Access to Justice Review (2)

The Agenda

September 2014

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Access to Justice Review (2) – The Agenda

Foreword

As a former chair of the Northern Ireland Legal Services Commission and with a firm belief in access to justice, I am fully committed to a continuing and indispensable role for publicly funded legal services. That is why I have agreed to carry out this review. However, the review is taking place at a time when serious questions are being asked about the cost of legal aid in Northern Ireland, as is the case in other jurisdictions. It is clear that the inexorable growth in the spend on publicly funded legal services cannot continue; and, in the face of competing demands from other vital public services, there is an expectation of significant reductions in funding in this area.

Some efficiencies and cost-cutting measures have been put in place or are in the course of development for implementation, but it seems likely that further measures will be needed. This review affords everyone with an interest in access to justice the opportunity to contribute now to thinking about how the challenges that lie ahead might be met. A planned approach, based on clearly articulated principles and drawing on inputs from those committed to the justice system, is the way to safeguard the key elements of access to justice. Also, a zero-based exercise, building services from the bottom up, can facilitate the development of new and innovative approaches to service provision.

The fundamental driver behind the review is securing and maintaining access to justice while providing a basis for targeting services where they are most needed and will secure the greatest benefit. This agenda document starts by making the case for access to justice in the context of the Department of Justice vision statements but, more importantly, as part of a commitment to human rights, to protecting the vulnerable and to upholding the rule of law. Equally, however, it raises questions about prioritisation, the means by which the desired outcomes are secured and how to secure value for money.

There are aspects of this agenda setting paper that will not be welcome to some at least of its readers. I will take the opportunity to emphasise a point made in the introductory chapter, which is that the presence of an idea or proposition in the document does not necessarily indicate a pre-disposition in its favour. However, change is inevitable. I hope that all with an interest in the justice system will feel able to contribute to this review and help shape its outcome so that it can provide a basis for making decisions about the future of access to justice and publicly funded legal services in Northern Ireland.

Jim Daniell

5 September 2014

Introduction

1.1 The purpose of this document is to set out the scope of the review, identify key issues and questions and invite contributions from stakeholders and all with an interest in access to justice. The review, established by the Minister of Justice, David Ford MLA, started work on 16 June 2014 with the following terms of reference:-

"Publicly funded legal services have undergone significant reform and change in recent years. Looking to the future, it is important to have a clear strategic approach to the development of publicly funded legal services and access to justice.

A strategic approach is necessary to safeguard the interests of justice in an environment where there are many competing demands on public expenditure. It helps ensure that decisions on resources are informed by clearly articulated and prioritised business needs. It will help government to meet its obligations by ensuring that the right services are prioritised and can be sustained at the appropriate level and quality into the future.

Building on the review conducted in 2011, and taking account of changes already in hand, this further review of access to justice will contribute to the development of the vision for the future of publicly funded legal services in Northern Ireland, drawing on the views of the legal profession and other stakeholders, taking account of the experiences of other jurisdictions and reflecting on the financial implications.

The review will:-

- Identify and prioritise those services where publicly funded advice and/or representation should be provided in order to meet human rights obligations, safeguard the interests of the vulnerable and meet the wider public interest.
- Consider the delivery models that might be best suited to the provision of publicly funded legal services including through mechanisms other than legal aid.
- Consider whether there are aspects of the justice system where efficiencies might contribute towards reducing the cost of publicly funded legal services while sustaining the quality of service provision."

1.2 The review is being carried out by Jim Daniell, a consultant to the Department of Justice (NI). The aim is to produce a final report by the beginning of 2015.

How to contribute

1.3 Contributions and views are invited on the issues identified in this agenda document and on any matter covered by the terms of reference. It is important to stress that this document is only a pointer to the kind of issues that will be addressed in the final report and is not intended to limit or put boundaries around the areas for debate that fall within the terms of reference; I will particularly

welcome fresh ideas and new thinking from any source on this important area of public policy and service delivery.

1.4 As for changes and consultations that have been instituted since the last review, I understand that these will continue to be progressed and will not be suspended or put on hold pending the outcome of the review. This review will not therefore focus in detail on such matters as fees and remuneration, financial eligibility or levels of representation.

1.5 Submissions and contributions should be made as soon as practicable and, in any event, no later than by **30 November 2014**. The timetable for this review is such that it will not be possible to take account of submissions received after that date.

1.6 Written submissions should be sent electronically to reviewteam@courtsni.gov.uk, or in hard copy to:-

Access to Justice Review
5th Floor
Laganside House
23-27 Oxford Street
Belfast
BT1 3LA

Also, I will be pleased to hear views at meetings. Anyone or any organisation wishing to meet with me should make contact through the email address given above or by telephone on 02890 412286.

1.7 The review has a presence on the Department of Justice website that can be accessed at **http://www.dojni.gov.uk/index/access-to-justice-review-2.htm.** Relevant documents are stored there, including the report of the Access to Justice Review (1) that was completed in September 2011.

1.8 The remainder of this document will outline the ground that, on the basis of current thinking , will be covered in the final report and identify some of the key issues and questions. The fact that an issue is flagged is intended to stimulate and focus discussion; it does not mean that I am pre-disposed in favour of any proposition outlined in this document. Over forty issues and questions are flagged in bold in throughout the document but I fully appreciate that many who respond will only wish to address those matters that are of direct interest to them.

Context

2.1 Before engaging in discussion of the substance of the terms of reference, it is useful briefly to reflect on three contextual issues that will need to be taken into account:- budgetary matters; developments in other jurisdictions; and implementation of recommendations in Access to Justice Review (1).

2.2 This review is taking place against a background of the rising cost of legal aid at a time when there are competing demands for funding and when budgets across all public services are being squeezed. Expenditure on legal aid in Northern Ireland, including administration costs, rose from £63.1m in 2005/06 to £110.2m in 2013/14. It is clear that a level of growth in spend of that order cannot be sustained.

2.3 The final report will identify some of the drivers behind the increased costs in criminal and civil legal aid as well as addressing the way in which the budget was set over the years, matters that were covered in paragraphs 3.1 to 3.14 in the report of Access to Justice Review (1). In short, it is apparent that prior to devolution a nominal budget was established with little relationship to forecast spend, on the basis that any necessary additional funds would be found through in-year supplementary provision. As part of the arrangements for devolving justice matters, additional funding was made available for legal aid on a transitional basis for two years to allow a breathing space; after that the budgetary provision was reduced to the pre-devolution level, uplifted by an amount that would go part way to meeting any shortfall. A series of measures was put in place to bring costs within budget. However, these are demand led services that have to be delivered in order to meet statutory obligations; and, notwithstanding the measures already taken, the combined effect of high demand and rising costs has led to “in year” funding pressures that impact on the wider business of the Department of Justice. The efforts to bring spend within budget have produced a focus on efficiencies and have started to drive some excessive costs out of the system, so far with little impact on service provision. However, there comes a point where “top down” cost cutting results in a “salami slicing” approach to cutting services, with decisions based on where savings can most easily be made rather than a full assessment of the impact on service provision or of possible innovative new delivery mechanisms.

2.4 This review provides the opportunity for a very different approach. It means starting from a zero base, identifying the irreducible minimum level of provision of publicly funded legal services required to meet our human rights obligations and protect the most vulnerable, and then assessing the priority to be attached to other areas of provision. This will enable the development of a budget and financial planning assumptions based on a strategic approach to taking, albeit sometimes difficult, decisions on priorities for spend; and it will facilitate comparison between legal aid priorities and other areas of departmental spend, taking account of the department’s strategic objectives. The review will also consider whether different and innovative ways of delivering legal services and advice, perhaps in partnership with other public bodies, the voluntary and the private sectors, might in some areas provide better value for money than the current model, while sustaining the quality of provision.

2.5 As in Access to Justice Review (1), this review will emphasise the importance of a well tuned and sensitive financial forecasting model to give early warning of pressures and easements and help mitigate the debilitating effects of having to make short term adjustments to services in order to stay within budget. However, in this area extraneous factors outside the control of those responsible for legal aid can have a significant impact on spend, requiring a margin allowing for a degree of flexibility to be built into financial planning and budgeting. This is a more significant consideration in small jurisdictions, such as Northern Ireland, where a single unplanned or unforeseeable event may have a disproportionate impact on overall spend which cannot be so easily absorbed as in larger jurisdictions.

2.6 When this agenda document comes to addressing particular areas of law in the context of access to justice, it will show the level of spend and volume of legal aid payments (where there have been any) over the previous four years for that area. However, this should be taken as a general indication of the scale of activity rather than as a precise indicator of possible future spend.

2.7 The report of the review will address concerns that are sometimes expressed about the level of spend on legal aid in Northern Ireland when compared with other jurisdictions. Examination of the causes of such disparities, such as differing approaches to public law children cases and to financial eligibility in Scotland, might provide pointers for matters to be examined in this jurisdiction. However, comparisons should be treated with caution. So far as the other UK jurisdictions are concerned, factors such as comparative wage levels and degree of dependency on benefits are bound to impact on financial eligibility for legal aid; and if a jurisdiction has higher levels of financial eligibility than others then, all other things being equal, a higher level of spend might be expected, although perhaps not to the extent that is currently the case in Northern Ireland. Looking farther afield, it is questionable how far valid comparisons can be made with civil law jurisdictions which place a greater emphasis on the investigative and fact finding roles of judges and magistrates than is the case in common law adversarial systems.

2.8 Legal aid is facing financial pressures in many jurisdictions and this review can take account of lessons learnt from measures taken to respond to those pressures, for example the impact of greater numbers of litigants in person. It will also take the opportunity to examine the possible applicability here of innovations and change taking place elsewhere such as the introduction of a comprehensive framework for mediation and ADR in the Republic of Ireland, the use of web-based guides to dealing with matrimonial issues in the Netherlands, models for the delivery of advice and assistance in England and Wales and the use of a limited number of employed solicitors to complement the private sector in Scotland.

2.9 Access to Justice Review (1) was completed in September 2011, with 159 recommendations covering publicly funded legal advice and assistance, and representation in civil and criminal matters. It also addressed delivery mechanisms and the arrangements for administering legal aid through the Legal Services Commission. (The Legal Aid and Coroners Courts Bill, currently before the Assembly, provides for the dissolution of the Legal Services Commission and the creation of the Legal Aid Agency as part of the Department of Justice, as was recommended in the earlier review. For purposes of this review I will continue to refer to the body administering legal aid as the Legal

Services Commission.) Key themes in Access to Justice Review (1) included alternative dispute resolution, partnership working in delivering advice and assistance, family justice reform, alternative arrangements for funding money damages cases and the facilitation of early guilty pleas and diversionary measures in criminal cases. There was also consideration of budgetary issues, along with recommendations about levels of representation, remuneration for those providing publicly funded services and financial eligibility for legal aid. Value for money, predictability and control of rising costs (for example through greater use of standard fees), while sustaining quality services and fair remuneration, were also very much to the fore in the thinking behind that review.

2.10 Implementation of the first review's recommendations is being managed through a programme management framework comprising 39 projects. Some projects have been completed, while others are at a relatively early stage of implementation with the development of pilot schemes and ongoing consultation. Given the scale of such undertakings in a small jurisdiction, the requirement for consultation and the careful scrutiny of the department's proposals by the Assembly and the Justice Committee, it is inevitable and right that some of these projects should take time to come to fruition. There are also issues of capacity and quality control that need to be addressed in areas such as mediation. It is not part of this review's remit to report on progress in implementing recommendations of the earlier review but the final report will make reference to the work of Access to Justice Review (1) where it impinges on the current terms of reference; and it is of course entirely open to stakeholders and others to draw on material covered in that review when contributing to the current exercise.

A Strategic Approach

3.1 In making a business case for the provision of a service (access to justice) from a zero sum position, a useful starting point is to establish how that service contributes to the broader strategic objectives of the responsible department, in this case the Department of Justice.

3.2 The Department of Justice (DoJ) mission statement is "Building a fair, just and safer community". Two of the themes underpinning that statement, and published in the department's 2014/2015 business plan, are clearly relevant to this review and to the case for access to justice. They are:-

- Promote faster, fairer justice through cross-cutting policy, procedural and structural reforms

- Provide and contribute to safer communities through partnership working with statutory organisations, communities, the third sector and business.

This mission statement and supporting themes are consistent with, and indeed indispensable elements of, a modern democratic society committed to the fair and equal treatment of all its citizens regardless of their background. The delivery of safer communities requires the existence of an inclusive, efficient and effective justice system as a basis for addressing civil disputes and dealing with criminality.

3.3 Justice and the rule of law, backed by the oversight of an independent judiciary, facilitate:- the protection and promotion of fundamental freedoms and human rights; the fair treatment and trial of those accused of criminal offences; the ability of individuals to assert or defend their rights in relation to public authorities or the economically more powerful; protection against arbitrary decision-making by public authorities; and transparent, safe and fair means of avoiding or resolving disputes. Fundamental to securing these outcomes is a commitment to equality before the law; and this can only be achieved if there is equal access to the law and the justice system. If by reason of background, economic disadvantage, lack of capacity or lack of knowledge, individuals or groups in society do not have as effective access to the justice system as others, then no matter how fair the system and its procedures, the characteristics of the rule of law outlined above will be compromised.

3.4 So, access to justice is an essential component of the justice system and the rule of law. At one level it means enabling those who cannot otherwise afford it to secure legal advice and representation through publicly funded legal services, pro bono arrangements or other mechanisms (such as conditional fees) that do not involve up-front payment. Access to justice is also about having substantive law and procedures that are easily understood, logical and predictable and that produce outcomes with a minimum of delay. It means making information and advice easily accessible to the public through a range of media from face to face, through telephone helplines to web-based material – to assist people in understanding their legal position, in resolving practical problems, in preventing disputes arising in the first place and in resolving matters without having to go to a court or tribunal. In all of this there is a role for the private sector legal profession, but also for the

voluntary sector, specialist advisers, government departments, business, trade unions, law centres and academia.

3.5 However, proportionality is also a consideration, especially where public funds are concerned; and enabling access to justice does not mean supporting vexatious litigation, enabling parties to use the courts as a means of perpetuating conflict or placing parties with access to legal aid at an advantage as against those who might not meet the financial eligibility criteria. Where legal aid is available, it should place the recipient in the position of taking decisions on the case, for example about whether to proceed or to settle, on the same basis as would a potential litigant paying for legal assistance and/or representation out of their own pocket.

3.6 While equal and proportionate access may be the ultimate objective, we have to recognise that we operate in a world of finite resources. It is not possible to guarantee legal representation across all types of legal procedure any more than the health service can provide limitless supplies of lifesaving drugs to all. This review will therefore seek to identify the minimum level of provision necessary to meet human rights obligations and/or without which the ability to deliver a "fair, just and safer community" would be seriously undermined. Taking account of the views of stakeholders and anyone who wishes to contribute, it will go on to assess the priority that might be attached to other areas, as well as examining means of delivery and efficiency issues.

3.7 The following paragraphs outline for comment some criteria against which provision might be prioritised.

3.8 The final report will identify some human rights norms and associated case law that are relevant to any consideration of access to justice. In particular it will refer to Article 6 of the European Convention on Human Rights (right to a fair trial, including the right to free legal representation in criminal proceedings where the defendant does not have the means to pay and the interests of justice require it). Articles 2 (right to life), 5 (right to liberty) and 8 (right to privacy and family life) are also relevant. Other international instruments (some of which were detailed in paragraph 2.4 of the previous review) that come into play are:-

- The UN Convention on the Rights of the Child – including the right of the child to be heard or represented in judicial and administrative proceedings affecting their interests (Article 12) and that the child's best interests should be the determining factor in decision-making.

- The UN Convention on the Rights of Persons with Disabilities (incorporated into UK law) – the obligation on states to ensure effective access to justice for persons with disabilities including through the provision of procedural and age-related accommodations (Article 13).

- UN Basic Principles on the Independence of the Judiciary.

- UN Basic Principles on the Role of Lawyers – states to ensure the availability of sufficient resources to provide legal aid to the poor and disadvantaged and the legal profession to co-operate (Principle 3).

- Resolution 78(8) of the European Council of Ministers and Article 47 of the Charter of Fundamental Rights of the European Union – right to a fair trial, representation before the courts and legal aid where necessary to secure access to justice.

- International Covenant on Civil and Political Rights – equality of all before courts and tribunals and the right to legal assistance in criminal matters (Article 14).

- The EU Public Participation Directive – requiring states to provide a means of challenging environmental decisions that is not prohibitively expensive.

- The Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental matters, agreed under the auspices of the UN Economic Commission for Europe.

3.9 The commitment to equal access to justice includes adherence to the requirements of sections 75 and 76 of the Northern Ireland Act 1998 in relation to equality.

3.10 The review will go on to identify specific criteria to be taken into account when considering what priority to attach to particular areas of law or legal process, or types of individual, in determining whether and to what extent public funding in support of access to justice should be provided. These might include:-

- Matters affecting right to life.
- Where individual liberty is potentially at issue.
- Whether an individual may be at risk of being subjected to violence or intimidation.
- Whether homelessness is an immediate risk.
- The potential impact of the matters at issue – proportionality.
- Whether parties to a dispute or potential dispute may be vulnerable.
- Where the interests of children are affected.
- Allegations against public authorities of serious wrongdoing, abuse of power or significant breach of human rights.
- Potential power imbalances, for example between the individual and the state or a multi-national company.
- Complexity of issues at stake.
- Ensuring that legal aid does not put the recipient in a position to pursue cases unreasonably or put unfair pressure on a non-legally aided party.

- The availability of other means of securing advice or resolving problems, such as CAB, complaints procedures and ombudsmen.
- The availability of other sources of funding, including where money and/or other assets are the subject of the litigation.
- The extent to which the matter at issue may be amenable to litigation in person, perhaps with pre-hearing advice.
- The extent to which publicly funded advice and assistance at an early stage might increase the chances of early resolution, thus producing more satisfactory outcomes and saving expense at later stages in the process – but being aware of the danger that immediate access to publicly funded advice from a lawyer might encourage individuals to think in terms of litigation rather than other options for resolving issues.

Q1 Are there any comments on, or is there anything to add to, the high level case for access to justice, the human rights considerations and the criteria for assessing priorities set out in the previous paragraphs?

3.11 The ensuing sections of this paper identify the main areas of law that might be prioritised in relation to the public funding of access to justice and legal aid, seeking views on the respective priority that might be attached to each, taking account of the criteria noted above. For each area it also seeks views on possible delivery models and efficiencies that might contribute towards reductions in the costs of publicly funded legal services. Particular attention will be paid to the opportunities afforded by forms of alternative dispute resolution, such as mediation. In the final chapter of the document there is a round-up of issues relating to delivery models and efficiencies in the justice system as a whole, as well as consideration of whether a different strategic approach to access to justice might be considered.

Criminal Legal Aid

4.1 The table below gives an indication of spend and volumes of payments made in the key areas of criminal legal aid. The "other" category includes payments in respect of appeals, extradition cases and the 1992 Rules (where the available management information does not distinguish between Crown Court and magistrates' court cases).

Table 1 Costs and volumes of Criminal Legal Aid

	2010/11	**2011/12**	**2012/13**	**2013/14**
Crown Court cost (£000)	**36,887**	**25,597**	**28,735**	**30,926**
Crown Court bills	4,673	5,377	6,147	7,529
Magistrates Ct cost (£000)	**20,604**	**21,948**	**18,087**	**19,348**
Magistrates Ct bills	33869	37,222	31,633	32,643
PACE (police station advice) cost (£000)	**3,193**	**2,960**	**2,285**	**3,015**
PACE bills	23,893	20,827	15,848	22,104
Other criminal cost (£000)	**496**	**806**	**894**	**1,117**
Total cost (£000)	61,180	51,376	50,001	54,406

In the four years prior to 2010/11 Crown Court costs had fluctuated between £30m and ££45m, largely due to the impact of very high cost cases which are no longer part of the remuneration arrangements. That savings in the cost of Crown Court cases have not been more pronounced in 2013/14 can be explained in part by increased volumes brought about by the assignment of an additional Crown Court Judge to reduce backlogs. However, it is also relevant that the number of cases received into the Crown Court during the past four years has been substantially higher than in previous years. Another factor impacting on current and future spend is that the new Crown Court remuneration arrangements introduced in 2011 have not resulted in the expected level of savings.

Magistrates' court costs had been running at a steady rate of around £15m in the years before 2010/11. Part of the increase since then may be due to the introduction of the 2009 rules for remuneration with a simplified fee structure that will have speeded up the submission and processing of applications for payment and because of the Commission's efforts to encourage the submission of outstanding bills. The number of defendants received by the magistrates' courts dropped substantially in 2013 to 45,313 from the 50,000 to 58,000 that were received annually over the previous decade.

The final report will include a fuller analysis of the trends in the volumes and types of criminal cases coming before the courts, which is of obvious importance in any consideration of legal aid costs. We will also relate this to crime rates and to trends in diversionary disposals such as cautions and fixed penalty notices, which might be expected to reduce the number of magistrates' court cases (and may already be doing so).

In this and subsequent tables volumes are measured by the number of bills presented to the Commission by solicitors and barristers. Other possible measures include number of cases and number of defendants assisted by legal aid. Given that

some cases involve more than one defendant and some defendants will have more than one lawyer acting on their behalf, these measures will produce different looking figures, but the trends are likely to be broadly the same.

4.2 Articles 28 to 31 of the Legal Aid Advice and Assistance Order 1981, provide for the grant of legal aid in criminal proceedings where the court considers the defendant to be of insufficient means to pay for legal representation and it is in the interests of justice that it be granted. Advice and assistance may also be provided under the "green form" scheme to persons detained by the police. The availability of criminal legal aid ensures compliance with Article 6 of the European Convention (paragraph 3.8 above) insofar as it relates to the more serious cases where individual liberty may be at issue given the availability to the courts of custodial sentences or community sentences that impose restrictions on the convicted defendant. Convictions or cautions for apparently less serious offences can also have a significant impact, for example on reputation and employability. However, it would be difficult to justify granting legal aid for more minor offences and strict liability cases where the impact of a conviction is not so great and the potential benefits for the defendant accruing from legal representation are commensurately less.

4.3 The "interests of justice" were not defined in the 1981 Order but successive Lord Chancellors have endorsed what are commonly referred to as the Widgery criteria, established in 1966 following a recommendation in the Report of the Departmental Committee on Legal Aid in Criminal Proceedings, chaired by Mr Justice Widgery. The criteria are applied in each of the UK jurisdictions and will be given statutory authority by Article 29 of the Access to Justice (NI) Order when it is commenced. The criteria are as follows:-

- the charge is a grave one in the sense that the accused is in real jeopardy of losing his liberty or livelihood or suffering serious damage to reputation;
- the charge raises a substantial question of law;
- the accused is unable to follow the proceedings and state his own case because of inadequate knowledge of English, mental illness or other mental or physical disability;
- the nature of the defence involves tracing and interviewing witnesses or expert cross-examination of a prosecution witness;
- legal representation is desirable in the interest of someone other than the accused, for example in a case involving a sexual offence where it would be undesirable for the accused to cross examine the witn

Q.2 Should the Widgery criteria be retained as the basis for determining whether it is in the interests of justice that criminal legal aid should be granted? Should the criteria be amended in any way?

4.4 The Access to Justice Review (1) made recommendations about alternatives to prosecution in respect of adults, including fixed penalty notices, prosecutorial fines and cautions. It recommended that legal aid should enable the provision of advice to financially eligible people who have been

offered such interventions but, in the event of their wanting to go to court, should only be available to support legal representation if it would have been available if the matter had been prosecuted in the first place. However, it is arguable that, since the impact of such interventions is likely to be at the lower end of the spectrum, the provision of such advice would not be of the highest priority.

Q3. Should the continuation of legal aid to support the provision of legal advice to adults offered diversionary interventions be regarded as of a relatively lower priority, provided that information is provided by the authorities on the implications of accepting such interventions and on the option of taking the issue concerned to court?

4.5 Where children and young people are concerned, it may be felt particularly important that they should have access to independent advice about diversionary measures, including restorative youth conferencing. This would put them in a position to make an informed response to offers of diversionary disposals at an early stage and help ensure that they understand the implications of what is being proposed (including in some cases the possibility of gaining a criminal record). Youth engagement clinics, currently being rolled out across Northern Ireland, enable a multi-agency team to explain to the young person, in a safe environment, the nature of the case against them and the options. The young person is supported by appropriate adults and, in some cases (in all cases where the offence is not admitted), by lawyers funded through legal aid.

Q4. To what extent do the current arrangements, including youth engagement clinics, ensure that children and young people fully understand the implications of diversionary options that may be offered and enable them to take informed decisions?

4.6 I now go on to consider the application of the Widgery criteria in the Crown Court and magistrates' courts.

Crown Court

4.7 The Crown Court tries the more serious criminal offences, including all indictable offences and indictable offences triable summarily where a district judge decides that the case should be moved to the higher court. There is also provision in certain types of offence for the prosecution to determine the mode of trial, and where an offence could attract a penalty of more than 6 months the defendant may elect for trial at the Crown Court.

4.8 Given that cases at this level are at the more serious end and attract a higher level of costs, they will invariably qualify for legal aid in accordance with the Widgery criteria and on the basis of financial eligibility. However, it is understandable that there should be concern when large legal aid bills accrue in relation to convicted defendants who have access to funds of their own. In England and Wales all defendants in the Crown Court can receive legal aid from the start of a case, but with possible contributions from the defendant following a means test or out of restrained assets. There is now a proposal there that if disposable income (after tax, childcare, living allowance etc) is above £37,500, then the defendant would be ineligible for legal aid but, if acquitted, he would be reimbursed legal costs at the legal aid rate (although not out of the legal aid fund).

4.9 It was with this in mind that the Access to Justice Review (1) recommended that regulations be prepared to enable the recovery of defence costs and to establish procedures for identifying those defendants with sufficient funds to be made subject to such orders in the event of conviction. Such regulations have been made but I understand that there remain concerns about the ability to identify those with sufficient funds to pay for or contribute to their defence should they be convicted. A detailed means test carried out at the start of proceedings might assist in this regard.

Q5. What more should be done to enable costs to be recovered from convicted defendants who have the necessary means and in particular to identify those who have the means and prevent them from transferring or concealing their assets? Should consideration be given to an upper limit of income and/or capital beyond which legal aid in these cases is not available, with provision for payment of costs at the legal aid rate in the event of acquittal?

Magistrates' courts

4.10 The range of offences dealt with in the magistrates' courts is such that some would qualify for legal aid by virtue of the Widgery criteria while many others would not. In Northern Ireland it is the judiciary who determine whether legal aid should be granted following an application, often made in the course of a hearing. In doing so, they take account of the applicant's means and determine whether it is in the interests of justice that legal aid should be granted, effectively applying the Widgery criteria. Sometimes the application is brief with little reasoning given in support and no specific reference to the criteria, with similarly brief reasons given when legal aid is granted. This is in contrast to the position in the other UK jurisdictions where detailed guidance is provided on the material to be included in applications for criminal legal aid and on how the Widgery criteria are to be addressed.

4.11 In Access to Justice Review (1) we noted the increase in the cost and number of legal aid bills paid in the magistrates' courts and considered whether there might have been an element of "Widgery drift" with legal aid being granted in circumstances where previously this would not have been the case or which did not easily fit with the criteria. Research available to that review, albeit rather dated, found no evidence of such drift concluding that, other than at the margins, decision-making was consistent and that the high level of grant of legal aid (97% of applications) could be explained by the clear understanding on the part of solicitors of the type of case that would qualify. I understand it remains the case, however, that there is some anecdotal evidence of legal aid being granted in relatively trivial cases and sometimes of counsel being certified in circumstances and at stages in the proceedings where the case could not on the face of it be described as "unusually grave or difficult"[1]. In the course of this review we will look further at the possible causes of fluctuations in the volume and costs of legal aid in the magistrates' courts, including trends in the

[1] Article 28(2) of the Legal Aid, Advice and Assistance (NI) Order 1981 provides "Free legal aid given for the purposes of any defence before a magistrates' court shall not include representation by counsel except in the case of an indictable offence where the court is of the opinion that, because of circumstances which make the case unusually grave or difficult, representation by both solicitor and counsel would be desirable".

overall number of cases going through the courts, and consider whether further research into the type of cases in receipt of legal aid would be worthwhile.

Q.6 Would further research into the way the Widgery criteria are applied be worthwhile? With the Widgery criteria being placed on a statutory footing in the Access to Justice Order (NI) 2003, should all applications and grants of criminal legal aid have to make specific reference to the criterion or criteria relevant to the case in hand? And should requests for certification of counsel have to be justified specifically in the terms laid down by Article 28(2)? Would such an approach provide reassurance as to the rigorous and fair application of the relevant criteria?

4.12 There are three key decisions made by the judiciary in determining whether to grant legal aid – whether the applicant has sufficient means to fund his own defence; whether it is in the interests of justice that legal aid be granted; and the certification of counsel. In other UK jurisdictions this decision-making role, together with a more stringent approach to means testing, has been shifted to the body administering legal aid or court-based staff acting on behalf of such a body. Following the other jurisdictions in transferring responsibility for decisions on the grant of criminal legal aid to the Legal Services Commission is an option that might provide reassurance in terms of consistency of application of Widgery and help with predictability of spend; and it would make for better financial accountability in that the spending authority would make the decisions that had financial consequences. However, there would be some additional administrative costs and care would have to be taken to ensure that such a change did not cause delay or interfere with the efficient running of the courts. Also, it is arguable that the judge hearing the case is best placed to assess whether the interests of justice require that a defendant be represented. This review will afford an opportunity to explore the systems in use in other jurisdictions and, in particular, whether a transfer of all or some aspects of decision-making on criminal legal aid might entail significant additional administrative costs or interfere with the efficient running of the courts.

Q7. Is there a case for considering the transfer of all, or some, aspects of decision-making on the grant of criminal legal aid and certification of counsel to the Legal Services Commission or court-based staff acting on behalf of the Commission?

Police station advice

4.13 In 2013/14, some 22,104 bills were paid to solicitors in respect of attendance on, or telephone advice to, suspects held at police stations, at a cost of around £3 million. It is an integral and vital part of our justice system that anyone under arrest or otherwise detained by the police should have access to a lawyer, whether by telephone to clarify the legal position or in person in preparation for and during an interview under caution. The detained person's liberty is at issue in such circumstances while informed and expert legal advice at this point can be of critical importance to the detained person's future defence. European case law (Salduz v Turkey 2008 49 EHRR) and the UK Supreme Court (Calder v HMA Scotland 2010 UKSC 33) have confirmed that access to independent

legal advice before being questioned by the police is a necessary component of the right to a fair trial under Article 6 of the Convention.

4.14 The detained person may be in a position to select his own solicitor. However, where the suspect does not have a solicitor or his solicitor is unable to attend, in Belfast or at the Antrim Crime Suite he will be provided with a solicitor drawn from a rota of duty solicitors organised by the Law Society. Elsewhere a variety of local arrangements apply. While the registration arrangements for solicitors providing legally aided services, that are currently under consultation, should provide some assurance in relation to quality, it is questionable whether it is satisfactory that public funds should be paid to solicitors when it is not clear to the Legal Services Commission how those outside Belfast are selected for this important task. There is also the question of whether there is sufficient geographical coverage of suitably experienced solicitors available at any time of the day and night to be called to provide advice and assistance.

4.15 One option would be to agree with the Law Society a system that provided a suitably robust rota of duty solicitors able to provide police station advice when required throughout Northern Ireland. In England and Wales, client choice is retained for those who wish to exercise it but, as part of the wider contractual arrangements, firms of solicitors, alternative business models, consortia or joint ventures will tender for a limited number of contracts to provide duty solicitor services at police stations. As part of the tender document they will have to demonstrate that they are sufficiently resourced to be able to operate a comprehensive duty rota drawing on solicitors with the necessary background and expertise to provide the service. Those who secure such contracts will be subject to peer review. This review will consider the options (including maintenance of the current arrangements) for ensuring that there is a comprehensive quality assured network of duty solicitors able to give police station advice on a 24 hour basis wherever required in Northern Ireland.

Q8. How should the Legal Services Commission ensure that the necessary network of solicitors is available wherever and whenever required in Northern Ireland to deliver police station advice and support? Is there a role for contractual arrangements (including accreditation requirements) in this context?

Delivery Models

4.16 The terms of reference require me to examine the delivery models best suited to the provision of publicly funded legal services. In the context of criminal legal aid client choice carries a particular resonance in Northern Ireland and plays a part in contributing to confidence in the justice system. It is facilitated by the delivery model currently in operation which is based on private sector providers making applications for legal aid to the courts on behalf of their clients, while the proposed registration system will help provide the necessary quality assurance. We have already outlined above how a duty solicitor scheme ensures that those unable to secure a chosen solicitor can be provided with legal advice when detained by the police.

4.17 However, there are other models for consideration. In England and Wales there has been extensive consultation on proposals for the procurement of criminal legal aid services, with the Government's response and proposed way forward, "Transforming Legal Aid – Next Steps:

Government response" published in February 2014[2]. Under these arrangements there will be an unlimited number of contracts for own client work, subject to the suppliers meeting the tender requirements, and a limited number of contracts for duty work (see para 4.14 above). It is clear that part of the thinking behind these proposals is to encourage the development of service providing entities, including alternative business models, of sufficient size to be able to benefit from economies of scale, while having the necessary skills and expertise to deliver quality services. The contractual model in England and Wales does not extend to Crown Court Advocacy. However, the Review of Independent Criminal Advocacy in England and Wales[3] carried out by Sir Bill Jeffrey (see also paragraph 8.4 below) did include as an option that the Legal Aid Agency there could maintain a panel of approved advocates for legally aided defence along the lines of the panel operated by the CPS (and in Northern Ireland the Public Prosecution Service also maintains such a panel). This would help meet the public interest in maintaining quality as well as sustaining a cadre of criminal advocates with a regular flow of work in a potentially declining market.

4.18 Another model is the public defender service, with lawyers employed directly by government agencies. Such a service operates extensively in the United States as a means of capturing cases where otherwise defendants would fail to secure representation. Public defence solicitors' offices acting under the auspices of, but operationally independent from, the Scottish Legal Aid Board have been operating since 1998, while there is a less well developed Public Defender Service in England and Wales. In both jurisdictions they are very small undertakings when compared with private sector providers but have considerable value in providing a means of benchmarking and developing new ideas and quality standards and (in Scotland's case) providing a service in geographical areas where the private sector might otherwise be stretched. It is for consideration whether such a service would bring sufficient benefits to justify the set-up costs in Northern Ireland and whether there would be issues about its perceived, as well as actual, independence.

Q9. What considerations should be taken into account in assessing other models of delivering criminal legal aid in Northern Ireland, such as a contract-based approach, a public defender service and/or a panel of advocates for Crown Court defence work?

Possible Efficiencies

4.19 I have been asked to consider whether there are aspects of the justice system where efficiencies might contribute towards reducing the cost of publicly funded legal services while sustaining the quality of service provision. There is a range of issues relating to criminal justice that could be considered under this head, including:- tackling delay; streamlining procedures; reducing the number of review hearings; encouraging early guilty pleas and reducing the number of cracked trials; all concerned being ready for trials to start on the appointed day; the availability of forensic and medical evidence; digitalisation and its potential to streamline court processes; the use of video links both in court and to assist solicitors in managing consultations with clients in prison; whether it

[2] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid--next-steps

[3] https:www.gov.uk/government/publications/independent-criminal-advocacy-in-england-and-wales

remains necessary for solicitors invariably to attend Crown Court hearings and trials in support of advocates (this is no longer the case in England and Wales); and performance management. Action has been taken on a number of these fronts, for example in the development of the Causeway IT system enabling agencies to communicate with each-other securely and electronically, a pilot and legislative measures to facilitate early guilty pleas, an expansion of the fixed penalty system and legislation to introduce prosecutorial fines; and legislation to reform committal procedures. However, this is an opportunity for stakeholders to identify whether there are particular features of the criminal justice system where reform and change might speed up the process and, in particular, enable those delivering publicly funded defence services to operate more efficiently.

4.20 In England and Wales, such matters have been taken forward through the Ministry of Justice "Strategy and Action Plan to Reform the Criminal Justice System", published in June 2013 and focusing in particular on digitalisation and speeding up the justice system. In March 2014 and at the request of the Lord Chancellor, the Lord Chief Justice appointed Sir Brian Leveson, President of the Queen's Bench Division, to conduct a review and identify ways to streamline and modernise the process of criminal justice and reduce the total length of criminal proceedings. The first phase of the review will examine the extent to which better use could be made of technology, for example by holding short hearings by telephone or by web or video-based applications. It is hoped to identify ways of reducing the number of pre-trial hearings that require defendants and advocates to attend court. From observation of magistrates' court sittings in Northern Ireland during Access to Justice Review (1) the number of pre-trial reviews and hearings requiring lawyers to spend unproductive time waiting around in court was quite striking. The Leveson Review in England and Wales will also critically examine the criminal procedure rules with a view to ensuring that maximum efficiency is required from every participant in the system.

Q10. What changes to the criminal justice system in Northern Ireland would enable publicly funded defence services to be delivered at lower cost and more efficiently while sustaining quality? Are there particular priorities for attention?

Family and Children

5.1 The following table provides an indication of the trends in legal aid case volume and expenditure in relation to the main components of family law. The figures aggregate together all cases in the Family Proceedings Court, Family Care Centre and High Court and, in relation to divorce proceedings cases in the County Court and the High Court. Family proceedings account for over 70% of the spend on non-criminal legal aid.

Table 2 Costs and volumes of family legal aid

	2010/11	**2011/12**	**2012/13**	**2013/14**
Public law children order cost (£000)	**9,285**	**10,533**	**12,536**	**13,188**
Public law children order bills	2,004	2,018	1,960	2,061
Private law children order cost (£000)	**8,522**	**12,070**	**10,040**	**9,903**
Private law children order bills	6,755	6,841	5,198	4,990
Divorce and associated ancillary relief (£000)	**4,418**	**6,648**	**6,503**	**7,962**
Divorce etc bills	1208	1542	1,296	1,523
Ancillary relief and other matrimonial (£000)	**1,353**	**1,977**	**1,908**	**2,479**
Ancillary relief etc bills	179	255	216	271
Non-molestation orders cost (£000)	**1,971**	**2,113**	**1,634**	**1,499**
Non-molestation orders bills	3,102	3,444	2,757	2,642

5.2 Private law in family justice largely concerns matters arising out of the break-up of family relationships, including divorce, separation, financial settlements (ancillary relief) and contact arrangements with children. Much of the legislation relating to divorce and separation dates back to the 1980s and beyond but the Domestic Violence (NI) Order 1998 is of particular significance in that it provides for non-molestation and occupation orders, as part of a strategy aimed at protecting spouses from domestic violence and children from abuse.

5.3 Public law provides a mechanism for the Trusts to protect children who might be at risk from abuse or neglect or are beyond parental control. The Children (NI) Order 1995 establishes a framework and court-based procedures whereby the Trusts can take children into care or instigate other interventions such as supervision orders. The Order, largely modelled on the 1989 Children Act in England and Wales, also contains provisions relating to the treatment of children in private law proceedings including residence and contact issues. In accordance with the UN Convention on the

Rights of the Child, Article 3 of the Order provides that the child's welfare shall be paramount in decisions taken by the courts.

5.4 Proceedings in public and private law matters concerning children may take place in the Family Proceedings Court, the Family Care Centre or, in the most complex cases, in the High Court. Divorce and related proceedings take place in the county courts or the High Court, often depending on where the parties' lawyers choose to bring proceedings.

Public law children

5.5 The parties in these cases are the Trust, the Guardian ad Litem Agency (which provides the independent officer of the court to safeguard the interests of the child), the child (whose solicitor is appointed by the Guardian from a panel of accredited lawyers), the parents (together or separately) and, sometimes, others who have a legitimate interest in the case. All of these parties may be represented and on occasion the Guardian will have separate legal representation from the child so that the child's view can be expressed independently. Legal aid is available, in some cases without the need for means or merits test, to the child, to the parents and sometimes to other parties who may be from the extended family. Given the provisions of the UN Convention on the Rights of the Child, the paramount importance of protecting and taking the right decisions in respect of children at risk and the potential implications for the rights of parents, the provision of legal aid in respect of public law children cases might be regarded as part of the irreducible minimum of service provision. Perhaps the only caveat is whether legal aid should invariably be available to parties other than the child and those exercising parental responsibility or whether the same levels of representation should be afforded to such parties.

5.6 The procedures in these cases can be complex and lengthy, a year being the average time taken to complete proceedings in Northern Ireland (as it was in England and Wales before the recent reforms). This adds to the costs of the justice system and legal aid but, more importantly, such delays are inimical to the interests of the child who, while protected on an interim basis, can only benefit from clear and timely decisions about his or her long term future. Some of the issues that have been identified as contributing to delay and increased costs include:- inconsistent application of the COAC[4] guidance on case management; variability in the quality of social work assessments and evidence; excessive and sometimes inappropriate commissioning of expert reports; judges needing to approve the detail of care plans rather than establishing that the core elements are present; and the legislative requirement that Interim Care Orders be reviewed after 8 weeks and then every 4 weeks which is a big factor contributing to the number of hearings required. It is open to question whether the procedures established by the Children Order allow for the most efficient and effective ways of processing these cases in the interests of the child.

5.7 In England and Wales, these matters have been addressed through the Children and Families Act 2014 and the Tri-borough pilot (running for a year from April 2012 and involving the key

[4] Children Order Advisory Committee established in 1997 to advise on Children Order matters, it is chaired by a High Court judge and includes membership from all tiers of the judiciary, the Official Solicitor, the trusts, DHSPSS and the Northern Ireland Courts and Tribunals Service..

stakeholders in committing to reduce the duration of care proceedings) both of which flowed from the wide ranging Norgrove review of family justice. Amongst other things the legislation included a 6 month time limit for care proceedings and provisions to enable the more flexible treatment of interim care orders. A revised Public Law Outline contains a number of measures aimed at further improving case management and the frontloading of work undertaken by local authorities at the pre-proceedings stage. The Children and Families Act addresses another cause of delay and expense in restricting the use of experts in proceedings involving children to what is necessary to resolve the case; and if expert evidence is to be permitted by the court it must first consider the impact of any associated delay on the child and whether the relevant information might be available from the parties.

5.8 In Northern Ireland there are plans to run a similar pilot to Tri-borough overseen by the Department of Justice and DHSSPS. It will help develop an evidence base on the causes of delay, foster good practice and determine how best to secure improvements in process as well as whether and where legislative reform may be needed. If the Tri-borough experience is anything to go by, the key to its success will be the whole hearted commitment of all the stakeholders involved, including the departments, the Trusts, the Northern Ireland Guardian ad Litem Agency (NIGALA), the judiciary and lawyers representing the parties.

Q11. Given the inclusion of public law children cases in the irreducible minimum of service provision category, should this apply to parties other than the child and the parents? Are there particular legislative or procedural issues that should be addressed in any consideration of how to improve efficiency and timeliness in processing these cases without compromising on quality? What can be learnt from the experience of England and Wales in implementing the Norgrove recommendations? What is the best and most efficient way of establishing when expert evidence is necessary and, when it is, of securing and funding such evidence?

Private law matters

5.9 In Northern Ireland divorce proceedings may be lodged in the High Court or the county courts. During Access to Justice Review (1) some respondents to our consultation exercise favoured retention of the High Court option as it gave access to the Masters whose contribution in ancillary relief matters through financial directions was rated highly. In England and Wales, in uncontested divorces there has been no need for any form of hearing for many years and, following the Norgrove review, it has been agreed that the paperwork should be handled by administrative staff in the courts rather than judges. It is not part of this review's remit to engage in the debate about the rights or wrongs of so-called "postal divorces" or on the substantive law of divorce. However, I do raise the question of whether legal aid is a high priority requirement in the large majority of divorces that are uncontested and therefore relatively straightforward or where a no fault ground is available. The availability of clear information in written and web-based format on the steps to be taken, together with telephone or face to face advice where necessary, might be sufficient.

Q12. How important is legal aid in divorces that are uncontested or where a no fault ground is available to the parties? What about the minority of divorce cases that are contested?

5.10 It is the issues that go with separation and divorce that are more complex, in particular ancillary relief (financial arrangements) and the arrangements for residence and contact with children. Moreover, particular care needs to be taken in respect of private law cases where domestic violence is involved or children are at risk.

5.11 In England and Wales, private family law has been removed from the scope of legal aid except where there is objectively verified evidence that domestic violence or child abuse may be at stake. Such evidence might be adduced through the existence of a non-molestation order, ongoing criminal proceedings, a court finding of child abuse or a finding of a risk of harm to a child by a multi-agency risk assessment conference. However, funding is provided to financially eligible parties in the generality of cases to support mediation, to provide legal advice to parties engaging in mediation and to enable the parties to give legal effect to any mediated agreement. It is fair to say that the removal of legal aid for representation in court in private family cases has met with criticism from stakeholders. Also in other jurisdictions, notably Canada and Australia, where this has happened the judiciary have voiced concern about the impact on court business of unrepresented litigants and about the difficulties that occur when an unrepresented party to a divorce or family dispute cross examines the other, especially if harassment or domestic violence is involved.

5.12 During Access to Justice Review (1), we were given the opportunity to observe proceedings in the Family Proceedings Courts and in a Family Care Centre where it appeared to us more difficult for the Court to guide parties towards a sensible accommodation when they were unrepresented. However, we also heard about cases where one or both parties were using legal aid to perpetuate conflict and about complaints from non-legally aided parties to family proceedings that, without the financial discipline associated with privately funded representation, the other party was using his or her legal aid to exert unreasonable and unfair pressure.

5.13 In terms of priority, and taking account of the criteria at paragraph 3.10 above, there is a strong argument that legal aid should continue to be available for non-molestation orders and other aspects of family proceedings where there is objective evidence of domestic violence or child abuse. Where there is no such evidence, the position may be regarded as less clear cut. During the review we will consider the degree of priority that should be attached to legal aid for ancillary relief proceedings, noting that these proceedings by their nature do involve existing assets and income streams, albeit that this does not necessarily mean that such funds are readily available to pay for legal representation. We will ask how important legal representation is in these cases and whether there is a case for empowering the court to make interim lump sum orders against a party who has the means to pay for the other party's legal representation. Even though one party may be financially much weaker than the other, in cases where significant funds are at issue it is difficult to argue for a high priority to be given to legally aiding one of the parties.

5.14 In contact and residence cases, it is the interests of the child that are paramount and they are likely to be best served by the parents coming to amicable agreement without the need for court involvement. Where cases do reach the courts, at Family Proceedings Court level the court children's officer, funded by the relevant Trust, can have an important role in ensuring that the child's interests and wishes are taken into account, although the extent of the children's officer

involvement is variable from area to area. In the higher courts, the Official Solicitor may have a role in securing separate representation for the child.

5.15 The importance to society of family life and the paramount interests of the child are such that a high priority might be afforded to supporting families during a break-up. A key question for this review is whether there is a case for adopting an approach similar to that of England and Wales and focusing on mediation rather than legal representation at court. It is argued that mediation, where it works, supports early resolution of issues to the benefit of all including children, avoids the potential acrimony of legal proceedings, has a greater chance of securing buy-in as it is the parties' agreement and is more cost-effective. The DHSSPS already fund mediation in cases involving children that have not gone to court under the 'Family Matters' strategy and are leading on the development of a cross-departmental approach to alternative dispute resolution in the family justice system. Another form of pre-court ADR is collaborative law where the parties' legal representatives engage in a 4-way co-operative dialogue with the parties with a view to resolving any differences and incorporating the outcome in a legally binding agreement. We will engage with the Ministry of Justice and the Legal Services Agency in England and Wales to learn from their (early) experience of the new arrangements. However, some key issues for consideration in relation to family ADR and mediation if they are to be funded out of legal aid on a similar basis to England and Wales are as follows:-

- Financial modelling to assess the potential costs of mediation sessions (would there be a limit to the number of sessions to be funded?), advice to participants and converting agreements into enforceable orders.
- The danger that providing a comprehensive ADR service supported by public funds and in parallel with legal aid for court proceedings could increase costs overall, especially if sufficient cases are not resolved out of court.
- Securing geographical coverage of properly accredited mediators.
- Whether there should be a prescribed methodology for mediation and whether other forms of ADR might be applicable.
- Accreditation arrangements which, in addition to mediation capabilities, would ensure that mediators were qualified to take full account of the wishes and interests of children.
- Delivery models and the applicability of contractual arrangements or a panel of accredited mediators.
- Arrangements for Mediation Information and Assessment Meetings (MIAMS) which in England and Wales are a mandatory requirement before a case reaches court.
- The status of mediated agreements and their enforceability in the courts.
- The policy in respect of those cases judged unsuitable for mediation – should they be legally aided and what would this mean for overall costs?
- The lead-in time for the introduction of comprehensive arrangements of this sort.

5.16 If legal aid is to remain available for the generality of private law family cases, it is for consideration whether there are ways of limiting its application in order to avoid an open ended commitment (we have been told of some cases that can result in up to 30 hearings) and the (ab)use of the court process to perpetuate family disputes or unfairly pressurise non-legally aided parties. Legal aid might be limited to a specified number of hearings for example, and consideration could be given to whether the judiciary have sufficient powers and sanctions to deal with breaches of contact orders, which we understand to be a significant cause of cases returning to court.

Q13. How important is it for private family law court proceedings to remain in scope? If they do remain in scope, should legal aid for private family law court proceedings be circumscribed in some way, for example by limiting the number of hearings that will be supported or limiting the amount of funding available for each case?

Q14. What priority should be given to legal aid in family proceedings where there is a background of domestic violence or child abuse? If this category were the only type of private family law case staying in scope, how could the funding authority ensure that those high risk cases that genuinely fell within this category were identified and that there was no incentive to make unfounded allegations?

Q15. In the generality of private family law cases should the focus for publicly funded support of financially eligible parties be ADR and mediation as in England and Wales? If so, are there views on the implementation issues listed at paragraph 5.14 and are there other important matters to take into consideration? What steps would need to be taken to ensure that mediation and ADR did not simply become an additional cost driver?

Q16. Are there further measures that could be taken to reduce the propensity for contact cases to return to court? Should there be more effective enforcement measures in the event of breaches of contact orders?

Q.17 How should the interests of children best be represented in private law proceedings? How should their views be taken into account?

Q18. How can the assets at issue in ancillary relief cases be used to fund legal representation at the point of delivery rather than in the future (as is the case with the statutory charge)?

Family Law – Efficiency and Delivery issues

5.17 In Access to Justice Review (1) at paragraphs 5.89 to 5.92 we drew attention to some systemic and policy issues that affected the quality and cost of access to justice and recommended a fundamental review of family justice to be carried out under the auspices of the interested departments (in particular DoJ, DHSSPS and DFP) and/or the Law Commission. There remains a strong case for such a review. Comparative research of legal aid in various European jurisdictions[5] suggests that the "huge variation" in the costs of legal aided family proceedings in England and Wales when compared with elsewhere may be largely explained by the complexity of law and procedure there; as there are many similarities between procedures in England and Wales and those in Northern Ireland it is reasonable to suppose that such comments apply equally to this jurisdiction. The Department of Justice and DHSSPS are engaging in a staged reform of the family justice system, as demonstrated by the planned public law pilot and the work being carried out on mediation. However, while such an incremental approach to implementation might secure quicker results than a wholesale review, it may be worth giving some consideration now to one other major innovation in England and Wales instituted following the Family Justice Review led by David Norgrove – the introduction of a unified family court.

5.18 Currently in Northern Ireland matters relating to children may be dealt with in the Family Proceedings Court, the Family Care Centre or the High Court, while divorce and associated ancillary relief proceedings may be taken at county court or High Court level. The result is a system that is difficult to navigate and understand, while the affairs of one family may be being progressed by different judges at more than one court with all the potential inefficiencies that entails. Moreover, it seems that key office holders in the family law context, such as Masters, children officers and the Official Solicitor, carry out their duties in particular court tiers rather than on the basis of the needs of the parties; if it is the case, as mentioned above, that some cases might go to the High Court, not because of their complexity but because of the availability of the service provided by the Master, then that would of itself call into question the current organisational structure.

5.19 In England and Wales the unified Family Court came into being on 22 April 2014 and will be responsible for hearing all family and children cases except for certain categories, such as wardship, that are reserved to the High Court. All levels of judge will sit in the court to which cases will have a single point of entry, while the frequency of transfer of cases between courts and judges will be substantially reduced. The objective will be to enable all aspects of a case to be processed together by the same judge who would provide continuity in the event of future hearings. New arrangements are being put in place to provide judges with support in the more routine areas of activity outside of hearings.

5.20 It does not follow that what happens in England and Wales is necessarily good for Northern Ireland. However, it may be that the unified family court concept, together with the implications for judicial and other office holders, is worth investigating as a possible means of enhancing efficiency and quality of service to families and children. This would of course be a long term project,

[5] Legal Aid Systems Compared, a report by the Hague Institute for the Internationalisation of Law, January 2014.

ultimately requiring legislation. It is arguable that the courts should be structured so as best to meet the needs of users in the most effective and efficient way rather than trying to engineer an uneasy fit between the current requirements of users and traditional structures.

Q19. How might the introduction of a unified family court in Northern Ireland affect the quality and efficiency of service to court users?

5.21 Earlier in this document at paragraph 3.4 I stressed the importance to access to justice of people having easily accessible information about their options and the way forward in the event of justiciable issues arising. This is especially true of family law and would be all the more important if the generality of private family law cases were to be removed from the scope of legal aid. In such circumstances there would have to be an increased emphasis on the availability of advice and support for litigants in person. In Northern Ireland the Courts and Tribunals Service website contains guidance for people wishing to petition for divorce without going to a solicitor, while the NI Direct guidance on "Relationship Breakdown and Your Children" contains a link to the website www.sortingoutseparation.org.uk which is the principal route for providing such information in England and Wales. The Dutch Legal Aid Board, working in concert with Tilburg University, has developed an interactive website known as "Rechtwijzer" (www.Rechtwijzer.ni), roughly translated as "Interactive platform to justice". It covers a range of legal matters, but its material on relationship break-up has aroused particular interest. Through a series of interactive questions, it takes the user on a route map towards the possible basis of a mediated settlement. It is overseen by an advisory group, including judges, mediators and lawyers. Such innovations might well be worth exploring further to see if there is any application in the Northern Ireland context.

Q20. What information, advice and interactive assistance relating to family justice matters and dispute resolution is, and should be, available across the different types of media to support self-help and signpost other advice sources? What can be learnt from other jurisdictions?

Other Civil

Money damages

6.1 Money damages cases in Northern Ireland currently fall within the scope of civil legal aid. In many of these cases, there is no charge on the legal aid fund as there is an 85 to 95% success rate and in such circumstances the losing side pays the costs. Where a case is settled and the defendant does not accept some elements of the legally aided litigant's costs, then the shortfall will be paid by the legal aid fund in the first instance but those costs may then be recouped from damages. So, the legal aid fund effectively pays for the costs of the legally aided litigant only when the case is lost. In the event of the case being lost, cost protection for legally aided work usually means that the successful defendant, often an insurance company, employer or public agency, has to bear its own costs. Over the past 5 years, money damages cases have typically cost the fund around £2 million, although there can be big fluctuations as a result of the impact of one or two complex and expensive cases (for example in 2011/12 the figure was £5.4 million, largely due to costs associated with the Omagh civil case). The following table for 2013/14 shows the type of cases that are funded.

Table 3. Cost to the Legal Aid fund of Money damages cases in 2013/14

	Cost (£)	**Number of payments**
Contract	525,820	51
Medical negligence	434,700	136
Road traffic accidents	316,667	125
Tripping	220,975	59
Employers' liability	179,449	36
General negligence	778,991	166
Totals	2,456,602	572

Some of the damages recovered in legally aided cases, as in all damages cases, may be used by the Compensation Unit to defray the cost of social security payments arising out to the event at issue.

6.2 Money damages cases vary enormously in their impact, from the relatively minor tripping case that involves a modest payout for pain and suffering to a large clinical negligence claim with special damages to pay for future loss and the costs associated with care where there is a long term injury. Determining liability and assessing damages in the latter circumstances can be a very complex, and sometimes lengthy, process involving the consideration of evidence from medical and other experts as well as extensive legal submissions.

6.3 In England and Wales personal injury cases, apart from those involving clinical negligence, were removed from the scope of legal aid in 1999 on the basis that they could be pursued under conditional fee agreements (CFAs) that were first permitted in that jurisdiction in 1995. The CFA is a type of no win no fee arrangement whereby the lawyers acting for the claimant receive no fee if the case is lost but if the case is won they receive a success fee in addition to their normal rates. The claimant is able to secure after the event insurance (ATE) to cover the opponent's costs, and the insurance premium itself, should the case be lost. Some changes to these arrangements were made following the Jackson review of civil litigation costs in 2010 which were outlined in Access to Justice Review (1) but the conditional fee concept was retained. Subsequently, clinical negligence has been removed from scope there, although there remains the option of exceptional funding in very complex cases. In Scotland money damages cases remain in scope but many cases there are run on a contingency fee basis backed by insurance arrangements.

6.4 The Access to Justice Review (1) recommended that most money damages case be removed from scope, provided that an alternative means of funding such cases could be found. The Department of Justice issued a consultation paper on "Alternative Methods of funding Money Damages Claims" in March 2013 and is considering the responses. In short, that paper outlined a number of possible approaches including maintaining the status quo with money damages remaining within scope of legal aid, three variants of conditional fee arrangements (including the Jackson model), a contingency legal aid fund, and a contingency fee scheme.

6.5 it is not for this review to pre-empt the outcome of the department's consultation exercise. Rather it will seek to apply the principles outlined in the strategic approach described in paragraphs 3.8 to 3.11 above and invite comments accordingly. Given that money is the subject of the proceedings and that, if the appropriate part of the Access to Justice (NI) Order 2003 is implemented, other means of funding these cases will be available, it might be considered unreasonable to accord the generality of money damages cases a high degree of priority for retention within scope; moreover such cases are unlikely to have the same level of impact as those where personal liberty is at risk or the welfare of children is at issue. Also, we should bear in mind that if effective alternatives to legal aid can be developed in this area, that will have a positive impact on access to justice for those who fall outside the financial eligibility limits for publicly funded assistance. However, different considerations may apply to the more serious cases at the complex end of the spectrum, such as large clinical damages claims where solicitors have to make a heavy commitment at the early stages of a case and there could be a large initial outlay on experts.

Q21. If money damages cases in general are to be afforded a lower priority for inclusion within the scope of legal aid, do different considerations apply to the more serious cases where substantial special damages might be at issue or particular types of case which might not be so amenable to alternative funding models? If so, at what point, in terms of quantum or type of case, would those considerations apply?

Efficiency and structural issues relating to money damages

6.6 In June 2008, the then Master of the Rolls appointed Lord Justice Jackson to conduct a review of civil litigation costs in England and Wales; most of his recommendations were subsequently accepted and acted upon by government. In short they retained the CFA concept and ended the ban on contingency fees (where the lawyers fee is expressed as a percentage of general damages) but ended the recoverability of success fees and ATE, which are now to be paid out of damages, thus giving claimants a financial interest in controlling costs and seeking early settlement. Damages are uplifted by 10% to mitigate the impact of claimants having to pay success fees. Qualified one way cost shifting is introduced so that the claimant is not liable for the defendant's costs in a lost case unless it was pursued unreasonably. Significant changes are made to the civil procedure rules to strengthen financial incentives and costs sanctions to encourage parties to make and accept reasonable offers. The relevance or otherwise of the Jackson proposals to Northern Ireland will depend to some extent on what decisions are taken following the consultation on alternative methods of funding money damages. However, they do bring into sharp relief the potential impact of civil procedure rules and pre-action protocols on incentives to settle cases at an early stage, avoiding delay and expense.

6.7 In England and Wales the creation of a single county court structure in 2014, with no geographical boundaries, has been associated with significant change to its financial jurisdiction. The upper limit for bringing non personal injury financial claims has been raised from £30,000 to £350,000, while claims below £100,000, and below £50,000 in personal injury cases, must be brought in the county court; the objective is for most cases to start in the county court. This and other innovations were flagged in "Solving disputes in the county courts: creating a simpler, quicker and more proportionate system – the Government Response to consultation"[6], published in February 2012. The increase in the county court jurisdiction in Northern Ireland to cover cases worth up to £30,000 was broadly welcomed and the question arises as to whether further jurisdictional increases might be considered for small claims and the county courts. One possibility would be for all but the most complex cases to start in the county court.

6.8 An example of exploiting digital capacity to streamline case progression outside the court system is in England and Wales where the road traffic accident portal has been extended to include relatively low value (less than £25,000) employer and public liability cases. This is an arrangement negotiated between the legal profession, the insurers and government (under the auspices of the Civil Justice Council) which provides for secure communication through an electronic portal with set time limits and protocols for the exchange of information and negotiation of settlements. We drew attention to this in Access to Justice Review (1) and raise the question now of whether there is scope for such a scheme in Northern Ireland.

Q22. What benefits might accrue from further increases in county court and small claims jurisdictional limits in Northern Ireland or from the creation of a single point of entry into the county court for all but the most complex cases? What disadvantages might there be to such

[6] https://consult.justice.gov.uk/digital-communications/county_court_disputes

changes? What further improvements could be made to processes, especially at the pre-action stage, that would facilitate timely resolution of money damages cases?

Administrative law

6.9 The report of Access to Justice Review (1) identified three limbs to its consideration of administrative law:- tribunals, ombudsmen and judicial review. The first of these, tribunals, cover a wide range of issues including social security appeals, employment, traffic penalty appeals, special education needs and disability (SENDIST), appeals against decisions on criminal injuries compensation, planning appeals, mental health and immigration and asylum. These are matters that can have a significant impact on the lives of individuals. Research carried out for a review published by the Law Centre in 2010, "Redressing Users' Disadvantage"[7], suggested that advice and representation in such proceedings by those with specialist knowledge (not necessarily lawyers in all cases) could be beneficial in terms of outcomes. In the first review particular concern was expressed about SENDIST whose procedures were described as highly complex, legalistic and daunting for those appearing before it. It is noteworthy that England and Wales has retained SENDIST cases within the scope of legal aid. Similar points have been made about Immigration Tribunals where the law and procedure, including such matters as time limits, can be difficult to follow, especially for people whose first language may not be English.

6.10 Tribunal procedures are more inquisitorial than would ordinarily be the case in courts and should be easier for lay people to negotiate. However, while it is difficult to justify placing issues such as social security appeals in a high priority category for securing full legal aid for representation by a lawyer, help and assistance from the advice sector could be regarded as of significance, especially given research demonstrating its positive impact. I will address this further in chapter 7 of this document. From the legal aid perspective, a logical approach would be to focus on those tribunals dealing with matters that impinge on the criteria identified in paragraph 3.8 to 3.11 above. For example the Mental Health Review Tribunal and Immigration tribunals address issues concerning liberty and, in the case of asylum, personal safety and right to life. (Annual expenditure on civil legal aid for representation in immigration and asylum matters has fluctuated between £225k and £330k over the last four years while legal aid for advice and assistance on immigration and asylum has averaged around £100k). Immigration cases where "reunion" and family links are at issue could be argued to bring Article 8 of the Convention into play.

Q23. Should advice to individuals on the generality of tribunal-related issues be considered in the context of an overall inter-departmental advice strategy rather than as a priority area for civil legal aid? What sort of tribunal work might be assessed as being a priority for legal aid? Should it be the responsibility of the relevant departments and public bodies to ensure that effective mechanisms are in place to inform and support those affected by their decisions and to facilitate early resolution of disputes before they escalate to tribunal or court cases?

[7] http://www.lawcentreni.org/news/recent-news/66/672-tribunal-reform.html

6.11 The Northern Ireland Ombudsman (and Commissioner for Complaints) has powers of investigation following complaints of maladministration against public bodies including such matters as avoidable delay, faulty procedures and bias and unfairness. The process is inquisitorial and usually conducted on paper while outcomes in upheld complaints can be recommendations for an apology, explanation, reconsideration of a decision or consolatory payments (not compensation but recognition for inconvenience and nuisance). Key objectives of the ombudsman's office are early resolution of complaints and ensuring that the public bodies learn from their mistakes. There is also a Prisoner Ombudsman whose task is to address prisoner complaints when other avenues have been exhausted and who also uses the complaints mechanism to secure service improvements. If matters can be resolved through the ombudsman process without escalating to the point where courts are involved, that is a positive outcome for the complainant, it facilitates service improvement in the public body concerned and it has the potential to save costs associated with taking matters to court. In Access to Justice Review (1) we made two recommendations designed to encourage use of the ombudsman (and other non-court routes). The first was that consideration should be given to legislating to prevent apologies or offers of redress made during negotiations, mediation or an ombudsman investigation from being used in subsequent court proceedings to imply an admission of negligence or wrongdoing. The second was to explore whether, if the Prisoner Ombudsman were resourced to deal with time-bound issues on a fast track basis, that might reduce the number of prisoner cases going to judicial review (the point being that the 3 month time limit for instituting judicial review proceedings is a disincentive to engage in any other process that might take longer than three months to complete).

Q24. Are there steps that could be taken to enhance further the role of ombudsmen as a means of addressing disputes and complaints?

6.12 Judicial review is the third pillar of administrative law and is of some significance from the legal aid perspective. The table below gives an indication of the numbers of civil legal aid payments and costs associated with judicial review in the last four years.

Table 4. Judicial Review

	2010/11	**2011/12**	**2012/13**	**2013/14**
Judicial review cost (£000)	1,049	1,149	1,591	2,103
Judicial review bills	149	138	141	200

6.13 In the report of Access to Justice Review (1) we saw "access to judicial review as of central importance in maintaining the rule of law and safeguarding the individual against arbitrary or perverse actions by public authorities; as such it is a priority for remaining within the scope of legal aid". It is of particular significance in the light of the UK's commitments in enabling access to justice on environmental matters. At the same time there are concerns that judicial review could become a

tool for the vexatious litigant, those determined to pursue trivial complaints and those seeking to use the process to delay decisions on controversial proposals.

6.14 From the courts' perspective, the requirement to seek leave for judicial review, together with a practice direction and pre-action protocol, provide safeguards against misuse of this remedy. The pre-action protocol focuses on the need for exchanges of correspondence and genuine attempts to resolve matters before embarking on court proceedings, together with the potential for cost penalties if the guidance is not followed. It is arguable that, in addition to the case having a reasonable prospect of success any legal aid for judicial review should be targeted on individuals who have standing and will personally benefit from the resolution of the matter at issue, while also taking account of the wider public interest. Paragraph 5.130 of Access to Justice (1) contains a formulation that was devised when it was planned to introduce a Funding Code.

6.15 In England and Wales, the Government has consulted on, and decided to implement, a number of changes to the judicial review process, designed to inhibit frivolous or vexatious proceedings[8]. These include:-

- Leave to proceed to be refused where the defect in decision-making complained of would be "highly unlikely" to have made a difference to the outcome – the previous benchmark was that it should be "inevitable" that it would not have made a difference.
- Legal aid to be paid only where leave to proceed is granted or in certain other specified circumstances, for example where the matter concludes early in the applicant's favour.
- Where an applicant insists on an oral permission hearing, having been refused leave on the paper, and does not secure leave to apply at the hearing, defendant's costs to be awarded against the applicant.
- Restricting the circumstances where protective costs orders can be made in non-environmental cases.
- Interveners in JR cases to bear the costs of their intervention.
- Courts to notify the regulator and the Legal Aid Agency when wasted costs orders are made as a result of a legal representative's improper, unreasonable or negligent behaviour.

Q25. What priority should be placed on judicial review remaining within scope of legal aid? What respective roles should the personal benefit to the applicant, the wider public interest and human rights considerations play in determining whether a case qualifies for legal aid? Are there further measures that can and should be taken in Northern Ireland to ensure that the judicial review process is not abused through frivolous or vexatious claims?

[8] Judicial Review – proposals for further reform: the Government response February 2014. https://consult.justice.gov.uk/digital-communications/judicial-review.

6.16 In Access to Justice Review (1) we recommended that action be taken to develop management information systems in the Legal Services Commission and/or Court Service that would enable annual reporting of the numbers of judicial reviews, the authorities against whom they were directed and outcomes. In the past two years there appears to have been an increase in legally aided judicial review activity. It might be instructive to survey these cases, and non-legally aided cases, successful and otherwise, to establish if there is any pattern in the issues or organisations they concern; it is possible that this might lead to consideration of action that could be taken to improve decision-making processes and reduce the future incidence of legal challenge (a similar approach to that of the Ombudsman in using complaints to secure improvements). An example of what might be achievable through such an approach arises out of a judicial review instigated by the Children's Law Centre (with the assistance of legal aid) in respect of a decision by a Trust that a sixteen year old presenting as homeless was not a child in need, entitled to accommodation under Article 21 of the Children (NI) Order 1995. Following application for leave, the Trust accepted a declaratory judgement that the child was "Article 21 entitled"; and, at the suggestion of the Court, the Health and Social Care Board and Housing Executive engaged with the Children's Law Centre about reviewing the "Regional Good Practice Guidance on meeting the accommodation and support needs of 16-21 year olds", thus reducing the likelihood of such matters coming to court in the future. Revised guidance was issued in March 2014.

Q26. Would research into the grounds and outcomes of judicial review cases be worth pursuing? Can more be done to ensure that the outcome of judicial reviews is used by public authorities to inform and improve future decision-making processes?

Injunctions

6.17 In recent years legal aid payments in respect of injunctions have been running at about 400 per annum and a cost of between £1.2m and £1.4m. We do not have quantifiable information on the types of cases involved, but we believe that many relate to neighbour disputes and civil actions brought under the Protection from Harassment (NI) Order 1997 – which provides for a choice of reporting to the police with a view to criminal prosecution or civil remedy by way of injunction in cases of persistent harassment. Such harassment can range from name calling through anti-social behaviour to the worst kind of hate crime.

6.18 In Access to Justice (1) we noted that there were examples of multiple applications for injunction supported by legal aid (although the Commission was taking steps to limit payments in such cases) and that there was scope to use legal aid in these circumstances as a means of perpetuating conflict. On the other hand, for the genuinely serious cases victims need to be in a position to take action. Access to Justice (1) recommended (paragraph 5.60) a series of actions based on using ADR and mediation as a basis for seeking early resolution of this type of dispute, while if the matter was at the serious end of the spectrum it should be treated as a criminal matter by the police. Any grant of legal aid for neighbour disputes (and possibly other matters involving injunctive relief) would be conditional on merit and on genuine attempts at mediation having been made; any legal aid granted to the complainant would be conditional on seeking an enforceable court order as

opposed to a negotiated settlement that was liable to come unstuck and result in repeated court appearances.

Q27. How high a priority is injunctive relief for the legal aid fund? If the generality of injunctive relief cases is not to be treated as of high priority, how could we identify the small number of such cases that might be afforded a higher level of priority? Should legal aid in such circumstances be reserved for an exceptional grant category that would only apply when an applicant's safety was at issue?

Other categories of case

6.19 Preceding sections of the paper have identified and commented on the main areas of family and civil law which are at issue. A later section will address advice and assistance. It is not possible to be comprehensive in identifying every conceivable type of issue that might give rise to a justiciable right but a list of matters which stay in scope for full legal aid in England and Wales, and of those removed from scope, is produced below:-

Matter staying within scope in England and Wales are:-

Asylum and asylum support where accommodation is claimed;
claims against public authorities other than judicial review concerning a breach of human rights or abuse of power;
claims arising from sexual abuse or sexual assault;
community care;
debt (where the client's home is at immediate risk);
housing where the home is at immediate risk (but excluding squatters) or there are disrepair issues that put health at risk;
immigration detention;
appeals to the Special Immigration Appeals Commission;
international child abduction;
international family maintenance;
mental health, including mental capacity issues;
private law family and children cases involving domestic violence or child abuse;
public law cases (judicial review and similar cases) other than representative actions and certain immigration and asylum judicial reviews;
public law children cases;
registration and enforcement of judgements under EU legislation;
representation of children in certain private law children cases;
miscellaneous matters including confiscation and protection from harassment proceedings;
discrimination cases;
environmental cases;
EU cross border cases;
Appeals on matters otherwise within scope.

Matters removed from scope are:-

consumer matters and general contract;
clinical negligence;
asylum support except where accommodation is claimed;
Criminal Injuries Authority cases;
debt, except where the home is at immediate risk;
education cases except for Special Educational Needs;
employment cases;
housing, except where the home is at immediate risk or disrepair threatens health;
immigration cases (non-detention);
probate and land law;
social security appeals;
court actions concerning personal data;
wills and certain matters relating to trusts;
tort;
welfare benefits.

Defamation has not been in scope at any stage.

Q28. Are there any views on the priority that should be attached to including any of the items listed above within the scope of legal aid in Northern Ireland? Taking account of the criteria at paragraphs 3.8 to 3.11 above, which should be regarded as part of the irreducible minimum category of legal aid provision and why?

Special Exceptional Grant and Inquests

6.20 The purpose of the Statutory Exceptional Grant Scheme is to enable the Legal Services Commission exceptionally to provide legal aid in cases that would otherwise be outside of scope or not qualify on grounds of financial eligibility. Following the passage of the relevant legislation in 2000 the Lord Chancellor issued guidance setting out the criteria that should be met in such cases:-

- Significant public interest in the resolution of the case, or
- The case is of "overwhelming importance" to the client, or
- Exceptional circumstances where lack of funding would make it impossible to bring or defend proceedings, leading to obvious unfairness.

The civil case brought in relation to the Omagh bombing was funded under this provision, but it has been used mainly for the funding of family representation in relation to inquests, particularly Article 2 (right to life) cases where there may be controversy about the possible role of state employees in the circumstances of the death.

6.21 The Department of Justice has in July published a post consultation report following a review of the scheme. The main outcome of the review will be that responsibility for decision-making on whether to grant legal aid under the special exceptional grant provisions will lie solely with the Director of Legal Aid Casework in the new Legal Services Agency, with no input from the Minister. The Director will be able to extend the arrangements for funding representation at contentious inquests to include deaths which occur while the deceased is detained under mental health legislation. The consultation process also addressed issues about the definition of the immediate family for purposes of representation at inquests and about remuneration which do not need to be elaborated upon here.

6.22 One point that will have to be resolved is that of funding, in the sense that if the grant is exceptional and substantial it is unlikely to have been factored into financial planning assumptions. If the potential cost is significant, and the Director of Legal Aid Casework is to make a funding decision on the merits of the case(s), then there will have to be a clear understanding about how it is to be financed.

Q29. Is a special exceptional grant provision required for those exceptional cases that merit funding but are not within scope? If so, how can it be ensured that the cases are genuinely exceptional and that this is not regarded as a way of circumventing rules on scope and financial eligibility? If a decision to make such a grant is likely to have significant expenditure consequences, how is the necessary funding to be secured?

Q.30. Is legal aid to secure representation for the immediate family in Article 2 inquests or where death has occurred during detention under mental health legislation part of the irreducible minimum of provision and, if so, why?

Categories of client with particular legal needs

6.23 In Access to Justice Review (1) we recommended (paragraph 5.61) that a legal needs survey of children and young people should be commissioned, paying particular attention to accessibility of advice and assistance, the way in which it is delivered and their experience of the justice system. Such a survey was commissioned by the Department of Justice and was published in July 2014 by the Centre for Children's Rights at Queen's University, Belfast. It highlighted a number of important issues including the extent of children's knowledge of their legal rights, the ability of legal professionals to engage effectively with children and the types of justiciable issue that they most commonly faced. While consumer law, neighbour disputes and contact with the police were most often mentioned in the survey, educational and family issues (in particular care, fostering and adoption), along with legal problems relating to physical and mental health conditions, might be considered of particular significance in terms of potential impact and of the possible vulnerability of the child. The review team will engage with interested stakeholders on how best to address the issues raised in the survey.

Q31. What are the implications of the Survey into the Legal Needs of Children and Young People in Northern Ireland? Where do the priorities lie? How should any available resources be most effectively and efficiently be directed towards providing legal advice, information and support for children and young people? What delivery model would most successfully facilitate positive engagement with children and young people on legal matters that affect them?

6.24 Older people and those with physical or mental disabilities will also have particular legal needs, especially in terms of the ability to access help, advice and information, whether on a face to face basis or through the web or telephone. The review team would be interested to hear from any organisation or individual on these points.

Q32. Do older people or people with physical or mental disabilities have particular legal needs or issues over access to legal advice and information that are not currently being addressed adequately? Are there other categories of people who should receive particular consideration in this review?

Advice and Assistance

7.1 Articles 3 to 8 of the Legal Aid, Advice and Assistance Order 1981 enable financially eligible persons to secure legal advice and assistance, short of instituting proceedings and representation, from a solicitor on any point of Northern Ireland law. This "green form" scheme supports around 10,000 to 15,000 acts of advice and assistance each year at a cost to the legal aid fund of between £1m and £2m. The wide range of matters on which advice is given is illustrated by the table below covering the main areas where legal aid payments have been made in this category.

Table 5. Legally aided advice and assistance on civil matters in 2013/14

Category	**Volume**	**Cost (£)**
Asylum	228	64,072
Immigration	319	62,497
Inquests	32	20,066
Complaints against the police and historical inquiries	616	59,106
Family (including children order, public and private)	2006	156,802
Benefits	606	56,610
Health, social services and education	360	42,217
Housing	417	28,234
Landlord and tenant	176	11,914
Debt	297	20,445
Non molestation order	202	13,009
Neighbour disputes and injunctions	503	32,736
Judicial review	136	15,340
Miscellaneous, including small claims, defamation, name change and freedom of information	426	27,665
Money damages	1562	240,020
Parole Commission cases	137	59,609
Prison issues	519	30,683
Wills/probate	214	14324
Work and employment issues	212	28,706

7.2 Early advice and assistance can assist with the resolution of issues before they escalate into disputes that result in loss to the individual or go to court, with all the expense and distress that can cause; and face to face advice provides support for vulnerable clients who might not otherwise have the confidence to deal with apparently intractable problems. It places people in a position where they understand their rights and can take informed decisions on how to proceed. Also, legal needs surveys and research in many jurisdictions show that justiciable issues associated with such matters as family break-up, housing and financial problems tend to arise in clusters, which means that a solicitor or other adviser has the opportunity to address them on a holistic basis.

7.3 However, many of the issues identified above have a practical as well as a legal dimension, for example in relation to money management and sometimes simply knowing which public service to access or which forms need to be filled in. During Access to Justice (1) we heard that non-lawyers were often able to deliver advice and assistance in specialist areas, including on legal and tribunal related issues, at least as effectively as generalist solicitors. Moreover, there is a wide ranging advice network throughout Northern Ireland including generalist organisations such as CAB and Advice (NI), and specialist providers in areas such as debt and housing, able to deliver advice on a face to face basis, by telephone and increasingly through innovative web-based applications (such as the CAB's Advice Guide website). Funding sources for these services include various government departments, local government (sometimes distributing central government funding), the Lottery Fund and charities. In the light of such developments, it makes sense strategically to consider the application of the "green form scheme" as part of the overall advice picture in Northern Ireland.

7.4 As recommended in Access to Justice (1) the Department of Justice is now represented on the inter-departmental Government Advice and Information Group, thus enabling it to be part of and contribute to developments in the wider advice community. I understand that the Department of Social Development is due to issue a consultation document on Advice Services Strategy in the autumn, and, as part of this review, I will examine how legal advice and assistance best fits with DSD's approach. Access to justice in terms of advice and assistance can be viewed as part of a mixed model where legally aided services provided by lawyers are a relatively small part of the overall picture. To put it in context, it is worth reflecting that while around 10,000 acts of advice were delivered by lawyers in Northern Ireland under the green form scheme in 2012/13, the Belfast Advice consortium processed 191,085 enquiries in 2012, over 25,000 of those being debt related.

7.5 This review will look at experience in Northern Ireland and other jurisdictions of operating different delivery mechanisms in support of advice and assistance and, among other things, will consider the following:-

- Telephone advice lines, such as the Civil Legal Advice line in England and Wales that has effectively replaced the green form scheme there and covers a limited number of areas such as debt and benefits;

- Generalist advice but with the capacity to signpost to specialist advisers (including solicitors), where it is clear that expert advice would be of direct benefit to the client;

- Advice counters such as those operated in the Netherlands;

- The presence of specialist advisers in court buildings along the lines of the service provided by Housing Rights in the Royal Courts of Justice and Laganside Courts for those facing mortgage re-possession or eviction (see paragraph 5.16 of Access to Justice Review 1);

- Web-based systems, including those such as Rechtwijzer (paragraph 5.21 above) that are interactive, and document creation applications – which can be used directly by clients or by those advising them;

- Facilitating pro bono assistance, for example the work of the Legal Support Project under the auspices of the Northern Ireland Law Centre and financed by Atlantic Philanthropies, and the concept of pro bono cost orders as provided for in England and Wales through the Legal Services Act 2007.

- Requiring all law firms registered to provide legally aided services to provide 30 minutes free advice on matters of law to financially eligible clients (as some firms do now for private clients).

- Legal advice clinics operated by lawyers and students under supervision on a voluntary basis.

The review will also consider the applicability to Northern Ireland of some of the ideas and the strategic approach discussed in the report of the Low Commission[9] published in January 2014:- "Tackling the Advice Deficit – A Strategy for access to advice and legal support on social welfare law in England and Wales".

7.6 It is for consideration whether direct access to a solicitor for advice on any point of law through the green form scheme remains the right and proportionate approach. It may be that there is a good case for funding advice and assistance from a solicitor on matters of unusual complexity or where there is a real prospect of litigation but for many issues easily accessible information, or assistance via helplines and specialist or generalist advice organisations, would meet the need. The key would be to develop a mechanism for referring cases from the advice organisation or helpline to a solicitor where specialist legal input was necessary.

Q33. How should the provision of legal advice and assistance be integrated into the advice strategy in Northern Ireland while retaining the capacity for direct input from a solicitor where that will bring direct and tangible benefit to the client?

Q34 Should the green form scheme be retained? If not, how might it be replaced by a mix of the mechanisms identified in paragraph 7.5 above? Are there matters listed in Table 5 where immediate direct access to a solicitor for advice and assistance, supported by legal aid, should be regarded as of high priority?

[9] The Low Commission is made up of people with expertise in social welfare and legal services, is independent of government, is funded by charitable foundations with support from two major legal firms and has a secretariat drawn from the Legal Action Group.

Delivery Models and Efficiency in the Justice System

8.1 Previous sections of this document have incorporated references to delivery models and efficiency issues. However, as these are discrete parts of the terms of reference of this review some threads are drawn together here.

The Legal Profession

8.2 While immigration and asylum services have been funded by the Legal Services Commission through a grant to the Law Centre and payments for mediation services made through disbursements, these are the exceptions. The delivery model for publicly funded legal services in Northern Ireland involves private sector solicitors, operating in partnership or as sole practitioners, seeking authorisation to provide legally aided services in individual cases and then receiving payment for those services from the Legal Services Commission. It is for the client to choose which solicitor to use, whether in privately funded or legally aided work. Where advocacy services are required, the solicitor has the option (and must do so in the High Court) of securing the services of a solicitor advocate or a self-employed barrister drawn from the independent referral bar. The Law Society may issue a waiver to voluntary sector bodies to enable them to employ solicitors to give advice to and represent third parties, thus enabling them to participate in legally aided work; but otherwise there is no provision in Northern Ireland to enable legal services to be provided through alternative business models (for, example joint undertakings between solicitors, barristers and other professionals or lawyers working out of commercially funded public companies).

8.3 Whatever model of service delivery is adopted, the private sector legal profession is likely to remain a major supplier of publicly funded legal services; its efficiency, structure and business model are therefore of critical importance in any consideration of the delivery of legal aid. Chapter 6 of the report of Access to Justice Review (1) addresses issues concerning the structure and regulation of the legal professions in Northern Ireland and I do not propose to go into those issues in any detail in this document. However, given the central importance of these matters to effective service delivery, the final report of this review will allude to them and I will welcome any input that stakeholders wish to make.

8.4 England and Wales has an increasingly different landscape in the structure of the legal profession from that in Northern Ireland, with the introduction of alternative business models and the focus on contracting in the purchase of publicly funded legal services. However, one development is worthy of comment which is the report by Sir Bill Jeffrey, commissioned by the Ministry of Justice and published in May 2014: “Independent Criminal Advocacy in England and Wales: A Review”. In short, this concerns the impact on the independent criminal bar of a declining workload, with lower crime rates, more early guilty pleas, fewer contested trials and lower fees; it also addresses the respective positions of solicitor advocates and independent barristers, raising issues about training and quality. In some respects the situation is different in Northern Ireland but Access to Justice Review (1) drew attention to the relatively large number of practising barristers in Northern Ireland (now around 700) compared with other parts of the UK; and some of the issues identified in 6.31 to 6.37 of Access to Justice Review (1) resonate with the matters addressed in Sir Bill’s report. This has implications for civil as well as criminal law, for the efficiency and quality of

justice overall and in particular for the need to sustain a cadre of advocates of the quality and numbers that bear a relationship to likely current and future demand for advocacy services. The idea of a panel of advocates, accredited to defend publicly funded clients in the Crown Court (paragraph 4.17 above), may be relevant in this context.

Q35. What views are there on the extent to which the regulatory framework of the legal professions and the permitted business models for legal practices facilitate the delivery of the most efficient and effective legal services? Do they support a mixed model of service delivery in which the private, voluntary and public sectors can play a part? In this context is the Law Society's waiver system working satisfactorily?

Delivery Models

8.5 Article 12 of the Access to Justice (NI) Order 2003, albeit not yet commenced, opens the way for a mixed model for service delivery funded in a variety of ways. It provides that the Legal Services Commission may fund civil legal services by:-

a) Entering into contracts with persons or bodies for the provision of services by them.

b) Making payments to persons or bodies in respect of the provision of services by them.

c) Making grants or loans to persons or bodies in respect of the provision of services by them.

d) Establishing and maintaining bodies to provide, or facilitate the provision of, services.

e) Making grants or loans to individuals to enable them to obtain services.

f) Itself providing services.

g) Doing anything else which it considers appropriate for funding services.

These provisions enable the Commission to secure the provision of civil legal services, including advice and assistance, representation and alternative dispute resolution from lawyers and/or non-lawyers and by any appropriate means, including working in partnership with other funding organisations. Similar provisions apply in respect of criminal legal aid (Article 24).

8.6 Earlier in this document the use of contracts in relation to duty solicitors providing police station advice and mediators (who may or may not be lawyers) has been mooted. Contracts and tendering processes in such circumstances are a means of setting, securing and monitoring quality standards, ensuring geographical coverage and providing a more predictable flow of work, thus helping providers sustain the service and making financial forecasting easier. On the other hand in some fields they could add to administrative costs and might not produce significant benefits over and above those that can be secured through an effective registration regime.

8.7 Access to Justice (1) noted (paragraph 5.21) that the Scottish government had allocated £3 million to the Legal Aid Board over two years to support initiatives targeted at the recession, from which local voluntary and public sector organisations were grant aided to provide help and advice in

areas such as housing, debt, benefits and employment; this included the provision of in-court advice by both lay people and solicitors. That is an example of how grant funding could work, over a short or longer timescale. Such grants could be paid as part of partnership funding of an advice project, provided it could be demonstrated that legal services were being provided, or it might be possible to fund, through grant or contract, a legal adviser to work with and take referrals from a voluntary sector advice provider. An alternative approach would be to provide an advice provider a cash-limited grant with which to secure legal advice for more complex legal issues being faced by those seeking assistance, putting the onus on the advising organisation to prioritise.

8.8 The Legal Services Commission could provide direct services, for example telephone help lines and, if a public defender service were thought worthwhile or necessary, that could be provided directly by the Commission or through an organisation set up by the Commission. However, in contemplating direct service provision, account should be taken of the intention to convert the Commission to agency status in 2015, which brings it closer to government and therefore might render it less appropriate for it to deliver services directly where actual and perceived independence from government is a critical factor.

8.9 This document, together with Access to Justice (1), has emphasised the role of partnership working with the voluntary sector and other public agencies in providing advice, help and support within and outside the legal aid system. Voluntary organisations such as the Law Centre (NI) and the Children's Law Centre pursue cases with the assistance of legal aid (and other funding sources) and work with others on behalf of individuals and potentially vulnerable groups.

8.10 The work of the Housing Rights Service is an example of what can be achieved through partnership working. Against a background where people facing re-possession were unable to secure legal aid (as they could not satisfy the merits test), the Lord Chief Justice announced in 2009 a pre-action protocol designed to encourage resolution of matters before they came to court and, where possible, avoid immediate re-possession or ejectment. In parallel with this the Courts and Tribunals Service facilitated the Housing Rights Service (funded by DSD and with grant funding from the Commission in respect of advice at hearings) in providing court representatives in the Royal Courts of Justice and Laganside Courts to advise, support and represent those facing re-possession or ejectment. The advisers, employed because of their expertise rather than because they were lawyers, appeared regularly before the Chancery Judge and Master and were well received and respected, securing positive outcomes and avoiding re-possession in a substantial number of cases, often through negotiation. The service has been sustained through a Department of Justice grant and now covers all county court divisions.

8.11 Legal Expenses Insurance (LEI) can be available linked to motor or household insurance, or as part of membership of consumer groups or trade unions, although the cover provided may be significantly circumscribed. In Germany around half the adult population has LEI as a bespoke product and cover tends to be wider, including transactional matters which in that jurisdiction are associated with fixed costs and are therefore more amenable to affordable insurance cover. It is questionable whether in Northern Ireland those who are financially eligible for legal aid would purchase insurance cover, or whether such cover could be sufficiently comprehensive effectively to be an alternative to publicly funded legal services. However, the review will explore the possible role

of insurance, especially for those whose financial circumstances render them just outside the eligibility limits but who could not easily afford to pay for legal advice or representation.

Q36. What type of publicly funded legal services are suited to contractual arrangements? Should the contracts become the norm for legally aided services, supported by tendering arrangements? Is there any place for price competitive tendering as a means of encouraging efficiency and economies of scale?

Q37. What type of services would be suited to grant provision, including situations where grants might facilitate partnership working in the community in the provision of advice and assistance, and perhaps in establishing arrangements for alternative dispute resolution, thus diverting people away from the courts?

Q38. Are there other areas of law where the Housing Rights model of providing expert advice and, where necessary, representation in court might provide a cost-effective way of assisting those facing court proceedings?

Q39. How could insurance play a greater role in supporting access to justice?

8.12 There is a tradition in Northern Ireland of pro bono assistance and, while this cannot be regarded as an alternative to legal aid, it has the potential to make an important contribution to access to justice and equality before the law. In Access to Justice Review (1) we suggested that offering an initial free 30 minute consultation, already prevalent in many practices as a means of attracting fee paying clients, might be a requirement for all organisations in receipt of legal aid funding; it could be incorporated in the registration scheme. In 2012 the Law Centre (NI) established the Legal Support Project (LSP), with the assistance of funding from Atlantic Philanthropies, through which volunteers provide advice and representation in social security and employment cases for people who would not otherwise be assisted. In October 2012 the LSP, along with the Public Interest Litigation Support project, hosted a seminar at the Inns of Court to promote pro bono work. It was at this seminar that support was expressed for the introduction of pro bono costs orders, already available in England and Wales through the Legal Services Act 2012; where such orders are granted, the proceeds can be used to sustain and further promote pro bono work.

8.13 In the United States and other jurisdictions it is common for academic institutions to support pro bono initiatives in law centres, with students, acting under the supervision of volunteer lawyers, providing advice and assistance. Also large and wealthy law firms there contribute funding to organisations providing free legal help, such as Greater Boston Legal Services which employs 59 attorneys working in such areas as welfare law, immigration, housing, disability access and family. In Northern Ireland, Law Centre (NI) engages in similar work, while the Public Interest Litigation Support project engages in legal actions aimed at securing outcomes for the most vulnerable and disadvantaged – with the focus of such public interest action being on the community rather than the individual. The University of Ulster runs the Ulster Law Clinic at its Belfast campus where students taking a master's degree as part of their course provide supervised legal advice and

representation at employment and social security tribunals, as well as learning the practicalities of managing a law practice.

Q40. How can pro bono work be further supported and enhanced? What sources of funds can be accessed from the private, public and charitable sectors to support organisations delivering free legal assistance and representation for vulnerable clients outside the legal aid system?

8.14 Especially if litigants in person become increasingly prevalent, there will be a premium on the provision of information in plain English about legal rights, how to pursue them, the role of negotiation and mediation and court processes. The Rechtwijzer project (paragraph 5.19 above) is an example of how this can be taken beyond the provision of written information and guidance to an interactive web-based guide, able to tailor the guidance to the particular circumstances of the user. Tilberg University played a key role in the development of the software and it does raise the question of the extent to which government, the professions and academic institutions might co-operate in the development of self-help tools, especially in areas where procedure and judicial decision-making follow a predictable path.

Q41. What role in supporting access to justice can be played by the development of accessible information and self-help tools that would assist those with potentially justiciable problems but who are unable to access professional legal advice and representation?

A Different Strategic Approach to service provision

8.15 Earlier in the paper, and in accordance with our terms of reference, we considered factors to be taken into account in determining priorities to be attached to different areas of service provision. The final report will seek to identify the irreducible minimum below which the system could not go if it were to comply with human rights requirements and protect the most vulnerable. Anything above that minimum would be prioritised on the basis of the available resources. However, there is another more radical approach which may need to be considered and which is briefly outlined below.

8.16 So far, this agenda document has approached its task from the perspective of the existing model of delivering publicly funded legal services, albeit with the possibility of substantial modification and re-prioritisation. However, financial pressures may be such that it will be necessary to consider from a zero base, not just the breadth of service provision but, more fundamentally, the means by which the desired outcomes encapsulated in paragraph 3.2 above are achieved. Legal aid has developed on a piecemeal basis over the years since its inception in 1949 in England and Wales, and subsequent introduction in Northern Ireland on a similar basis. The world since then has been transformed, not least by new technology and new ways of delivering services to consumers. The question arises of whether, if we were to start afresh, the model for delivering publicly funded legal services would look anything like its current format, or even if that is what we would be trying to deliver.

8.17 The legal profession itself might look very different if it were developed now from a zero base, but that is not the primary focus of this review; and, so far as criminal matters are concerned, it is difficult to envisage any major departure from the delivery options discussed in section 4 above. However, for family and civil services a very different emphasis could be contemplated, bringing together some of the ideas mentioned earlier in this document.

8.18 One possibility might be that, rather than focusing on legal support and representation from the outset of a problem through negotiation to completion of a court case, an 'unbundling' technique might be adopted. This might mean publicly funded legal services being provided to the financially eligible only to cover those parts of the process where absolutely necessary to safeguard their interests on matters within scope and at a level that was affordable. For other parts of the process, the litigants, or potential litigants, would take matters forward themselves on a self-help basis, using other sources of information and advice that might be available. This could be associated with the presence at court of duty solicitors or expert advisers able to provide on the spot advice about the merits of the case and process; or it could mean a legally aided litigant doing the basic preparation for a case, perhaps using web-based or other advice tools, and then being funded to go straight to an advocate for representation in court. The level and cost of any representation, if there were to be any, might be capped.

8.19 Unbundling, or something like it, would be for consideration if financial provision is trimmed to the point where high priority services cannot be sustained within current delivery models. The provision of accessible and user friendly information, along the lines of the Rechtwijzer project and other web-based tools, is likely to be a key element of any access to justice strategy that focuses on self-help and limited but targeted assistance and support for clients. This review will explore further the work of the University of Ulster Legal Innovation Centre in mapping and conceptualising legal processes and will examine whether interactive tools might be developed in a way to support such an approach.

8.20 It might be possible to envisage a strategic approach to access to justice that still includes publicly funded legal representation where that is an imperative but which has a much greater emphasis on enabling and facilitating self-help than is the case at present. This might include all or some of the following elements:-

- advice, support and representation provided by the legal professions (private and voluntary sectors – and from any business model permitted by the regulatory framework) in criminal law and strictly limited areas of family and civil law;
- high quality and user friendly information about rights and legal procedure provided through a range of media, including inter-active web-based guides;
- unbundling so that legal help and advice can be targeted at where it counts most, while other parts of processes could be addressed through self-help;
- a positive drive towards facilitating self help and, where necessary, litigants in person;
- mediation and other ADR mechanisms;

- support for, and incentivisation of, avoidance or resolution of justiciable matters at the earliest possible stage;
- the availability of advice and support on the practical and legal implications of welfare, educational and housing issues through advice counters, help lines, and/or web-based media;
- capacity for those providing advice to refer complex matters to solicitors or barristers working in the private or voluntary sectors;
- Facilitation of pro bono provision.

8.21 Providers of the services outlined in paragraph 8.20 might include private and voluntary sector solicitors and barristers; academic institutions; law centres; generalist and specialist advice bodies; mediation specialists (who may or may not be lawyers); and direct provision by government departments and public bodies. Some of this would involve making use of existing services and funding streams, but in a more planned and co-ordinated way. It would mean making the best possible use of funding from government departments and public bodies, the legal aid fund, charitable sources, the lottery and commercial opportunities (for example academic institutions might have the opportunity to create income streams from innovative services they develop). The full range of funding routes noted in paragraph 8.5 above could be applicable. However, the key to a holistic approach of the sort envisaged above would be the ability of several government departments and public agencies, private and voluntary sector lawyers, academic institutions and the advice sector to work together seamlessly to plan and deliver**.**

Q42. What strategic approach could be adopted if funding did not enable the provision of legally aided services as currently organised across high priority areas?

Q43. Is it realistic to envisage planning for, or incremental moves towards, a holistic approach to access to justice and advice services of the type mooted in paragraph 8.20 above?

Efficiency Issues

8.22 It has been suggested in a number of quarters in this jurisdiction, and elsewhere, that if justice were more efficient costs could be reduced across the system, including the legal aid budget. Avoidable delay is a constantly recurring theme across the criminal, family and civil fields. During Access to Justice Review (1) we experienced whole mornings in the magistrates' and family proceedings courts where large numbers of lawyers would hang around waiting to be called for some form of case review that would often last a matter of minutes; could the matters have been dealt with by e mail, telephone or video link? This is not the place undertake a fundamental review of efficiency issues in the civil and criminal justice systems but it is an opportunity for stakeholders to identify issues which, if tackled, would increase efficiency and effectiveness without compromising the interests of justice. Some issues have been identified in the body of this document, including court structures and tackling the causes of delay in public law children cases. However, stakeholders who work in the system on a day to day basis are best placed to know where

the rubbing points are and, in particular, those that are liable to affect the cost of publicly funded legal services.

8.23 There is a big drive to improve efficiency in the justice system in other UK jurisdictions. The Leveson review of criminal justice procedures in England and Wales was mentioned at paragraph 4.20 above, while other parts of this document cover initiatives in the family and civil justice systems there. As part of this review I will look in at the "Making Justice Work" programme in Scotland, a joint enterprise involving the Justice Directorate of the Scottish Government, the Crown Office, the Procurator Fiscal, the Scottish Legal Aid Board, the Court Service and the Police. Four projects in this programme are of particular interest:- court structures; procedures and case management; access to justice, with a particular focus on avoiding, or early resolution of, disputes; and a justice digital strategy.

Q44. In what areas of Northern Ireland's justice system could efficiencies reduce costs, including the cost of legal aid, while sustaining quality of provision? What efficiencies could make significant improvements in terms of cost and service provision?

8.24 In addition to procedural issues, the substantive law itself can have a big impact on costs borne by the court system, legal aid, public authorities and private litigants. A key factor in Scotland's lower spend on legal aid in family and civil matters than Northern Ireland and England and Wales is their use of children's panels for most public law children cases rather than the court-based procedures enshrined in the Children Act and Northern Ireland's Children Order (see paragraph 5.6 above). Access to Justice (1) stressed the importance of the legal aid impact assessment process as a means of assessing the impact of new law or policy decisions on demand for legal services and indeed on the efficiency of the justice system. Such assessments would go alongside financial memoranda and equality assessments. Where it is assessed that proposals would have an impact on the legal aid fund or justice system, then it should be incumbent on the department making the proposal to find the extra funds to support legal aid, institute their own procedures to maximise information and advice and make available routes for challenging decisions, or modify the proposal to alleviate the impac

Q45. Is the legal aid impact assessment system working satisfactorily? Are there areas of existing substantive law that contribute to inefficiencies in the justice system and which should be reviewed?

LIST OF AGENDA DOCUMENT QUESTIONS

The business case and criteria for measuring priorities

Q1 Are there any comments on, or is there anything to add to, the high level case for access to justice, the human rights considerations and the criteria for assessing priorities set out in the previous paragraphs?

The Widgery criteria for determining the interests of justice in criminal legal aid

Q.2 Should the Widgery criteria be retained as the basis for determining whether it is in the interests of justice that criminal legal aid should be granted? Should the criteria be amended in any way?

Criminal legal aid and adult diversion

Q3. Should the continuation of legal aid to support the provision of legal advice to adults offered diversionary interventions be regarded as of a relatively lower priority, provided that information is provided by the authorities on the implications of accepting such interventions and on the option of taking the issue concerned to court?

Youth diversion

Q4. To what extent do the current arrangements, including youth engagement clinics, ensure that children and young people fully understand the implications of diversionary options that may be offered and enable them to take informed decisions?

CONVICTED DEFENDANTS WHO CAN AFFORD TO PAY

Q5. What more should be done to enable costs to be recovered from convicted defendants who have the necessary means and in particular to identify those who have the means and prevent them from transferring or concealing their assets? Should consideration be given to an upper limit of income and/or capital beyond which legal aid in these cases is not available, with provision for payment of costs at the legal aid rate in the event of acquittal?

Justifying the grant of legal aid and certification of counsel in the magistrates' courts

Q.6 Would further research into the way the Widgery criteria are applied be worthwhile? With the Widgery criteria being placed on a statutory footing in the Access to Justice Order (NI) 2003, should all applications and grants of criminal legal aid have to make specific reference to the criterion or criteria relevant to the case in hand? And should requests for certification of counsel have to be justified specifically in the terms laid down by Article 28(2)? Would such an approach provide reassurance as to the rigorous and fair application of the relevant criteria?

Decision-making in criminal legal aid

Q7. Is there a case for considering the transfer of all, or some, aspects of decision-making on the grant of criminal legal aid and certification of counsel to the Legal Services Commission or court-based staff acting on behalf of the Commission?

Police station advice and support

Q8. How should the Legal Services Commission ensure that the necessary network of solicitors is available wherever and whenever required in Northern Ireland to deliver police station advice and support? Is there a role for contractual arrangements (including accreditation requirements) in this context?

Other models of delivering criminal legal aid

Q9. What considerations should be taken into account in assessing other models of delivering criminal legal aid in Northern Ireland, such as a contract-based approach, a public defender service and/or a panel of advocates for Crown Court defence work?

Efficiencies in the criminal justice system

Q10. What changes to the criminal justice system in Northern Ireland would enable publicly funded defence services to be delivered at lower cost and more efficiently while sustaining quality? Are there particular priorities for attention?

Public law children cases

Q11. Given the inclusion of public law children cases in the irreducible minimum of service provision category, should this apply to parties other than the child and the parents? Are there particular legislative or procedural issues that should be addressed in any consideration of how to improve efficiency and timeliness in processing these cases without compromising on quality? What can be learnt from the experience of England and Wales in implementing the Norgrove recommendations? What is the best and most efficient way of establishing when expert evidence is necessary and, when it is, of securing and funding such evidence?

Legal aid and divorce

Q12. How important is legal aid in divorces that are uncontested or where a no fault ground is available to the parties? What about the minority of divorce cases that are contested?

Private law family proceedings and mediation

Q13. How important is it for private family law court proceedings to remain in scope? If they do remain in scope, should legal aid for private family law court proceedings be circumscribed in some way, for example by limiting the number of hearings that will be supported or limiting the amount of funding available for each case?

Q14. What priority should be given to legal aid in family proceedings where there is a background of domestic violence or child abuse? If this category were the only type of private family law case

staying in scope, how could the funding authority ensure that those high risk cases that genuinely fell within this category were identified and that there was no incentive to make unfounded allegations?

Q15. In the generality of private family law cases should the focus for publicly funded support of financially eligible parties be ADR and mediation as in England and Wales? If so, are there views on the implementation issues listed at paragraph 5.14 and are there other important matters to take into consideration? What steps would need to be taken to ensure that mediation and ADR did not simply become an additional cost driver?

Q16. Are there further measures that could be taken to reduce the propensity for contact cases to return to court? Should there be more effective enforcement measures in the event of breaches of contact orders?

Q.17 How should the interests of children best be represented in private law proceedings? How should their views be taken into account?

Q18. How can the assets at issue in ancillary relief cases be used to fund legal representation at the point of delivery rather than in the future (as is the case with the statutory charge)?

A unified family court

Q19. How might the introduction of a unified family court in Northern Ireland affect the quality and efficiency of service to court users?

Sources of advice on family justice matters

Q20. What information, advice and interactive assistance relating to family justice matters and dispute resolution is, and should be, available across the different types of media to support self-help and signpost other advice sources? What can be learnt from other jurisdictions?

Scope and money damages cases

Q21. If money damages cases in general are to be afforded a lower priority for inclusion within the scope of legal aid, do different considerations apply to the more serious cases where substantial special damages might be at issue or particular types of case which might not be so amenable to alternative funding models? If so, at what point, in terms of quantum or type of case, would those considerations apply?

Jurisdictional limits

Q22. What benefits might accrue from further increases in county court and small claims jurisdictional limits in Northern Ireland or from the creation of a single point of entry into the county court for all but the most complex cases? What disadvantages might there be to such changes?

What further improvements could be made to processes, especially at the pre-action stage, that would facilitate timely resolution of money damages cases?

Advice to individuals on tribunal cases

Q23. Should advice to individuals on the generality of tribunal-related issues be considered in the context of an overall inter-departmental advice strategy rather than as a priority area for civil legal aid? What sort of tribunal work might be assessed as being a priority for legal aid? Should it be the responsibility of the relevant departments and public bodies to ensure that effective mechanisms are in place to inform and support those affected by their decisions and to facilitate early resolution of disputes before they escalate to tribunal or court cases?

Role of ombudsman

Q24. Are there steps that could be taken to enhance further the role of ombudsmen as a means of addressing disputes and complaints?

Judicial review

Q25. What priority should be placed on judicial review remaining within scope of legal aid? What respective roles should the personal benefit to the applicant, the wider public interest and human rights considerations play in determining whether a case qualifies for legal aid? Are there further measures that can and should be taken in Northern Ireland to ensure that the judicial review process is not abused through frivolous or vexatious claims?

Q26. Would research into the grounds and outcomes of judicial review cases be worth pursuing? Can more be done to ensure that the outcome of judicial reviews is used by public authorities to inform and improve future decision-making processes?

Injunctive relief

Q27. How high a priority is injunctive relief for the legal aid fund? If the generality of injunctive relief cases is not to be treated as of high priority, how could we identify the small number of such cases that might be afforded a higher level of priority? Should legal aid in such circumstances be reserved for an exceptional grant category that would only apply when an applicant's safety was at issue?

Prioritising areas for inclusion within scope of legal aid

Q28. Are there any views on the priority that should be attached to including any of the items listed above (paragraph 6.9) within the scope of legal aid in Northern Ireland? Taking account of the criteria at paragraphs 3.8 to 3.11 above, which should be regarded as part of the irreducible minimum category of legal aid provision and why?

Exceptional grant scheme for cases not otherwise eligible for legal aid

Q29. Is a special exceptional grant provision required for those exceptional cases that merit funding but are not within scope? If so, how can it be ensured that the cases are genuinely exceptional and that this is not regarded as a way of circumventing rules on scope and financial eligibility? If a decision to make such a grant is likely to have significant expenditure consequences, how is the necessary funding to be secured?

Inquests

Q.30. Is legal aid to secure representation for the immediate family in Article 2 inquests or where death has occurred during detention under mental health legislation part of the irreducible minimum of provision and, if so, why?

The legal needs of children and young people

Q31. What are the implications of the Survey into the Legal Needs of Children and Young People in Northern Ireland? Where do the priorities lie? How should any available resources be most effectively and efficiently be directed towards providing legal advice, information and support for children and young people? What delivery model would most successfully facilitate positive engagement with children and young people on legal matters that affect them?

Access to justice for older people and those with disabilities

Q32. Do older people or people with physical or mental disabilities have particular legal needs or issues over access to legal advice and information that are not currently being addressed adequately? Are there other categories of people who should receive particular consideration in this review?

Legal advice and assistance and how it fits with the broader advice strategy

Q33. How should the provision of legal advice and assistance be integrated into the advice strategy in Northern Ireland while retaining the capacity for direct input from a solicitor where that will bring direct and tangible benefit to the client?

Q34 Should the green form scheme be retained? If not, how might it be replaced by a mix of the mechanisms identified in paragraph 7.5 above? Are there matters listed in Table 5 where immediate direct access to a solicitor for advice and assistance, supported by legal aid, should be regarded as of high priority?

Q35. What views are there on the extent to which the regulatory framework of the legal professions and the permitted business models for legal practices facilitate the delivery of the most efficient and effective legal services? Do they support a mixed model of service delivery in which the private, voluntary and public sectors can play a part? In this context is the Law Society's waiver system working satisfactorily?

Funding models for delivering publicly funded legal services

Q36. What type of publicly funded legal services are suited to contractual arrangements? Should the contracts become the norm for legally aided services, supported by tendering arrangements? Is there any place for price competitive tendering as a means of encouraging efficiency and economies of scale?

Q37. What type of services would be suited to grant provision, including situations where grants might facilitate partnership working in the community in the provision of advice and assistance, and perhaps in establishing arrangements for alternative dispute resolution, thus diverting people away from the courts?

Q38. Are there other areas of law where the Housing Rights model of providing expert advice and, where necessary, representation in court might provide a cost-effective way of assisting those facing court proceedings?

Insurance and access to justice

Q39. How could insurance play a greater role in supporting access to justice?

Pro bono

Q40. How can pro bono work be further supported and enhanced? What sources of funds can be accessed from the private, public and charitable sectors to support organisations delivering free legal assistance and representation for vulnerable clients outside the legal aid system?

Accessible information and self-help tools

Q41. What role in supporting access to justice can be played by the development of accessible information and self-help tools that would assist those with potentially justiciable problems but who are unable to access professional legal advice and representation?

A different strategic framework?

Q42. What strategic approach could be adopted if funding did not enable the provision of legally aided services as currently organised across high priority areas?

Q43. Is it realistic to envisage planning for, or incremental moves towards, a holistic approach to access to justice and advice services of the type mooted in paragraph 8.20 above?

Efficiencies and costs

Q44. In what areas of Northern Ireland's justice system could efficiencies reduce costs, including the cost of legal aid, while sustaining quality of provision? What efficiencies could make significant improvements in terms of cost and service provision?

Q45. Is the legal aid impact assessment system working satisfactorily? Are there areas of existing substantive law that contribute to inefficiencies in the justice system and which should be reviewed?