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Access to Justice: Delivery of Advice and Alternative Business Models

1 Introduction

This paper examines possible changes to the system for providing civil legal services. One possibility is greater partnership with the voluntary and community sector to provide advice. Another is to develop alternative business structures for the legal professions.

2 Access to Justice Review Northern Ireland

2.1. Voluntary and Private Partnerships

One of the issues considered by the Review Team was the scope for a mixed model of service delivery in the area of legal help and advice. The Review Team notes the work undertaken in this area by solicitors who provide advice and assistance on any point of law in NI short of instituting proceedings under the 'Green Form' scheme. The Review Team highlighted that advice sector in NI which includes is well established and has an extensive network of providers.

It is suggested that tribunals should be included in the mixed model for advice and assistance as full legal aid should not be made available in tribunals except in those where liberty is at stake such as mental health tribunals.¹ The advice services provided by Housing Rights Service in helping people facing repossession of their homes should be sustained and it is recommended that consideration is given to what lessons that can be learnt in other contexts.²

The Review Team considered whether to recommend that the Government should facilitate the establishment of law centres and advice centres to add to the existing organisations such as Law Centre (NI) and the Children's Law Centre. The Review Team looked at models that exist in England and Wales such as Community Legal Advice Centres however noted that contractual arrangements were difficult to operate.³ The Review Team emphasised the importance of the role the voluntary sector plays in providing legal advice and assistance. Instead the Review Team recommends that the Law Society be proactive in operating its waiver to enable voluntary organisations to employ solicitors to give advice to third parties.⁴ The Review Team also considered a system of triage operated by a telephone service similar to the Community Legal Advice helpline in England and Wales. The Review Team suggested that this model could be open to testing in the future but indicated that this may simply add another layer to the advice process. The Review Team⁵ 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, reinforced as necessary by new providers.⁶

The Review Team argued 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.⁷ It is recommended that all recipients of funding for legal advice services from the private or voluntary sector should commit to providing a limited period of free advice to all who

¹ Access to Justice Review Northern Ireland "The Report", August 2011, 52

² Access to Justice Review Northern Ireland "The Report", August 2011, 52

³ Access to Justice Review Northern Ireland "The Report", August 2011, 54

⁴ Access to Justice Review Northern Ireland "The Report", August 2011, 54

⁵ Access to Justice Review Northern Ireland "The Report", August 2011, 55

⁶ Access to Justice Review Northern Ireland "The Report", August 2011, 55

⁷ Access to Justice Review Northern Ireland "The Report", August 2011, 58

approach them regardless of means.⁸ The Review Team reiterates in the final report that DoJ should be a member of the DSD Advice and Information Group. Furthermore it was recommended that DoJ and the Legal Services Commission should be open to piloting new ideas to assess their impact.⁹ 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.¹⁰ The Review Team recommended some ideas that could be considered in the future including:¹¹

- 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.

2.2 Alternative Business Models

In the final report, the Review Team recommends that Ministers may wish to give the issue of ABMs further consideration in the future and that the experience of other jurisdictions should be closely watched. It is suggested that the questions of ABMs should be revisited if it becomes clear it could bring advantages for Northern Ireland.¹²

It may therefore be useful to consider the previous review chaired by Sir George Bain who recommended against opening up the legal services market to alternative business models. The Bain Review considered a number of models including:¹³

- **Associations between Barristers-** the Bain Review considered that it was a risk that the choice that consumers currently have of engaging a barrister of their choice would be constrained by the introduction of associations between Barristers;
- **Legal Disciplinary Practices between solicitors and barristers-** it was concluded that this was unnecessary given the size and scale of Northern Ireland; the disadvantages would outweigh the advantages and potentially consumer choice would be reduced as consumers would be expected to use in-house counsel;
- **Multi-disciplinary practices-** the Bain Review recommended against this approach as the regulation of professionals from different backgrounds would be fraught with difficulties including different professional standards, codes of practices, conflicts of interest and issues of confidentiality;

⁸ Access to Justice Review Northern Ireland "The Report", August 2011, 58

⁹ Access to Justice Review Northern Ireland "The Report", August 2011, 59

¹⁰ Access to Justice Review Northern Ireland "The Report", August 2011, 59

¹¹ Access to Justice Review Northern Ireland "The Report", August 2011, 59

¹² Access to Justice Review "The Report", August 2011, 112.

¹³ Legal Services Review Group "Legal Services in Northern Ireland" (2006), 73-75, http://www.dfpni.gov.uk/legal_services.pdf

- **External Ownership**-ownership of legal firms by non- lawyers- it was suggested that a potential conflict of interest exists in balancing duties of the lawyer to the court and client against the interests of investors who would be interested in maximising their investment.

3 Developments in England and Wales

3.1 Telephone Advice as a gateway for civil legal aid services

The Access to Justice Review Team considered a system of triage operated through a telephone helpline similar to the Community Legal Advice (CLA) helpline in England and Wales. The Ministry of Justice has set out in its proposals in its Green Paper on reform of legal aid that the CLA helpline will be established as a single gateway for civil legal aid services. The Government has suggested that seeking civil legal aid can be stressful, time consuming and inconvenient for those in employment, for the elderly or immobile or for the vulnerable living in small communities. It is therefore proposed that a solution is required to cater for these needs and take into account changes in technology. The proposed approach is the use of a "simple straightforward telephone service..."¹⁴ The characteristics of this service are as follows:

- The helpline will be established as the single gateway to civil legal aid services;
- All clients will be able to access the first tier of service (the operator service);
- The second tier will offer specialist advice to eligible clients to all categories of law within the scope of legal aid;
- The operator will initially diagnose clients problems and determine their eligibility for legal aid;
- The Operator will also discuss with the client a range of options and refer them to the most appropriate service suited to their circumstances such as legal aid specialists, a paid for service or alternative sources of help.

The Ministry of Justice also proposed to expand the CLA helpline to include the option for paid for advice services for clients ineligible for legal aid. CLA operators in these cases will refer clients to paid for services, explain the charges for the service and make the relevant referral.¹⁵ The Ministry of Justice proposed that the CLA helpline would provide not just a gateway to legally aided services but to the wider advice services market including voluntary services.¹⁶

The Justice Committee at Westminster received evidence from stakeholders highlighting concerns about the telephone helpline as a single gateway for civil legal

¹⁴ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 82

¹⁵ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 84

¹⁶ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, 84

aid services particularly in relation to asylum clients who have experienced traumatic events such as rape and torture in which it can take a period of time for them to disclose their problems. It was suggested that face to face interaction was the most suitable way to deal with such clients to enable them to build trust.¹⁷ The Justice Committee, accepting such concerns, however concluded that there are significant savings to be made annually (£50-70m) and that it is an option worth pursuing. The Committee recommended that the Government works with public and private service providers to ensure the helpline is designed to effectively provide a service to vulnerable clients and to monitor its effectiveness.¹⁸

3.2 Alternative Business Models

In 2004, the Government tasked Sir David Clementi to conduct a review (the Clementi Review) to consider a regulatory framework which would promote competition, innovation and ensure consumer interest in the legal sector.¹⁹ The Review recommended that outside ownership of Legal Disciplinary Practices²⁰ should be permitted and that non-lawyers should be permitted to be managers of such practices. It was recommended that outside ownership should be subject to a 'fitness to own' test and that the regulatory focus should be on the economic unit rather than the individual lawyer.²¹ Legislation has been introduced to give effect to these recommendations. Part 5 of the Legal Services Act 2007 contains provisions for Alternative Business Structures (ABS), enabling lawyers and non-lawyers to form partnerships. Section 72 provides that where non-lawyers are managers or have an interest in shares in the body, then it must become a licensed body and regulated by a licensing authority. Part 6 of the Act deals with the complaints procedures relating to ABS including an in-house complaints mechanism and the role of the Ombudsman Scheme administered by the Office of Legal Complaints.²²

The Law Society in the lead up to the General Election in 2010 welcomed the provisions permitting the development of alternative business models. However the Law Society manifesto highlighted two issues: the first concern was the effect of large firms offering commoditised legal work will be that existing firms will find it uneconomic to undertake less remunerative publicly funded work in fields such as immigration,

¹⁷ House of Commons Justice Select Committee "Government's Proposed Reform of Legal Aid" Third Report of Session 2010-2011, para 162

¹⁸ House of Commons Justice Select Committee "Government's Proposed Reform of Legal Aid" Third Report of Session 2010-2011, para 163

¹⁹ Sir David Clementi "Review of the Regulatory Framework for Legal Services in England and Wales", December 2004, pg 1, <http://webarchive.nationalarchives.gov.uk/http://www.legal-services-review.org.uk/content/report/report-chap.pdf>

²⁰ The Clementi report explains that Legal Disciplinary Practices are law practices which bring together lawyers from different practices to provide legal services to third parties, Sir David Clementi "Review of the Regulatory Framework for Legal Services in England and Wales", December 2004, pg 9

²¹ Sir David Clementi "Review of the Regulatory Framework for Legal Services in England and Wales", December 2004, pg 138-139, <http://webarchive.nationalarchives.gov.uk/http://www.legal-services-review.org.uk/content/report/report-chap.pdf>

²² Legal Services Act 2007, <http://www.legislation.gov.uk/ukpga/2007/29/contents>

housing and mental health. The second issue was that there needs to be a level playing field to ensure the regulatory regime applying to all firms is fair and provides protection for clients.²³

4 Developments in Scotland

4.1 Advice

The Government in its Programme for Government 2009-2010 committed to supporting initiatives to support individuals most vulnerable to the impact of the economic recession. An additional £3 million pounds has been available to the Scottish Legal Aid Board (SLAB) to expand in-court advice and other legal advice services.²⁴ The purpose of the funding is to provide legal advice and representation for people facing repossession and other problems such as debt.²⁵ Furthermore an additional £1.1 million has been provided to Citizen's Advice Bureau for its face-to-face debt services.²⁶

4.2 Alternative Business Models

In 2009, the Scottish Government consulted on whether Alternative Business Structures (ABS) should be permitted for the provision of legal services in Scotland. At that time, solicitors could work alone or in a partnership with other solicitors. Only solicitors could own a firm of solicitors and they were prevented from forming a partnership with non-solicitors (with the exception of foreign lawyers in multi-national practices). Solicitors could not form business relationships with Advocates.²⁷ The Government held the view that these restrictions constrained innovation and did not deliver a competitive market across a range of legal services. It was also recognised that Scottish legal firms need to be able to compete effectively against firms from other jurisdictions.²⁸ The options for ABS set out in the consultation paper were:²⁹

- An **ABS involving non lawyer ownership**, enabling non-lawyers to participate in a practice but not offering a direct service to clients. For example a chief executive or financial director who would hold an equity stake in the practice;

²³ The Law Society "Delivering Justice", 21, <http://www.lawsociety.org.uk/new/documents/2010/manifesto2010.pdf>

²⁴ The Scottish Government "Towards a more successful Scotland: The Government's Programme for Government 2009-2010, <http://www.scotland.gov.uk/Publications/2009/09/02152902/4>

²⁵ Scottish Legal Aid Board News Release "Legal advice for people facing repossession and debt" <http://www.slabb.org.uk/documents/grantfundingGENERALPRESSfinalforwebpdf.pdf>

²⁶ The Scottish Government "Towards a more successful Scotland: The Government's Programme for Government 2009-2010, <http://www.scotland.gov.uk/Publications/2009/09/02152902/4>

²⁷ Advocates are the equivalent of Barristers in Northern Ireland.

²⁸ The Scottish Government Analysis of responses to the consultation paper on the regulation of legal services in Scotland" para 3.2 <http://www.scotland.gov.uk/Publications/2009/10/29090306/4>

²⁹ The Scottish Government "Wider Choice and Better Protection: A consultation paper on the regulation of legal services in Scotland" para 2.22-2.30

- An **ABS involving external ownership** which would allow shareholding by investors who would hold sufficient shares to give them an influencing or controlling interest in the practice. It is suggested this type of ownership would have a number of advantages including increased access to external capital which would enable firms to grow and compete as well as incentives for staff who could be rewarded with shareholding. Possible risks cited include possible pressure to act in improper or illegal ways, compromising independence or concentrating practices in larger units which could impact on access to justice in rural areas;
- **Multi-Disciplinary Practices (MDPs)** which would allow solicitors and other professionals such as accountants or surveyors to come together in business to provide legal and other services to third parties. The advantages of MDPs include greater flexibility and choice for clients including one stop shops to conduct a range of businesses, firms would be able to share overheads and could sustain legal practices in smaller communities where a solicitor's practice may not be commercially viable on its own. The main difficulty with this approach is reconciling the different regulatory codes that may impact on the business.

The majority view of respondents to the consultation (22 respondents or 58%) was in favour of permitting ABS. A number of advantages were suggested in responses including that they would enable better access to justice, would give consumers more choice, reduce prices, ensure convenience in providing a one stop shop and potentially provide a better quality of service and increase consumer confidence in the profession. Minority views were that there was no need for ABS, potentially the independence of the profession could be undermined, there is little evidence to support their introduction, and that legal services should be provided by smaller rather than larger firms.³⁰

The Legal Services (Scotland) Act 2010 was introduced in November 2010.³¹ The policy memorandum to the Bill noted that the legal profession in Scotland was facing competition from English firms entering the Scottish legal services market and had been affected by the economic climate.³² The legislation 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.³³ The legislation sets out regulatory objectives and professional principles which apply to all legal professionals. Part 2 of the legislation sets out the regulatory framework within which licensed providers must operate and includes regulatory functions for Scottish

³⁰ The Scottish Government Analysis of responses to the consultation paper on the regulation of legal services in Scotland" para 3 <http://www.scotland.gov.uk/Publications/2009/10/29090306/4>

³¹ <http://www.scotland.gov.uk/News/Releases/201011/10100446>

³² Legal Services (Scotland Bill) Policy Memorandum, 1

³³ Sections 62-97 of the Legal Services (Scotland) Act 2010 deals with the issue of non solicitor investors, sections 123 and 124 allow solicitors to enter business relationships with licensed legal service providers.

Ministers, approved regulators and the Office of Fair Trading.³⁴ Section 141 of the legislation provides a role for the Scottish Legal Aid Board in monitoring the availability and accessibility of legal services in Scotland.

5 Developments in the Republic of Ireland on Competition in the legal Profession

In the Republic of Ireland, the programme for Government 2011 contains a commitment to “establish independent regulation of the legal professions to improve access and competition, make legal costs more transparent and ensure adequate procedures for addressing consumer complaints.”³⁵ This commitment will be introduced in the Legal Services Bill which is due to be published by the end of September and is required as part of the memorandum of understanding with the European Union and International Monetary Fund. It is suggested that the legislation will address modernisation of the legal profession, restrictions on access, competition and the demarcation of solicitors and barristers.³⁶

6 Conclusion

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, however 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 recommend 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.

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;
- Additional funding to the Scottish Legal Aid Board which has funded initiatives to deal with the impact of the recession.

³⁴ Part 2 of the Legal Services (Scotland) Act 2010.

³⁵ Department of the Taoiseach, Programme for Government 2011, http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf

³⁶ Irish Times, “Legal Services Bill for Cabinet Today”, 8 September 2011, <http://www.irishtimes.com/newspaper/ireland/2011/0908/1224303701131.html>

In terms of the development of the telephone helpline concerns have been raised regarding impact on vulnerable clients particularly asylum clients. However it has been determined that the savings make it an option worth pursuing.

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. The Republic of Ireland is introducing a Bill in September 2011 which will include competition in the legal profession.

Some of the benefits outlined in the literature on ABMs include;

- Increasing access to justice;
- Giving consumers greater choice and flexibility;
- Potentially lowering prices;
- Enabling firms to share overheads, increasing capital to enable firms to grow and compete in the market as well as rewarding staff with shareholding.

However some concerns raised in the literature that should be carefully considered include;

- Compromising independence of the legal profession;
- Impacting on access to justice in rural areas if services were concentrated in larger units;
- In the case of Multi-disciplinary practice, reconciling different regulatory codes of practice;
- Whether some firms would find it uneconomic to undertake less remunerative publicly funded cases for example in the areas of immigration, housing and mental health.