

## 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 31<sup>st</sup> 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**