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Access to Justice: Eligibility in Civil Legal Aid

1 Introduction

This paper examines developments relating to eligibility in civil legal aid. This is the second paper in a series on developments in access to justice in Northern Ireland. The first paper considered some recent developments in eligibility in criminal legal aid in reducing costs of the legal aid budget. This paper considers recent developments in the reform of civil legal aid and also highlights issues arising from the Access to Justice Review in Northern Ireland. The paper also looks to the Ministry of Justice Green paper on Proposals for the Reform of Legal Aid in England and Wales which sets out proposals to tighten eligibility criteria and changes to equity disregards.

2 Reforming financial eligibility criteria in civil legal aid in Northern Ireland

Statistics provided by the Access to Justice Review suggest that in 2010/11 about £1.46 million was spent on 16,000 acts of advice and assistance on civil matters compared with £1 million on 9100 items the previous year. £36.9 million was spent on other forms of civil legal aid, involving preparation or representation at court proceedings. In 2010/11, 70% of that sum was devoted to family or children order cases.¹

There are three types of civil legal aid:²

- Legal advice and assistance (this includes such matters as preparing applications for civil legal aid certificates, writing letters, drafting documents, negotiation, taking statements, getting an opinion from a Barrister etc);³
- Assistance by way of representation (ABWOR), this permits a solicitor to represent a client in a limited set of cases e.g certain proceedings in Magistrates' courts or Mental Health Review Tribunal;⁴ and
- Legal aid which includes representation in court proceedings.⁵

Qualification for legal advice and assistance is subject to the applicant's financial circumstances.⁶ In order to qualify for civil legal aid including ABWOR, two tests must be satisfied:⁷

- The 'means test' looks to the applicant's financial eligibility; depending on the applicant's circumstances the applicant may be entitled to free legal aid or may have to pay a contribution towards the costs;
- The second test involves the 'merits' test- persons shall not be granted civil legal aid unless they can demonstrate that they have reasonable grounds for taking, defending or being party to proceedings.⁸ For example if the action is trivial, or if cost to the Legal Services Commission is disproportionate to the advantage gained from litigation, legal aid may be refused even if financially eligible.⁹

¹ The Access to Justice Review Northern Ireland "The Report", August 2011, 48

² <http://www.courtsni.gov.uk/en-GB/Services/LegalAid/LAImpactTest/>

³ B Dickson (2005) *The Legal System of Northern Ireland*, 5th Edition, SLS Legal Publications, 147.

⁴ B Dickson (2005) *The Legal System of Northern Ireland*, 5th Edition, SLS Legal Publications, 147.

⁵ B Dickson (2005) *The Legal System of Northern Ireland*, 5th Edition, SLS Legal Publications, 150.

⁶ <http://www.courtsni.gov.uk/en-GB/Services/LegalAid/LAImpactTest/>

⁷ <http://www.courtsni.gov.uk/en-GB/Services/LegalAid/LAImpactTest/>

⁸ Legal Aid, Advice and Assistance (NI) Order 1981, Article 10(4)

⁹ B Dickson (2005) *The Legal System of Northern Ireland*, 5th Edition, SLS Legal Publications, 151

What is the current means test?

Financial eligibility for legal aid is set out in the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 as amended by subsequent regulations. According to Article 9 of the Order, legal aid is available for anyone whose disposable income does not exceed 9,937 pounds (or 10,955 in personal injuries cases); but a person may be refused legal aid if they have disposable capital in excess of 6,750 pounds (8,560 pounds in personal injury cases) and it appears they can afford to proceed without legal aid.¹⁰ Persons in receipt of civil legal aid will have to make contributions if their disposable income exceeds £3355 or if they have disposable capital of more than £3000.¹¹

Financial eligibility for legal advice and assistance is set out in the same 1981 Order as amended. According to Article 3(1) of the Order, such assistance is available if a person's disposable income does not exceed £234 per week¹² or if the person is in receipt of income support or income based job seeker's allowance; the applicant must not have disposable capital of more than £1000 for legal advice and assistance or £3000 for ABWOR.

Regulations on financial eligibility for legal advice and assistance and ABWOR are set out in the NILSC Green Form Key Card documents.¹³ This requires a solicitor to identify the disposable capital and disposable income of an applicant. Applicants with disposable capital above certain limits are ineligible for assistance. The levels are variable depending on the number of dependents. The limits are different for the two schemes, and different rules apply to, for instance, people on benefits under the two schemes. The form also sets out disposable income limits. Persons with a disposable income of more than £234 per week are ineligible for assistance. Persons with a disposable income of between £100-234 per week can receive assistance but have to pay a contribution of the costs. Persons with a disposable income not exceeding £100 per week do not have to pay any contribution.

What reforms are taking place?

There have been a number of recent proposals to make changes to arrangements determining the financial eligibility for legal aid in Northern Ireland. The NILSC consulted in November 2007 on proposals to introduce a simplified eligibility test, partly based on a review of the simplified system introduced in England and Wales in 2001.

¹⁰ Legal Aid, Advice and Assistance (NI) Order 1981, Article 9, as amended by Legal Aid (Financial Conditions) Regulations 2009 and SR 1992/107.

¹² Article 12 (1) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 as amended
¹³ Article 3(1) of the Order, as amended by the Legal Advice and Assistance (Financial Conditions) Regulations (NI) 2009.

See the Green Card at
[http://www.nilsc.org.uk/uploads/circulars/documents/LSC.08.10.KEY%20CARD%2033%20\(amended\).10september10.pdf](http://www.nilsc.org.uk/uploads/circulars/documents/LSC.08.10.KEY%20CARD%2033%20(amended).10september10.pdf)
The Citizens Advice Bureau provides a guide to legal aid in Northern Ireland at
http://www.adviceguide.org.uk/nireland/your_rights/legal_system_nireland/help_with_legal_costs_nireland.htm.

Some of the components of the new system identified in the consultation paper are: a gross incomes threshold acts as an initial screening mechanism to determine eligibility and the incorporation of housing equity as a criterion in the screening process.¹⁴ The NILSC noted that it was important to introduce a sufficiently high level for housing equity in order not to affect the eligibility of the general population.¹⁵

Section 15 of the Access to Justice (NI) Order 2003 makes provision for the Legal Services Commission (NILSC) to prepare a Funding Code setting out criteria for deciding whether to fund civil legal services and what services are to be funded. The NILSC issued a consultation on the Funding Code criteria and procedures in 2009, however these do not appear to have been implemented at present.¹⁶ The NILSC sets out in the Funding Code plans to change the wording of the current merits test.¹⁷ Similar to the Funding Code for England and Wales, the new Funding Code will take into account the applicants prospects of success, the importance of the case to the client or whether the case has a wider public interest or raises human rights issues.¹⁸

Other changes have recently been made relating to the financial eligibility test in certain types of cases: firstly the removal of the test for applications for representation before a Mental Health Review Tribunal; secondly a waiver in domestic violence cases extending the upper income limit, extending access to justice for victims.¹⁹ The Justice Minister announced in December 2010 that he was removing the upper earnings and capital limits for persons applying for non-molestation orders in Magistrate's Courts.²⁰

Access to Justice Review Recommendations on financial eligibility

In its final report, the Access to Justice Review has emphasised the importance that changes should contribute towards the objective of bringing spend within budget and has made a number of suggestions in relation to financial eligibility in civil legal aid. These include:²¹

- Benchmark the upper income and capital limits with England and Wales;

¹⁴ NILSC "Financial Eligibility for Civil Legal Aid in Northern Ireland: A Consultation Paper on Proposals for Reform", 18. The paper outlines other elements of the proposed new scheme including treating rates as part of housing costs, recognition that people in Northern Ireland may have greater commuting costs, etc.

http://www.nilsc.org.uk/uploads/consultation/documents/Fnc1%20Elgblty_screen.pdf

¹⁵ NILSC "Financial Eligibility for Civil Legal: A consultation Paper on Proposals for Reform", November 2007

¹⁶ The Northern Ireland Funding Code-The Criteria, 29 June 2009 and The Northern Ireland Funding Code-The Procedures, 29 June 2009.

¹⁷ NILSC "Financial Eligibility for Civil Legal: A consultation Paper on Proposals for Reform", November 2007,2

¹⁸ NILSC The Northern Ireland Funding Code, Consultation Paper on the Proposed Criteria, Published 29.06.2009 7.4.5

¹⁹ NILSC "Legal Aid in Northern Ireland: A Briefing Paper for the Justice Committee" 23 September 2010, 9

²⁰ Department of Justice "Ford Announces Changes to Help Victims of Domestic Violence" 30 December 2010 Available at http://www.dojni.gov.uk/index/media-centre/news-archive/december_2010/ford_announces_changes_to_help_victims_of_domestic_violence.htm

²¹ Access to Justice Northern Ireland "The Report" August 2011, 103

- Include housing equity in the calculation of capital subject to a £100,000 disregard. The Review Team's concern was that if people can raise significant amounts of money against the equity in their property they should do so. This can be compared with the proposals in England and Wales where the proposal is to abolish the equity disregard, retain the mortgage disregard and include a gross capital limit for eligibility;
- For people in receipt of passported benefits, reduce the capital limits for eligibility to the same level as for those not in receipt of benefits. This is the same as the proposal in England and Wales;
- Where contributions are being paid, these should be based on a percentage of disposable income; Persons with a higher disposable income should pay a higher percentage of their disposable income in contributions. It is suggested that financial modelling should include options for higher contributions than those proposed in England and Wales where there is a proposed upper limit of 30% of disposable income. This may help to retain some areas of law in scope;
- Extend the liability to make monthly contributions to a minimum of 12 months or the duration of the case if it lasts longer than 12 months. Currently in England and Wales contributions are paid during the lifetime of the case;
- Remove the contributions requirement from the limited number of advice and assistance applications that can be expected in future;
- Provide for a small upfront contribution to be paid to the Commission in all cases except cases such as public law cases;
- Introduce standard allowances and disregards to reduce discretion where feasible.

The Review Team recommended that particular consideration could be given to increasing the level of contributions out of disposable for those above the upper limit and it was noted that in 2010/11 contributions amounted to around £850,000. The Review Team also suggested that a small up front contribution might secure a small budgetary easement²²

3 Changes to determining financial eligibility in civil legal aid in England and Wales

As is the case in Northern Ireland, to qualify for legal aid funding, an applicant has to satisfy two tests, the means test and the merits test. To qualify for the means test, an applicant in receipt of income support, Jobseekers Allowance, or income related Employment Support Allowance automatically qualify for legal aid without payment of a contribution. An applicant will qualify for free legal aid if they have a gross monthly income not exceeding £2657, a monthly disposable income not exceeding £315 and disposable capital of £3000 or less. An applicant will be offered funding on the basis

²² Access to Justice Review Northern Ireland "The Report", August 2011, 134

they agree to make a contribution towards legal costs if their monthly disposable income is between £317 and £733 or disposable capital between £3000 and £8000.²³

The merits test is set out in the Funding Code where the Legal Services Commission have to consider the prospects of success, whether the case has a significant public interest, is of overwhelming importance to the client or raises human rights issues.²⁴

The Ministry of Justice has set out its proposals for reforming financial eligibility rules for civil and family legal aid in its recent Green Paper. The government has no plans to change financial eligibility rules for criminal legal aid due to the recent introduction of means testing for crown court cases.²⁵

Changes to capital eligibility have been outlined in the consultation paper. One proposal concerns people 'in receipt of passporting benefits'. This term covers cases where the Legal Services Commission has used the receipt of certain income related benefits as a proxy to determine that someone is entitled to legal aid, without going through a more time consuming assessment process. The issue is that one may be in receipt of these benefits even though one has capital asset in excess of what would otherwise disqualify one from receiving legal aid. This issue had earlier been identified by NILSC.²⁶ It is proposed in the Ministry of Justice Green Paper that people in receipt of passporting benefits should have their capital assessed in the same way as it is assessed for others (although receipt of these benefits would still passport the applicant through the income side of the means test). It was highlighted that clients in receipt of passporting benefits are currently eligible for civil legal aid even though they may have capital up to £16,000, whereas non passported clients with disposable capital in excess of £8000 are financially ineligible for legal aid. This would apply to all types of legal help.²⁷ These changes have two implications: firstly that those with disposable capital in excess of £8000 would no longer be financially eligible for civil legal. Secondly clients in receipt of passporting benefits with capital of £8000 or less may become liable to pay capital contributions towards their legal costs based on an assessment of their disposable capital.²⁸ The Government indicates in its impact assessment that this proposal would make average annual savings of £6m to the legal aid fund.²⁹

²³ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 159

²⁴ The Funding Code Criteria, 8.3.2 http://www.legalservices.gov.uk/docs/civil_contracting/Funding_code_criteria_Jul07.pdf, last accessed on 30 May 2011

²⁵ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010

²⁶ NILSC "Financial Eligibility for Civil Legal Aid in Northern Ireland: A Consultation Paper on Proposals for Reform", 20.

²⁷ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 86

²⁸ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 87

²⁹ Ministry of Justice Impact Assessment on Proposals for the Reform of Legal Aid in England and Wales, November 2010, <http://www.justice.gov.uk/downloads/consultations/ia-financial-eligibility.pdf>

It is also proposed that clients with disposable income of £1000 or more would be liable for a one off contribution of £100.³⁰ It is estimated that this proposal would make average annual savings of £1-3 million to the legal aid fund.³¹

Further the Ministry of Justice paper suggests changes to rules which overlook the fact that someone may have substantial equity in property, known as the equity disregard.³² It is suggested that those who have access to funds through equity in a property would be required to use it before accessing legal aid.³³ It is proposed the equity disregard will be abolished and the mortgage disregard retained. However there will be a gross capital limit for eligibility of £200,000. In the case of pensioners, the gross capital limit would be £300,000. It is estimated that this proposal would make average annual savings of £4-20 million to the legal aid fund.³⁴

The paper also outlines proposals for persons with a certain level of disposable income to make slightly greater financial contribution towards the cost of legal aid funded litigation.³⁵ It is suggested that the new contribution would equate to no more than 30% of the clients disposable income, currently the maximum is 20%.³⁶ It is suggested that this proposal would make average annual savings of £3-8 million to the legal aid fund.³⁷

³⁰ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 87

³¹ Ministry of Justice Impact Assessment on Proposals for the Reform of Legal Aid in England and Wales, November 2010, <http://www.justice.gov.uk/downloads/consultations/ia-financial-eligibility.pdf>

³² Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 90.

³³ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 20

³⁴ Ministry of Justice Impact Assessment on Proposals for the Reform of Legal Aid in England and Wales, November 2010, <http://www.justice.gov.uk/downloads/consultations/ia-financial-eligibility.pdf>

³⁵ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 98.

³⁶ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 98

³⁷ Ministry of Justice Impact Assessment on Proposals for the Reform of Legal Aid in England and Wales, November 2010, <http://www.justice.gov.uk/downloads/consultations/ia-financial-eligibility.pdf>

4 Conclusion

The Access to Justice Review final report makes a number of suggestions 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 proposals 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.

Many of these proposals are in line with the English proposals although there appear to be some differences such as the approach to equity and mortgage disregards and the suggestion that financial modelling should include options for greater contributions for Northern Ireland than proposed in England and Wales to help retain some areas of law in scope.