

LEGAL AID AND CORONERS' COURTS BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial memorandum has been prepared by the Department of Justice in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum needs to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause or schedule does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. Under current arrangements, legal aid in Northern Ireland is administered by the Northern Ireland Legal Services Commission ("the Commission"), an executive Non Departmental Public Body ("NDPB"). The Department of Justice ("the Department") is the sponsoring department for the Commission. The main primary legislation regarding legal aid currently in operation is the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order") and the Access to Justice (Northern Ireland) Order 2003 ("the 2003 Order"). However, to date only limited provisions in the 2003 Order have been commenced.
4. In September 2010, the Minister of Justice, David Ford, 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 Northern Ireland was published in September 2011 and, following consultation, the Minister published his response to the Assembly on 2 July 2012.
5. One of the principal recommendations of the Access to Justice Review was that the body responsible for legal aid delivery (the Commission) should become an Executive Agency within the Department. Changing the delivery arrangements from a NDPB to an Executive Agency will help to increase transparency, accountability and efficiency in line with Government policy; reduce the cost of administration; and improve financial modelling, monitoring and forecasting. The Review also recommended that the Chief Executive should be a statutory office holder responsible for decisions on civil legal aid applications without any involvement on the part of the Minister, any political institution or staff in the core of the Department. The Minister accepted the Review recommendation that individual decisions should be taken independently of government and instructed his Department to carry out a detailed analysis of the consequences of delivering the administration of civil legal aid through an Executive Agency.

6. The analysis supported the recommendation of a change in status subject to a number of appropriate safeguards being put in place to protect the independence of decision making in the grant of civil legal aid. A set of safeguards is included in the Bill.
7. The main purpose of the Bill is therefore to make arrangements to dissolve the Commission and transfer its functions and staff to the Department. It will also set in statute a number of safeguards to protect the independence of the individual decisions on the grant of civil legal aid.
8. 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 2003 Order to reflect the fact that the Department rather than the Commission will have statutory responsibility for the administration of legal aid. The provisions in Articles 10 to 20 of the 2003 Order regarding *civil legal services*, with the exception of the Funding Code, will be commenced on the same date that the Commission is dissolved (and the Agency is created) – the “dissolution date”. 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, a registration scheme and restriction on the disclosure of information for criminal legal aid.
9. The Bill will also make the Lord Chief Justice the President of the coroners' courts, and requires 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.
10. 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.

CONSULTATION

11. The proposal for the change in status of the Commission was subject to public consultation when the Access to Justice Report was published in July 2012. There were no objections in principle. In May 2013, the Department consulted further on the safeguards that it intends to put in place to protect the independence of individual decisions on the grant of civil legal aid. The responses to the proposed safeguards consultation were in general positive, though a number raised concerns about the proposed appeals mechanism. In response, the Minister has replaced the proposal that appeals would be heard by one person, with a procedure whereby appeals will be heard by a panel of three, at least one of whom will be a practising lawyer. This addresses the key points raised.

12. The Assembly's Committee for Justice was briefed on the responses to the consultation on the Access to Justice Review in June 2012. It was further briefed on responses to the consultation on the safeguards to protect individual decisions on the granting of civil legal aid and the proposed way forward on the change of status of the Commission on 20 June 2013. The Committee confirmed that it was content that the Commission should become an Executive Agency within the Department and that the Chief Executive should be a statutory appointment. The Committee also noted that the changes would be taken forward in a new Bill.
13. In the normal manner, the 2003 Order was subject to an extensive programme of consultation when it was being brought forward. That process included consideration by an ad hoc Committee of the Assembly in 2002. The policy underpinning *civil legal services* has already been the subject of extensive consultation by the Legal Services Commission since 2007 and more recently the Department of Justice. The views expressed throughout this history of consultation have continued to inform our decision-making. Going forward, the subordinate legislation required to implement *civil legal services* will be the subject of further scrutiny by the Assembly, including the Justice Committee. Some of the subordinate legislation will also involve the Assembly's affirmative resolution procedure.
14. It was not considered necessary to consult publicly on the proposed change to the role of the Lord Chief Justice, due to its technical and specialist nature. A targeted consultation with the Coroners was carried out and the Justice Committee was made aware of the proposal by way of letter dated 12 June 2013.
15. The various consultation documents and summaries of responses on all of the closed consultations can be accessed separately at www.dojni.gov.uk or individually as now listed.

Safeguards to Protect the Individual Decisions on the Granting of Civil Legal Aid.

Consultation Document:

<http://www.dojni.gov.uk/index/public-consultations/archive-consultations/consultation-on-safeguards-to-protect-the-individual-decisions-on-the-granting-of-legal-aid.pdf>

Summary of Responses:

<http://www.dojni.gov.uk/index/public-consultations/archive-consultations/summary-of-responses-to-the-consultation-on-safeguards-for-granting-civil-legal-aid.pdf>

OPTIONS CONSIDERED

16. In line with the National Audit Office's good practice principles to help assess proposed changes to arm's length bodies an options appraisal was carried out. This involved identifying a range of options, including retaining the NDPB, the Agency model and a hybrid model suggested by the Commission. The Agency model was selected as the outcome of this appraisal.

OVERVIEW

17. The Bill has 13 clauses and 3 Schedules and is divided into 3 Parts. A commentary on each of the clauses and Schedules follows below.

COMMENTARY ON CLAUSES

Clause 1: Dissolution of Northern Ireland Legal Services Commission

This clause 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 in Northern Ireland.

Subsection (5) refers to Schedule 1 to the Bill which makes provision for the transfer of the assets, liabilities and staff from the Commission to the Department.

Clause 2: Designation of Director of Legal Aid Casework

This clause makes provision for the appointment of a Director of Legal Aid Casework ("the Director"). 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 selection of the person to be so designated must be on the basis of merit through fair and open competition. The Director's function will be to make decisions on the grant of civil legal aid 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 service as the Director is service in the Northern Ireland civil service.

Subsection (4) requires the Department to provide civil servants or other persons (or both) to give appropriate assistance to the Director.

Clause 3: Exercise of functions by Director

This clause 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. 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 clause in relation to an individual case.

Subsection 3(3) requires the Department to publish any such directions or guidance.

Subsection 3(4) provides for directions and guidance under this section to be revised or withdrawn from time to time.

Clause 4: Delegation of functions of Director

This clause makes provision about the delegation of the Director's functions.

Subsection (1) allows the Director to delegate the Director's functions. This enables the Director to delegate, for example, decision-making in relation to the merits of a legal aid application, the application of any relevant means test for a particular area of work in relation to a legal aid application and the on-going monitoring of decisions.

Subsection (2) provides that under clause 3 the Department may give directions to the Director 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 the persons to whom the Director may or may not delegate those functions.

Subsection (3) ensures that a function of the Director may be delegated entirely or subject to limitations or conditions. For example, decision-making in relation to the merits and financial eligibility might be delegated to providers (whether solicitors in private practice or the voluntary/Not-for-Profit sector) in relation to particular matters, or subject to particular financial limits as to the amount of work that can be carried out before the case must be referred to the Director for a decision on further legal aid funding.

Subsections (4) to (8) make provision about the effect of the delegation of functions under subsections (1) to (3).

Subsection (4) gives the Director the power to limit the duration of a delegation as well as to vary or revoke the delegation at any time. It also reserves the right of the Director (or another person) to continue to exercise a function that has been delegated.

Subsection (5) provides that any act or omission by a person ("authorised person") in exercising a function of the Director delegated to them under clause 4(1) to (3) is to be treated as being done or omitted to be done by the Director.

However, the liability of the Director for acts or omissions of an authorised person is not absolute. Subsection (6) provides that subsection (5) does not affect the rights and liabilities of the Department and the authorised person between themselves (for example, contractual disputes), does not prevent civil proceedings from being brought against the authorised person and does not apply to criminal offences alleged to have been committed by the authorised person.

Clause 5: Annual report of Director

This clause concerns the production of an annual report by the Director of Legal Aid Casework.

Subsection (1) requires the Director to produce an annual report for each financial year as soon as practical following the end of that financial year.

Subsection (2) requires that the report will set out how the Director has carried out the functions of the office in the financial year.

Subsections (3) and (4) respectively require that the Director send a copy to the Department, and that the Department lay the report before the Assembly and arrange for its publication.

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

This clause introduces Schedule 2 which contains a large number of amendments. The amendments 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.

Clause 7 Lord Chief Justice to be president of coroners' courts

This clause 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.

Clause 8: Presiding coroner

This clause requires the Lord Chief Justice to appoint a Presiding coroner with responsibility for the coroners' courts and the other coroners and deputy coroners. The person appointed as Presiding coroner will hold that office in accordance with the terms of his or her appointment. If the office of Presiding coroner becomes vacant, the Lord Chief Justice may appoint another coroner to act until a new appointment can be made. Any of the Lord Chief Justice's functions relating to coroners' courts, other than functions under section 36 of the Coroners Act (Northern Ireland) 1959, may be delegated to the Presiding coroner. A number of existing powers of delegation are consequentially repealed.

Clause 9: Application to the Crown

This clause is self-explanatory.

Clause 10 Supplementary, incidental or consequential provision

This clause is self-explanatory.

Clause 11 Repeals

This clause is self-explanatory.

Clause 12: Commencement

It is intended that *civil legal services* will be implemented on the same date that the Commission is dissolved (and the new Agency is set up within the Department). For this reason, various provisions and consequential amendments will be coming into operation on the day after Royal Assent. This will enable the Department to bring forward the necessary secondary legislation to implement *civil legal services* and have them commence on the dissolution date.

Clause 13 Short title

This clause is self-explanatory

Schedules

Schedules 1: Transfer of Assets, Liabilities and Staff of Commission

Schedule 1 to the Bill makes provision for the transfer of the assets, liabilities and staff of the Commission to the Department.

Subsection 1 provides that all assets and liabilities to which the Commission is entitled or subject before the dissolution date shall be transferred on that date to the Department.

Subsection 2 provides that employees of the Commission, at the dissolution date, will be transferred to the Northern Ireland civil service. The Transfer of Undertakings (Protection of Employment) Regulations 2006 will apply.

Subsection 3 provides that a reference to the Commission in any statutory provision or document relating to anything transferred to the Department by virtue of this Bill is to have effect, after the dissolution date, as a reference to the Department.

Subsection 4 provides that the Department must, as soon as practicable after the dissolution date prepare a report on how the Commission carried out its functions in the final period (together with a statement of accounts for that period). The report and the statement of accounts for the final period are both to be published and laid before the Assembly by the Department.

Schedule 2: Amendments

Schedule 2 sets out a large number of amendments to the 1981 Order and a number of other pieces of legislation. The great majority of these amendments are purely technical in nature; and they are necessary to reflect the transfer of functions regarding the administration of legal aid from the Commission to the Department.

There are five areas of substantive amendment.

As an interim measure, pending the commencement of *criminal defence services* under the 2003 Order, criminal representation will continue to be funded under Part 3 of the 1981 Order. Paragraph 1(4) to (6) of Schedule 2 effectively reproduces the provisions contained in the 2003 Order regarding the assignment of solicitor and counsel, a register of solicitors and counsel eligible to be assigned under criminal legal aid, and the restriction of disclosure of information for criminal legal aid. The new provisions being inserted into the 1981 Order each contain rule-making powers. Any rules made under those provisions will be the subject of separate consultation, including with the Assembly. The rules made under each of the provisions will be subject to the Assembly's draft affirmative resolution procedure.

Furthermore, as an interim measure, 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*.

Paragraph 6(13) substitutes a new provision regarding the provision of legal aid funding in 'exceptional cases'. One recommendation of the Access to Justice Review was that the Department should no longer have any decision-making role in the grant of exceptional funding. Under the current provision, the Department can either direct that legal aid be provided by the Commission in specified categories of case which fall outside the scope of ordinary legal aid funding; or the Department can authorise funding generically or in respect of individual cases, if the Commission request it to do so. Under the new substituted provision, the Director of Legal Aid Casework will have full statutory responsibility for the grant of exceptional funding.

Paragraph 6(16) and (17) remove the current provision for 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 and, if so, what services are to be funded for that individual. As originally provided for under the 2003 order, the funding code was also to specify procedures for making decisions about the funding of *civil legal services* by the Commission. The preparation of the funding code, together with any revision of it, was to be subject to prescribed legislative procedures. The provisions made in paragraph 6(16) and (17) remove the requirement to have a statutory funding code. Instead, decision-making on the funding of *civil legal services* in respect of any individual case will on the basis of a uniform prescribed merits test – as provided for by the amendment under paragraph 6(15)(c) of Schedule 2.

Paragraph 6(22) provides that 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* under Article 12A to 20 of the 2003 Order. The regulations made regarding appeal panels will be subject to the Assembly's draft affirmative resolution procedure.

Schedule 3: Repeals

This schedule is self-explanatory and reflects the amendments made under Schedule 2 to the Bill.

FINANCIAL EFFECTS OF THE BILL

18. There are costs associated with the change in status of the Commission to become an Executive Agency within the Department. The largest are expected to be those arising from changes in the pension provider and the terms and conditions of staff. The approved business case sets out how these costs will be met.

HUMAN RIGHTS ISSUES

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

EQUALITY IMPACT ASSESSMENT

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.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

20. There will be no direct costs created as a result of the changes proposed for the private or voluntary sectors.

LEGISLATIVE COMPETENCE

21. The Minister of Justice has made the following statement under section 9 of the Northern Ireland Act 1998:

“In my view the Legal Aid and Coroners' Courts Bill would be within the legislative competence of the Northern Ireland Assembly.”