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Legal Aid Supplementary Briefings

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INTRODUCTION

This paper was commissioned as a follow-up to the *'Information Briefing on Legal Aid Funding'* that was included in the papers for the Committee for Justice meeting on 7th October 2010. This paper addresses further issues and questions that were raised by members at that Committee meeting. In particular it examines: the role of the Legal Services Commissions in Northern Ireland and in England and Wales; a number of different legal aid developments that have been introduced in Northern Ireland; comparative legal aids cost in the Republic of Ireland and Northern Ireland.

(1) THE NORTHERN IRELAND LEGAL SERVICES COMMISSION

The Northern Ireland Legal Services Commission (NILSC) is an executive Non-Departmental Body (NDPB) that is sponsored by the Northern Ireland Courts and Tribunal Service (NICTS), which itself is an agency under the Department of Justice. The powers of the Commission are set out in Article 7 of the Access to Justice (Northern Ireland) Order 2003. An executive NDPB is typically established in statute and carries out executive, administrative, regulatory and/or commercial functions.

Legal Aid – the Northern Ireland Courts and Tribunals Service and the Department of Justice

The NICTS is one of the five agencies within the Department of Justice¹. Two Divisions within the NICTS deal with the NILSC: the Finance Division has financial oversight of the NDPB arrangements; and the Public Funded Legal Services Division is responsible for sponsorship. In relation to Public Funded Legal Services, the NICTS Business Plan 2010/2011 states that to improve access to justice it shall:

- Maintain a robust governance, probity and challenge function over the Northern Ireland Legal Services Commission in relation to financial management, business planning and strategic decision making
- In conjunction with the Legal Services Commission, assist with the development and delivery of reform projects via a Transformation Programme Board, that will lead to tangible cost savings
- Efficiently and effectively discharge policy and advisory responsibilities in relation to criminal and civil legal aid provision
- Keep under review the provision and delivery of legal aid services and bring forward proposals for further reforms where necessary
- Commission a fundamental review of Public Legal Services in Northern Ireland

¹ Other agencies being: Northern Ireland Prison Service; Compensation Agency; Youth Justice Agency; and Forensic Science Agency.

- Provide timely and appropriate support to the Justice Minister and the Legal Services Commission on legal aid matters²

It has been indicated that, whilst the NICTS will retain responsibility for legal aid in the Department of Justice for the current business year, from the beginning of next year it is expected that responsibility for legal aid will move to the Justice Delivery Directorate of the Department of Justice. Commenting on the potential change, the Director of the NICTS explained to the Committee for Justice that:

Arguably, that is a more appropriate home for legal aid policy, given that it will lessen the emphasis on legal aid being simply about court cases. Repositioning responsibility for legal aid as part of the core Department of Justice will send an important signal that publicly funded legal services should be about other forms of legal redress as well as going to court.

Landscape Review³

During the first half of 2007, the Public Funded Legal Services Division of the NICTS commissioned Deloitte MCS to undertake a Landscape Review of the NILSC. Included in the terms of reference were an evaluation of the effectiveness, efficiency and value for money of the operation of the NILSC and consideration of:

- the extent to which the current arrangements deliver the Government's objectives;
- the extent to which the current arrangements service the needs of users and how this could be improved;
- the extent to which the current arrangements provide appropriate governance accountability and risk management; and
- the extent to which the current arrangements are capable of delivering effective services in a devolved environment.

The overarching conclusion made in the report of the Landscape Review was that:

Whilst there has been significant progress in some key areas of the reform of civil legal services, current arrangements are not yet delivering Government's objectives on access to justice and value for money

Current arrangements³ are not serving the needs of all users and stakeholders; and

² Northern Ireland Courts and Tribunals Service Business Plan 2010/2011 http://www.courtsni.gov.uk/NR/rdonlyres/EA986CFC-CACC-4E68-BB81-BBDC688721BF/0/p_tp_BusinessPlan_1011.htm

³ Landscape Review of the Northern Ireland Legal Services Commission <http://www.nilsc.org.uk/uploads/publications/documents/Landscape%20Review.pdf>

Current arrangements are not providing appropriate governance, accountability and risk management.

The Review concludes that these findings are not a result of design failure (i.e. the Executive NDPB model is appropriate for the work of the Commission) but rather they are a result of failures in direction and focus. Therefore, an immediate step change is required in order to rebalance the priorities of the organisation and the application of resources. The main areas requiring rebalancing, renewed attention and appropriate resourcing are (a) financial management including VFM and accountability and (b) delivering service excellence.

In response to the Landscape Review, the NILSC produced an action plan which was agreed with the NICTS.⁴ This plan, together with the Landscape Review's main findings, was published by the NICTS in January 2009. Speaking at a meeting of the Committee for Justice in May 2010, the Director of NICTS noted that:

The devolution of justice and policing appears to have brought the opportunity to review not only the Legal Services Commission but the legal aid system and what we call publicly funded legal services. A few years ago, a fundamental examination of the Legal Services Commission took place and, as a result, quite a lot of improvements were made.⁵

He went on to add, however, that he had to acknowledge that:

there has been an upward drift in the administrative costs of legal aid. We touched on that in an earlier exchange, and we want those costs to come down because they have to come out the legal aid budget. The budget of £79 million for 2013 not only has to cover fees for legal aid cases but the running costs of the type of administration that we have at that point. If, in 2013, running the Legal Services Commission were to cost £7 million a year, it is self-evident that only £72 million would be left for paying for people to get access to justice.⁶

In relation to the increasing running costs of the NILSC the following information was provided recently to the Committee for Justice by the NILSC stating that:

When the Commission assumed responsibility for legal aid in November 2003 it was allocated an annual budget of £5.6m for 04/05 and employed 105 staff during that year. In 2009/10 the Commission's running costs were £7.4m with

⁴ Northern Ireland Legal Services Commission Landscape Review: Action Plan
<http://www.nilsc.org.uk/uploads/publications/documents/Landscape%20Review%20Action%20Plan.pdf>

⁵ Committee for Justice – Official Report (Hansard) Legal Aid: Proposals for Primary and Subordinate Legislation (20th May 2010)
<http://www.niassembly.gov.uk/record/committees2009/Justice/100520LegalAidProposalsForPrimaryandSubordinateLegislation.htm>

⁶ [See](#) above

160 staff, including 10 staff on loan from its sponsor delivering specific projects.

Since its creation, the Commission has increased its capacity in 3 areas. As the Commission was given the statutory responsibility for the reform of civil legal aid, it had to establish an integrated policy team capable of developing and implementing a challenging programme of legislative change. From a zero base, the Commission has established a Policy and Service Development team which represents 7.5% of its total running costs.

In addition the Commission had to supplement the capacity it inherited in the corporate services areas to enhance its finance and IT functions. Through the investment in finance staff the Commission has made significant inroads into a range of backlogs, including the production of Annual Accounts and Reports. In addition the Commission has increased its resources deployed in service delivery to deal with the increase in throughput as it has worked to address longstanding backlogs which it inherited.⁷

In relation to the research functions and policy role of the NILSC, the Landscape Review recommended that:

The Commission should retain its research functions and policy role in relation to civil legal services. Responsibility for criminal legal services policy should remain with the sponsor body in the short to medium term and this should be reviewed post implementation of civil legal services.⁸

The NILSC's response to this recommendation, as set out in its relevant action plan, stated that:

Policy and reform of civil and criminal legal aid can only be pursued effectively if linked to the fullest extent possible with the service delivery function. Moreover, there needs to be synergy between policy and reform, (including the setting of fee structures) and financial planning; without complete visibility of policy work, those responsible for budgeting and planning, as well as service delivery, will have at least one hand tied behind their backs. There needs to be absolute clarity about where responsibility for decision-making and the financial consequences lies. These considerations should be reflected in organisational structures and relationships; devolution will provide an opportunity for addressing such matters.⁹

⁷ Legal Aid in Northern Ireland – A Briefing Paper for the Justice Committee (Meeting 23 September 2010) Submitted by the Northern Ireland Legal Services Commission (paras 3.3-3.5)

⁸ Landscape Review of the Northern Ireland Legal Services Commission (para 6.6)
<http://www.nilsc.org.uk/uploads/publications/documents/Landscape%20Review.pdf>

⁹ Northern Ireland Legal Services Commission Landscape Review: Action Plan
<http://www.nilsc.org.uk/uploads/publications/documents/Landscape%20Review%20Action%20Plan.pdf>

As regards a fundamental review of the administration of legal aid, when considering the implications for Northern Ireland of the Magee review of Legal Aid Delivery and Governance in England and Wales, minutes of a meeting of the NILSC record that:

The Chairman introduced his outline note of the key issues emerging from the Magee Review and invited Commissioners [sic] views on the relevance and implications of the review findings on the administration of legal aid in Northern Ireland; particularly whether a similar review of legal aid in Northern Ireland would be appropriate at this time. The NICTS confirmed that the Director of the Courts and Tribunals Service would be raising the possibility of a fundamental review of legal aid at his evidence session with the Justice Committee later in the day.

Following discussion it was agreed that:

- The recommendations of the Magee Review of Legal Aid in England and Wales were not necessarily appropriate to Northern Ireland;
- The Board would be supportive of a fundamental review of the administration of legal aid in Northern Ireland;
- The Terms of Reference and individuals identified to conduct the review would be crucial to the effectiveness of the exercise;
- The reform programme and other ongoing business should continue as planned, and not be delayed or interrupted pending the outcome of a review.¹⁰

On the 13th September 2010, the Minister for Justice announced the establishment of a fundamental review of access to justice. The review is being lead by Mr Jim Daniell, who as a consequence stood down as chairman of the Legal Services Commission.¹¹ The scope of the review will include an examination of the machinery for developing policy on access to justice and administering legal aid.

¹⁰ Minutes of Meeting of the Northern Ireland Legal Services Commission held on Thursday 20 May 2010 at 9.30 am in the Board Room, Waterfront Plaza (42.1 and 42.2)

<http://www.nilsc.org.uk/uploads/publications/documents/LSC%20Board%20Minutes.20may10.FINAL%20SIGNED.doc>

¹¹ Review of Access to Justice - Statement to the Assembly (Official Report 13 September 2010)

<http://www.niassembly.gov.uk/record/reports2010/100913.htm#a7>

(2) THE LEGAL SERVICES COMMISSION IN ENGLAND AND WALES

In March 2010 it was announced¹² that the Legal Services Commission in England and Wales (LSC) would be abolished. The LSC was established as an NDPB through the Access to Justice Act 1999. The sponsor Department was the then Lord Chancellor's Department, but is currently the Ministry of Justice. The announcement of its abolition followed the publication of a report by Sir Ian Magee (Review of Legal Aid Delivery and Governance) who had been tasked with examining the effectiveness of the LSC after concerns it was not delivering value for money. Both the Commons Public Accounts Committee and the National Audit Office had previously released reports criticising the LSC. The Magee Review found that the:

legal aid policy making process and the roles, responsibilities and accountabilities within it (were) not clearly defined...there are two sets of teams involved in legal aid policy making, one in the MoJ and one in the LSC...the inconsistencies in roles and responsibilities for policy formulation and delivery appear to have evolved historically with no clear rationale.¹³

The Magee Review recommended repositioning the LSC as an Executive Agency of the Ministry of Justice to ensure one 'policy voice' and different accountability arrangements. In general terms executive agencies are created to enable executive functions within government to be carried out by a well-defined business unit with a clear focus on delivering specified outputs within a framework of accountability to Ministers. The Review identified the potential benefits and risks of such an approach:

Benefits

- legal services provision would be part of the MoJ family of agencies making it easier to assess the impact of legal aid against demands of the whole system
- economies of scale would see a reduction in policy and other corporate resources
- improved clarity for the market as to who calls the shots over policy
- independence effectively maintained through an independent appeals and adjudication process

Risks

- potential for staff change and unrest
- potential adverse implications associated with perceived reduced independence of case by case funding decisions, although the creation of a new tribunal would deal with this

The Review envisioned that:

¹² Straw announces new vision for legal aid delivery – Ministry of Justice press release 3 March 2010
<http://www.justice.gov.uk/news/newsrelease030310d.htm>

¹³ Review of Legal Aid Delivery and Governance, Sir Ian Magee, 2009

The new executive legal aid agency would simply handle legal aid commissioning and procurement within the Ministry. It would not make policy or give advice on policy – an area of much confusion in recent years with both LSC and MoJ having policy teams. The new body would be akin to Job Centre Plus and the Pensions Agency (which come under Department for Work and Pensions) and the UK Borders Agency (under Home Office).

The Review also recognised that primary legislation would be required to bring about these changes.

The decision to replace the LSC prompted concerns that giving the government control of the legal aid service would violate human rights and jeopardise the independence of legal services. The director of the Legal Action Group said ‘My concern is that this is a complete politicisation of legal aid administration. There is going to be no semblance of independence. An executive agency pretty much does what its ministers say it will. This is not just about justice but also the appearance of justice’.¹⁴

To date, the LSC remains in place although it was on the leaked list of quangos earmarked for abolition - the entry next to the LSC reads ‘Abolish as NDPB – change to Executive Agency (Transparency)’.¹⁵

¹⁴ Legal News ‘Ministers axe Legal Services Commission to wrest back control of legal aid budget’ 4 March 2010

¹⁵ Cabinet Office list dated 26 August 2010 of quangos and other public bodies to be axed or merged, obtained by the BBC’s Politics Show http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/24_09_10_bbcnewsquangos3.pdf retrieved 12 October 2010

(3) LEGAL AID REFORMS IN NORTHERN IRELAND

This section of the paper explores legal aid scheme developments in Northern Ireland that have also been enacted in England and Wales. Reforms in relation to Very High Cost Cases and Means Testing Applicants' Incomes have already occurred in England, however as demonstrated in the previous paper *'Information Briefing on Legal Aid funding'* it has proved difficult to determine the effectiveness of these changes.

Very High Cost Cases

In 2008-09 the LSC let 432 contracts at a cost of £112 million – this amounts to almost 10% of the criminal legal aid budget. LSC is currently considering how to fund VHCCs in future – options under consideration include abandoning contracting arrangements in favour of expanded use of graduated fees.

Very High Costs Cases (VHCCs) are those which last over 25 days and the NILSC may grant a certificate to state that the case will be considered a VHCC this provides access to higher rates of remuneration for preparatory work and higher fees. Last year costs reached £28.4 million with 55 cases being VHCC instead of an estimated five.

Furthermore *'it appeared that claims were being submitted and paid without the supporting records to validate the number of hours claimed for preparatory work and in some cases counsels' claims were based on submission of a brief fee only and the system did not provide a good basis for understanding, forecasting and managing costs'*¹⁶.

Means testing applicants' incomes

Means testing was introduced in England Wales for those applicants earning between £12,475 and £22,325 with those exceeding the upper threshold being exempt unless they can prove hardship. Applicants on prescribed benefits are pass-ported through the tests but still must pass an interest of justice test. In 2008-09, 562,000 people passed the means test and the Interest of Justice test – 93 per cent of those who applied for criminal legal aid. For 2008-09, the Commission calculated that the means test achieved a gross saving of £51.8 million at a cost of £20.3 million; a net saving of £31.5 million.

Currently in Northern Ireland in relation to civil legal aid there is both a financial eligibility and merits of case test. The thresholds relate to disposable income of between £9,937 and £10,900 per annum, if disposable income exceeds the upper threshold then there is absolute refusal of legal aid. If legal aid is refused in relation to the merits of the case test then there is a right of appeal.

¹⁶ See above

The grant of criminal legal aid in Northern Ireland is currently governed by the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. There are two tests to be met to receive legal aid in criminal proceedings:

- the means test; and
- the interests of justice test.

However under the current legislation there are no prescribed financial limits for the means test for criminal legal aid.

It's anticipated that the Justice Bill (NI) 2010 will make provision for an enabling power to means test applicants' incomes. After the completion of a consultation exercise no thresholds have been established although rules will prescribe the financial eligibility limits¹⁷.

Remuneration of defence costs in the Crown Court

The previous paper 'Information Briefing on Legal Aid funding' made reference to the Graduated Fees Scheme in England and Wales, however no similar scheme operates in Northern Ireland rather payments to solicitors and counsel working on legally aided cases in the Crown Court are governed by the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (the 2005 Rules). The 2005 Rules provide for remuneration to be based on a range of Standard Fees with the exception of Very High Cost Cases. As part of the review of Standard Fees the NICTS considered the Graduated Fee Schemes that operate in England and Wales. Graduated Fees Scheme operates by:

- providing solicitors and counsel with a small basic fee (varied to reflect different classes of offence) enhance by additional variable fees reflecting the number of pages of served prosecutorial evidence, the number of prosecution witnesses (counsel only) and, where appropriate, the duration of the trial¹⁸.

Whereas the 2005 Rules provide:

- a significantly higher basic fee (again varied to reflect different classes of offence) with other add on fees¹⁹.

Comparison of the remuneration fees indicated that the Standard Fees under 2005 Rules could be 50% higher than the Graduated Fees Scheme in England and Wales. The NICtS concluded that the Graduated Fees Scheme could operate successfully in Northern Ireland, with a number of modifications, however the Law Society and Bar Council are opposed to

¹⁷ Remuneration of Defence Representation in the Crown Court – Consultation Document (NICTS)
<http://www.courtsni.gov.uk/NR/rdonlyres/D399C077-450F-4230-94E0-60782851C5FA/0/FINALCrownCourtRemunerationConsultationPaper240910.pdf>

¹⁸ See above

¹⁹ See above

their introduction because the differences between the two jurisdictions are such that, even with modifications, the Graduated Fees Scheme would not provide fair remuneration²⁰.

Order to recover costs of legal aid

Although not included in the previous paper regarding the development of legal reforms in England and Wales, an anticipated provision of the Justice Bill (NI) 2010 is an enabling power for an order to recover costs of legal aid. This would enable the courts to make an order to recover the defence costs or proportion of costs of a legally aided defendant where the court considers that the defendant has sufficient means to pay.

²⁰ Remuneration of Defence Representation in the Crown Court – Consultation Document (NICTS) <http://www.courtsni.gov.uk/NR/rdonlyres/D399C077-450F-4230-94E0-60782851C5FA/0/FINALCrownCourtRemunerationConsultationPaper240910.pdf>

(4) COMPARATIVE LEGAL AID COSTS IN THE REPUBLIC OF IRELAND AND NORTHERN IRELAND (BASED 2006 FIGURES)

The table below sets out a range of comparative data relating to spending on legal aid in the Republic of Ireland and Northern Ireland. The table is based upon data from the European Commission for the Efficiency of Justice (CEPEJ). The objectives of the CEPEJ are 'the improvement of the efficiency and functioning of justice in the member States; and the development of the implementation of the instruments adopted by the Council of Europe to this end'. The CEPEJ undertakes regular evaluations of the efficiency and equality of judicial systems amongst the Council of Europe's member states. The latest CEPEJ report, based upon 2006 data from 45 states, was published in October 2008.²¹ It is anticipated that a report, based on figures from 2008 will be published during autumn 2010.

	RoI	NI
Total annual approved public budget allocated to legal aid	€63,000,000	€95,772,010
Annual public budget allocated to legal aid per inhabitant	€15	€55
Annual public budget allocated to legal aid per inhabitant as a % of per capita GDP	0.04%	0.24%
Total number of cases granted with legal aid per 10,000 inhabitants	120	445
Number of criminal cases granted with legal aid per 10,000 inhabitants	92	189
Number of other than criminal cases granted with legal aid per 10,000 inhabitants	22	255
Average amount of legal aid allocated per case	€1,245	€1,237
Average amount of legal aid allocated per criminal case	€1,003	Not included in source
Average amount of legal aid allocated per other than criminal case	€2,305	Not included in source

²¹ European judicial systems Edition 2008 (data 2006): Efficiency and Quality of Justice European Commission for the Efficiency of Justice (CEPEJ)
[https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2008\)Evaluation&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2008)Evaluation&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6)