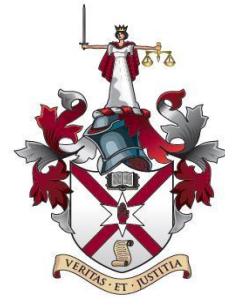


THE **LAW SOCIETY**
OF NORTHERN IRELAND



Department of Justice
Consultation
PRO BONO COSTS ORDERS

**Response of the Law Society of
Northern Ireland**

October 2021

*96 Victoria Street
Belfast BT1 3GN
Tel: 02890 23 1614
Fax: 02890 232606
Email: enquiry@lawsoc-ni.org
Website: www.lawsoc-ni.org*

ABOUT THE LAW SOCIETY

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (Northern Ireland) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,800 solicitors working in approximately 470 firms, throughout Northern Ireland, in the public sector and in business. Members of the Society thus represent private clients, small, medium and large enterprises, government bodies and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland.

October 2021

RESPONSES TO QUESTIONS

Q1. Do you agree that pro bono cost orders should be introduced in Northern Ireland?

The Society believes that there is merit and many benefits in introducing pro bono cost orders in Northern Ireland. Pro bono cost orders have been available in England and Wales since 2008, and in Scotland since 2018. It is our view that the introduction of pro bono cost orders in Northern Ireland will help to even up the disparity in the position between Northern Ireland and other UK jurisdictions. Similar to many other jurisdictions, there is a long tradition of the provision of pro bono work in Northern Ireland. It provides an essential avenue for many individuals to pursue litigation, who may otherwise be denied it, and subsequently contributes to accessing justice. Access to justice is an essential component of the justice system and an essential element of the rule of law.

Currently, there is a major risk involved when a party is being represented on a pro bono basis of incurring the costs of the other party if they lose their case. The risk of incurring costs often acts as a major barrier and deterrent for many individuals when deciding to initiate a case. This risk is also an important factor affecting the dynamics and decisions taken within a case. For example, it may lead to settlement or withdrawal of litigation, which may not otherwise have been the case. If all parties to the litigation have equal risks of incurring costs, this will help to balance negotiating positions and ensure that there is an equality of arms between the parties.

There may also be other benefits arising out of the availability of pro bono cost orders. For example, it may encourage more practitioners and firms to engage in this area of work. Subsequently, this may have a positive impact on reducing the number of litigants in person within the court system. Moreover, the introduction of pro bono cost orders has the potential to help address current unmet legal need, contribute towards accessing the courts, and ultimately justice, and may also help to ensure that Article 6 rights to a fair trial are met for all.

Whilst pro bono work is an important aspect of the justice system, and should be encouraged and promoted due to the many benefits it presents, pro bono advice and representation should not be a substitute for the availability of publicly funded legal services. Increasingly, solicitors are reporting that they are forced to act pro bono in many cases due to a reducing legal aid budget and current restraints within the legal aid system, particularly around eligibility to legal aid due to capital limit thresholds.

Many groups in society are ineligible for legal aid, but are also unable to afford to pay the costs of a legal representative. This often includes groups such as the elderly and recently redundant. The amount of money someone has should not be a factor in limiting their ability to access a legal representative and ultimately justice. Moreover, it is important to emphasise that acting in pro bono cases takes as much time and effort as in a case which is not pro bono.

Q2. Do you agree funds from pro bono cost orders should be allocated to pro bono service providers as in England and Wales and Scotland?

It is important that the funds from pro bono cost orders should be allocated to pro bono service providers. However the difficulty is that, in Northern Ireland there is no equivalent or similar charity to the Access to Justice Foundation. Pro bono work is currently provided in a range of ways in Northern Ireland, for example, through organisations such as Advice NI, the Law Centre, the Ulster Law Clinic, solicitor firms, and individual barristers. Subsequently, it is not easy to identify who the funds should be allocated to so that they are allocated in a fair manner. There may be merit in the creation of a similar body to the Access to Justice Foundation in Northern Ireland which could hold a central register of pro bono practitioners and providers, and be responsible for the allocation of funds from pro bono cost orders. Alternatively, there may be scope in allowing the party involved in the proceedings to have the discretion to express a preference to whom the funds are distributed to. If this was the case, it would be important to have a list available consisting of all those charities, organisations, bodies and individual practitioners that support pro bono work in Northern Ireland, and the option could also be available for some or all of the funds to go towards the remuneration of the practitioner representing them.

Q3. Apart from the format in England and Wales, do you have any views on how else funds might be utilised?

Please see response to Question 2 above.

It is important that that funds are utilised in a fair manner, and are allocated towards pro bono advice, assistance and representation to ensure the positive effects of this policy are achieved both for individuals and the wider public good.

Q4. Do you have any views on how a scheme could be administered to ensure the costs do not outweigh the benefits?

In considering the amounts that have been recouped by the Access to Justice Foundation, and in comparing them to the population in Northern Ireland, there may not actually be significant funds arising out of this. However, in contrast to the present situation, it is important to outline that if pro bono cost orders are introduced, the money, no matter how minimal, can be used to support other worthy cases and address access to justice issues. It is better that some funds are allocated towards these areas rather than none at all. It is also important to emphasise that the threat of a pro bono cost order may encourage a party to settle or withdraw a non-meritorious case, thus saving court time, resulting in savings in that regard.

Q5. Should quality standards of pro bono work funded under any scheme be monitored?

Those acting pro bono in cases are often doing so for a worthy cause or because they are passionate about a certain issue or legal area, and subsequently a lot of time and effort are dedicated to these cases. The Law Society expects practitioners to uphold quality standards at all times.

Q6. Are there any other practical challenges to the introduction of orders?

There may be a need to consider the impacts on indemnity insurance particularly if there is a surge in cases as a result of this new proposal.

Q7. Are there any other ways to guard against a party using their opponent's pro bono status tactically?

The introduction of the availability of pro bono cost orders should reduce the ability to use an opponent's pro bono status tactically as this will help to level the playing field between the pro bono represented litigant and the represented opponent. The threat of costs is currently a tool only available to the represented litigant, subsequently, the change in position may result in a more cautious approach being taken. It is likely to be an important factor that will be considered when negotiations are taking place. It may also bring benefits to deter individuals from progressing litigation where their claim is without merit.

Q8. Are there any ways in which pro bono work could be encouraged, enhanced or supported?

The availability of standard documentation e.g. retainer letters may also be useful. Moreover, there is currently a lack of information and resources surrounding pro bono work in NI. Guidance should therefore be developed both for those looking to avail of pro bono work e.g. how they can access it, and also for providers on what is expected of them. Moreover, as recommended in the Access to Justice Review and outlined in the consultation document, there may be scope for the Society to consider publishing a revised pro bono policy. This matter is being referred to our Access to Justice Committee.

Q9. Who else should take steps to enhance pro bono work?

Pro bono work can be promoted within various organisations and professional bodies through CPD events to raise awareness of the benefits of engaging in this area of work. It would also be important to raise awareness of the proposed change around the availability of pro bono cost orders if it comes into effect.

Q10. Are there any other issues relating to the costs of unrepresented or pro bono represented parties that should be considered?

It may be important to consider what happens in cases where there is an appeal and the case is subsequently overturned.

There may be a need to consider what would happen in a case where the individual commencing the case subsequently runs out of money, but the practitioner continues to work on a pro bono basis. It would be important for both normal costs and pro bono costs to be recoverable in this scenario.

It may also be useful for a standardised form to be created if a case proceeds to a hearing, showing what costs the winning party would have been liable for if represented.

Q11. Are there any ways the evidence base on pro bono work or the likely impact of the introduction of orders might be enhanced to inform decisions?

Currently, there is a lack of information available on the providers of pro bono work in Northern Ireland, the number of hours spent on pro bono work, the savings to the public purse through pro bono work, and other wider benefits of the work. Subsequently it may be useful to collect statistics in this area to capture the above benefits, and publish them on an annual basis.

CONCLUSION

The Society welcomes the opportunity to submit a response in respect of the Consultation on the introduction of Pro Bono Cost Orders in Northern Ireland.

We trust our contribution is constructive and we would like to be kept informed of any subsequent proposals formed as a result of this consultation and also any changes to the overall policy direction of the topic under discussion along with a stated rationale.