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Access to Justice

1 Introduction

The Justice Committee commissioned research on key developments and thinking in legal aid and access to justice that have recently taken place in England and Wales and other jurisdictions with comparable legal systems to Northern Ireland. The context of the research is the Access to Justice Review which was commissioned by the Minister for Justice David Ford on 13 September 2010. The Minister published the Review Team's comprehensive report on 13 September 2011 which made 159 recommendations. The report is now subject to a three month consultation and the Minister will bring forward firm recommendations in the New Year. The main question for consideration is what will happen next. The Minister indicated that the report endorsed the provisions in the Justice Act 2011 on the recovery of costs from convicted defendants; proposals will be published to commence these powers. The Minister has acknowledged that given the complexity of the report, there will need to be a degree of prioritisation and will be seeking views on that.¹

The Committee may wish to consider how these recommendations will be prioritised. Will the Department accept that the matters identified by the Review as a matter of priority will be dealt with first, for example planning to implement recommended structural changes in respect of legal aid delivery? Or will it establish its own set of

¹ Northern Ireland Assembly Official report, 13 September 2011, 77
<http://www.niassembly.gov.uk/record/reports2011/110913.pdf>

priorities and if so, based on what principles? The Committee may also wish to consider how the Department will deal with these proposals for reform. For example will the Department propose a single comprehensive Bill for matters that require legislation or incremental reforms? Another issue for consideration is whether the Department will consider initiatives taking place in other jurisdictions that have not been recommended by the Review Team at this time.

To facilitate the Members of the Committee in their consideration of proposals recommended by the Review, eight research papers have been prepared. They cover the following areas:

- Access to Justice- Eligibility in Criminal Legal Aid
- Access to Justice- Eligibility in Civil Legal Aid
- Access to Justice-Scope in Civil Legal Aid
- Access to Justice -Alternative Dispute Resolution
- Access to Justice- Remuneration
- Access to Justice-Advice and Alternative Business Models
- Access to Justice-Money Damages
- Access to Justice- Structures for the Delivery of Legal Aid

These papers will be published shortly on the Northern Ireland Assembly website.

2 Access to Justice Papers

This section will give a brief synopsis of each of the papers listed above.

2.1 Access to Justice- Eligibility in Criminal Legal Aid

This paper considers recommendations from the Access to Justice Review in relation to eligibility in criminal legal aid and highlights key developments in England and Wales from two main sources: the Ministry of Justice Green paper on Proposals for the Reform of Legal Aid in England and Wales, and the House of Commons Justice Select Committee report on the government's proposed reforms. The paper also considers recent developments in Scotland in relation to financial contributions and criminal legal aid schemes in the Republic of Ireland.

The Access to Justice Review main recommendations in respect of eligibility in criminal legal aid are:

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

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

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

In England and Wales, the Ministry of Justice stated there are no proposals to change financial eligibility in criminal legal aid as means testing was introduced in the Magistrates Courts in 2006 and in the Crown Courts in 2010. However the Legal Aid, Sentencing and Punishment of Offenders Bill 2011 allows for the possibility of means testing to be introduced in advice and assistance for individuals detained in police stations. Whilst the Government has no plans at present to introduce means testing for representation upon arrest, the clause enables the government to introduce means testing if the circumstances dictate it. The Bill also allows for limits to be introduced on the amount an accused person who is acquitted of an offence can be reimbursed out of central funds. The Courts, where appropriate, may reduce the amount awarded to the accused because they may have been convicted of some offences but acquitted in other cases.

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

In the Republic of Ireland, the main type of legal aid provided to someone who is accused of a criminal offence is free legal aid provided under the Criminal Justice (Legal

Aid) Act 1962. The decision to grant legal aid is a discretionary matter for the courts and is not governed by financial eligibility guidelines. The Garda Station Legal Advice Scheme was established in 2001. The scheme applies to anyone detained at a Garda station for the purpose of investigation in certain types of offences. The scheme is confined to persons who are in receipt of social welfare payments or whose earnings are less than €20,316 per year.

2.2 Access to Justice-Eligibility in Civil Legal Aid

This paper provides information on the recommendations of the Access to Justice Review on changes to eligibility in civil legal aid and developments in England and Wales. The Access to Justice Review final report makes a number of recommendations regarding eligibility in civil legal aid. These suggestions are made primarily with a view to controlling spending as well as simplifying and harmonising the rules on eligibility. The recommendations from the Review Team cover among other matters: including housing equity in the calculation of capital; for people on passporting benefits reducing the capital limits for eligibility to the same as for persons not on such benefits; and increasing the contributions for persons on certain incomes; and requiring most applicants to pay a small up front contribution to the Commission. It has been suggested by the Review Team that particular consideration could be given to increasing the level of contributions out of disposable income for those above the upper limit and it was noted that in 2010/11 contributions amounted to around £850,000. The Review Team highlighted that a small up front contribution might secure a small budgetary easement. The Review Team has also suggested that financial modelling should include options for higher contributions than those proposed in England and Wales which could help to retain some areas of law in scope.

Many of these proposals are in line with the Ministry of Justice proposals although there appear to be some differences such as the approach to equity and mortgage disregards. The estimated savings for the proposals in England and Wales are:

- Applicants who are in receipt of passported benefits should be subject to same capital eligibility rules as others- average annual savings of £6m to the legal aid fund;
- Introduce a capital contribution fee of £100 for clients with disposable capital of over £1000- average annual savings of between £1-3 million to the legal aid fund;
- Abolition of capital disregards but retaining mortgage disregard in cases not involving contested property-average annual savings of between £4-20 million to the legal aid fund;
- Increase income contributions for all legally aided contributory clients would equate to no more than 30% of the clients disposable income, currently the maximum is 20%- average annual savings of between £3-8 million to the legal aid fund.

2.3 Access to Justice- Scope of Civil Legal Aid

This paper provides information on the recommendations of the Access to Justice Review on limiting the scope of civil legal aid and on developments in England and Wales. The Access to Justice Review Team stated they are working on the basis that criminal legal aid will remain in scope in line with the United Kingdom's human rights commitments. However the Review Team proposed in its final report that some areas could be taken out of the scope of legal aid to reduce spend. These areas include money damages and limiting the ability to reopen private family law disputes. The Review Team estimates that removing money damages from the scope of legal aid has the potential to save the legal aid fund £1 million per annum as well as significant running costs.

A number of candidates have been identified by the Review Team if budgetary pressures mean that some types of cases are to be taken out of scope. These include:

- Consumer issues and general contract;
- Criminal injuries compensation;
- Debt (unless the home is at risk);
- Immigration;
- Tort, including nuisance and injunctive relief (except in protection from harassment cases where mediation has failed);
- Other miscellaneous matters such as probate.

These are similar to some of the areas identified in England and Wales that could be taken out of scope; however the Ministry of Justice proposals go much further than the areas identified by the Access to Justice Review Team. Other areas in England and Wales include private law family cases (except in cases where domestic violence and child abuse is involved), employment, education and welfare benefits.

The Ministry of Justice estimated that removing these cases from scope has the following costs impacts:

- It is estimated that 600,000 clients would be impacted and would receive around £280m less worth of legal aid services;
- Legal service providers would provide £280m worth less of legally aided services;
- One off Legal Services Commission implementation costs are estimated to be around £1m;
- The proposed reforms might lead to a reduction in the number of court and tribunal cases and the fee income collected;
- A rise in unrepresented cases or represented cases previously brought by legally aided clients is likely to result in a rise in court fee remissions. This may place an additional cost burden on the Court Service estimated to be around £8m

- The total estimate of savings to the legal aid fund is £270m

Some concerns have been raised regarding the proposals in England and Wales in particular the issue of domestic violence as a criterion for eligibility. The Government has set out a number of instances which demonstrate evidence of domestic violence in which legal aid would be available.

Concerns have also been raised that the Ministry of Justice's proposals to remove some areas from legal aid could disproportionately impact on vulnerable groups in England and Wales including black and ethnic minority groups and people with disabilities who often rely more on legal aid. Another issue to be considered is the possible removal of immigration from the scope of legal aid due budgetary pressures. In England and Wales, amendments have been made to the Legal Aid, Sentencing and Punishment of Offenders Bill 2011 to bring cases where persons who have applied for leave to remain under the domestic violence immigration rules back into the scope of legal aid.

2.4 Access to Justice-Alternative Dispute Resolution

This paper provides information on the recommendations of the Access to Justice Review on Alternative Dispute Resolution (ADR) and on developments in England and Wales, Australia and the Republic of Ireland. The Access to Justice Review Team in the final report concludes that ADR enhances access to justice and in particular recommends the development of a family ADR pilot. The Review Team also recommended that consideration should be given to making it for a condition of legal aid in particular categories of case that the option of ADR should have been considered. The Review Team highlights the importance of confidentiality in ADR and outlines some instances where there may be exceptions, for example in ensuring enforcement of an agreement, where child abuse or domestic violence issues are at stake or where disclosure is needed to facilitate the investigation or prevention of a crime. The Review Team recommends legal position on privilege is confirmed in these circumstances and if necessary, legislation enacted.

In England and Wales, the number of publicly funded mediation cases has risen year on year from 400 in 1997 to 14,500 in 2009. In England and Wales, it has been proposed that legal aid will be retained for family mediation in private family law including private law children and family proceedings and ancillary proceedings. It is also proposed that that where a client enters mediation a fixed amount of legal help (equated to £150 of work) will be made available to facilitate the input of a solicitor in providing advice during mediation and formalising any agreement made. The fee would be payable whether mediation succeeds or not. This is useful to consider as the

Access to Justice Review highlights the desirability that parties have legal advice at appropriate points in the ADR process in Northern Ireland. In England and Wales, it has been suggested that ADR provides savings of around £10m to the family budget. The Review promotes the use of mediation or collaborative law if further help is needed to resolve outstanding issues. The Family Justice Review Team indicates in the interim report that attendance at dispute resolution should not be compulsory but should aim to become the normality.

In the Republic of Ireland, a comprehensive report and draft legislation covering Alternative Dispute Resolution has been published by the Law Commission. It is suggested that there is a strong economic case for the use of ADR as the Government spends €300m on litigation costs and associated legal expenses. The Law Commission recommends a statutory framework for specific forms of ADR and recommends that participation in the mediation process is voluntary.

In Australia, Family Dispute Resolution has been well established and this was supported by the establishment of Family Dispute Resource Centres. In Australia, the FDR process is compulsory. When a person is applying for a parenting order, they must first attend FDR and obtain a certificate to confirm an attempt at FDR was made. However there are exceptions to the compulsory requirement to attend FDR, in instances of family violence, child abuse or urgency. A cost benefit analysis of FDR concluded that legal aided FDR delivers a benefit costs ratio of 1:1.48, meaning that for every \$1 of Commonwealth funding spent on these services, there is a return of \$1.48 to the Commonwealth.

2.5 Access to Justice-Remuneration

This paper considers the Access to Justice Review recommendations in respect of legal professionals and expert witnesses. It also considers developments in England and Wales and the Republic of Ireland. There have been a number of recent developments regarding remuneration of the legal profession in Northern Ireland including reducing standard fees payable to solicitors and barristers in Crown Court cases and proposals setting out rules determining when legal aid will pay for two or more counsel at the Crown Court. The Review Team concludes it would not be right to make further cuts to remuneration without at least awaiting the outcome of a review of the workings of the new arrangements.

The Access to Justice Review Team recommends research on introducing a standard fee in criminal cases whether there is a contest, a guilty plea before or after listing. The Team also suggests looking at the fees in family and children cases. The Team notes the across the board reduction to civil fees in England and Wales, but suggests looking at each area on its merits rather than applying a blanket approach. The Access to Justice Review Team recommends the Department develop a scheme addressing expert witnesses.

In England and Wales, there are a number of proposals on remuneration outlined by the Government in its Green Paper:

- In civil cases, the Government is proposing an across the board 10% reduction in most legal fees ;
- **Reducing remuneration of expert witnesses**- it is proposed there should be a 10% reduction in rates. It is suggested that expert witness fees might account for £2-3 m of spend per year in civil cases;
- In criminal cases **harmonising fees in murder and manslaughter cases with other serious cases such as rape**. It is estimated that this proposal would produce £17m savings to the legal aid fund and making changes to fees in dishonesty cases. In England and Wales it is proposed **to reduce the number of categories where remuneration is based on the value involved in dishonesty cases**. It is estimated this proposal would produce average annual savings of £6m per annum;

In the Republic of Ireland, the Department of Justice and Equality has taken a phased approach to reducing rates payable under the criminal legal aid scheme. In July 2011, regulations were introduced and came into force in July 2011 to impose a 10% reduction in fees payable to solicitors and counsel under the criminal legal aid scheme. Rates were reduced by 10.5% in 2009 and by 8% in 2010. The regulations introduced in 2011 apply to fees payable to solicitors and counsel under the criminal legal aid scheme for appearances in the District Court and for appeal to the Circuit Court. The decrease applies to fees payable for essential visits to prisons, other custodial centres and bail applications. The reduction also applies to fees payable under the Ad-Hoc Garda Station, CAB schemes professionals engaged by the defence as expert witnesses and individuals providing translation or interpretation services.

The Department of Justice and Equality has also introduced regulations which impose a 10% reduction in fees for appearances in proceedings under the Enforcement of Court Orders Act 1940 where a legal aid certificate has been granted by the court.

2.6 Access to Justice-Advice and Alternative Business Models

This paper considers the Access to Justice Review's recommendations in relation to the delivery of advice and Alternative Business Models. This paper also considers developments in England and Wales, Scotland and the Republic of Ireland. The Access to Justice Review explored the scope for a mixed model of service delivery of

legal services. The Review recommended that the Law Society should be proactive in operating its waiver to facilitate voluntary organisations to employ solicitors to give advice to third parties whilst ensuring client protection arrangements are in place. The Review also considered the telephone helpline in England and Wales and indicated that this model may be open to testing in the future but suggested that the model may simply add another layer to the advice process. The Review Team concluded that it would be possible to achieve the objectives of the triage or gateway approach used in England and Wales through the existing infrastructure in NI.

The Review Team also argue that there is a case for publicly funded advice on legal issues such as debt, housing, welfare benefits and education to be provided on the basis of grants or contracts by the Northern Ireland Legal Services Commission. The Review Team recommended that the DoJ and the Legal Services Commission should be open to piloting new ideas to assess their impact. The Review Team provided examples such as the Housing Court Representation Service or the approach adopted by Scotland identify local initiatives to provide grant aid. The Review Team recommended some ideas that could be considered in the future including:

- Duty solicitors to be available at court to advise litigants in person;
- Acting on the outcome on the assessment of legal needs of children;
- Legal clinics involving lawyers and law students , perhaps on a pro bono basis to provide basic legal advice at local facilities;
- Piloting and evaluating a telephone helpline to provide initial advice and signposting services.

The Review Team suggests that proposals for legal advice and assistance will be cost neutral, with the additional costs of contracts for welfare advice and assistance being balanced by reductions in spend in other areas such as money damages.

England and Wales and Scotland have taken other approaches. These include:

- The development of a telephone helpline to act as a single gateway to civil legal aid for legally aided clients and paid -for services and would also act as a gateway to the wider advice services market including voluntary services. Concerns were raised to the House of Commons Justice Committee about this proposal in relation to vulnerable groups such as asylum seekers. The Justice Committee concluded that there are significant savings to be made annually (£50-70m) and that it is an option worth pursuing.
- Additional funding to the Scottish Legal Aid Board which has funded initiatives to deal with the impact of the recession.

The Access to Justice Review has also suggested that it may be appropriate in the future to reopen the debate on Alternative Business Models (ABMs) in NI. England,

Wales and Scotland have legislative provisions permitting such models. In England and Wales, Legal Services Act 2007 contains provisions for Alternative Business Structures (ABS), enabling lawyers and non-lawyers to form partnerships. The Legal Services (Scotland) Act 2010 contains provisions liberalising the legal services market, enabling solicitors to enter into business relationships with non-solicitors and allow investments from non-solicitors and external ownership. The Republic of Ireland is introducing a Bill in September 2011 which will include competition in the legal profession.

2.7 Access to Justice-Money Damages

This paper considers the Access to Justice Review Team's recommendations on money damages and looks at developments in England and Wales and the statutory body in the Republic of Ireland to determine claims for personal injury claims which is well established. The Access to Justice Review suggested that one of the significant areas that could be removed from the scope of civil legal aid is money damages. This paper has considered the Review Team's suggestions as to how money damages could be funded. The Review Team recommends the introduction of Conditional Fees in NI through commencement of Article 38 of the Access to Justice Order (Northern Ireland) 2003 and the relevant recommendations in Lord Justice Jackson's Review of Civil Litigation Costs

The Ministry of Justice has proposed changes to civil litigation costs, implementing Lord Justice Jackson's recommendations made in his review of civil litigation costs. These include:

- abolishing recoverability of CFA success fees from losing parties;
- abolishing recoverability of ATE insurance but allow the recoverability of ATE insurance premiums to cover the costs of expert witnesses reports in clinical negligence cases;
- The introduction of Qualified One Way Costs Shifting (QCOS) particularly in personal injury cases which means that the claimant will not be required to pay the defendants costs if the claim is unsuccessful;
- Increase the level of general damages for personal injury, nuisance and other civil wrongs to individuals by 10%.

It should be noted however concerns have been raised particularly with regards to the changes to CFAs. In response to the Ministry of Justice's proposals it has been suggested that some of the changes to No Win No Fee and ATE could have an adverse impact for example on lawyers taking up public interests cases or ordinary people holding powerful institutions to account.

The Republic of Ireland has taken a different approach in establishing a statutory body to assess all personal injury claims except for medical negligence known as InjuriesBoard.ie (formerly the Personal Injuries Assessment Board). Prior to the

introduction of InjuriesBoard.ie, the average timeframe for cases pursued through the litigation system prior was 36 months. InjuriesBoard.ie reported that actual savings in 2009 was €44.1 million (InjuriesBoard.ie v the litigation system). The Access to Justice Review Team considered a statutory body along the lines of the model in the Republic of Ireland but concluded that the circumstances of NI did not warrant the potential expenses or risks associated with setting up such a scheme.

2.8 Access to Justice-Structures for the Delivery of Legal Aid

This paper considers the recommendations for the delivery of legal aid in Northern Ireland and examines developments in England and Wales and New Zealand. The Access to Justice Review has suggested that policy responsibility for criminal and civil legal aid should be moved within an Access to Justice Directorate within the DoJ. It has also been recommended that the legal aid delivery arm should change its status from an NDPB to executive agency status within the DoJ with a Chief Executive responsible for decisions on individual legal aid application. It is also recommended that statutory provision should be given to a small board to ensure independence in decision making and to advise the Minister on legal aid matters. The review notes that a significant one off cost will be an effective IT system and highlights the system in the Scottish Legal Aid Board which is considered effective. The Review Team recommends that the Department of Justice carries out the necessary planning as a matter of priority and implements the structural changes at the earliest legislative opportunity, as they are conscious of the need to reduce uncertainty over governance arrangements and future status of staff.

In England and Wales, there are a number of changes to governance and administration currently taking place in the form of legislation, the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill 2011. Some of the key developments include:

- **Abolition of the Legal Services Commission:** changing its status from an NDPB to an executive agency within the Ministry of Justice;
- The transfer of **functions, responsibilities and powers** to the Lord Chancellor;
- The **designation of a senior civil servant** as director for legal aid casework who will be under duty to comply with direction and guidance by the Lord Chancellor
- One question that has emerged in relation to the proposed changes is how to ensure that **decisions regarding individual cases are made from political interference**. LASPO 2011 contains a provision which prevents the Lord Chancellor from giving directions or guidance to the director for legal aid on decisions in individual cases. The Access to Justice Review has highlighted that independence must be a key requirement of any arrangements.

Developments have also been taking place in New Zealand in respect of structures responsible for delivery of legal aid. The Legal Services Agency has been abolished and functions have been transferred to a business group in the Ministry of Justice under the Legal Services Act 2011. The Acting Deputy Secretary of the Legislation and Treaty Group is also the Legal Services Commissioner who has responsibility for taking decision on the grant of legal aid, independently from Government. The new Commissioner was formerly the General Manager of the Legal Services Agency.

3 Other areas for consideration

The papers commissioned from research do not cover every area dealt with in the Review which was very comprehensive. Some of the areas not considered include: family justice, procurement, quality, regulation and some areas relating to criminal cases dealt with in the report including election for trial at the Crown Court, a Public Defender Service and Solicitor Advocates amongst others. The Committee may wish to consider commissioning research on family justice as the Review Team have recommended a fundamental review of family justice in Northern Ireland to commence as soon as the Norgrove Review on Family Justice in England and Wales reports. The Review Team has referred to some of the recommendations in this review such as an integrated family service and the creation of a single family court. Another area the Committee may wish to consider further research is on procurement as the Ministry of Justice propose introducing competitive tendering principles initially in criminal cases and in the future in civil cases.