

THE **LAW SOCIETY**
OF NORTHERN IRELAND



SAFEGUARDS TO PROTECT THE INDIVIDUAL DECISIONS ON THE GRANTING OF CIVIL LEGAL AID

Response of the Law Society of Northern Ireland

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Introduction

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 (NI) 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 2,600 solicitors working in some 570 firms, based in over 74 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients in legal matters, government 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 Law Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which local politicians have responsibility for the development of justice policy and law reform, this role is as important as ever.

The solicitor's profession, which operates as the interface between the justice system and the general public, is uniquely placed to comment on the particular circumstances of the Northern Irish justice system and is well placed to assess the practical out workings of policy proposals.

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Do you agree that the proposals in this paper provide adequate safeguards over the award of civil legal aid by an agency of the Department of Justice?

Comments on Proposed Structures

- 1.1. The Society has a number of observations to make on this subject, which provokes a number of crucially important issues in terms of ensuring independence and credibility in decisions to grant civil legal aid. This is the practical litmus test for access to justice, as certain key principles of an open and fair justice system ought to prevail over the partisan political pressures of day to day government. As a demand-led service, provision of legal aid must be the cornerstone of civil rights and cannot be sacrificed in the name of political expediency or budgetary pressures. Given that these proposals for reform closely mirror those that have recently taken effect in England and Wales, the debate within that jurisdiction is instructive as to the issues arising.
- 1.2. The first observation that the Society would make is that the proposal to abolish the NILSC and transfer its functions into an executive agency within the Department only represents the broad sweep of reforms and much will depend on the detailed statutory arrangements laid down in the new governance arrangements. In particular the detail of relationships between the agency and government that such provisions create and the specific institutional mechanisms of delivery and challenge will require significant additional scrutiny. Despite this caveat, the choice of the executive agency structure helps to narrow focus to the specific problems likely to be connected with this model and suggest means of redress to the defects identified.
- 1.3. The legislative passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) in England and Wales drew out the importance of strong statutory provisions concerning the independence of the Director of Legal Aid Casework. Clause 4 of LASPO outlines that the Lord Chancellor could provide guidance to the Director on the discharge of his/her functions, yet could not interfere in decision-making in individual cases. Policing the boundary between legitimate policy guidance to the Director and what is effectively creative interference

through the application of pressure or otherwise is absolutely critical to preserving the integrity of individual decision-making.

- 1.4. Crucially, the ability of the Minister to issue guidance concerning the exercise of the Director's functions in categories of cases, e.g. judicial review, may weaken the separation between broad policy making and decisions in individual cases. There is no mention in the proposals for provision for the new statutory office holder to have recourse to external legal advice in the course of discharging his/her duties, something the Society would view as an important safeguard in preventing the drift of ever more intrusive guidance compromising independence of decision-making. Although under the model in England and Wales, the Lord Chancellor must routinely publish his/her guidelines to the Director, the Society is of the view that such reporting duties on the Minister should be made formal and routine to the Assembly and the Justice Committee.
- 1.5. The Society notes in Para 3.1 that under the proposed structures the Minister will designate a civil servant to be the statutory office holder, likely to be the Chief Executive of the Agency. The Society would stress the importance of ensuring that clear criteria for this appointment are developed in order to determine suitability for the post. Prior experience of dealing with civil justice matters ought to be one important prerequisite for such a post holder, ensuring coherent and informed decision-making. This is particularly important given the closer proximity of the new agency to central government, as the knowledge base to effectively challenge guidance given and resist interference is vital. Also, some degree of professional separation between the official concerned and Departmental colleagues may be an important factor in developing 'chinese walls' between individual decision making and the broader policy role for the core department. Familiarity may tend to lead to undue pressure being applied, either consciously or unconsciously if clear lines of accountability are not defined.
- 1.6. The Society notes that the Joint Committee on Human Rights in England and Wales considered this issue during the passage of LASPO. Despite assurances from the MOJ that practical reporting arrangements ensured independence, with the Director of Casework reporting to the

Permanent Secretary rather than the Minister and civil servants under the Director reporting directly to him/her, the Joint Committee considered that their overarching adherence to the Civil Service Code provided for ultimate loyalty to the Minister of State, whatever practical arrangements were put in place. This was felt to threaten Article 6 ECHR rights via the perception of a lack of independence in decision-making, compounding the importance of clearly analysing the precise institutional and practical mechanisms used to guarantee independence. More detail on these matters is required in order to exercise full and proper scrutiny of proposed arrangements.

- 1.7. The Society notes that the Chief Executive of the former LSC in England and Wales considered that whilst the removal of duplication and an end to disjointed decision-making would come about with a closer interaction with the Ministry of Justice, she also noted that the content of the guidance being issued by the Lord Chancellor would be critical in establishing a credible separation between individual cases and overall policy making. Given the relative infancy of the arrangements in England and Wales, some caution may be required in drawing any firm conclusions from their operation, but some thought needs to be given to remedying this danger when legislative proposals emerge after this consultation exercise is completed. In the absence of a draft set of provisions, it is difficult to make a concrete judgment about whether the proposed arrangements secure both the substance and appearance of independent decision making in relation to legal aid decisions.

- 1.8. The Society agrees with the observations of Sir Bill Callaghan, former Chairman of the LSC in England and Wales that such interference can occur in subtle and pervasive ways and may be exacerbated if a firm institutional separation between individual cases and the host department is not strictly observed. Research by the Legal Action Group has uncovered a strongly held view amongst former officials at the LSC that the UK government had overstepped the boundary on numerous occasions, notably during the decision to grant the Gurkhas legal aid for their case against government to secure settlement rights.¹ This is of unique importance when it comes to the grant of legal aid for judicial review proceedings against government departments.

¹ Steve Hynes, *Austerity Justice*, 2013 Legal Action Group, p. 69-72.

- 1.9. The Society considers this potential risk as being particularly strong in Northern Ireland, where securing cross-community confidence in justice systems is of such importance that any perception of bias in granting legal aid must be especially strongly guarded against. This risk would be particularly high in relation to legacy cases under the Statutory Exceptional Grant Scheme as well as the grant of funding to take civil cases against alleged terrorists as in the recent Omagh civil action. Impartiality and distance from political interference is of paramount importance in a post-conflict society.
- 1.10. In light of these concerns, the Society notes that at 2.1-2.2, the document makes reference to the carrying out of a feasibility study on a range of models for the delivery of legal aid and that this study endorsed the ATJ Review's recommendation of an executive agency for the management of legal aid. The Society is of the view that this study should have been published along with the range of options canvassed, in order that stakeholders could analyse the interpretations drawn from the results by the Department. In the absence of such clear evidence of the scoping study, it is impossible to see how the Department arrived at this conclusion and to scrutinise it effectively. Accordingly, the Society cannot simply endorse a move to a new model of delivering legal aid without full and proper consideration of the alternative models, the detail of the statutory arrangements put in place and the evidence base from which these proposals have been drawn.
- 1.11. This absence of evidence is particularly striking given the findings of the Institute for Government that one of the most damaging factors contributing to poor public perceptions of arms-length bodies stems from a lack of clarity over the business justification for their operations and the feeling that they are created for political expediency rather than objectively sound reasons.² The inability of stakeholders to scrutinise a wider range of options for the new structures of delivering legal aid only serves to compound these problems. The Society considers that this consultation should seek to rectify this deficiency and ensure good governance by disclosing the findings in order that a fuller discussion may result. The Society notes that a business case was produced for

² Institute for Government, *Read Before Burning: Arm's Length Government for a New Administration*, 2010.

similar reforms by the Ministry of Justice in England and Wales but that one unique to the experience of the NILSC would be appropriate.

- 1.12. This is particularly important when it comes to assessing the credibility of projected cost-savings, as reflected in the National Audit Office report into the re-organisation of central government bodies. That report noted that a failure to adequately share best practice, develop properly informed cost assessments and clearly map out the benefits of governance changes undermined the integrity of general statements of efficiency savings.³ A fully costed assessment would allow the full range of motivations for reform to be weighted, as for example the reduction in VAT was one factor noted in the business case of the MOJ for the new agency. The Department has not noted any mention of these issues in the consultation and no indication is given as to the relative importance of the factors taken into account in choosing this model.
- 1.13. Another consideration which would be covered by a full business case is the anticipated governance benefits such a conversion to agency status would have in terms of accuracy of financial forecasting, a longstanding issue identified by the Public Accounts Committee and Auditor-General in relation to the NILSC. Additionally, the degree to which IT and personnel systems are divergent between the Department and the NILSC has not been set out in any detail, another impediment to a comprehensive cost-benefit calculation about the proposals. Any shift in status for the legal aid delivery body will be motivated by a variety of factors and these should be fully transparent and open to scrutiny in order to get the decision right.

Appeal Arrangements

- 1.14. Given the concerns in relation to independence expressed above, the Society has reservations about the proposal outlined in 3.8, that appeals are to be paper based and heard by one member with expertise in the area. Given the potential for accusations of bias in specific cases, one member sitting alone could potentially be vulnerable to challenge and the Society would propose that a panel format is maintained in each appeal. This would meet the concerns of the Joint Committee on Human

³ National Audit Office, Cabinet Office, Reorganising central government bodies, 2012.

Rights in London who considered that the closer relationship of the new agency's director to government, an additional safeguard against independence was important in order to guard against arbitrariness in decision-making, a potential breach of Article 6 ECHR rights. Similarly, the Society would have concerns that if the work is to be allocated on the basis of specialism, some appointees will be under pressure from excessive case loads – particularly in the voluminous family field. There would be no even spread of work.

- 1.15. The Society welcomes the fact that the proposed appeals panel will have the power to overturn decisions and will be drawn from outside the Department, but agrees with the former Chair of the LSC Bill Callaghan, who called for a multi-member appeals mechanism akin to an independent tribunal, rather than a single member, paper-based jurisdiction. Accordingly, the Society disagrees with the proposal to make the appeals process purely on written submissions in a blanket fashion. We understand that there is a facility under the English/Welsh arrangements where if the Independent Adjudicator considers that it is in the interests of justice to hear oral representations before making a determination, the client or any person authorised by the client may attend before the Adjudicator to make such representations. We feel this is a vital safeguard for effective access to justice.
- 1.16. The Society is of the view that oral hearings may provide a greater sense of confidence in the process for clients and those more vulnerable clients who cannot afford to pay for the services of a solicitor may not possess the literacy skills to be able to make strong representation on their own behalf in writing. It should be noted that oral hearings may also be more effective when issues of credibility of evidence are in question and there may not be a substitute for oral testimony in terms of gauging the merits of an application. Consequently, the implications for access to justice in removing the provision for oral appeals outweigh whatever modest savings may be made from pursuing this course of action.
- 1.17. Again, as the Society noted in our response to the NILSC consultation on new appeal arrangements for civil legal aid, we have serious concerns about the provision for the appeals unit within the agency to monitor any “apparent diversity of approach or contradictory decisions”. We

consider that this proposal has the potential to seriously undermine the independence of the members of the appeal panel. Specifically, the goal of ensuring a consistent and defensible decision-making process would be undermined if appeals panel members worked under the threat of removal by officials under a fairly broad discretion. Given the discussion of the often subtle interference by officials, the Society feels that providing this power would increase the likelihood of such a culture emerging.

1.18. Overall, the Society notes that the proposals are in skeleton form at the present moment and an indication as to the detail of the statutory and informal mechanisms of separation between the functions of the new agency and the DOJ is necessary before an informed judgment can be made. We do have some concerns that this set of proposals has emerged in advance of the publication of consultation responses to the earlier consultation on appeal arrangements by the NILSC. It is important that those responses should inform this process of consultation and that all options are adequately set out for consideration by stakeholders.

1.19. Of particular importance in this respect is mapping the relationship between the Minister and the new statutory head of legal aid, providing institutional mechanisms of separation and clear guidelines as to the limits of the Minister's competence to play a role in affairs of legal aid. Furthermore, the draft appeals process as presently conceived is flawed in several key respects and has the potential to undermine the integrity of perceptions of independent decision-making in relation to legal aid.

If not, what additional/alternative safeguards do you consider are necessary and proportionate?

1.20. The Society notes that currently, certain categories of appeal against legal aid decisions are made by the Special Legal Aid Committee. This consultation is silent on the future of this body and we would suggest that there are instances in which particularly vigilant appeal mechanisms apply, such as in the case of leave to take a judicial review against the operational procedures of the decision making body. The Society would welcome clarification on this and would submit that this would be best achieved in the context of a more comprehensive menu of options in

relation to the future of the administration of legal aid and its related appeal mechanisms.

Concluding Remarks

1.21. The Society considers the fair and impartial administration of legal aid as a vital component of a strong and practically effective civil justice system. If one of key goals is ensuring an efficient, independent and transparent system which ensures access to justice as the key principle above all others, then any reforms must have detailed consideration by all relevant stakeholders. The Society has provided suggestions as to the types of considerations which should inform this process. As a result, the Society would appeal for greater detail about the options considered by the Department, the rationale for selecting the executive agency option as opposed to other models and for a draft set of statutory provisions governing the proposed new relationships between the Minister, the new agency and appeals panels to be provided for consideration.