

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.

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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

¹ [2002] App Nr 46800/99.

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.

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

² Ibid at paras 25 & 26

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.

³ [2014] UKSC 4.

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.