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Civil Legal Aid

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This research paper provides information on civil legal aid schemes and expenditure in Northern Ireland. The paper looks at recent developments in Northern Ireland and examines practices in other jurisdictions.

Key Points

- In international terms, legal aid expenditure in NI is high compared to other jurisdictions. Some of the studies indicated that Northern Ireland had the highest legal aid expenditure amongst the countries examined. Furthermore, comparisons for non-criminal legal aid are based on 2008 data and do not reflect the significant increases reported by DoJ in NI recent years.
- MoJ research indicated that, although spending on legal aid in England and Wales was relatively high in comparative terms, this did not apply to the overall costs of the justice system, as spending on prosecution and courts were comparatively low. However, this cannot be said for Northern Ireland;
- Legal aid for Children Order and Civil Legal aid has increased significantly in recent years. Children Order cases account for approximately 18% of the total civil legal aid expenditure and civil legal aid accounts for approximately 70% of the total civil legal aid expenditure. Without a detailed breakdown of the civil legal aid expenditure, it is not possible to ascertain whether particular types of cases are driving the civil legal aid costs;
- The DoJ have offered a number of reasons for the increases in civil legal aid expenditure. These included an increase in Children Order cases, an increase in the number of complex, higher cost cases. The taxing Master has also processed cases faster clearing a backlog of cases and there has been a lag in reform in Northern Ireland compared to other jurisdictions. In addition, the NILSC reported a significant proportion of the increase in 2011/12 related to the Omagh civil action case, as well as the increase in Children Order cases;
- An examination of developments across a range of jurisdictions demonstrates that there are a number of ways to control legal aid expenditure: change financial eligibility rules, reform representation, reduce scope, reduce remuneration, developing alternatives to court and improvement of governance. DoJ proposes to do most of these except for reducing scope (with the possible exception of alternative funding of money damages cases). According to the DoJ, further reduction of scope may be considered if more savings are required;
- Reports by the NIAO and PAC in Northern Ireland were critical of the governance arrangements within the NILSC and of the reliability of information used to project current and future spend. The CAG was also concerned that the civil legal aid system was complex compared to the criminal legal aid scheme and there was greater scope for fraud or error in terms of eligibility or payments to practitioners. The Access to Justice Review Departmental Action Plan contains a number of projects on governance including those relating to management information and counter-fraud.

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1 Introduction

In September 2010, the Minister for Justice, David Ford, commissioned the Access to Justice Review. The Review, which was chaired by Jim Daniell, former Chairman of the Northern Ireland Legal Services Commission (NILSC), published its final report, containing over 150 recommendations and concluding points, in August 2011. A number of these recommendations related to civil legal aid.¹

In July 2012, the Minister for Justice published a Departmental Action Plan which included 38 projects to implement the recommendations of the Access to Justice Review.² The Action Plan contains three strategic objectives: improving access to justice; bringing legal aid within budget; and governance and accountability projects in response to Northern Ireland Audit Office/Public Accounts Committee reports. The Department of Justice has recently consulted on proposals for the reform of publicly funded legal representation in the civil and family courts and is currently consulting on proposals to reform financial eligibility for civil and criminal legal aid.³

Section 2 of this paper sets out the background to civil legal aid and responsibility for legal aid in Northern Ireland. Section 3 looks at civil legal aid expenditure and associated cost drivers in Northern Ireland. Section 4 looks at international comparisons in legal aid including civil legal aid. Section 5 considers ways to control legal aid expenditure. Section 6 draws a number of conclusions based on consideration of the information presented in the paper

2 Civil Legal Aid in Northern Ireland

2.1 Background

Legal Aid is the scheme by which the State provides financial assistance in legal matters.⁴ In Northern Ireland there are broadly five areas in the legal aid scheme:

- Legal Advice and Assistance;
- Assistance by Way of Representation (ABWOR);
- Children Order;
- Civil Legal Aid;

¹ Access to Justice Review Northern Ireland "The Report" available at http://www.courtsni.gov.uk/en-GB/Publications/Public_Consultation/Documents/Access%20to%20Justice%20Review%20Northern%20Ireland%20-%20The%20Report/Access%20to%20Justice%20Review%20FINAL%20REPORT.pdf

² Department of Justice Access to Justice Departmental Action Plan <http://www.dojni.gov.uk/access-to-justice-review-departmental-action-plan>

³ Department of Justice Reform of Publicly Funded legal representation in the Civil and Family Courts . Available at <http://www.dojni.gov.uk/index/public-consultations/current-consultations/reform-of-publicly-funded-legal-representation-in-the-civil-and-family-courts.htm>

⁴ B Dickson "The Law in Northern Ireland: An Introduction" SLS Legal Publications, pg 295

- Criminal Legal Aid

The following sections will cover legal aid in the civil sphere but not criminal legal aid. In Northern Ireland, nearly every type of hearing falls under the coverage of the legal aid schemes. However, a few problems are not covered by the scope of legal aid, for example, libel and slander, hearings relating to elections or recovery of debt.⁵

Legal Advice and Assistance

Legal Advice and Assistance (the Green Form Scheme) enables individuals aged 16 and over, if they are financially eligible, to obtain advice from a solicitor before cases go to court. Solicitors can claim £43.25 an hour for their work and £3.35 for each letter they write or telephone call they make.⁶ The maximum a solicitor can claim under this scheme is £88 per case unless they get special permission from the Northern Ireland Legal Services Commission (NILSC) to undertake further work.⁷ At present, an applicant with no dependants does not qualify if his/her disposable capital (savings) exceeds £1,000. There are higher limits for persons with dependents.⁸ If a person's disposable capital is less than £1,000, they will only be eligible for free legal advice and assistance if they are on passported benefits such as Jobseeker's Allowance or Pension's Credit or if their disposable income is less than £234 per week.⁹ Disposable income means the applicant's take home pay minus regular living expenses such as food and rent.¹⁰ Persons who are not in receipt of passported benefits may have to pay a contribution.¹¹ Legal Advice and Assistance accounted for £4.6m of legal aid expenditure in 2011/12; this represents 8.6% of the total civil legal aid expenditure. There was an increase of 119% from 1999/2000 (see table 1 in this paper for figures).

Assistance by Way of Representation (ABWOR)

Assistance by Way of Representation (ABWOR) allows a solicitor and in some instances counsel to provide representation to a person in civil proceedings in magistrates' courts (for example proceedings in relation to children) and is available to patients before Mental Health Review Tribunals. In cases of ABWOR, the disposal capital limit for eligibility is £3,000. As is the case in Legal Advice and Assistance, ABWOR is a contributory scheme.¹² Unlike the Legal Advice and Assistance scheme, approval for representation will only be granted by the NILSC if it is shown that there are reasonable grounds for taking, defending or being party to proceedings (known as the Merits Test). ABWOR excluding Children Order cases accounted

⁵ Schedule 1, part II of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981

⁶ B Dickson "The Law in Northern Ireland: An Introduction" SLS Legal Publications, pg 295

⁷ Legal Aid in Northern Ireland, obtained from the Department of Justice with thanks on 14 January 2013.

⁸ <http://www.nilsc.org.uk/uploads/publications/documents/KEYCARD%209th%20APRIL%202012.pdf>

⁹ B Dickson "The Law in Northern Ireland: An Introduction" SLS Legal Publications, pg 296

¹⁰ B Dickson "The Law in Northern Ireland: An Introduction" SLS Legal Publications, pg 296

¹¹ Legal Aid in Northern Ireland, obtained from the Department of Justice with thanks on 14 January 2013.

¹² Legal Aid in Northern Ireland, obtained from the Department of Justice with thanks on 14 January 2013.

for £2.1m of legal aid expenditure in 2011/12; this was 3.9% of the total civil legal aid expenditure. There was an increase of 200% since 1999/2000 (See table 1 for figures).

Children Order

Children Order funding is not strictly speaking a separate type of legal aid. Funding is provided by way of ABWOR or civil legal aid depending on the court where proceedings take place. ABWOR and civil legal aid are provided without the application of a means test in special Children Order proceedings, for example emergency child protection proceedings. In other Children Order proceedings, financial eligibility tests are applied and the applicant may have to pay contributions.¹³ Children Order cases accounted for £9.5m of legal aid expenditure in 2011/12; this was 17.8% of the total civil legal aid expenditure. There was an increase of 428% since 1999/2000.

Civil Legal Aid

Civil legal aid provides for representation in civil court proceedings, primarily in the County Court and High Court. Civil legal aid allows someone to obtain legal representation by a solicitor and counsel to bring or defend a case.¹⁴ Civil legal aid is subject to a financial eligibility and merits test. Civil legal aid is available for those whose disposable capital is not more than £6,750 and whose disposable income does not exceed £9,937 per annum. In cases involving personal injury claims, these limits are increased to £8,560 and £10,955 respectively.¹⁵ An applicant for civil legal aid will have to make contributions towards the costs of legal aid if:¹⁶

- His or her disposable income exceeds £3355 a year;
- His or her disposable capital exceeds £3,000

Once the financial eligibility tests have been satisfied, the NILSC has to consider whether the applicant has reasonable grounds for being a party to proceedings and that it would not be unreasonable for legal aid to be granted. Legal aid may be refused, even if the applicant is financially eligible, if the cost to the NILSC is disproportionate to the advantage that might be gained from the action.¹⁷ Civil legal aid amounted to £37.2m of legal aid expenditure in 2011/12. This was 69.9% of the total civil legal aid expenditure. There was an increase of 447% since 1999/2000.

¹³ Legal Aid in Northern Ireland, obtained from the Department of Justice with thanks on 14 January 2013

¹⁴ Legal Aid in Northern Ireland, obtained from the Department of Justice with thanks on 14 January 2013

¹⁵ Legal Aid, Advice and Assistance (NI) Order 1981, Article 9, as amended by Legal Aid (Financial Conditions) Regulations 2009, Regulation 3.

¹⁶ Legal Aid, Advice and Assistance (NI) Order 1981, Article 12, as amended by Legal Aid (Financial Conditions) Regulations 2009, regulation 4.

¹⁷ B Dickson "The Law in Northern Ireland: An Introduction" SLS Legal Publications, pg 295

2.2 Responsibility for Civil Legal Aid

The Northern Ireland Legal Services Commission (NILSC) is a Non Departmental Body (NDPB) of the DoJ. The Access to Justice (Northern Ireland) Order 2003 provides that the NILSC is responsible for securing that individuals have access to civil legal services that meet their needs and promoting the availability to individuals of such services.¹⁸ The key activities of the NILSC include:¹⁹

- Considering applications for civil legal aid;
- Assessing bills for civil and criminal legal aid, including advice and assistance;
- Developing and implementing a programme of reform in civil legal aid, and in conjunction with PLSD, implementing reforms of criminal legal aid;
- Making payments and reporting on expenditure with in relation to civil and criminal legal aid;
- Maintaining and developing the systems, procedures and relationships and support these key activities;
- An appeals function comprising:
 - An Appeals Committee dealing specifically with appeals against the refusal of civil legal aid;
 - A Fees Assessment Committee advising on appeals against the assessment of bills for work done under civil legal aid;
 - Up to 31st March 2011 an Appropriate Authority, a Committee established under the Legal Aid in Criminal Proceedings (Costs) Rules (NI) 1992, which determined claims made for work done in criminal proceedings and related appeals where the criminal legal aid certificate was granted prior to 2005.

It should be noted, however, that whilst delivery of legal aid is the responsibility of the NILSC, from November 2011 the DoJ has become responsible for all areas of legal aid policy not assigned to the Commission by statute.²⁰ For example, the Access to Justice (Northern Ireland) Order 2003, requires the NILSC to prepare a Funding Code setting out the criteria according to which any decision is to be taken as to whether to fund civil legal aid services for an individual and if so what services are to be funded²¹ The Access to Justice Review

¹⁸ Article 3 (3) (a) of the Access to Justice (NI) Order 2003.

¹⁹ NILSC Annual Report and Financial Statements for the Year ended 31 March 2012, http://www.nilsc.org.uk/uploads/publications/documents/annualreport_2011_2012.pdf

²⁰ NILSC Annual Report and Financial Statements for the Year ended 31 March 2012, http://www.nilsc.org.uk/uploads/publications/documents/annualreport_2011_2012.pdf

²¹ Article 15 of the Access to Justice (Northern Ireland) Order 2003

Team recommended the “integration of legal aid policy and sponsorship of the delivery of the agency within a strong access to justice directorate in the Department of Justice.”²²

3 Civil Legal Aid Expenditure in Northern Ireland

Civil cases across a number of areas, with the exception of Children Order cases appear to be decreasing in Northern Ireland; however civil legal aid costs have escalated in recent years. The following sections examine the data on civil cases in Northern Ireland and costs of legal aid expenditure.

3.1 Costs of Civil Legal Aid in Northern Ireland

Civil legal aid expenditure has increased significantly over the last 12 years. There has been an increase from £11.4m in 1999/2000 to £53.4m in 2011/2012, an increase of 368% (See Table 1 below). All civil legal aid accounted for 48.7% of total legal aid expenditure in 2011/12. Overall legal aid expenditure in 2011/12 amounted to £109.6m.

Officials from DoJ explained to the Committee for Justice in an oral briefing that in the 2011/2012 approximately £4.5 million was spent on the Omagh proceedings. If these costs are taken out of the equation, the figure for civil legal aid spend is £48.7m. The Department included this figure in its consultation paper on Reform of publicly funded legal representation in the civil and family courts as the Omagh proceedings were unique and therefore not to be taken as a general comparator. The Department indicated that would give a percentage of over 300% increase.²³

DoJ reported that criminal legal aid reforms are having the predicted effect and that criminal legal aid expenditure is forecast to reduce to under £37m in 2014/15 from a peak of £59.9m in 2009/10.²⁴ The Committee was informed that this year’s legal aid spend could be up to £107m compared to a budget of £85m.²⁵

Table 1 below sets out **civil legal aid expenditure** in NI from 1999/2000 to 2011/2012.²⁶

²² Access to Justice Review Northern , “The Report” Recommendation 152, pg 154, http://www.courtsni.gov.uk/en-GB/Publications/Public_Consultation/Documents/Access%20to%20Justice%20Review%20Northern%20Ireland%20-%20The%20Report/Access%20to%20Justice%20Review%20FINAL%20REPORT.pdf

²³ Briefing to the Justice Committee on 22 November 2012.

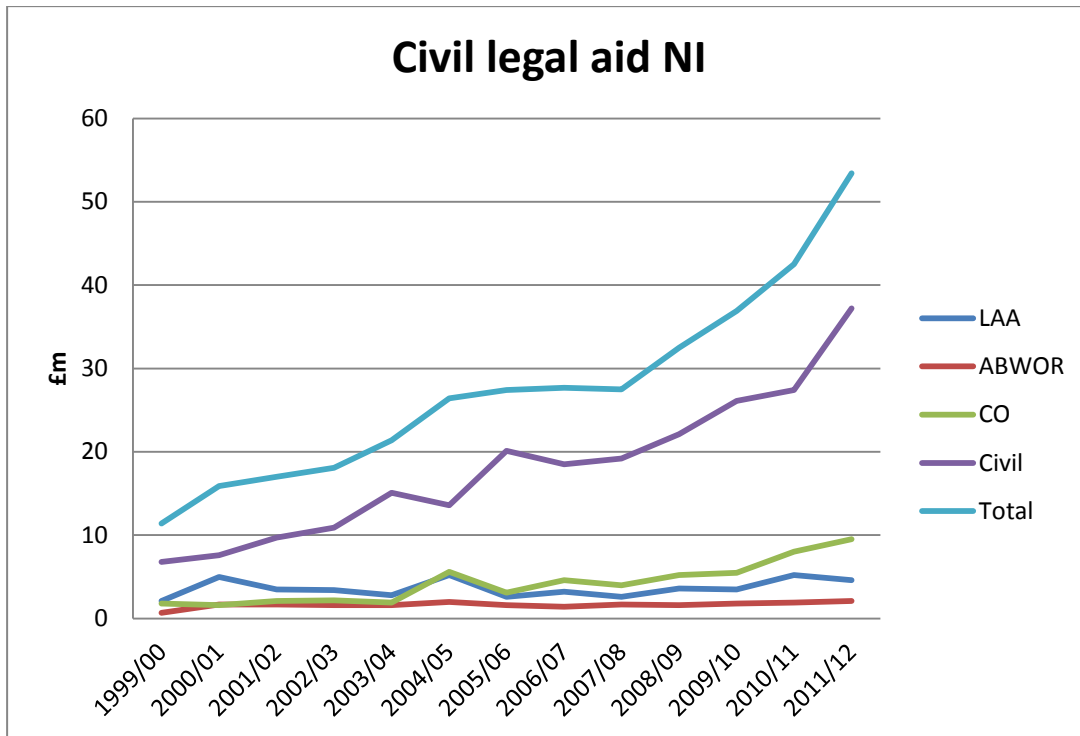
²⁴ Department of Justice Consultation Document “Reform of Publicly Funded legal Representation in the Civil and Family Courts” November 2012, pg 7.

²⁵ Briefing from the Department of Justice to the Justice Committee on the January 2013 Monitoring Round , 10 December 2012, para 8 & 9.

²⁶ Profile of Legal Aid Cash Expenditure from 1999/2000 – 2011/2012 Information taken from a table obtained with thanks from the Department of Justice on 14 January 2013

Financial Year	All Civil				
	LAA	ABWOR	CO	Civil	Total
	£m	£m	£m	£m	£m
99/00	2.1	0.7	1.8	6.8	11.4
00/01	5.0	1.7	1.6	7.6	15.9
01/02	3.5	1.7	2.1	9.7	17.0
02/03	3.4	1.6	2.2	10.9	18.1
03/04	2.8	1.6	1.9	15.1	21.4
04/05	5.2	2.0	5.6	13.6	26.4
05/06	2.6	1.6	3.1	20.1	27.4
06/07	3.2	1.4	4.6	18.5	27.7
07/08	2.6	1.7	4.0	19.2	27.5
08/09	3.6	1.6	5.2	22.1	32.5
09/10	3.5	1.8	5.5	26.1	36.9
10/11	5.2	1.9	8.0	27.4	42.5
11/12	4.6	2.1	9.5	37.2	53.4

The graph below shows the expenditure for each type of civil legal aid since 1999/2000



3.2 Drivers of costs

A number of factors have been highlighted by the Department of Justice in a briefing to the Committee for Justice on the rising costs of civil legal aid expenditure in NI.²⁷ One explanation given is the increased volume in children order cases. The NILSC annual report and accounts explain that there has been a significant increase in civil legal aid in 2011/12. The NILSC annual report offers two explanations: the Omagh Civil Action case which was £4.5 m was paid during the year; and the increase in Children Order cases which had an increase of £1.3m from £8.4m in 2010/11 to £9.7m in 2011/12.²⁸

According to a recent DoJ consultation paper, while many business areas are decreasing, children order cases are increasing.²⁹ The Children Order came into effect in 1995 and that has led to a significant increase in terms of average case cost and applications. The Baby P case in 2009 led to an increase in cases.

Judicial statistics published by the Northern Ireland Courts and Tribunals Service (NICTS) indicate that civil cases across a number of business areas are decreasing in volume, however Children Order cases have significantly increased in recent years. For example in the County Court, the number of ordinary civil bill cases received and disposed increased year on year between 2007 and 2010 with an overall increase of 15% and 22% respectively. However between 2010 and 2011, the number of civil bill cases received and disposed decreased by 12% and 10% respectively.³⁰ In the Magistrates Court, Civil and Family Business received decreased by 33% between 2007 and 2008. Subsequently the volume of business received fluctuated over the next four years, decreasing by 5% overall between 2008 and 2011.³¹ Civil and Family Business in the Magistrates' Court disposed has also fluctuated over the last five years. Between 2007 and 2011, civil business disposed has decreased by 2%.³²

Children Order cases have increased in recent years. Applications in Children Order cases decreased by 7% between 2007 and 2008 and increased each year until 2011. Applications received increased by 32% overall between 2007 and 2011. Applications disposed in Children Order cases decreased by 6% between 2007 and 2008. There was a further 1% decrease between 2008 and 2009 and then applications increased each year until 2011. Applications disposed of increased overall by 38% between 2007 and 2011.³³

The Department informed the Committee for Justice that there has been an increase in the number of complex, higher cost civil cases this year. There were 32 cases in 2011-12 at a

²⁷ Briefing by Officials from the Department of Justice to the Committee for Justice, 22 November 2012

²⁸ NILSC Annual Report and Accounts 2011-2012, pg 15

²⁹ Department of Justice "Reform of Publicly Funded Legal Representation in the Civil and Family Courts" November 2012, para 4.3, pg 7

³⁰ Northern Ireland Courts and Tribunals Service "Judicial Statistics 2011", 58, http://www.courtsni.gov.uk/en-GB/Publications/Targets_and_Performance/Documents/Judicial%20Statistics%202011/p_tp_Judicial-Statistics-2011.pdf

³¹ Northern Ireland Courts and Tribunals Service "Judicial Statistics 2011", pg 76

³² Northern Ireland Courts and Tribunals Service "Judicial Statistics 2011", pg 76

³³ Northern Ireland Courts and Tribunals Service "Judicial Statistics 2011", pg 90

cost of £2.6m compared to a forecast 100+ cases this year, at a cost of £8m.³⁴ The Taxing Master has also processed cases faster which has cleared backlogged cases and thus increased costs.³⁵ Another factor given in relation to higher costs is the lag of reform in Northern Ireland, compared to other jurisdictions in the last ten years. In England and Wales, a number of cases have been taken out of scope. There are also differences in the substantive civil law jurisdictions. For example, in England it is possible to obtain administrative divorces. The Access to Justice Review also noted that Scotland's lower legal aid spend could be explained by the use of inquisitorial process in Children's panels as opposed to our court based systems.³⁶

From the table and graph above, it can be seen that civil legal aid has had the largest increase in expenditure. The DoJ and NILSC both report increases in Children Order cases as reasons for increases in civil legal aid expenditure. It has not been possible to get a detailed breakdown of the different kinds of legal aid expenditure to ascertain further cost drivers. The figures provided by the DoJ and those contained within the NILSC annual report 2011-12 provides a basic breakdown of legal aid expenditure by scheme. Without a detailed breakdown of the costs for civil legal aid, it is not possible to further identify the cost drivers, for example whether there are particular types of cases driving costs.

The impact of Special Children's Act cases on civil legal aid expenditure in England and Wales should be noted. The Legal Services Commission Annual Report for 2011-12 reported an increase of £15.2m expenditure in the Community Legal Service Fund.³⁷ The Community Legal Service Fund includes solicitors and advice agencies which provide civil and family legal advice and representation. This increase is driven by a number of factors including an increase of £67.7m in civil representation related to an increase in public family cases arising from the Special Children's Act; a decrease in Legal Help expenditure of £42.2m resulting from improved financial stewardship activities; volume reductions in calls to Community Legal Advice Helpline and an increase in income of £18.1m related to costs from successful cases.³⁸

4 International Comparisons in relation to Legal Aid Costs

4.1 Workload Comparisons between NI, England and Wales and Scotland

³⁴ Briefing by Department of Justice on the January Monitoring Round 2013 and an update on legal aid expenditure, para 8

³⁵ Briefing by Department of Justice on the January Monitoring Round 2013 and an update on legal aid expenditure, para 8

³⁶ Access to Justice Review Northern Ireland "The Report", pg 8 http://www.courtsni.gov.uk/en-GB/Publications/Public_Consultation/Documents/Access%20to%20Justice%20Review%20Northern%20Ireland%20-%20The%20Report/Access%20to%20Justice%20Review%20FINAL%20REPORT.pdf

³⁷ <http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/lsc-annual-report-2011-12.pdf> pg 21

³⁸ Ibid.

Table 2 below contains information in workload comparisons between NI, England and Wales and Scotland for the year 2011/12.³⁹

Criminal	Northern Ireland	Scotland	England and Wales
Certificates registered/ acts of assistance/assistance grants	38,831	154,270	1,390,700
Spend	£48,352,491	£98,000,000	£1,100,700,000
Average per act of assistance	£1,245.20	£635.25	£791.47
Civil	Northern Ireland	Scotland	England and Wales
Certificates registered/ acts of assistance/assistance grants	68,440	108,752	1,086,100
Spend	£53,036,059	£53,900,00	£977,700,000
Average per act of assistance	£774.93	£495.62	£900.19
Total	Northern Ireland	Scotland	England and Wales
Certificates registered/ acts of assistance/assistance grants	107,271	263,022	2,476,800
Spend	£101,388,550	£155,900,000	£2,078,400,000
Average per act of assistance	£945.16	£577.52	£839.15

³⁹ Information obtained from the Department of Justice, 12/03/2013

Admin Cost	£7,423,000	£15,626,000	£82,118,000
Admin cost per act of assistance	£69.20	£59.41	£33.15

In Northern Ireland, there are on average more civil legal aid certificates issued per case than criminal legal aid certificates issued per case. The figures for average costs per act of assistance, however, may be distorted due to multiple certificates. Civil cases in family matters may be the subject of legal aid applications for different parts of the case. For example, a certificate may be issued for divorce proceedings, followed by a certificate for proceedings for ancillary matters, which are those matters relating to property, and another certificate to resolve child contact arrangements. Normally, in criminal cases there will be one legal aid certificate for cases in the Magistrates' courts and two certificates for Crown Court cases as the case starts in the Magistrates' court.⁴⁰

Emergency certificates in civil legal aid in NI are reportedly quite common and it is suggested that this may be due to the length of time taken to process applications in comparison to Scotland and England and Wales. The application process is essentially the same but in England and Wales and Scotland the process is more efficient due to online applications and better IT systems. In 2011/12, there were 68,440 certificates granted, of which 7083 were emergency certificates. If these were stripped out from the figures, the average costs per act of assistance in civil legal aid would be £864.38 rather than £774.93. Stripping out all the emergency certificates will not give a like for like comparison with England and Wales but will give a better comparison. There are emergency certificates in England/ Wales and Scotland but proportionately fewer than in Northern Ireland.⁴¹

4.2 European Comparisons

According to the European Commission for the Efficiency of Justice (CEPEJ) report, Northern Ireland has the highest annual public budget allocated to legal aid per inhabitant in 2010 at **€53.5 per inhabitant** in comparison to a number of other European States. In England and Wales, it is €45.7 and in the Netherlands €21.6. The median spend in Europe is €2.1 per inhabitant (see Figure 1 below).⁴²

Figure 1: Annual Public Budget allocated to legal aid per inhabitant in 2010

⁴⁰ Information obtained from the Department of Justice 12/03/13 and via email on 13/03/13

⁴¹ Information obtained from the Department of Justice 12/03/13 and via email on 13/03/13

⁴² CEPEJ "European Judicial Systems 2012 (2010 data) Efficiency and Quality of Justice, pg 46

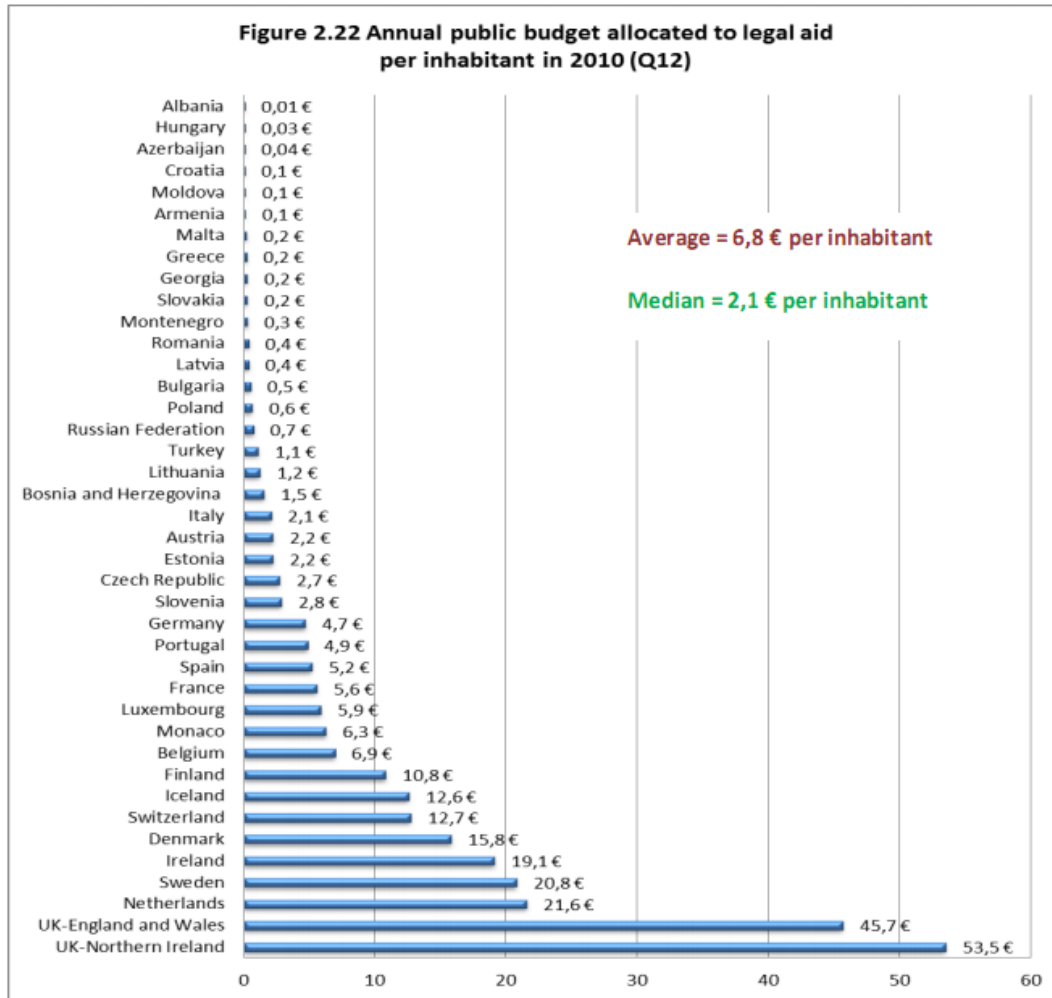
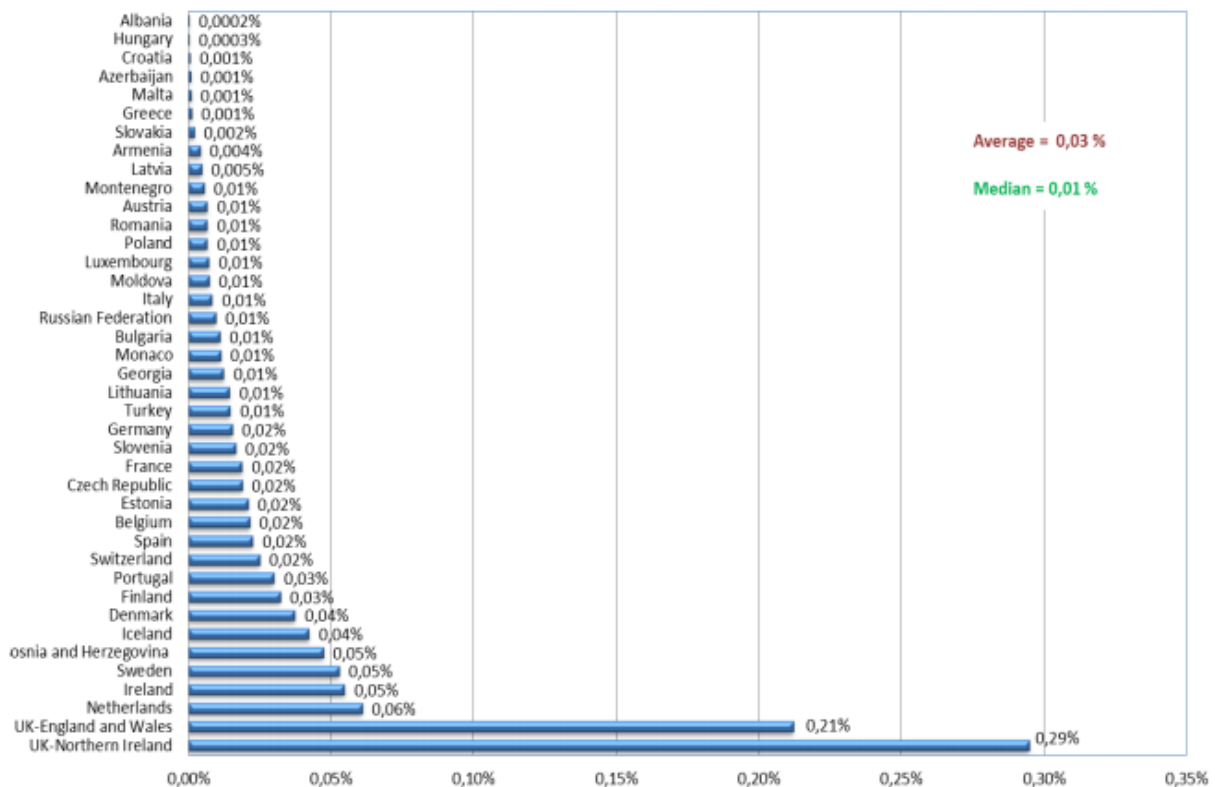


Figure 2: Annual Public Budget allocated to legal aid per inhabitant as part in % of the GDP per capita in 2010⁴³

⁴³ CEPEJ “European Judicial Systems 2012 (2010 data) Efficiency and Quality of Justice, pg 47



Northern Ireland also spent more per inhabitant, in terms of share of GDP, on legal aid in 2010 compared to other European countries (see **Figure 2 above**). The next highest legal spend per head as a proportion of GDP was that of England and Wales at 0.21%. These figures compare with 0.06% in the Netherlands, 0.05% in Sweden, and 0.02% in France, Spain and Belgium. The average was 0.03%.

Figure 3 below, which includes figures for Northern Ireland, contains the most recent data on criminal and non-criminal cases granted with legal aid per 100,000 inhabitants.

Unfortunately, the most recent CEPEJ report from 2012 does not provide information on Northern Ireland on the average amount allocated in the public budget for legal aid per case, only England and Wales. To obtain the most recent data on Northern Ireland along with other European countries, it has been necessary to look to the previous CEPEJ report published in 2010, based on 2008 data. CEPEJ noted with some disappointment in the 2012 publication that only 21 states or entities were able to provide data on the number of cases where legal aid had been granted, in contrast to 27 in the previous report.⁴⁴

⁴⁴ CEPEJ "European Judicial Systems 2012 (2010 data) Efficiency and Quality of Justice, pg 67

Figure 3: Number of Legal Aid Cases per 100,000 inhabitants and average amount allocated in the public budget legal aid case in 2008⁴⁵

Country	Cases granted with legal aid per 100 000 inhabitants (total)	Criminal cases granted with legal aid per 100 000 inhabitants	Other than criminal cases granted with legal aid per 100 000 inhabitants	Average amount of legal aid allocated per case	Average amount of legal aid allocated per criminal case	Average amount of legal aid allocated per other than criminal case
Armenia	66.9	66.9		164 €	164 €	
Austria			165.9			
Belgium	1 422.8			397 €		
Bosnia & Herzegovina	69.5	36.2	33.3	1 928 €	3 700 €	
Bulgaria	562.8			113 €		
Croatia	32.7		32.7			
Denmark			62.9			(12 369 €)
Estonia	2 612.3	2 408.8	203.4	84 €	76 €	189 €
Finland	1 609.8	712.9	896.9	663 €		
France	1 392.0	626.8	765.2	353 €	263 €	427 €
Georgia	210.0	192.7	17.3	130 €		
Hungary	435.9	28.2	407.7	7 €		
Ireland	1 419.3	1 249.7	169.6	1 432 €	1 001 €	4 619 €
Italy	247.1	165.3	81.8	787 €	898 €	563 €
Lithuania	1 313.5	1 043.6	270.0	94 €		
Luxembourg	740.0			714 €		
Moldova	125.7	125.7		56 €	56 €	
Montenegro	187.4	186.4	1.0	132 €	133 €	
Netherlands	2 482.3	963.4	1 518.9	1 029 €	994 €	1 052 €
Portugal	1 036.9			331 €		
Romania	676.9			30 €		
Russian Federation	991.9			38 €		
San Marino			3.2			
Slovakia			13.7			1 218 €
Slovenia	322.9	42.1		431 €		

Country	Cases granted with legal aid per 100 000 inhabitants (total)	Criminal cases granted with legal aid per 100 000 inhabitants	Other than criminal cases granted with legal aid per 100 000 inhabitants	Average amount of legal aid allocated per case	Average amount of legal aid allocated per criminal case	Average amount of legal aid allocated per other than criminal case
Spain	1 389.6			349 €		
Switzerland	510.3			1 911 €		
PYROMacedonia	141.3	139.5	1.7	614 €	120 €	
Turkey	8 298.6	4 276.9	4 021.7	8 €	13 €	3 €
UK-England & Wales	3 051.1	1 144.4	1 906.7	1 131 €	1 931 €	651 €
UK-Northern Ireland	4 843.9	1 740.2	3 103.7	1 021 €	1 656 €	598 €
UK-Scotland	5 975.1	3 748.9	2 226.2	537 €	558 €	429 €
Average	1 506.0	994.7	757.3	536 €	826 €	2 011 €
Median	866.0	626.8	169.6	353 €	411 €	598 €
Minimum	32.7	28.2	1.0	7 €	13 €	3 €
Maximum	8 298.6	4 276.9	4 021.7	1 928 €	3 700 €	12 369 €

Figure 3 demonstrates that the average amount of legal aid allocated in non-criminal cases Northern Ireland was €598, incidentally the median amount allocated in non-criminal cases. In 2008 England and Wales, the average amount allocated was €651 and in Scotland €429. The maximum amount allocated per case was Denmark (€12,369) and the lowest was in Turkey (€3). Northern Ireland granted legal aid in more non-criminal cases per 100,000

⁴⁵ Data obtained from CEPEJ "European Judicial Systems 2010 (2008 data) Efficiency and Quality of Justice, pgs 52 and 53

inhabitants than any other European country in the CEPEJ study, with the exception of Turkey.

It should be noted that the CEPEJ figures are based on 2008 data and would therefore not reflect the rise, reported by the DoJ, in civil legal aid spend in Northern Ireland from 2008 onwards.

4.3 Comparisons with Other Common Law Countries

An ad hoc briefing paper on international comparisons of public expenditure on legally aided services was published in 2011 to support the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The paper, which includes some data on Northern Ireland, contains information on legal expenditure generally, not only on civil legal aid. The report found that legal aid expenditure per head in England and Wales (£39 per head) was higher between 2004 and 2010 than the latest estimates for other countries with similar legal systems. The exception was Northern Ireland in 2008 which was £48 per head.⁴⁶

Table 3 below provides information on comparisons in legal aid expenditure per head in common law countries⁴⁷

Common Law –Legal Aid Expenditure Per Head £					
	2004	2006	2008	2009	2010
Northern Ireland	38	37	48	-	-
England and Wales	38	37	39	39	39
Ireland	8	10	20	-	-
Canada	7	8	10	-	-
New Zealand	8	8	9	14	18
Australia	7	-	-	-	-

*The report notes that figures for England and Wales, Canada and New Zealand have been revised from previous reports. Northern Ireland and the Republic of Ireland figures are those set

⁴⁶ Ministry of Justice “International Comparisons of Public Expenditure in Legally Aided Services “ Ad Hoc Statistics Note, September 2011, pg 2

⁴⁷ Ministry of Justice “International Comparisons of Public Expenditure in Legally Aided Services “ Ad Hoc Statistics Note, September 2011, pg 3.

out in the CEPEJ reports and have not been updated. Figures for Australia are from the University of York study.

4.3 Issues to consider when making comparisons

Officials from the Department stressed that Northern Ireland is not in a directly comparable situation with other UK jurisdictions and civil legal aid differs between the jurisdictions in a way that is not as evident as in criminal legal aid. In 2011/12 in Northern Ireland, £29 per person was spent on civil legal aid, compared to £17 per person in England and Wales and £11 per person in Scotland.⁴⁸ Some of the differences highlighted include that there has been a lag in reform in Northern Ireland compared to other jurisdictions in the last ten years. In England and Wales, a lot of areas have been taken out of scope of civil legal aid.⁴⁹

Officials informed the Committee that there are also differences in substantive civil law between the jurisdictions as well as in the legal aid systems. In England and Wales, it is easier to obtain a divorce and is less expensive. Divorces are mainly dealt with administratively. In England and Wales, i.e. they can be obtained entirely 'by post'.⁵⁰ The Access to Justice Review final report noted that there was some opposition to moving in the direction of 'postal divorces' as in England and Wales.⁵¹ Officials highlighted to the Committee that changes in this area would probably require consideration by another department, the Department of Finance and Personnel.⁵²

In Scotland, there is no Children Order. Instead, there are Children's Panels in which decisions regarding care and supervision are usually taken by the Lay Panel and lawyers are rarely present in proceedings.⁵³ The Access to Justice Review noted that, whilst the system was well embedded in Scotland, it did not mean it would be applicable in the Northern Ireland context. The Review, however, recommended a major review of family law and justice.⁵⁴

Research published by the Ministry of Justice (MoJ) on *International Comparisons of Publicly Funded Legal Services and Justice Systems* highlighted that differences in expenditure between countries will reflect differences in the justice system. An example provided is that inquisitorial systems may spend more on the judiciary but have a lower legal aid spend as the examining authorities undertake a lot of the work that is conducted by defence lawyers in England and Wales. Other factors identified in the research which may contribute to differences in costs include: differences in criminal procedure; underlying cost structure in the

⁴⁸ DOJ "Consultation Document: Proposals for the Reform of Financial Eligibility for Civil and Criminal Legal aid" <http://www.dojni.gov.uk/index/public-consultations/current-consultations/proposals-for-the-reform-of-financial-eligibility-for-civil-and-criminal-legal-aid.pdf> pg 6

⁴⁹ Briefing by Officials from the Department of Justice to the Committee for Justice, 22 November 2012

⁵⁰ B Dickson "Law in Northern Ireland: An Introduction" 2011, SLS Publications, pg276.

⁵¹ Access to Justice Review "The Report" August 2011, pg77

⁵² Briefing by officials from the Department of Justice on Proposals for the Reform of Publicly Funded Representation on Civil and Family cases, 22 November 2012

⁵³ Access to Justice Review Northern Ireland "The Report" August 2011, pg69

⁵⁴ Access to Justice Review Northern Ireland "The Report" August 2011, pg70

provision of legal services (such as differences in regulatory burdens to legal aid suppliers) and level of competition in the market. Practices in England and Wales may have contributed to higher costs including higher income ceilings on eligibility and wider scope in terms of what is covered.⁵⁵

The Ministry of Justice research indicated that comparisons should be treated with caution for two main reasons. Firstly, the authors of the paper noted the complexity in making comparisons due to differences in methodology and reporting of data associated with the justice systems.⁵⁶ Secondly, although legal aid costs were unusually high in England and Wales, the same did not apply to the overall costs of the Justice system. For example, the CEPEJ report data suggested that spending on courts and public prosecution were comparatively low. The MoJ report stated:⁵⁷

This would imply that looking at legal aid expenditure in isolation risked missing important structural differences between the justice systems. But it could also be the case that this was an artefact of technical issues related to data collection.

This argument, however, does not hold in the Northern Ireland context as the CEPEJ report indicated spending on courts and public prosecution were also comparatively high. The annual public budget allocated to all courts per inhabitant in 2010 in NI was €46.2 compared to €21.4 in England and Wales.⁵⁸ The annual public budget per inhabitant allocated to public prosecution service in 2010 in Northern Ireland is €24.2 compared to €13.7 in England and Wales, and well above the average amount.⁵⁹

5 Ways of Controlling Civil Legal Aid Expenditure

There are several ways to control civil legal aid expenditure: changing financial eligibility rules; making changes to rules regarding representation of legal professionals in certain types of cases; reducing scope; reducing the number of cases that go to court; and improving governance. The following subsections highlight different initiatives elsewhere and, where appropriate, developments in Northern Ireland.

5.1 Change Financial Eligibility Rules

In France, the income ceiling on entitlement was much lower than that in many other countries and a little over half the level in England and Wales. In 2005, the ceiling for partial legal aid was €15,180 per annum (£13,083.78) and the ceiling for full legal aid was €10,128

⁵⁵ Ministry of Justice "International Comparisons of Public Expenditure in Legally Aided Services" Ad Hoc Statistics Note, September 2011, pg 4.

⁵⁶ R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009, pg 36.

⁵⁷ R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009, pg 36.

⁵⁸ CEPEJ "European Judicial Systems 2012 (2010 data) Efficiency and Quality of Justice", Figure 2.6, pg 28

⁵⁹ CEPEJ "European Judicial Systems 2012 (2010 data) Efficiency and Quality of Justice", Figure 2.19, pg 43

(£8730.40). There is no assets test in France to complement the income criterion.⁶⁰ Eligibility criteria were tighter with lower income ceilings in Australia than in England and Wales.⁶¹ In the Netherlands, legal aid was readily accessible but eligibility criteria were stricter than in England and Wales.⁶² In Canada the rate of cases funded by legal aid is much lower than in England and Wales and this can be explained by a much lower income ceiling at which individuals qualify for legal aid.⁶³ In British Columbia, net monthly income must fall below \$1400 for a one person household to qualify. There were complex limits on the value of household assets to qualify.⁶⁴ New Zealand eligibility for civil legal aid is more restricted with a lower monthly income limit.⁶⁵ In contrast, some jurisdictions have higher income ceilings but recover costs by way of contributions.

In the Scottish system of civil legal aid, more costs are recovered by contributions. The approach was to increase the level of income within which applicants qualified for civil legal but to introduce a system of tapered contributions. Where income approached the limit, almost all the costs were borne by the applicant's contributions. The system of contributions is set out in the table below.⁶⁶

If someone's disposable income exceeds £3,521 they are eligible on income, but will have to pay a contribution. The following table sets out how the contribution should be calculated

Disposable income	Contribution rates applied to income in that range
Below £3,521	0%
£3,522 - £11,540,	33%
£11,541 - £15,743	50%
£15,744- £26,239	100%
Over £26,239	Not eligible

The Access to Justice Review recommended that:

We think it important that the applicability of the Scottish civil legal aid eligibility and contribution arrangements to Northern Ireland is included in the modelling exercise, focusing on the consequences of raising eligibility limits while significantly increasing the level of contributions for those at higher levels of disposable income.⁶⁷

⁶⁰ R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009, pg12

⁶¹ R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009, pg15: Ministry of Justice "International Comparisons of Public Expenditure on Legally Aided Services" Ad Hoc Statistics Note, 8 September 2011, pg4.

⁶² R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009,pg 12

⁶³ R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009, pg17

⁶⁴ R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009, pg17

⁶⁵ Ministry of Justice "International Comparisons of Public Expenditure on Legally Aided Services" Ad Hoc Statistics Note, 8 September 2011, pg4.

⁶⁶ Information obtained from Scottish Legal Aid Board "Advice and Assistance and Civil Legal Aid: KeyCard 2012" available at <http://www.slab.org.uk/common/documents/profession/documents/KeyCard2012Final.pdf>

⁶⁷ Access to Justice Review "The Report" August 2011, pg103

The Department has now considered the applicability of the Scottish civil legal aid eligibility and contribution arrangements to Northern Ireland and has concluded that it would not be feasible to introduce these changes, as they would be too costly to implement.⁶⁸

Changes to the eligibility rules for civil legal aid in England and Wales resulted in a sharp drop over later years in the proportion of the population eligible for legal aid. The proportion fell from 52% in 1998 to 46% in 2001, and then 29% in 2007.⁶⁹ It should be noted that a number of changes have recently been made to financial eligibility in England and Wales. Capital passporting has been abolished to ensure that applicants are subject to the same capital test regardless of benefits and monthly contributions from clients have been increased to 30% of disposable income.⁷⁰

The DoJ Access to Justice Review Departmental Action Plan 2012-2015 includes a project to review financial eligibility for civil legal aid (Project 26).⁷¹ A consultation document has recently been published on proposals for the reform of financial eligibility for civil and criminal legal aid.⁷² The consultation considers a number of proposals for simplifying and harmonising civil legal aid means testing. The proposals include:⁷³

- The income limits across all three tests are aligned and that the Upper Income Limit should be raised by 7.5% to £10,680. The Lower Income Limit remains £3,355;
- An income cap of £35,000 should be applied in Northern Ireland before any means assessment takes place;
- The removal of passporting on capital and that the capital limit across the schemes is increased to £8,000;
- Applicants eligible for legal aid should be required to make contributions for the lifetime of the case. Currently contributions are for a maximum of 12 months;
- The inclusion of a housing equity disregard whereby any equity in a house over a £100k disregard for mortgage and £100k for equity should be included in the capital calculation for the purposes of legal aid.

If the proposals are implemented, there would be an estimated 8.3% reduction in eligibility for civil legal aid (42.7% to 34.4%) and savings of £2.47m. The Department said this compared favourably with England and Wales where 28% of the population are eligible for civil legal aid.⁷⁴

⁶⁸ Department of Justice "Proposals for the Reform of Financial Eligibility for Civil and Criminal Legal Aid" March 2013, pg 21
⁶⁹ R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009, pg17

⁷⁰ <http://www.justice.gov.uk/legal-aid/news/latest-updates/legal-aid-reform>

⁷¹ Department of Justice Access to Justice Review Departmental Action Plan, <http://www.dojni.gov.uk/access-to-justice-review-departmental-action-plan>

⁷² Department of Justice "Proposals for the Reform of Financial Eligibility for Civil and Criminal Legal Aid" March 2013

⁷³ Department of Justice "Proposals for the Reform of Financial Eligibility for Civil and Criminal Legal Aid" March 2013, pg 11.

⁷⁴ Department of Justice "Proposals for the Reform of Financial Eligibility for Civil and Criminal Legal Aid" March, pg 11-12

Other countries have stricter rules in the ‘merits test’ in determining eligibility. In Australia, there is a tight legal merits test applied in civil matters based on the prospects of success and whether a prudent litigant with money would spend their own resources on the matter.⁷⁵ In 2010, Ireland applied a tighter merits test than in England and Wales. The Legal Aid Board considers the reasonableness of funding the case, along with the chance of success, likely cost against benefit and whether there is alternative method for dealing with the issue.⁷⁶ In England and Wales, the merits test for civil legal aid will be amended so that civil legal aid may be refused in cases suitable for alternative funding such as Conditional Fee Agreements.⁷⁷ The Ministry of Justice (MoJ) is currently consulting on further proposed changes to the merits test in England and Wales. The MoJ proposes to abolish the ‘borderline prospects of success category’ which would mean these cases would cease to qualify for civil legal aid funding.

There are certain types of cases where the prospects of success test (and therefore this proposal to abolish the borderline class) does not apply, including:⁷⁸

- Certain family cases;
- Mental health cases;
- Public law children cases;
- EU Maintenance regulation;
- Hague Convention 2007 cases concerning international recovery of child support and other forms of maintenance.

For all other cases, the Legal Aid Agency must place cases in prospects of success categories. The categories are:⁷⁹

- Very Good- which means an 80% or more chance of obtaining a successful outcome;
- Good- which means a 60% or more chance of , but less than an 80% chance of a successful outcome;
- Moderate which means a 50% or more chance, but less than a 60% chance o obtaining a successful outcome;
- Borderline which means that the case is not unclear but that it is not possible by reason of disputed law, fact or expert evidence to decide that the chance of a successful outcome is 50% or more, or classify the prospects as poor;

⁷⁵ R Bowles and A Perry “International Comparison of Publicly Funded Legal Services and Justice Systems” MOJ Research Series 14/09, October 2009, pg15

⁷⁶ Ministry of Justice “International Comparisons of Public Expenditure on Legally Aided Services” Ad Hoc Statistics Note, 8 September 2011,pg 4

⁷⁷ <http://www.justice.gov.uk/legal-aid/newslatest-updates/legal-aid-reform>

⁷⁸ Ministry of Justice “Transforming legal aid: delivering a credible and more efficient system” 9 April 2013, Pg 35 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183358/transforming-legal-aid.pdf f Justice

⁷⁹ Ministry of Justice “Transforming legal aid: delivering a credible and more efficient system” 9 April 2013, Pg 35 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183358/transforming-legal-aid.pdf f Justice

- Poor- which means the case is not likely to have a successful outcome;
- Unclear which means the Director is unable to put the case into any of the categories.

Cases must generally have a 50% chance of success to receive legal aid funding for full representation. There are certain types of housing or family cases that receive funding with borderline prospects of success. In other cases, funding is available if there is a borderline prospect of success and the case has special features (e.g wider public interest or a case with overwhelming significance for the individual).⁸⁰

In Northern Ireland, once the financial eligibility test has been satisfied, the NILSC has to consider whether the applicant has reasonable grounds for being party to proceedings and that it is not unreasonable for legal aid to be granted in the particular circumstances of the case.⁸¹ The NILSC conducted a consultation in the proposed Funding Code in 2009 in which it was proposed that full representation will be refused if the prospects of success in obtaining the substantive order sought in the proceedings are unclear or borderline and the case does not appear to have a public interest to be of overwhelming importance to the wider public or the client or to raise significant human rights issues.⁸² The Department of Justice has included a project in the Departmental Action Plan to complete development and introduce the Funding Code (Project 27).

5.2 Representation

The Government's proposals for reform of legal aid in England and Wales dealt with the issue of representation in publicly funded civil cases.⁸³ The consultation stated that

We are concerned to ensure that the use of Queen's Counsel (QCs) in family proceedings is controlled better, so that they are only used in complex, novel or exceptional cases which require that level of skill, expertise and experience.⁸⁴

The Ministry of Justice proposed to tighten guidance covering the engagement of a QC in a family case (whether the case is above or below the Very High Cost Case VHCC threshold) to make clear that they should only be approved by the Legal Services Commission if they meet the provisions equivalent to those applying in criminal cases. The document explains that these provisions are:⁸⁵

- That the case involves substantial, novel or complex issues of law or fact which can only be adequately addressed by a QC; and
- either the opposing party has engaged a QC or senior treasury counsel, or the case is exceptional for some other reason.

⁸⁰ Ministry of Justice "Transforming legal aid: delivering a credible and more efficient system" 9 April 2013, Pg 35 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183358/transforming-legal-aid.pdf f Justice

⁸¹ B Dickson (2011) "Law in Northern Ireland: An Introduction" pg 298

⁸² NILSC The Northern Ireland Funding Code, Consultation Paper on the Proposed Criteria, Published 29.06.2009 7.4.5

⁸³ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", pg122

⁸⁴ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", pg3

⁸⁵ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", pg123

The UK Government response was to proceed with the proposal on limiting the use of QCs in family cases as set out in the consultation document.⁸⁶ This change was implemented in October 2011.⁸⁷

The DoJ is currently conducting a consultation exercise on proposals for the reform of publicly funded legal representation in the civil and family courts (project 25 of the Departmental Action Plan⁸⁸). The document sets out two options to limit the occasions on which counsel can be authorised for a legally assisted party in a civil matter. The first option is to require prior authority for approval for counsel at all court tiers regardless of the circumstances. The second option is less strict and limits funding for counsel in certain court tiers. Legal aid funding would be removed from counsel for the lower tier courts in all cases other than those where criminal court proceedings had been brought concerning allegations of serious sexual or physical abuse. Funding for granting of senior counsel in the Family Care Centre would be removed, unless there were criminal court proceedings related to serious sexual and physical abuse. Legal aid funding would also be removed for senior counsel in all other civil matters in the County Court.⁸⁹

5.3 Reduce Scope

The 2011 MoJ study reported that scope is limited in New Zealand, excluding public law, mental health, immigration and medical negligence. In Australia in 2010, cases for debt, property, public law, mental health, immigration and medical negligence were outside the scope of the scheme. In Ireland, civil legal aid does not generally cover debt, public law, discrimination, mental health or medical negligence cases.⁹⁰

In England and Wales the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act has received Royal Assent. Part 2 of Schedule 1 of the Act will remove a number of areas from the scope of civil legal aid including personal injury or death, claims in tort in respect of assault, battery and false imprisonment, negligence, trespass to goods and land, damage to property, defamation, breach of statutory duty, conveyancing, making of wills, trusts, social security benefits, cases relating to criminal injuries compensation, claims under s 7 of the Human Rights Act 1998 in respect of damages for breaches of convention rights, matters

⁸⁶ Reform of Legal Aid in England and Wales: Government Response
<http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf>

⁸⁷ Legal Services Commission Summary of changes to be implemented on October 3rd 2011,
http://ftp.legalservices.gov.uk/docs/main/October_changes_summaryv5.pdf

⁸⁸ Department of Justice Access to Justice Review Departmental Action Plan, <http://www.dojni.gov.uk/access-to-justice-review-departmental-action-plan>

⁸⁹ Department of Justice Reform of Publicly Funded legal representation in the Civil and Family Courts . Available at <http://www.dojni.gov.uk/index/public-consultations/current-consultations/reform-of-publicly-funded-legal-representation-in-the-civil-and-family-courts.htm>

⁹⁰ Ministry of Justice "International Comparisons of Public Expenditure on Legally Aided Services" Ad Hoc Statistics Note, 8 September 2011, pg4.

relating to company or partnership law and changing an individual's name. Schedule 1 of the LASPO Act came into force on 1st April 2013.⁹¹

The NI Access to Justice Review recommended removing money damages from the scope of legal aid, provided an alternative means of securing access to justice could be implemented.⁹² The Minister for Justice has indicated that he is reluctant to pursue this route in Northern Ireland. In his Ministerial statement on the Departmental Action Plan on 2 July 2012, he stated:

I am determined that we will not go down the path being followed elsewhere with budgets cut by reducing the scope of support for those who genuinely need assistance in accessing justice. Rather we -elected representatives, the legal profession, and voluntary and community organisations-must work together to develop and deliver reforms that are effective and affordable.⁹³

The DoJ Departmental Action Plan sets out that, if further savings are required, consideration will be given to reducing the scope of legal aid.⁹⁴ If cases are removed from the scope of the legal aid scheme, it will be important to consider alternative funding mechanisms. In Germany, Legal Expenses Insurance (LEI) is very well developed and expenditure on these stand -alone policies offset much of the legal aid saving.⁹⁵ Sweden also relies heavily on Legal Expenses Insurance for various civil matters normally as part of household, motor or boat policies, but does not include family matters.⁹⁶ In other countries for example Germany and some provinces of Canada, funding may come in the form of a repayable loan.

The Departmental Action Plan includes a project on considering an alternative mechanism for the funding of money damages cases (Project 8). The Plan also contains a project in which the DoJ will heighten awareness of the role of legal expenses insurance in money damages cases.

A consultation paper was published on 5th April 2013 and sets out six options for funding of money damages cases:⁹⁷

- Money damages remain in scope as part of the legal aid fund;
- Conditional Fee Agreement with set success fee being paid by the losing defendant- Conditional Fess Agreements are an insurance based product which enables individuals to take proceedings without the use of legal aid funds. The solicitor only

⁹¹ See SI 2013/453

⁹² Access to Justice Review Northern Ireland, Recommendation 91, pg147.

⁹³ <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-11-12/02-July-2012/#a8>

⁹⁴ Department of Justice Access to Justice Review Departmental Action Plan, <http://www.dojni.gov.uk/access-to-justice-review-departmental-action-plan>

⁹⁵ R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009, pg13

⁹⁶ R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009, pg14

⁹⁷ Department of Justice "Consultation Document on Alternative Methods of Funding Money Damages Cases" March 2013. <http://www.dojni.gov.uk/index/public-consultations/current-consultations/alternative-methods-of-funding-money-damages-claims.htm>

gets paid if they win the case and a success fee is payable for the risk the solicitor takes in accepting the case. The success fee is paid by the defendant and therefore the client keeps 100% of their damages;

- Conditional Fee Agreement with set success fee being paid by successful plaintiff- This is similar to option 2 except the success fee is paid by the successful plaintiff and not the losing defendant ;
- Contingency legal aid fund: a percentage of damages paid into a fund to sustain it for future cases;
- The Jackson Model- proposals suggested by Lord Jackson in his review of civil litigation costs in England and Wales. The model retains conditional fee agreement arrangements but ends the ban on contingency fees where the solicitor's fee is linked to the percentage of the general damages. The model would end the recoverability of success fees and After the Event insurance which would be paid out of damages. General damages would be uplifted by 10% to mitigate the effect of claimants having to pay success fees;
- Contingency fee Scheme-the option would allow the claimant to bring a personal injury action underpinned by an insurance package which guarantees payment of opponent's costs should they lose the case. There is no success fee in this option.

5.4 Reduce Remuneration

In New Zealand, there were indications that lawyers were withdrawing from the legal aid market because remuneration rates had not been increased for 12 years. Whilst there was a 10% increase in rates in 2008, it was reported, however, that the New Zealand Law Society argued this was inadequate.⁹⁸ In Ireland, the Legal Aid Board, which provides legal aid and advice in civil cases, announced it was reducing the amount paid to counsel where they are instructed by Legal Aid Board solicitors.⁹⁹ This decision was taken due to the need to control expenditure due to pressure on resources and no increase in its grant from Government.¹⁰⁰

In England and Wales, in non- family certificates issued since October 2011, the prescribed hourly rates for solicitors have been reduced by 10%, enhancements capped down, barrister's hourly rates were codified and reduced by 10% and expert fees were codified and reduced by 10% as part of a package of legal aid reforms.¹⁰¹ The MoJ is currently proposing to reform fees in civil legal aid cases. The MoJ is proposing to reduce the representation fee

⁹⁸ R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009, pg13

⁹⁹ <http://www.irishtimes.com/newspaper/finance/2012/0924/1224324316375.html>

¹⁰⁰ <http://www.irishtimes.com/newspaper/finance/2012/0924/1224324316375.html>

¹⁰¹ http://ftp.legalservices.gov.uk/civil/legal_aid_reform.asp

paid to solicitors in public family law cases by 10%. This proposal would be introduced by secondary legislation to take effect in April 2014, subject to parliamentary processes.¹⁰²

The MoJ consultation proposed that self-employed barristers appearing in civil (non-family) proceedings in the County Court, Upper Tribunal and High Court should be remunerated on the same basis as other advocates. They would be paid standard rates subject to enhancements at the discretion of the authorities.¹⁰³ It is proposed that the 35% uplift in the rate for asylum and immigration cases would be removed. This uplift was intended to compensate providers for the risk of non-payment from the beginning of the application for reconsideration to the end of the case when costs are awarded. The MoJ highlighted that the aim of the scheme was to reduce the number of weak challenges of Asylum and Immigration Tribunal decisions, however cost orders were routinely made. The scheme failed to transfer financial risk to providers and the 35% uplift was routinely awarded. It is proposed that this proposal will be implemented through secondary legislation in Autumn 2013.¹⁰⁴

MoJ is also proposing that all expert fees will be reduced by 20%. It would be possible for these rates to be exceeded in exceptional circumstances.¹⁰⁵ It is anticipated this proposal will be implemented through secondary legislation to be laid in Autumn 2013.¹⁰⁶

The DoJ Access to Justice Departmental Action Plan includes a review of civil legal aid remuneration for civil and family cases and for expert witnesses (Project 24).¹⁰⁷ Officials indicated to the Justice Committee that the Department hopes to introduce civil legal aid standard fees in higher courts which would ensure better governance, accountability and predictability. There is currently a standard scale in county courts but higher courts claims go to the Taxing Master to determine what fees are to be paid. The Taxing Master uses the Comerton scale to assess fees.¹⁰⁸

5.5 Alternatives to Court Proceedings

In France case volumes is comparatively low and mediation is available for divorcing couples.¹⁰⁹ In family cases in Australia, there is quite widespread use of non-legal dispute

¹⁰² Ministry of Justice "Transforming legal aid: delivering a credible and more efficient system" 9 April 2013, Pg 88 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183358/transforming-legal-aid.pdf f Justice

¹⁰³ Ministry of Justice "Transforming legal aid: delivering a credible and more efficient system" 9 April 2013, Pg 91 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183358/transforming-legal-aid.pdf f Justice

¹⁰⁴ Ministry of Justice "Transforming legal aid: delivering a credible and more efficient system" 9 April 2013, Pg 94-95 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183358/transforming-legal-aid.pdf f Justice

¹⁰⁵ Ministry of Justice "Transforming legal aid: delivering a credible and more efficient system" 9 April 2013, Pg 94-95 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183358/transforming-legal-aid.pdf f Justice

¹⁰⁶ Ministry of Justice "Transforming legal aid: delivering a credible and more efficient system" 9 April 2013, Pg 99 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/183358/transforming-legal-aid.pdf f Justice

¹⁰⁷ Department of Justice Access to Justice Review Departmental Action Plan, <http://www.dojni.gov.uk/access-to-justice-review-departmental-action-plan>

¹⁰⁸ Briefing to the Justice Committee on proposals for the reform of publicly funded representation in civil and family courts, 22 November 2012

¹⁰⁹ R Bowles and A Perry "International Comparison of Publicly Funded Legal Services and Justice Systems" MOJ Research Series 14/09, October 2009, pg12

resolution methods.¹¹⁰ In Sweden, mediation is provided as a free alternative to separating couples. Over 90% of parents settled disputes over custody and access on their own, through mediation or counselling.¹¹¹ In Ireland, the Legal Aid Board has adopted initiatives to increase the use of mediation to resolve family disputes.¹¹² In Manitoba, Canada, lawyers offered collaborative law as an alternative to courts.¹¹³ A briefing paper published by the Ministry of Justice suggests there is mixed evidence on how effective Alternative Dispute Resolution Mechanisms are at reducing the volumes of legal aid work and whether ADR cases are more cost effective than the alternatives.¹¹⁴

A booklet on Alternatives to Court published in Northern Ireland in 2011 advises that ADR costs vary from free to extremely expensive depending on the complexity of the issues. For example, the costs in mediation of a dispute between neighbours regarding an overhanging tree will normally be very small compared with the costs in the arbitration of a large scale commercial dispute.¹¹⁵ However, advantages reported on the use of ADR methods include: going to court to solve problems faster, costing less money and being less stressful.¹¹⁶

The DoJ Departmental Action Plan includes a project to promote a suite of alternative dispute resolution mechanisms (Project 19). However, the timescale for the start of the project is dependent on the outcome of the scoping exercise. This exercise is a scope review of the operation of the family justice system (Project 18).¹¹⁷

5.6 Improving Governance

A MoJ consultation on reform of legal aid in England and Wales set out a number of proposals to improve governance and reduce bureaucracy associated with the legal aid scheme.¹¹⁸ The Government states it was “committed to the tightening of its stewardship of the legal aid fund, establishing clear lines of ministerial accountability and ensuring the Ministry of Justice (MoJ) has strict controls in place to manage the cost of the scheme”. One of the proposals was the abolition of the Legal Services Commission as an NDPB and replacing it with an executive agency within the MoJ. The consultation document also sought

¹¹⁰ R Bowles and A Perry “International Comparison of Publicly Funded Legal Services and Justice Systems” MOJ Research Series 14/09, October 2009, pg15

¹¹¹ R Bowles and A Perry “International Comparison of Publicly Funded Legal Services and Justice Systems” MOJ Research Series 14/09, October 2009, pg15

¹¹² <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/takes/dail2013020600109?opendocument&highlight=legal%20aid%20service%20reform#WRH02450>

¹¹³ R Bowles and A Perry “International Comparison of Publicly Funded Legal Services and Justice Systems” MOJ Research Series 14/09, October 2009, pg17

¹¹⁴ Ministry of Justice “International Comparisons of Public Expenditure on Legally Aided Services” Ad Hoc Statistics Note, 8 September 2011, pg 5

¹¹⁵ J Anderson (2011) “Alternatives to Court in Northern” Published by the Northern Ireland Ombudsman, Law Centre NI and Queens University Belfast, pg 8

¹¹⁶ J Anderson (2011) “Alternatives to Court in Northern” pg 6

¹¹⁷ Department of Justice Access to Justice Review Departmental Action Plan, <http://www.dojni.gov.uk/access-to-justice-review-departmental-action-plan>

¹¹⁸ Ministry of Justice “Proposals for the Reform of Legal Aid in England and Wales”, November 2010, <http://www.justice.gov.uk/consultations/legal-aid-reform>

views on how to simplify and improve the administration of the legal aid scheme. The Government was particularly interested in opportunities for better electronic working with providers and software vendor companies to gain efficiencies. The Government also sought views on the application process for both civil and criminal legal aid, applying for amendments, bill submission and whether the system of standard monthly payments should be retained or moved to payment as billed.¹¹⁹ As a result of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the Legal Services Commission will be replaced by the Legal Aid Agency, an Executive Agency of the MoJ in April 2013.¹²⁰

The Legal Services Commission (LSC) Annual Report 2011-12 noted that the LSC continued with its Financial Stewardship Programme which is designed to improve and control processes in the granting of legal aid for clients and in assessing claims by providers. The LSC operated a Financial Stewardship Implementation Board made up of senior LSC managers from across the organisation. The Board met monthly to review progress against the programme's objectives, received updates on other LSC programmes and initiated new work programmes to address issues identified. The LSC also made a number of specific control improvements. The LSC reported continued development of the testing of cases to establish the level and value of errors made in assessing the eligibility of clients and the accuracy of payments; In civil representation, the LSC continued to request further financial information from clients to enable it to assess better whether they were eligible for legal aid. Significant progress was also made in improving assessment of bills for civil representation, the largest area of legal aid expenditure. Improvements included the use of mandatory checklists for staff to ensure all the required information for assessing a bill is available. Further improvements were also made to cross quality control testing to reduce potential errors made by LSC staff. This work covers merits testing, means assessment as well as the final bills paid.¹²¹

In 2011, the Scottish Legal Aid Board (SLAB) moved to 100% submission of legal aid applications via the Legal Aid online system. SLAB reported that the online system makes the applications process quicker and removes significant amounts of manual intervention. The change went smoothly with few issues reported in the first few weeks.¹²²

A number of reports have identified shortcomings in governance arrangements concerning legal aid in Northern Ireland. A report by the Northern Ireland Audit Office (NIAO) published in 2011 reported that the NILSC has exceeded its budget every year since it was established

¹¹⁹ Ministry of Justice "Proposals for the Reform of Legal Aid in England and Wales", November 2010, pg s 141-142

¹²⁰ Legal Services Commission Annual Report and Accounts 2011-12, PG 6. <http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/lsc-annual-report-2011-12.pdf>

¹²¹ Legal Services Commission Annual Report and Accounts 2011-12, pg 19

<http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/lsc-annual-report-2011-12.pdf>

¹²² Scottish Legal Aid Board Annual Report and Accounts 2011-12
http://www.slaborg.uk/common/documents/Annual_report_2011_2012/Annual_Report_2011-2012.pdf

in 2003 and has been unable to estimate with accuracy the budget that was needed.¹²³ Key recommendations made included:¹²⁴

- new procedures and tighter criteria for assigning two counsel to be introduced as a matter of priority;
- the Commission must take immediate steps to review the information it relies upon to forecast and monitor expenditure, ensuring that it is comprehensive and up to date;
- The Commission must assess the quality and value for money of the criminal legal aid services funded from the public purse;
- The Commission and Court Service must review their governance arrangements on a regular basis to ensure conflicts of interest are minimised and managed effectively.

The NIAO report was subject to a Northern Ireland Assembly's Public Accounts Committee (PAC) hearing which made a number of criticisms of the management of criminal legal aid. One of the main concerns highlighted in its report was that "the lack of reliable management information and performance data has been the main contributor of the Commission's failure."¹²⁵ The PAC recommended that the Department works with the Commission to produce information necessary to begin to manage spending in criminal legal aid effectively.¹²⁶

Whilst both the NIAO and PAC reports dealt with criminal legal aid, the NILSC Annual report for 2011-12 stated

"The Commission in conjunction with its sponsor, continues to implement the recommendations of the PAC on Managing Criminal Legal Aid and is applying these lessons to civil legal aid."¹²⁷

In the NILSC Annual Report 2011-2012, the Comptroller and Auditor General (CAG) indicated some matters of relevance to the governance arrangements for Legal Aid and highlighted that civil legal aid systems are more complex with greater scope for fraud and

¹²³ Northern Ireland Audit Office "Managing Criminal Legal Aid" pg 36
http://www.niauditoffice.gov.uk/index/publications/report_archive_home/2011/8935_legal_aid_final.pdf

¹²⁴ Northern Ireland Audit Office "Managing Criminal Legal Aid"

¹²⁵ Northern Ireland Assembly Public Accounts Committee "Report on Managing Criminal Legal Aid"
<http://www.niassembly.gov.uk/Assembly-Business/Committees/Public-Accounts/Reports/Report-on-Managing-Criminal-Legal-Aid/>

¹²⁶ Northern Ireland Assembly Public Accounts Committee "Report on Managing Criminal Legal Aid"
<http://www.niassembly.gov.uk/Assembly-Business/Committees/Public-Accounts/Reports/Report-on-Managing-Criminal-Legal-Aid/>

¹²⁷ NILSC Annual Report and Financial Statements for the Year ended 31 March 2012, pg 4
http://www.nilsc.org.uk/uploads/publications/documents/annualreport_2011_2012.pdf

error in terms of eligibility and payments to legal practitioners.¹²⁸ The CAG has qualified the Legal Aid Grant Account for two reasons. First, because of insufficient evidence to verify that fraud did not exist and second, because of insufficient evidence as to the calculations used to estimate the legal aid liability. The CAG noted that progress was being made since his previous report indicated these problems and that he expected it would take years to fully address the problems.¹²⁹ The CAG identified a number of possible problems in the processes for preventing fraud. These included for instance the checks on an applicant's eligibility only runs for an assessment period of 12 months even though cases may last years (and thus the applicant's situation may change); the NILSC relied on Department of Social Development (DSD) data about benefit entitlements but did not have any information as to possible fraud or error within these figures; there was no inspection regime in place to inspect practitioners' offices.¹³⁰ CAG noted that NILSC was improving its processes in this area.

CAG also reported that there needed better evidence to justify the estimates for outstanding financial liability at the end of each year, referred to as 'Legal aid provision'.¹³¹ Weaknesses included whether assumptions were based upon worst case scenarios and so not accurately representative. The CAG suggested given his ongoing concerns about with the accuracy of the estimation basis, that the NILSC should consider whether the current basis is fit for purpose or whether an alternative approach should be sought.¹³²

The Access to Justice Review made a number of recommendations in respect of legal aid structures. The Review recommended that all aspect of legal aid policy should become part of an Access to Justice Directorate within the core of the Department of Justice. This recommendation has been implemented, as the DoJ assumed responsibility for legal aid policy, apart from those matters assigned to the Commission by statute, from November 2011. Further, the Review recommended that the legal aid delivery arm should become an executive agency within the Department. The Review also recommended that there should be a major one- off IT investment. The following benefits were identified:¹³³

- an integrated case and financial management system;
- reliable and consistent management information to inform performance management, identification of trends, forecasting and risk management;
- Better data management and quality control to support analysis and research;
- The use of IT to assist in fraud prevention and the integration of anti-fraud measures in the commission's processes;

¹²⁸ Northern Ireland Legal Services Commission Annual Report and Accounts 2011-12, pg 84
http://www.nilsc.org.uk/uploads/publications/documents/annualreport_2011_2012.pdf7

¹²⁹ Northern Ireland Legal Services Commission Annual Report and Accounts 2011-12, pg 84
http://www.nilsc.org.uk/uploads/publications/documents/annualreport_2011_2012.pdf

¹³⁰ Northern Ireland Legal Services Commission Annual Report and Accounts 2011-12, pg 85

¹³¹ Northern Ireland Legal Services Commission Annual Report and Accounts 2011-12, pg 86

¹³² Northern Ireland Legal Services Commission Annual Report and Accounts 2011-12, pg 87

¹³³ Access to Justice Review Northern Ireland "The Report"

- Integration with other justice related IT systems;
- Enabling on line legal aid applications and submissions for Bills;
- Supporting more efficient business processes, with the objective of a paperless office.

The Access to Justice Review Team identified the Scottish Legal Aid Board's system as an example of an effective system. It was also recommended there needed to be a rigorous review of potential efficiencies, posts, structures and staff gradings.¹³⁴

The DoJ Access to Justice Review Departmental Action Plan contains a number of governance and accountability projects in response to the NIAO/PAC projects. These include:¹³⁵

- Introduce a new mechanism for legal aid appeals and improve decision making (Project 32);
- A Management information Project to develop an accurate forecasting model for legal aid including a reliable mechanism for average case costs (Project 33);
- A Compulsory registration scheme for solicitors conducting legal aid cases (Project 34);
- NILSC IT improvement to put in replacement for NILSC case management system (Project 35);
- Management information project to develop an integrated forecasting system on a justice wide basis (Project 36);
- A Counter-Fraud Project (Project 37);
- An Integrated Remuneration Strategy (Project 38);

6 Conclusions

In international terms legal aid expenditure in NI is high compared to other jurisdictions. Some of the studies indicated that Northern Ireland had the highest legal aid expenditure compared to other countries examined. The CEPEJ report showed that NI had the highest annual public budget allocated to legal aid per inhabitant in 2010 at €53.5 compared to England and Wales (€45.7 per inhabitant), the Netherlands (€21.6), France (€5.6) and Germany (€4.1). The median spend in Europe is €2.1 per inhabitant

¹³⁴ Access to Justice Review Northern Ireland, "The Report", August 2011, 128

¹³⁵ Department of Justice Access to Justice Review Departmental Action Plan, <http://www.dojni.gov.uk/access-to-justice-review-departmental-action-plan>

According to the CEPEJ, in 2008, the average amount allocated in non- criminal cases was €598, also the European median. The average amount in Scotland was €429 and in England €629. It should be noted that the available figures for non -criminal legal aid are based on 2008 data and do not reflect the significant increased reported in civil legal aid in NI since 2008. NI granted legal aid in more non -criminal cases per 100,000 inhabitants than any other European country except Turkey.

Ministry of Justice research indicated that although spending on legal aid in England and Wales was relatively high in comparative terms the same could not be said for expenditure in on the courts and the prosecution system. However this argument does not apply to Northern Ireland as the CEPEJ data shows that the annual public budget allocated to all courts per inhabitant in 2010 in NI was €46.2 compared to €21.4 in England and Wales.¹³⁶ The annual public budget per inhabitant allocated to public prosecution service in 2010 in Northern Ireland is €24.2 compared to €13.7 in England and Wales, and well above the average amount.

Figures obtained from DoJ indicate significant increase over 12 years, particularly in Children Order cases and in civil legal aid. Unfortunately it has not been possible to ascertain if there are certain types of cases in the civil legal aid category driving costs as a detailed breakdown is not available. The DoJ offered a number of reasons for the increases in all civil legal aid expenditure including: the increase in Children Order cases, an increase in the number of complex higher cost cases, and faster processing by the Taxing Master. In addition to an increase in Children Order cases, the NILSC reported that a proportion of the increase related to the Omagh Civil action.

An examination of approaches used in other jurisdictions shows a number of ways used to control legal aid expenditure including eligibility, reform of representation, reduction of scope, reduction in remuneration of legal professionals and experts, the use of alternatives to court proceedings and changes to governance. The DoJ proposes to do most of these with the exception of reduction of scope, but is currently consulting on alternative funding in money damages cases. The DoJ also has not ruled out reviewing scope if further savings are required.

Reports by the NIAO and PAC criticised the NILSC governance arrangements and reliability and quality of information used to project current and future legal aid expenditure. The Comptroller and Auditor General also qualified the NILSC annual accounts in 2011-2012 based on two main areas: insufficient evidence to verify that fraud did not exist and second, because of insufficient evidence as to the calculations used to estimate the legal aid liability. The CAG did acknowledge that it was expected to take years to fully address these problems. The DoJ Access to Justice Review Departmental Action Plan contains a number of projects dealing with governance including management information projects to develop an accurate legal aid forecasting model and a counter-fraud project, amongst others.

¹³⁶ CEPEJ "European Judicial Systems 2012 (2010 data) Efficiency and Quality of Justice", Figure 2.6, pg 28