

Access to Justice Under Threat

A joint submission on the
draft Northern Ireland Executive Budget 2022-25



THE **LAW SOCIETY**
OF NORTHERN IRELAND



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INTRODUCTION

The Law Society of Northern Ireland (“the Society”) and The Bar of Northern Ireland (“The Bar”) jointly make this submission in response to the draft Northern Ireland Executive Budget for 2022-2025 which was recently published for consultation. Although both the Society and the Bar recognise that the consultation was halted following political developments, both organisations wish to highlight their significant concerns about what had been proposed.

This paper has been informed by the Executives’ draft Budget consultation paper, the Northern Ireland Fiscal Council’s Budget Report¹ and the Department of Justice’s Budget Consequences paper². It is clear that the draft budget proposals have the potential to cause generational harm to Access to Justice in Northern Ireland and that the damage may be irreparable.

This paper highlights the unique position of the legal profession in Northern Ireland. The predominance of small solicitor practices and the already scarce access to legal representation in rural communities should give the Executive pause before proceeding with cuts that would threaten jobs and leave rural communities in “legal aid deserts”.

As a demand led service, Legal aid in Northern Ireland is structurally under-funded. This effectively leaves the Legal Services Agency with only one budget-management tool – delaying payments. Without reform, cutting the Legal Aid budget means cutting cash flow to hundreds of small businesses and sole traders. The Department of Justice has produced estimates that even the most straightforward of cases would have to wait up to a year for payment. Many solicitor firms would simply not survive in this scenario, many others would be forced to withdraw from publicly-funded work in their community.

¹ <https://www.nifiscalcouncil.org/files/nifiscalcouncil/documents/2022-01/nifc-budget-report-jan-2022-full-final-version-19.01.22-14.30.pdf>

² <https://www.justice-ni.gov.uk/publications/department-justice-draft-budget-2022-25-consequences-document>

The draft Budget is constructed around the core aim of tackling the issues inherent in Northern Ireland's health system. As we emerge from a global pandemic, this is clearly necessary. What should be recognised however is that improving health outcomes requires effort across all public services and that the justice system has a significant role to play. Many of the issues apparent in the health system are also seen in the justice system – long delays, a dedicated but stretched and pressured workforce, historic underinvestment in the system and the need for structural reform.

Further parallels exist between the people served by both health and justice systems – often the most vulnerable in our society. What must be understood is that cutting one public service – like legal aid – will have a detrimental impact on other parts of the system. The reverse is also true – with a body of evidence demonstrating that investing in Access to Justice can help reduce the strain on other public services, including health.

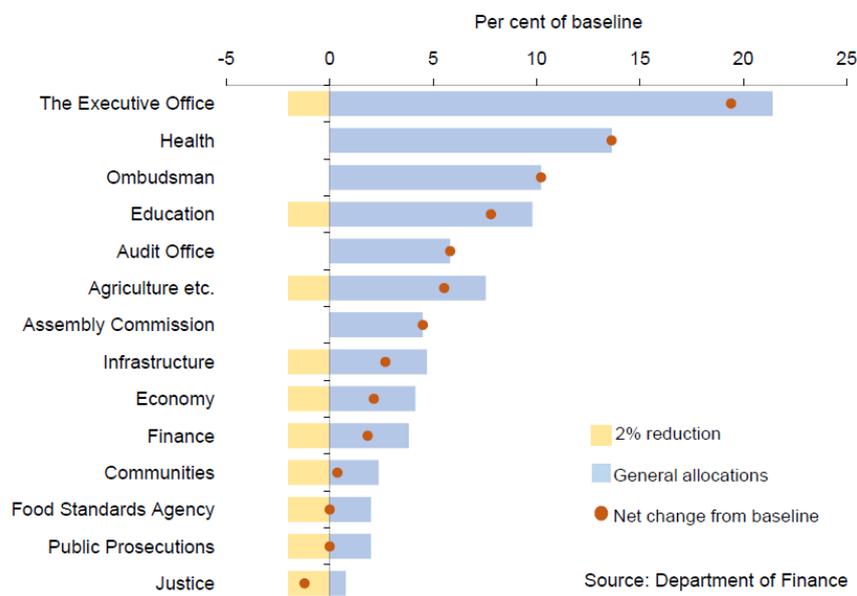
Both the Law Society and the Bar trust that this paper will be taken on board by Executive Ministers when the time comes to reconsider the Budget and that the next Executive will recognise the need to invest in Justice and protect the vital service it provides for local communities.

BUDGET CONTEXT

The Northern Ireland Fiscal Council's (NIFC) independent assessment of the draft Budget 2022-25 has highlighted the Budget's uniquely negative impact on the Justice system. As can be seen in Figure 1 below, the DoJ is the only Department where "general allocations" are insufficient to cover the baseline cut and therefore Justice is the only Department to see a net budget decrease.

Figure 1

Chart 4.3 – Average change in funding from baseline



The contrast with the situations in neighbouring jurisdictions is particularly striking. In England and Wales, there has been the largest funding increase in the Justice System in more than a decade, with £2.2bn being invested to drive recovery³. The Scottish Government meanwhile has recognised the need to support legal aid practitioners with grant schemes to support young professionals into legal aid practices⁴.

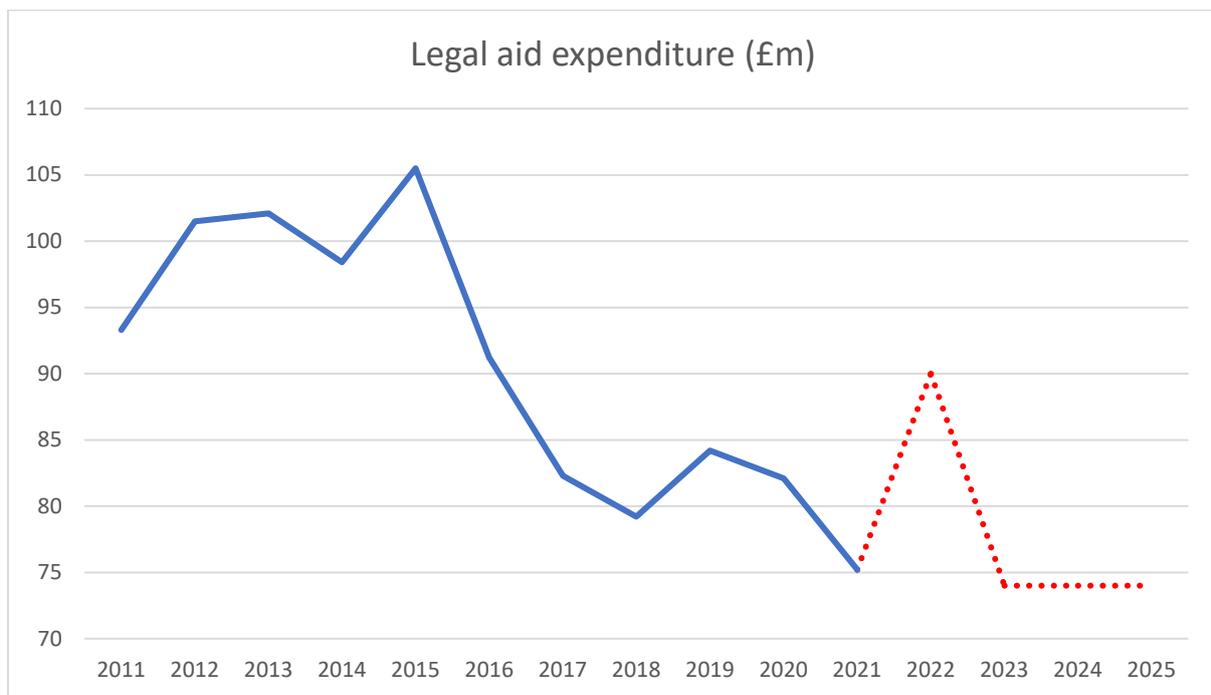
³ <https://www.gov.uk/government/news/largest-funding-increase-in-more-than-a-decade-for-justice-system>

⁴ <https://www.lawscot.org.uk/news-and-events/law-society-news/legal-aid-trainee-fund-launches/>

Reduction in legal aid expenditure in Northern Ireland since 2010

Figure 2 shows legal aid expenditure since legal aid became the responsibility of Stormont in 2010. Aside from top-up funding related to COVID-19 recovery, there has been a significant reduction over time while the DoJ's baseline is currently already 9% lower than what it was in 2011-12.

Figure 2



Source: Department of Justice / Legal Services Agency

Over recent years, the legal aid budget has consistently averaged £82m and the Legal Services Agency (LSA) has provided evidence which suggests that £82m is the minimum baseline funding required to allow bills to be paid within eight weeks of submission.

In spite of the clear evidence this would be insufficient, the LSA's opening budget in 2021-22 was less than £75.7m and has required significant top-ups through in-year monitoring rounds. The reliance on in-year funding to secure sustainable levels of payments has been a feature of the legal aid system over many years. This creates uncertainty for both the LSA and for practitioners where payment times fluctuate with the available budget and therefore cashflow cannot be relied upon.

Department of Justice modelling

In its Budget Consequences paper the DoJ has modelled a 2% reduction across its expenditure. A 2% cut applied to the 2021/22 legal aid baseline equates to a legal aid budget of £74m for the 2022-25 Budget period. This will cause irreparable damage to the network of legal aid providers in Northern Ireland.

The only way for the LSA to accommodate a reduction in funding is to delay paying bills. The LSA has projected that standard fee bills which are currently paid within 8 weeks would face a 47 week wait for payment by 2025. No businesses can afford to wait up to a year for payment. Small businesses in particular cannot survive when starved of cashflow in this manner. Suppliers of services have a statutory right to be paid for the services they deliver, and all suppliers require prompt payment of bills for work undertaken to maintain the viability of their business.

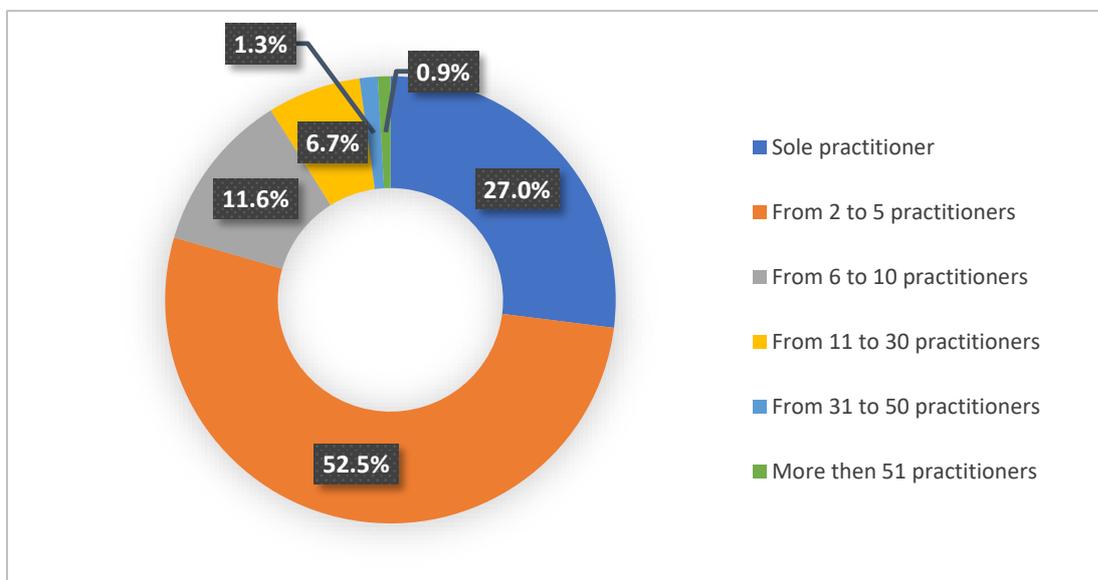
IMPACT ON THE SOLICITOR PROFESSION

This section provides an overview of private practice solicitor firms operating in Northern Ireland and outlines the potential damage that the draft Budget will cause.

Firm size

There are currently 484 solicitor firms in Northern Ireland, employing just over 2,800 solicitors. As can be seen in Figure 2, solicitor firms in Northern Ireland tend to be relatively small; almost 80% of our firms have 5 or practising solicitors while over a quarter of our firms are sole practitioners with only one solicitor.

Figure 2



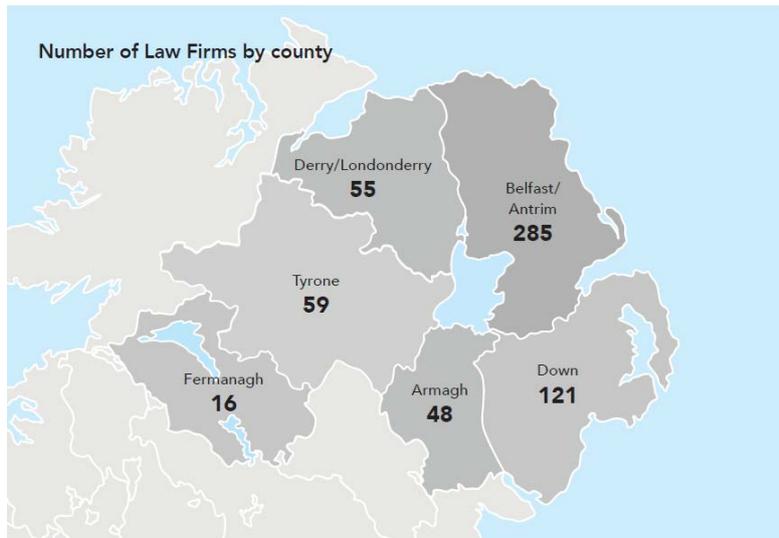
Source: LSNI data

A substantial number of solicitor firms in Northern Ireland rely on legal aid income for cashflow, and therefore prompt payment is vital. Smaller firms in particular are highly dependent on the prompt payment of legal aid fees and would therefore be disproportionately affected by any delay in payments.

Geographical distribution of solicitor firms

Figure 3 below shows the geographical distribution of solicitor firms. Outside of the Greater Belfast area, access to legal representation is already scarce in rural areas particularly in the South and West of the province.

Figure 3



Local solicitor firms supply a vital service to members of the public and are an essential part of the local community, delivering services that no other organisations can offer. The draft Budget creates the risk of an urban/rural Access to Justice divide. The already shrinking network of providers in rural areas would come under further threat, leaving vulnerable clients without representation in those areas.

Case Study: County Fermanagh

To further illustrate the vulnerability of rural communities, the Society has examined the solicitor practices in Co. Fermanagh in greater detail. There are currently only 16 solicitor firms for the whole county and as shown in Figure 4, of those 16 firms, nine have just one or two solicitors.

Figure 4

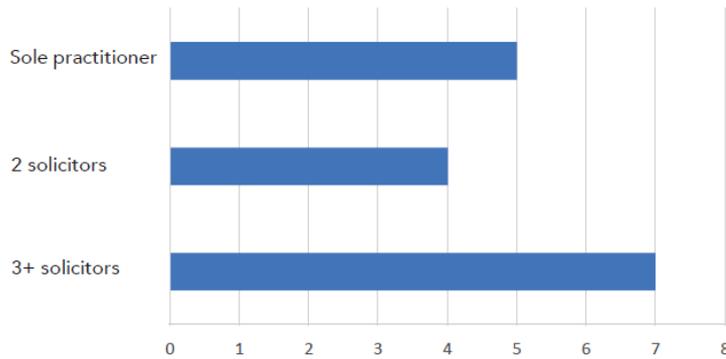
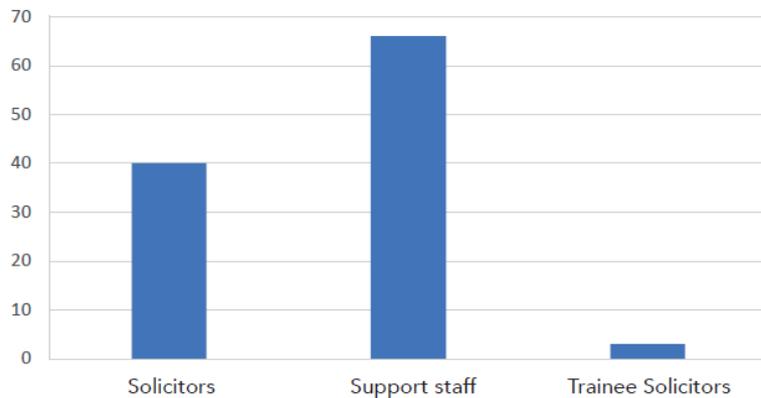


Figure 5 below shows that solicitor practices in the County directly support over 100 jobs. Their contribution to the local economy is further enhanced by the support provided to other businesses, such as accountancy, insurance and estate agents who in turn rely on those solicitor firms for business.

Figure 5



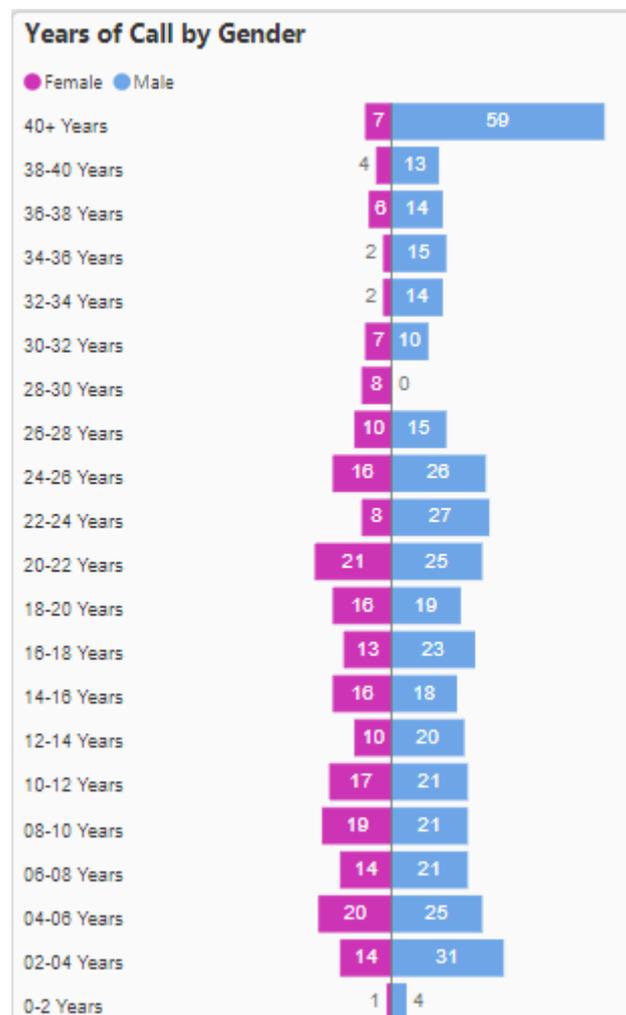
Cuts to the legal aid budget would have a profound impact on Co. Fermanagh. Of the 16 firms currently practising there, three have ceased to provide legal aid services in recent years. The impact of the draft Budget would exacerbate this trend, reducing the number of firms and the proportion of them that carry out legal aid work. Fermanagh, along with other rural communities will become an Access to Justice desert.

IMPACT ON THE BARRISTER PROFESSION

Demographic Background

There are approximately 650 barristers in independent practice in Northern Ireland. Each year the Bar admits 20 new entrants from the Institute of Professional Legal Studies in Belfast. All barristers are self-employed sole traders who operate from the Bar Library building in Belfast.

For several years the Bar, through a series of financial support measures and other policies, has been striving to increase the gender and socio-economic diversity at the Bar, supporting new entrants and attempting to retain females in the profession in order to arrest a trend of gender imbalance after 10 years in practice.



The Bar Library provides access to training, professional development opportunities, Research, technology and modern facilities which enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar

does not receive any external funding to support this model; it is entirely self-sufficient and funds the development and regulation of the profession from its own resources.

All barristers operating independently from the Bar Library building practice under the 'cab rank' rule. This requires barristers to accept instructions from a solicitor in any field in which they are competent, regardless of their views of the client or the circumstances of the case.

The independence of our barristers is of paramount importance and a vital virtue. As independent professionals, their entire purpose is to selflessly serve, fearlessly and rigorously, their clients' interests and to achieve the best possible result, whilst fulfilling their duty to the court.

It is estimated that approximately two thirds of all barristers practising in this jurisdiction will have a practice that will mainly or exclusively entail the provision of legal services funded by Legal Aid.

Barristers are not responsible for setting or administering the legal aid budget. They are also not responsible for the legal aid rates that they are in receipt of. Furthermore they are not at liberty to insert themselves into legally aided cases of their own accord. Their involvement only comes about after the case itself has been granted certification by either a Judge or the LSA and the instructing solicitor has chosen a particular barrister to best represent their clients' needs.

Access to legal aid has become increasingly restricted in recent years. Without specialist advocates to navigate complex legal issues, cases involving personal litigants inevitably experience delays, cost extra and are more likely to risk injustice.

Meanwhile many highly motivated, talented and qualified young barristers who have entered the profession to serve justice and help others are struggling to sustain viable practices at the Bar. Given the levels of socio-economic deprivation in parts of our society, it is not surprising that many seek to apply their professional skills and gain early experience in legally aided cases, yet they are being denied the opportunities

afforded to their predecessors as they embark on their legal careers. This has the potential to create serious long-term problems for our justice system.

Payment Delays Causing Younger, Female Practitioners to Cease Practice

If the LSA faces a reduction in its budget and seeks to address this by delaying paying bills it will mean that the only barristers who might possibly withstand the resultant cashflow pressures will be the older, typically male barristers based in Belfast who have accumulated sufficient reserves from previous years.

The Bar Council recently conducted a survey to assess the impact of proposed payment delays upon practitioners. 296 responses were received (approximately 45% of the relevant population of independent practising barristers).

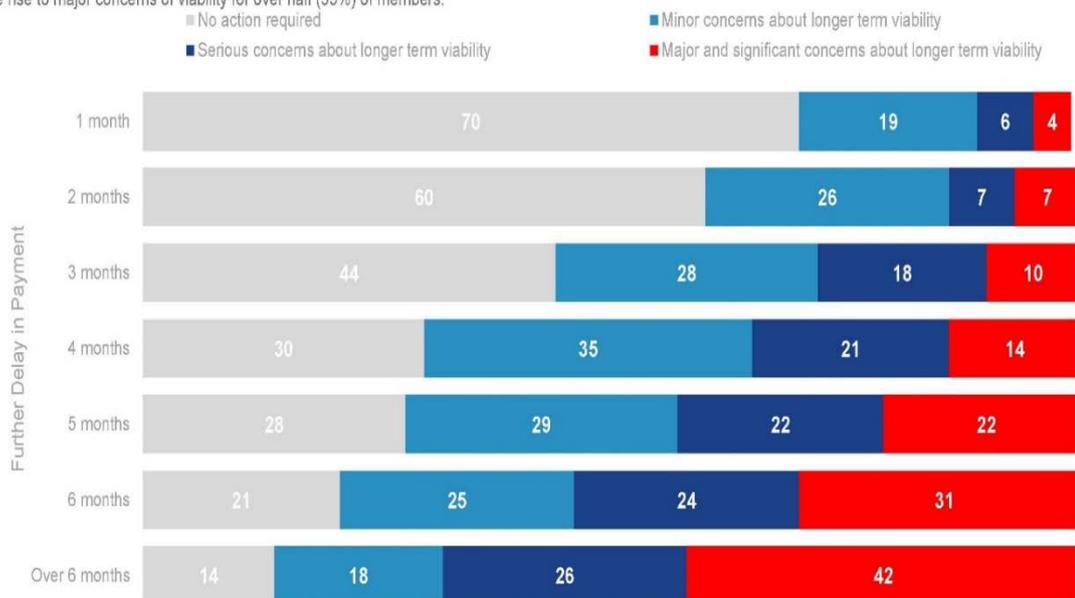
The results of the survey show that:

- Practices begin to cease being viable after even a 1 month delay with the impact being felt most acutely by those aged under 30 or with less than 5 years practice.
- The pace at which practices become non-viable more than doubles every 2 months.
- Ceasing practice is something that 1 in 13 (7%) of those aged under 30 would anticipate if fees were delayed for even 1 month. A delay of 5 months would force 1 in 5 (18%) young practitioners out of business.
- The most significant impact of payments delays are also seen with female barristers and barristers who practice outside of Greater Belfast.



Impact of further delays in payments

The extension of credit terms by a further months would result in 1 in 10 (10%) members having serious or major concerns over the future viability of their practice. If payment terms were increased by a further 3 months this would increase to over a quarter (28%) of members, a doubling of this to 6 months would give rise to major concerns of viability for over half (55%) of members.



Reduction in Access to Justice

If the projections indicated in this survey were to be realised it will mean that the services offered by members of the Bar will reduce. Younger, female and rural practitioners will not be able to withstand the cashflow delays.

Significant and irreversible gaps and imbalances will emerge in the ability of clients to gain access to justice. In addition to the existing delays in the criminal justice system and backlog of cases caused by Covid, the budget will pose a further direct threat.

Not only will the budget damage the availability of instructing solicitors but clients will also no longer be able to have the same choice of counsel to represent them in court.

The Bar will be less representative of society and face a generational crisis to replenish the pool of Legal Aid barristers. Barristers who might potentially retain a viable practice will be under huge financial and workload pressure. Ultimately this places the client's ability to have sustainable, reliable and meaningful access to justice in grave danger.

ACCESS TO JUSTICE IS A SERVICE FOR CITIZENS

Impact on vulnerable persons

Legal aid is about helping people - quite often the most vulnerable people facing the most challenging circumstances. Whether it is a parent seeking access to their child in a matrimonial dispute or someone defending a criminal charge, everyone deserves access to effective legal advice and representation.

The DoJ Equality Impact Assessment on the draft Budget 2022-25⁵ identified that the contraction of the network of providers, could mean that individuals seeking advice, assistance and representation may not have access to legal advisors. If smaller firms are forced to close, the choice of representatives will be more limited, and potentially less representative of society. Further, the DoJ Budget Consequences document highlighted that the draft Budget 2022-25 would *“have a direct impact on vulnerable groups and victims, with further implications from failure to deliver against statutory responsibilities and increased ‘downstream’ costs for the justice system, the health service and the wider public sector; its consequences will severely impact public confidence and would have a detrimental impact on frontline services which contribute to public safety and preservation of life”*.

Research conducted by the Joseph Rowntree Foundation in 2018 on Poverty in Northern Ireland⁶ shows that almost one fifth of our population live in poverty. This has almost certainly increased due to the COVID-19 pandemic. At a time when demand for legal aid is increasing, a limited supplier base of legal aid providers would lead to added pressures on an already overburdened court system, creating further backlogs, delays, and inefficiencies.

⁵ <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/esf-budget-17-02.pdf>

⁶ https://www.jrf.org.uk/file/51014/download?token=z3Sz-ui_&filetype=download

OTHER CONSIDERATIONS

Investing in Legal Aid delivers health benefits

In considering services to citizens, there is compelling evidence that legal aid is a vital and complementary part of the drive to improve health outcomes, as is the stated aim of the draft Budget.

Community Justice Fund research⁷ in 2021 demonstrated the benefits of legal aid in generating significant savings to other areas of public expenditure. For example, availing of professional legal advice and assistance can bring many benefits to clients and savings to wider society, including avoiding homelessness, families remaining together, avoidance of A&E/ambulance visits etc. This supports a report by the World Bank⁸, which shows that the cost of *not* investing in legal aid is substantial in terms of delay, disruption and inefficiency.

Analysis conducted by the Citizens Advice⁹ in 2015 found that GPs in England reported spending almost a fifth (19%) of their time on issues that are not principally about health. Housing, employment issues and welfare benefits were amongst the top issues diverting GPs from their core purpose – all of which would be better dealt with by legal professionals in a properly funded legal aid system.

The Impact on Courts

Courts are one of the principal means for individuals to access justice. The DoJ Budget consequences document shows that the proposed 2% reduction in the NI Courts and Tribunals Service (NICTS) budget would lead to: “*A reduction in court sittings and potential court closures resulting in significant delays...with associated impacts on: victims and witnesses; families and children; vulnerable adults and children*”.

⁷ <https://atjf.org.uk/wp-content/uploads/2021/09/Defending-the-public-purse-The-economic-value-of-the-free-legal-advice-sector-September-2021.pdf>

⁸ <https://documents1.worldbank.org/curated/en/592901569218028553/pdf/A-Tool-for-Justice-The-Cost-Benefit-Analysis-of-Legal-Aid.pdf>

⁹

https://www.citizensadvice.org.uk/Global/CitizensAdvice/Public%20services%20publications/CitizensAdvice_AVeryGeneralPractice_May2015.pdf

COVID-19 has had a significant impact on the Courts, where Northern Ireland was already a significant outlier in respect of case backlogs. Without additional funding, backlogs will continue beyond 2027 in the Crown Court. This is unacceptable for victims and witnesses and for the legal profession will lead to yet further pressures as cases take longer to complete and squeeze resources ever tighter.

Impacts on Justice and NI Executive programmes

The NI Audit Office's Report on the Northern Ireland Budget Process¹⁰ (June 2021) recommended that budget allocations should be linked more clearly to the outcomes identified in the Programme for Government. The draft Programme for Government¹¹ identifies "*Everyone feels safe – we all respect the law and each other*" as a key outcome with Access to Justice a priority within this. The draft Budget would make this outcome unachievable.

In the current mandate, the DoJ brought forward five major Bills, tackling domestic abuse and violence, stalking, human trafficking, and many of the Gillen recommendations. This is backed up by other significant policy initiatives such as strategies to tackle domestic and sexual abuse and violence against women and girls. Progress in these areas will be undermined by an under-funded, under-performing justice system.

¹⁰

https://www.niauditoffice.gov.uk/sites/niao/files/NIAO_Report_NI%20Budget%20Process%20Report_Combo_4_WEB.pdf

¹¹ <https://www.northernireland.gov.uk/sites/default/files/consultations/newnigov/pfg-draft-outcomes-framework-consultation.pdf>

CONCLUSION

The Law Society and the Bar share the belief that a new strategic direction is needed for the Justice System in Northern Ireland, with Access to Justice and the protection of services to citizens at its heart.

The draft Budget would cause generational harm to the Justice System to the detriment of some of society's most vulnerable. It has the potential to put many legal professionals out of business and force many others to withdraw vitally needed services from communities. The impact would not fall evenly and there is the potential to very significantly disadvantage rural communities.

The legal profession in Northern Ireland is urgently calling for a ringfenced legal aid budget of not less than £82m to secure Access to Justice. We urge all Ministers to ensure that our most vulnerable citizens are protected and have Access to Justice.

The Law Society of Northern Ireland

The Bar of Northern Ireland

March 2022