 (22) of Schedule 2 also contains a provision stating that oral appeals will be available only in circumstances to be prescribed in the Regulations to follow under the proposed new Article 20A (2) (f) of the 2003 Order. The Society stated in its response to the initial NILSC Consultation that provision should be made for oral appeals when it is considered that the complexity of the circumstances render this appropriate.
- 13.1 A clause that was redrafted in this way would provide greater flexibility than a prescriptive list of hurdles, which is a more narrowly exceptional approach. The Society believes that the proposed new Article 20A (2) (f) should be redrafted to remove the phrase "except in such cases as may be prescribed" in favour of a phrase along the lines "except in cases where the complex issues of law or fact requires an oral appeal".

The Proposed 'Value for Money' Clause

- 14.1 At paragraph 6 (11) of Schedule 2 of the draft Bill under the heading "Funding of civil legal services by the Department", the Department propose a revised Article 11 of the 2003 Order to provide the Department with an explicit aim to "obtain the best possible value for money" in funding civil legal services. The Society believes that this provision should be clarified in statute.
- 15.1 This phrase is not defined or qualified in any way, nor is its relationship to other clauses in the 2003 Order set out in the subsequent sections, leaving its meaning vague and open to interpretation.
- 16.1 The Society appreciates the importance of focusing resources on cases of merit, but we would caution that this clause has the potential to tip the balance of decision-making priorities over the long term towards cost-cutting rather than ensuring access to justice as the core principle. There are various accountability mechanisms built into the framework of legal aid governance which have the effect of rationing resources to cases of genuine need, such as the means and merits tests.
- 17.1 These tests ensure that resources are targeted to those most deserving in circumstance and in need financially. The operation of these tests strikes a balance between preserving access to justice for meritorious cases and applicants in socio-economic need under Article 6 ECHR

with the reality of scarce resources. The Society submits that the *Brownlee*³ judgment makes clear that for an applicant's access to justice to be effective, quality legal representation must be available at levels of remuneration adequate to guarantee those rights in practice.

18.1 A broad 'value for money' clause cannot avoid these public law requirements.

Proposed Alternative Clause

19.1 If the Department is committed to proceed with this clause, the Society would suggest to the Committee that the clause is clarified to include matters to be taken into account.

20.1 Such an amendment would place the new clause on a consistent footing with long-held principles of civil legal aid provision, which is to ensure access to justice for those in genuine need whilst requiring that those who are in a financial position to pay their own legal costs do so.

Proposed Amendment from the Attorney General to the Legal Aid and Coroners Courts Bill

21.1 As a first point, the Society considers that in order to allow for full consideration of the proposed amendment we would need to see a draft clause. Effective scrutiny of any clause would examine how it interacts with other clauses in this legislation and any other relevant legislation or Regulations.

22.1 The Society does however agree in principle that in order for the Attorney General (AG) to take reasonable decisions under the *Wednesbury* standard in respect of directing an Inquest under Section 14 of the Coroners' Act 1959, he must have adequate powers in order to provide him with sufficient information to take such decisions.

23.1 Given that the proposed amendment to the draft Bill by the AG is apparently designed to provide the AG with a power to compel the surrender of documents and computer records with respect to NHS Trusts regarding deaths in care, it is within the above criteria. In particular, without this additional power, the AG has stated that the Trusts maintain an understandable reluctance to disclose such documents on grounds of confidentiality.

24.1 Given that the legislation proposes to install the Lord Chief Justice as President of the Coroners' Courts and to create a Presiding Coroner, any such amending clause should clarify the procedures between the AG and the Courts. Consequently, there is a need to look at any new powers in detail to ensure that they are procedurally appropriate and clear. Doing so would ensure that any clause operates as a safety valve to provide for exceptional circumstances or circumstances in which it would be in the public interest for the AG to exercise his powers under the 1959 Act.

25.1 On the basis of the information provided and the broad scope of the power being sought, the Society would argue that any proposed new arrangements should provide for the AG to make application to the High Court to exercise such discretion to call for evidence. There is a similar provision provided for the AG of England and Wales in directing Inquests under Section 13 of the Coroners' Courts Act 1988 in England and Wales. This brings the jurisdiction of the AG within the supervision of the court and guarantees a collaborative, 'joined up' approach to policy on Inquests.

Conclusion

26.1 The Society appreciates the opportunity to submit a response in respect of the Committee's evidence-gathering stage on the Draft Legal Aid and Coroners' Court Bill.

27.1 We trust our contribution is constructive and we are happy to meet with the Committee to discuss any of the issues raised in our response.

3 [2014] UKSC 4.

Lord Chief Justice's Office



Laurene McAlpine
Principal Private Secretary

LORD CHIEF JUSTICE'S OFFICE,
ROYAL COURTS OF JUSTICE, BELFAST, BT1 3JF
TELEPHONE: (028) 9072 4614 • FAX: (028) 9023 0838
E-MAIL: Laurene.McAlpine@courtsni.gov.uk

Ms Christine

9 April 2014

LEGAL AID AND CORONERS' COURTS BILL

Thank you for your letter of 7 April addressed to the Lord Chief Justice.

The Chief Justice welcomes the provision which the Bill will make to appoint him President of the Coroners' Courts in Northern Ireland. This is consistent with his judicial leadership role for other judicial tiers.

The Chief Justice notes the proposal that the Bill be amended to allow the Attorney General to call for papers when considering the exercise of his power to direct an inquest under Section 14 of the Coroners' Act (Northern Ireland) 1959. The Chief Justice has indicated that it would be helpful if, as in England & Wales, the Attorney General made an application to direct an inquest through the High Court. This additional step in the process would be of assistance to the Coroners in allowing for greater understanding of why an inquest was directed.

I hope these comments are helpful. The Chief Justice has asked me to thank the Committee for consulting him.

Yours sincerely

Laurene McAlpine

Ms Christine Darrah
Clerk to the Committee for Justice
Rm 242 Parliament Buildings
Ballymiscaw
Stormont
BELFAST BT4 3XX

Northern Health and Social Care Trust



30 April 2014

**Ms Christine Darrah
Clerk to the Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast BT4 3XX**

Dear Ms Darrah

Legal Aid and Coroner's Courts Bill

With reference to your letter dated 4 April addressed to Ms Mary Hinds, the Trust's former Senior Director, please see below comments on the content of the Bill.

The Trust agrees that it would be important for the Attorney General to have access to relevant information to allow him to make an informed decision as to whether to direct that an Inquest be held, in cases where the Coroner has previously decided not to.

To this end, it is important that the potential amendment to the Bill should also clearly set out what such information the Attorney General is entitled to receive.

However, the Trust considers it to be essential that this proposed power should only be exercised by the Attorney General when a decision has been made by the Coroner, on conclusion of his investigations, that an Inquest is not to be held. To do otherwise would cause the Trust serious concerns regarding duplication of process and the resultant adverse impact on resources.

I trust that these comments will be of interest.

Yours sincerely

A handwritten signature in cursive script that reads 'Paul Cummings'.

**Paul Cummings
Senior Director**



Northern Ireland Human Rights Commission

Legal Aid and Coroner's Courts Bill

Introduction

1. The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(4) of the Northern Ireland Act 1998, advises the Assembly whether a Bill is compatible with human rights. In accordance with this function the following statutory advice is submitted to the Committee for Justice on the Legal Aid and Coroner's Courts Bill.
2. The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. In the context of this advice, the Commission relies in particular on:
 - The International Covenant on Civil and Political Rights, 1966 (ICCPR);¹ and
 - The CoE European Convention on Human Rights, 1950 (ECHR).²
3. The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom Government's ratification. In addition, the Northern Ireland Act 1998, section 26 (1) provides that *'if the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... he may by order direct that the proposed action shall not be taken.'*

Declaration Compatibility

4. The Commission notes that paragraph 19 of the Explanatory and Financial Memorandum states that "All proposals have been screened and are considered to be Convention compliant". The Commission advises the Committee to ask the Department to share its legal analysis upon which this statement is based.

Part 1 dissolution of Northern Ireland Legal Services Commission

5. The right to a fair trial is protected by the ICCPR, Article 14 and the ECHR, Article 6. Article 6 of the ECHR 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 interests 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;

1 Ratified in 1976

2 Ratified in 1951

- (b) *to have adequate time and 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;*
- (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."*

6. While Article 6(3)(c) provides that in criminal proceedings a person with insufficient means is to be given free legal assistance when the interests of justice so require, there is no express provision for legal aid in civil proceedings. However the European Court of Human Rights (ECtHR) has recognised that the rights protected by the ECHR must be practical and effective and that in disputes relating to a "civil right" the provision of legal assistance will be required, when it:

"... proves indispensable for an effective access to a court either because legal representation is rendered compulsory..., or by reason of the complexity of the procedure or of the case".³

7. The ECtHR has further held that:

"It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side."⁴

8. The ECtHR has acknowledged that the provision of legal aid is one of the methods of guaranteeing the right to equality of arms.⁵ Whether the provision of legal aid is necessary is determined on the basis of the particular facts and circumstances of each case.⁶

9. The Bill dissolves the Northern Ireland Legal Services Commission and makes provision for a Director of Legal Aid Casework, a civil servant in the Department of Justice, to make decisions on civil legal aid funding.⁷ The Commission notes that the Director must comply with directions given by the Department and must have regard to guidance issued by the Department.⁸

10. The Commission notes that on analysing comparative provisions contained within the Legal Aid Sentencing and Punishment of Offenders Bill, as it progressed through Parliament,⁹ the Joint Committee on Human Rights (JCHR) were not satisfied that the provisions provided sufficient institutional guarantees of the independence of the Director to prevent any appearance of a conflict of interest arising.¹⁰ The JCHR stated:

3 Airey v UK (Application no. 6289/73) 9 October 1979 para 26

4 Steel and Morris v UK (Application no. 68416/01) para 59

5 *ibid* para 60

6 *ibid* para 61

7 Clause 2

8 Clause 3

9 The territorial extent of which covered England & Wales only

10 JCHR 'Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill' HL Paper 237 HC 1717 19 December 2013

“Civil servants are bound by the Civil Service Code which sets out the constitutional framework within which they work. Civil servants owe their loyalty to the duly constituted Government and are usually accountable to the Minister responsible for their Department. Even if the Director reports to the Permanent Secretary in the Ministry of Justice (as the Government anticipates), the Permanent Secretary is responsible to the Lord Chancellor and the line of management accountability does not therefore secure institutional independence from the Government. The same consideration applies to the Ministry of Justice civil servants who will be provided to the Director: even if accountable to the Director when exercising functions delegated to them by the Director, they are ultimately accountable to the Lord Chancellor, and moreover remain directly accountable to the Minister in respect of all their other functions as civil servants.”¹¹

12. To ensure compatibility with Article 6 of the ECHR a regime governing eligibility for legal aid must contain sufficient guarantees against arbitrariness.¹² In the case of *Del Sol* the ECtHR noted:

“The scheme set up by the French legislature offers individuals substantial guarantees to protect them from arbitrariness. The Legal Aid Office of the Court of Cassation is presided over by a judge of that court and also includes its senior registrar, two members chosen by the Court of Cassation, two civil servants, two members of the Conseil d’Etat and Court of Cassation Bar and a member appointed by the general public (section 16 of the Law of 10 July 1991 cited above). Moreover, an appeal lies to the President of the Court of Cassation against refusals of legal aid (section 23 of the Law). In addition, the applicant was able to put forward her case both at first instance and on appeal.”¹³

13. The Commission notes that Schedule 2 to the Bill proposes the establishment of an appeals panel to hear appeals against prescribed decisions taken by the Director. The full details of the appeals process are not set out in the Explanatory Memorandum.

The Commission advises the Committee to request that the Department set out how it will ensure the institutional independence of the Legal Aid Agency and the Director to ensure full compliance with Article 6 of the ECHR. In particular the Committee may wish to consider whether the right of appeal is sufficiently robust.

Schedule 2 Exceptionality provisions

14. The Commission notes the proposal that the Director be empowered to make an exceptional case determination in circumstances in which a failure to do so would result in a breach of an individual’s Convention/ECHR rights.¹⁴ The Commission notes that the JCHR raised concerns regarding the comparable provision within the Legal Aid Sentencing and Punishment of Offenders Bill, stating:

“We are not convinced that the provision in the Bill to fund exceptional cases, including where a failure to make the services available to a person would be a breach of their Convention rights or EU rights, is a sufficient guarantee that the new legal aid regime will not create a serious risk that its operation will lead to breaches of Convention rights.”¹⁵

15. In England & Wales further concerns have been raised since the Legal Aid Sentencing and Punishment of Offenders Bill came into law with only 35 or 4.2% of applications for

11 JCHR ‘Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill’ HL Paper 237 HC 1717 19 December 2013 para 1.21

12 MAK and RK v UK , App. No. 45901/05 (23 March 2010) para 45

13 *del sol v. france*, no. 46800/99, echr 2002-iiPara 26

14 See Schedule 2 pg 14

15 JCHR ‘Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill’ HL Paper 237 HC 1717 19 December 2013 para 1.31

exceptional funding being granted in the period April 2013 to December 2013.¹⁶ **The Commission advises the Committee to seek estimates of the number of cases which the Department envisages will be funded by way of the exceptionality provision each year, these should be categorised.**

Schedule 2 Exceptional funding inquests

16. The right to life enshrined in Article 2 of the ECHR has been regarded by the ECtHR as one of the most fundamental provisions of the ECHR, so much so that, in addition to the substantive right, there exists a procedural requirement on the part of the state to conduct an effective investigation following an alleged breach of the substantive limb. In *Jordan v the United Kingdom*,¹⁷ the ECtHR stated:

Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which in peacetime no derogation is permitted under Article 15. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe... The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective.

...

The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.¹⁸

17. Five essential elements of an effective investigation have been identified by the ECtHR as:
- 1) The persons responsible for carrying out the investigation must be independent from those implicated.
 - 2) The investigation must be capable of leading to the identification and punishment of those responsible. The authorities must have taken all reasonable steps available to secure the evidence concerning the incident.
 - 3) The investigation must be prompt.
 - 4) There must be public scrutiny of the investigation or its results sufficient to secure accountability.
 - 5) The next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his/her justifiable interests.¹⁹
18. The involvement of the next of kin of the victim may in certain circumstances require the provision of legal assistance to ensure their effective participation in the procedures of an inquest.²⁰
19. The Bill proposes to introduce a new Article 12A to the Access to Justice (NI) Order 2003 appearing to provide two grounds for a family member seeking legal assistance in inquest

16 Ministry of Justice 'Ad Hoc Statistical Release: Legal Aid Exceptional Case Funding Application and Determination Statistics: 1 April to 31 December 2013' 13 March 2014, See further "Legal Aid Agency refuses to fund exceptional cases" Legal News | 9 September 2013 Read more: <http://ilegal.org.uk/thread/8106/laspo-exceptional-funding-scheme-working#ixzz2z8ago1Jt>

17 *Hugh Jordan v the United Kingdom*, European Court of Human Rights, Application No 24746/94 (4 May 2001).

18 *ibid*, paras 102 and 104.

19 *Jordan principles emerging from 19 Hugh Jordan v the United Kingdom*, European Court of Human Rights, Application No 24746/94 (4 May 2001).

20 *McCaughy and Others v UK* (Application no. 43098/09) 16 July 2013 See further *R Humberstone (on the application of) v Legal Services Commission* [2010] EWHC 760 (Admin) (13 April 2010) paras 61 and 62

proceedings to obtain legal aid.²¹ The Commission has previously queried why funding for inquests raising issues with regard to Article 2 of the ECHR are not within the scope of the mainstream legal aid system.²² **The Commission advises the Committee to seek an assurance from the Department that the requirement on a family member, seeking legal assistance in inquest proceedings, to apply for legal aid by way of the exceptionality provisions will not unnecessarily burden them.**

Part 2 Coroners' Courts

20. The Commission notes the proposal that the Lord Chief Justice be president of the Coroner's Court and that he be required to appoint a Presiding Coroner with responsibility for the Coroners' Courts. The Committee will be aware of the McKerr group of cases against the UK regarding the investigation of conflict related deaths in NI.²³ A package of measures has been developed to ensure compliance with these judgements, including measures relating to the Coroners Court.²⁴ At the time of writing the Committee of Ministers of the Council of Europe continue to monitor the implementation of these measures. In the judgement of McCaughey and Other the ECtHR stated:

"The Court considers that the carrying out of investigations, including holding inquests, into killings by the security forces in Northern Ireland has been marked by major delays. It further considers that such delays remain a serious and extensive problem in Northern Ireland".²⁵

The Commission advises the Committee to enquire if the new proposed arrangement is likely to have any positive implications for addressing delay in the Coroner's Court.

Additional Proposal

21. The Commission notes the proposal that the Attorney General for NI be empowered to obtain papers or information that may be relevant to the exercise of his power to direct an inquest. The power of the Attorney General to order an inquest provides a safeguard to ensuring an effective investigation into the circumstances of a death is carried out. The empowerment of the Attorney General to obtain relevant papers and information to inform the exercise of powers under section 14 (1) of the Coroners Act (NI) 1959 may further strengthen this safeguard. The Commission will provide further advice on publication of the proposed amendment as required.
22. Noting that the Attorney General has raised specific concerns regarding deaths in which there is a suggestion that a medical error has occurred, **the Commission advises that the procedural obligation under Article 2 of the ECHR extends to deaths in a medical context.**²⁶

April 2014

Northern Ireland Human Rights Commission

Temple Court, 39 North Street, Belfast BT1 1NA, Tel: (028) 9024 3987,
Textphone: (028) 9024 9066, SMS Text: 07786 202075, Fax: (028) 9024 7844,
Email: information@nihrc.org, Website: www.nihrc.org

21 Legal Aid Agency 'Inquests – Exceptional Cases Funding – Provider Pack' 1st April 2013 pg 3

22 NIHRC Submission to the Access to Justice Review January 2012 para 9 – 14

23 App. No. 28883/95 4 May 2001

24 CM/Inf/DH(2006)4 revised 2 23 June 20061 - Cases concerning the action of security forces in Northern Ireland – Stocktaking of progress in implementing the Court's judgments - Memorandum prepared by the Secretariat incorporating information received up to 12 June 2006. Paras 85 - 109
See further Communication from the UK concerning the McKerr group of cases against UK (App. No. 28883/95)

25 McCaughey and Others v UK (Application no. 43098/09) para 144

26 Silih v Slovenia, ECtHR, App No. 71463/01 (9 April 2009) see para 155

Northern Ireland Judicial Appointments Commission

Dear Christine

Thank-you for your letter of 4 April regarding the above named Bill. Having reviewed the various clauses I can confirm there are no issues arising on which NIJAC wishes to comment.

Kind regards

Mandy

Mandy Kilpatrick

Interim Chief Executive
NI Judicial Appointments Commission
90 569129

Northern Ireland Legal Services Commission



NORTHERN IRELAND
Legal Services
Commission

Office of the Chairman and Chief Executive

2nd Floor Waterfront Plaza
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Ways Meadow
Belfast BT1 3BN

Tel: 028 9040 8805
Email: accesstojustice@nilsc.org.uk

By e-mail only to: committee.justice@niassembly.gov.uk

Our Reference CEO/14/143

Date 18 April 2014

Dear Ms Darragh

Legal Aid and Coroners' Court Bill

I am writing to acknowledge receipt of your letter dated 4 April 2014.

I can confirm that the Commission supports the Bill's core proposal to transfer its responsibilities to an Agency within the Department of Justice for the reasons set out in the Access to Justice Review which was carried out by a previous chair of the Commission.

The Commission has argued for some time that the current architecture for legal aid is not fit for purpose. We believe that bringing responsibility for policy and delivery together within the Department will provide a more appropriate framework. This approach will, in particular, help to increase transparency, accountability and efficiency.

The Commission supports the measures proposed to ensure that individual decisions in respect of legal aid are, and are seen to be, taken independently of Government, including the concept of the Agency's chief executive being a statutory office holder. We also support the creation of an independent appeals mechanism and the requirement for all Ministerial guidance to the Agency to be published.

As many of the powers in the Bill are enabling in character, the Commission will work with the Department as they develop the secondary legislation envisaged by the Bill.

The Commission is committed to working closely with the Department to deliver a smooth transition to the new legal aid arrangements envisaged by the Bill.

The Commission believes that the proposed changes will assist in achieving better management of the challenges in forecasting legal aid spending and resourcing that spending.

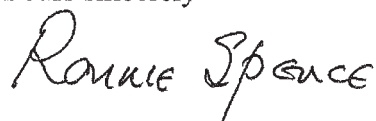
It also believes that the creation of an Agency will provide improved career opportunities for staff currently employed by the Commission and assist in securing specific additional skills which the Agency may require to implement reforms to the legal aid arrangements.

The Commission has welcomed the Justice Minister's announcement last autumn that he intends to initiate a second phase of review of access to justice. We hope that this exercise will encourage an informed debate about how best to, first, help people to solve legal problems and, second, develop affordable and value for money solutions appropriate to local needs.

As the provisions in the Bill which deal with the Coroners' Court have no direct impact on the Commission, no comment is offered on these specific provisions.

On behalf of the Commission I would like to thank the Committee for the opportunity to comment on the Bill.

Yours sincerely



Ronnie Spence
Chairman

Christine Darragh
Clerk to the Committee for Justice
Northern Ireland Assembly

Northern Ireland Local Government Association



Ms Christine Darrah
Clerk to the Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

15th April 2014

Dear Ms Darrah,

Re: Legal Aid and Coroners' Courts Bill

Thank you for your letter dated 4th April 2014 inviting a representative of the Northern Ireland Local Government Association (NILGA) to give evidence to the Committee for Justice regarding the Legal Aid and Coroners' Courts Bill. We regret that we are currently unable to assist the Committee in this regard. Local Government is currently undergoing a protracted period of Reform and Transformation which affects our ability to give due consideration to wider issues. This Bill does not fall within the areas of focus that NILGA is currently involved in. On this basis we consider that our contribution to this Call for Evidence may not provide any added value at this time.

However, NILGA is keen to work with the Committee on other issues that more directly relate to the work of councils, and in particular the developing policy on Police, Community and Safety Partnerships arrangements. I trust that the Committee will be satisfied that our input should be one with focus, on issues where we can provide more valuable assistance. If you should have any queries in relation to this response, please do not hesitate to contact Karen Smyth (k.smyth@nilga.org) at the NILGA offices.

Yours sincerely,



Derek McCallan
Chief Executive

Northern Ireland Local Government Association
Unit 5B, Castlereagh Business Park, 478 Castlereagh Road, Belfast BT5 6BQ
tel: 028 9079 8972 fax: 028 9079 1248 email: office@nilga.org www.nilga.org

Northern Ireland Policing Board



Jonathan Craig MLA
Chair of Performance Committee

Date: 1 May 2014

Mr Paul Givan MLA
Chair of the Justice Committee
Room 242
Parliament Buildings
Stormont
BT4 3ZZ

Dear Paul

LEGAL AID AND CORONERS' COURTS BILL

At its meeting on 17 April 2014 the Performance Committee considered the Justice Committee's consultation on the Legal Aid and Coroners' Courts Bill.

The Performance Committee noted that during the briefing to the Justice Committee on 13 March 2014, a Department of Justice official committed to provide additional information regarding the provisions in the Bill relating to the Coroners' Courts. I would be grateful if this information could be shared with the Performance Committee. The Committee would be particularly interested to know what the role and remit of the presiding coroner will be and whether he/she will be responsible for managing the ongoing issue of delay in relation to legacy inquests. If the Justice Committee is able to provide any additional information in this regard, it would be appreciated.

The consultation letter from the Justice Committee advises that the Attorney General for Northern Ireland has proposed a potential amendment to the Bill. The Attorney General has the power under the Coroners Act (Northern Ireland) 1959 to direct an inquest into a death where he considers it 'advisable' to do so. Mr Larkin has advised the Justice Committee that he has experienced some difficulty in recent years in securing access to documents that he has needed. His proposed amendment to the 1959 Act would confer on the Attorney General a power to obtain papers and it would provide a statutory basis for disclosure. Mr Larkin has indicated to the Justice Committee that the principle focus of his concern is deaths that occur in hospital or where there is a suggestion that medical error may have occurred.

The Performance Committee noted that the Attorney General for Northern Ireland's power to direct an inquest is not limited to deaths involving hospital/medical failings and there is no time limit as regards the date of death. For example, it was reported in 2013 that the Attorney General had ordered a new inquest into the Kingsmill massacre of 1976; and earlier this year it was reported that he had ordered a new inquest into the death of Thomas Friel who was killed by a rubber bullet in Derry/Londonderry in 1973. The Performance Committee would therefore be grateful to receive clarity on the nature of the Attorney General's proposed amendments – would they enable the Attorney General to obtain only certain types of documents, such as medical records, and only in respect of certain types of cases, such as medical cases, or would he be empowered to obtain any documents connected with any death in respect of which the Attorney General is considering directing an inquest?



The Committee looks forward to hearing from you. I would be grateful if you would copy your response to the Board's Director of Policy, Peter Gilleece.

Yours sincerely

A handwritten signature in black ink, appearing to read "Jonathan Craig".

Jonathan Craig MLA
Chair of Performance Committee

cc. Ms Christine Darrah, Clerk to the Committee for Justice



Northern Ireland Policing Board
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PSNI

Personal, Professional, Protective Policing



**MARK HAMILTON
ASSISTANT CHIEF CONSTABLE**

Our Ref: 14\4286

Please quote our reference number on all correspondence

12 May 2014

Ms Christine Darrah
The Committee Clerk
Room 242
Parliament Buildings
Stormont
Belfast BT4 3XX

Dear Christine

RE: LEGAL AID AND CORONERS' COURTS BILL

Thank you for your letter of 4 April 2014 requesting the views and comments of PSNI on the Legal Aid and Coroners' Courts Bill. The Chief Constable has requested that I respond on his behalf.

The Bill in its current form reorganises certain functions within the Department relating to Legal Aid and appoints the Lord Chief Justice as President of the coroners' courts. It is my view that this will not impact on normal policing and as such it would not be appropriate for me to comment.

However, you have indicated in your letter that the Attorney General intends to amend the Bill to include a provision that will enable him to gain access to certain records more easily. The intention is to use this provision principally in relation to medical records relating to deaths in hospital and due to medical error. Whilst I would have no view on such actions I am concerned that the provision may be drafted so that it could potentially extend the power to police records and if it did I would need to consider the implications for policing.

I would be grateful if you could send me a copy of the proposed amendment so that I may give it full consideration. This could have significant implications for policing and I consider it to be important that the committee is aware of PSNI view of the amendment.

I hope this is of assistance.

Yours sincerely

MARK HAMILTON
Assistant Chief Constable
Service Improvement Department

Northern Ireland
CRIME
Working in partnership with the police

Assistant Chief Constable's Office
PSNI Headquarters, 65 Knock Road, Belfast BT5 6LE
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Probation Board for Northern Ireland



80/90 North Street
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Web: www.pbni.org.uk

18 April 2014

The Committee Clerk
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

Dear Ms Darrah

RE: SUBMISSION OF EVIDENCE REGARDING LEGAL AID AND CORONERS' COURT BILL

Further to your correspondence dated 4 April 2014, I wish to advise that the Probation Board for Northern Ireland does not intend to submit any written evidence in respect of the above draft legislation, including the provision proposed by the Attorney General.

Yours sincerely

pp. Jackie Murray

Cheryl Lamont
(Acting) Director of Probation

Public Prosecution Service



Director

PUBLIC PROSECUTION SERVICE
BELFAST CHAMBERS
93 CHICHESTER STREET
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BT1 3JR

Ms Christine Darrah
Clerk to the Committee for Justice
NI Assembly
Room 242
Parliament Buildings
Stormont
BELFAST
BT4 3XX

29 April 2014

Dear Ms Darrah

LEGAL AID AND CORONERS' COURTS BILL

Thank you for your letter dated 4 April 2014.

We have no comment on the Bill as drafted although we maintain an interest in the areas it deals with. The recent proposals around Legacy Inquest investigations and the pressures that could be generated on our resources if large numbers of cases are sent to us to re-consider prosecution decisions are areas where we would wish to comment at the appropriate time.

Equally reforms to Legal Aid remuneration and the impact such remuneration has on Early Guilty pleas in the Crown Court is a matter of interest to the PPS but the Bill currently deals only with reform of the Coroners Court hierarchy and structural and systemic Legal Aid issues.

Yours sincerely

A handwritten signature in black ink, appearing to read "Barra McGrory".

Barra McGrory QC
Director of Public Prosecutions

South Eastern Health and Social Care Trust



25 April 2014

The Committee Clerk
Room 242
Parliament Buildings
Ballymiscaw
Stormont
BELFAST
BT4 3XX

Dear Sir/Madam

LEGAL AID AND CORONERS' COURTS BILL

The South Eastern Trust welcomes the opportunity to respond to the consultation on the proposed amendment by the Attorney General for Northern Ireland to the above Bill.

The proposed amendment is to provide a clear statutory basis for disclosure of papers to assist the Attorney General in relation to direction of an Inquest under Section 14(1) of the Coroner's Act (Northern Ireland) 1959.

In relation to the proposed amendment by the Attorney General this would assist the Trust where required to be clear about what documentation could be released to the Attorney General

The Trust has no comments to make in relation to the content of the Bill.

The Trust would have no objection to the amendment suggested by the Attorney General in relation to this Bill.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Elaine Campbell', written in a cursive style.

Elaine Campbell
Corporate Planning & Consultation Manager

Southern Health and Social Care Trust



25th April 2014

Our Ref: JS/lw

By Email: committee.justice@niassembly.gov.uk

The Committee Clerk,
Room 242,
Parliament Buildings,
Ballymiscaw,
Stormont,
Belfast BT4 3XX.

Dear Ms Darrah,

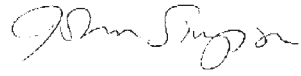
RE: LEGAL AID AND CORONER'S COURT BILL

Thank you for your letter of 04th April 2014. I have discussed the proposal from the Attorney-General that the Bill should be amended to confer a power on the Attorney-General to require access to documents to enable him to exercise his power under Section 14(1) of the Coroners Act(Northern Ireland) 1959 with the Chief Legal Advisor in the Directorate of Legal Services.

In principle we consider that, where the Coroner has decided not to hold an Inquest, it would be necessary for the Attorney-General to have access to relevant information in order for him to reach an informed decision as to whether to direct an Inquest in a particular case. It would be important that the legislation clearly sets out what information the Attorney-General is entitled to access.

However, if the Attorney-General were to exercise the power to request information while the death is still under investigation by the Coroner and a decision to hold an Inquest has not yet been taken by the Coroner, we would be concerned about duplication of processes and the consequent impact on resources.

Kind regards



Dr J Simpson
Medical Director

Cc: Mairead McAlinden, Chief Executive
Karen Wasson, Acting Litigation Manager

Southern Trust Headquarters, Craigavon Area Hospital, 68 Lurgan Road, Portadown, BT63 5QQ
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Northern Ireland
Assembly

Appendix 5

Correspondence from the Attorney
General for Northern Ireland and the
Minister for Health, Social Services and
Public Safety on the Attorney General's
proposed amendment to the Bill

Correspondence from the Attorney General for Northern Ireland and the Minister for Health, Social Services and Public Safety on the Attorney General's proposed amendment to the Bill

5 March 2014	Correspondence from the Attorney General proposing an amendment to the Legal Aid and Coroners' Courts Bill.
30 April 2014	Correspondence from the Attorney General providing an amended text for his proposed amendment.
18 April 2014	Correspondence from the Minister for Health, Social Services and Public Safety regarding the Attorney General's proposed amendment.
23 May 2014	Correspondence from the Minister for Health, Social Services and Public Safety regarding the Attorney General's proposed amendment.

5 March 2014 - Correspondence from the Attorney General proposing an amendment to the Legal Aid and Coroners' Courts Bill



Mr Paul Givan MLA
Chairman
Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

Our Ref: 18/05/14/001

Date: March 5 2014

Dear Chairman

Legal Aid and Coroners' Courts Bill

I understand that the Justice Minister intends to introduce the above Bill. This is a fairly short Bill, and only a small part of it deals with amendments to the Coroners Act (Northern Ireland) 1959. As you know, I have a power under this Act to direct an inquest where I consider it 'advisable' to do so. It is in this context that I draw the Committee's attention to a potential amendment to the 1959 Act (to be achieved through amending the above Bill) which could be of considerable benefit to the public.

As the Committee may know, while I can direct an inquest under section 14 (1) of the Coroners Act when I consider it 'advisable' to do so I have no power to obtain papers or information that may be relevant to the exercise of that power.

In recent years, I have had some difficulty in securing access to documents, such as serious adverse incident report forms, which I have needed from Health and Social Care Trusts. As there is no specific legal duty on Trusts to disclose what would otherwise be confidential material, it is understandable that there is some nervousness on the part of the 'Trusts' lawyers in sharing such materials with me.

An amendment to the 1959 Act could confer a power on the Attorney General to obtain papers. This would provide a clear statutory basis for disclosure. It could be drafted perhaps along the following lines:

"X(1) The Attorney General may for the purposes of consideration of whether or not to direct an inquest under section 14 (1) require any person who in his opinion is able to provide information or produce documents relevant to his consideration to provide any such information or produce any such documents.


(2) A person may not be compelled for the purposes of subsection (1) to provide any information or produce any document which that person could not be compelled to provide or produce in civil proceedings in the High Court.

(3) Where any information or document required to be provided or produced under this section consists of, or includes, information held by means of a computer or in any other form, the Attorney may require any person having charge of, or otherwise connected with the operation of, the computer or other device holding that information to make the information available, or produce the information, in legible form.

(4) Every person who fails without reasonable excuse to comply with a requirement under subsections (1) or (3) shall be guilty of an offence and be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

I do hope that you can consider this at the committee stage of the Bill. I am, of course, available to speak to the Committee should that be of assistance.

The focus of my concern is principally with deaths that occur in hospital or where there is otherwise a suggestion that medical error may have occurred.





John F Larkin QC
Attorney General for Northern Ireland

30 April 2014 - Correspondence from the Attorney General providing an amended text for his proposed amendment



Ms Christine Darrah
Clerk to the Justice Committee
Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

Our Ref: 18/05/14/001

Date: 30 April 2014

Dear Christine

Legal Aid and Coroners' Courts Bill

Thank you for your letter of 4 April seeking views on the above Bill and the Attorney's proposed amendment. Having reflected further on the draft amendment, the Attorney would suggest that the Committee, if it is in agreement with the substance of the proposal, adopt an amended text.

The main change, as can be seen from the new text below, is to clearly provide a statutory basis for disclosure to the Attorney of papers relating to deaths, for example, in a hospital over a certain period so that he can then consider whether he should exercise his section 14 (1) power to direct an inquest in any particular case. The text proposed initially could have been interpreted as only applying to papers relating to a specific death of which the Attorney was already aware. The second change is designed to restrict the scope of the power to information or documents which relate to the health or social care provided to the deceased. Finally, this text adopts a more modern drafting approach to information held electronically.

The Attorney's proposed amendment now reads as follows (drafted as an insertion into the Coroners Act (Northern Ireland) 1959:

Provision of information to Attorney General for purposes of section 14

14A.—(1) The Attorney General may, by notice in writing to any person who has provided health care or social care to a deceased person, require that person to produce any document or give any other information which in the opinion of the Attorney General may be

relevant to the question of whether a direction should be given by the Attorney General under section 14.

2) A person may not be required to produce any document or give any other information under this section if that person could not be compelled to produce that document or give that information in civil proceedings in the High Court.

(3) In this section—

“document” includes information recorded in any form, and references to producing a document include, in relation to information recorded otherwise than in legible form, references to providing a copy of the information in a legible form;

(4) A person who fails without reasonable excuse to comply with a requirement under this section commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

If the Committee wish to discuss any aspect of this proposed clause or the Bill as a whole with the Attorney then please do not hesitate to contact me.

Yours sincerely



Maura McCallion
Division Head

18 April 2014 - Correspondence from the Minister for Health, Social Services and Public Safety regarding the Attorney General's proposed amendment

FROM THE MINISTER FOR HEALTH,
SOCIAL SERVICES AND PUBLIC SAFETY
Edwin Poots MLA



Department of
**Health, Social Services
and Public Safety**
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Mr Paul Givan MLA
Chairman Committee for Justice
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Our Ref: AGY/271/2014

Date: 18 April 2014

Dear Paul

THE LEGAL AID AND CORONERS' COURTS BILL

Thank you for your letter of 4 April 2014 seeking comments on the contents of The Legal Aid and Coroners' Courts Bill and on the Attorney General's proposal for a potential amendment to that Bill.

I have noted the contents of the Bill as drafted and introduced on 31 March 2014, and there is nothing contained therein which is relevant to the work of my Department.

In relation to the Attorney General's proposed amendment, I have not seen the exact wording of that proposal. It would be important to consider whether the proposal would meet the Attorney General's policy intent and if it meets data protection requirements.

In your letter you have indicated that he has experienced some difficulty in securing access to documents and that the principle focus of his concerns relates to deaths in hospital or where there is a suggestion that medical error may have occurred.

If the Attorney General's proposal is, as suggested, related purely to deaths that occur in hospital or where there is otherwise a suggestion that medical error may have occurred, I would wish to see the detail of the proposed amendment, along with a clear indication of how it would be used in practice and what the wider implications would be.

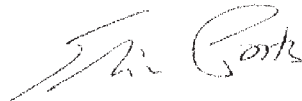
My Department promotes a culture of learning, openness and transparency. I want to ensure that when things do go wrong, the necessary learning is applied across the entire Health and Social Care system in Northern Ireland.

I have initial concerns that a legislative requirement to produce documentation may have an adverse impact on staff coming forward to provide relevant information which in turn could damage the potential to identify and share learning from serious adverse incidents or deaths in hospital.

Without knowing the specific detail of the Attorney General's proposal, I would not wish to comment any further at this stage.

I think it is important to bear in mind that the Executive have agreed the policy to inform the Bill as introduced to the Assembly on 31 March 2014. As this proposal would have an impact on, at least two Departments, it would need to be considered by the Executive.

There is also the issue of whether the proposed amendment will fall within the scope of the Bill and this will be a matter to be considered by the Minister of Justice and the Speaker.



Edwin Poots MLA
Minister for Health Social Services and Public Safety

23 May 2014 - Correspondence from the Minister for Health, Social Services and Public Safety regarding the Attorney General's proposed amendment

FROM THE MINISTER FOR HEALTH,
SOCIAL SERVICES AND PUBLIC SAFETY
Edwin Poots MLA



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and Public Safety**
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Paul Givan MLA
Chairman
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Our Ref: AGY/320/2014

Date: 23 May 2014

Dear Paul

THE LEGAL AID AND CORONERS' COURTS BILL

Thank you for your letter of 30 April forwarding a copy of the Attorney General's proposed amendment to the above Bill dated 5 March 2014, and his subsequent amendment dated 30 April 2014.

I think it is important to reiterate that the Executive has agreed the policy to inform this Bill as introduced to the Assembly on 31 March 2014. As the Attorney General's proposed amendment impacts on at least two Departments, I believe that a revised policy position would need to be considered by the Executive as required under the Ministerial Code.

Section 14 of the Coroners Act (NI) 1959 provides the Attorney General with a power to direct any coroner to conduct an inquest into the death of a person in circumstances where the Attorney General has reason to believe that a deceased person has died in circumstances which, in his opinion, make the holding of an inquest advisable. In principle, therefore, I would have no objection to the Attorney General having the power to access the information necessary to allow him to discharge his functions under section 14 of Coroners Act (NI) 1959.

The letter of 5 March from the Attorney General's office indicates that he is experiencing difficulty in getting access to the information that he feels may be relevant to the exercise of the power under section 14. This would appear to be the rationale for seeking the proposed amendment to the Legal Aid and Coroners' Courts Bill.

However, I would have concerns if the proposed amendment goes wider than that and would enable the Attorney General to request access to information in the circumstances described in the second paragraph of the letter of 30 April from his office to the Clerk to the Justice Committee. This would seem to suggest a power to obtain information relating to any death occurring within the Health and Social Care system, even where the Attorney has no reason to believe an inquest would be advisable.

For that reason, I think it would be important to have more policy clarity as to the precise intent of the provision and how it would be used in practice. That, of course, would be a matter for the Department of Justice to pursue in its capacity as lead sponsor of the Bill.

Finally, I note the concern of others about the appropriateness of using the Legal Aid and Coroners' Courts Bill as a vehicle to make the Attorney General's proposed amendment. I understand that it will be for the Speaker to determine whether the proposed amendment falls within the scope of the Bill.

I am copying the reply to David Ford so that it may be taken into account in his consideration of the Attorney General's proposed amendment.



Edwin Poots MLA
Minister for Health Social Services and Public Safety



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