THE BAR of NORTHERN IRELAND

The Report of Access to Justice 2

Bar Council – Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

2. This paper details the collective response of the Bar to the recommendations included in the final report of the Access to Justice Review 2, incorporating the views from the wider membership and the specialist bar associations including:

    - Criminal Bar Association
    - Family Bar Association
    - Personal Injury Bar Association
    - Young Bar Association

3. The Bar Council welcomes the opportunity to respond to the consultation by the Department of Justice on the Report of the Access to Justice Review Part 2. The Bar responded constructively and proactively to the previous Access to Justice Review and engaged with the Review team across all branches of practice throughout the course of this work. We submitted a detailed response to the 157 recommendations contained within the first Access to Justice Review. In 2012, the Minister announced his response to the Review through a Departmental Action Plan setting out 38 work streams (later 39) to take forward the recommendations of the Review and work in a number of these areas remains ongoing. We acknowledge the need for the DOJ to engage in strategic planning around the delivery of legal services. However, it is regrettable that the Department has conducted a second Access to Justice Review prior to the conclusion of these projects and before the impact of the reforms can be known.

4. The Bar believes that there is significant duplication and overlap between the two Reviews along with additional Departmental consultations which has only served to complicate the present position in respect of legal aid policy. The Bar highlighted in its submission to the Access to Justice 2 agenda document that the Review fails to fulfil the requirement of being an unfettered holistic and strategic analysis of the needs of the system that consolidates and prioritises all of the current and proposed changes. The final report serves only to further highlight that the potential for this Review to be a "*once in a generation*" opportunity has been missed. Throughout the period of the Review and beyond, the Department has continued to propose and implement changes to the scope of civil legal aid, levels

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of representation, money damages, Crown Court, civil remuneration and court house closures. The Review has therefore taken place against a backdrop of a rapidly changing and reducing level of legal aid provision and expenditure. However, the proposals contained in the final report fail to properly bring strategic direction and stability to these various strands.

5. Furthermore, the consultation issued by the Department in November 2015 on an Alternative Method for Funding Money Damages Claims represents yet more unnecessary duplication in this area with the proposals contained in Access to Justice 2 being simply regurgitated in a separate simultaneous consultation. The Bar queries the need for two consultations to be issued in this manner when dealing with the same recommendations calling for the majority of money damages cases to be removed from the scope of legal aid and for this to coincide with the introduction of Conditional Fee Agreements.

6. We are concerned that there is further overlap with other reform initiatives which are currently underway. The Review of Civil and Family Justice led by Lord Justice Gillen was launched in September 2015 with a view to improving access to justice, achieving better outcomes for court users and making better use of available resources. This review is set to report by September 2017 with the likelihood of more recommendations for reform of the administration of civil and family justice being added into an already crowded arena. Once again we question the rationale for different reform processes being undertaken concurrently.

7. The Bar believes that discussions remain necessary in order to provide clarity and further detail on a number of the issues raised within the report from Access to Justice 2. In many areas, it is impossible for the Bar to formulate a full response without further information and details around what is being proposed. The majority of the proposals require additional research and investigation before being subject to further consultation with the profession, stakeholders and service users. The Bar's response to the consultation is structured according to the substantive proposals outlined in each of the chapters contained in the report.

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Chapter 2: The Significance of Legal Aid

The Positive Case for Legal Aid

- I recommend that the Minister prepares a paper for the Executive summarising the positive case for legal aid and the dangers if its withdrawal goes too far. Together with the other recommendations in this report for savings and greater controls within the scheme, this should be used as a baseline for future negotiations over the budget for legal aid;
- I recommend that the Minister issues a statement of priorities both for access to justice and for legal aid. These should be used to build a consensus on the long term scope of the legal aid scheme.

8. The Bar welcomes the commitment shown by the Minister, the Executive and the Department to improving access to justice in Northern Ireland and agrees that it represents an "*indispensable part of our justice system*" which allows many vulnerable clients the only practical means of enforcing basic legal rights. We welcome the recommendation that the Justice Minister should prepare a paper for the Executive summarising the positive case for legal aid and the dangers of extensive reform.

9. However, we fundamentally disagree with the framing of chapter 2 of the report on the significance of legal aid around identifying the legally irreducible minimum required to fulfil statutory obligations. We find this to be an unacceptable premise on which to underpin the administration of justice. Whilst the Bar recognises that chapter 2 goes on to note the need to look beyond this, we would contend that any statement from the Minister around the priorities for both access to justice and legal aid must display a focus on ensuring that legal services are planned based on long term need and quality delivery, not merely budget requirements. Current short term financial pressures should not be allowed to constrain the provision of high quality front line legal aid services. Any statement of priorities must reflect this in order to build a consensus on the long term scope of the legal aid scheme in a practical way that articulates the fundamental importance of protecting the most vulnerable in society.

10. In addition, the Bar is concerned by the repeated references throughout the document to the requirement for cost effective systems, the desire to achieve value for money and the need to stay within budget which seems to demonstrate too great a focus on costs. We feel it is important to emphasise that the Review focuses too greatly on opportunities to cut costs and address budgetary constraints rather than representing a genuine attempt to improve the access and services offered to the public through the legal aid system. We would

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remind the author that this point was also highlighted in our response to the consultation on the first Access to Justice Review.

Chapter 3: Control of Legal Aid Expenditure

Scope

- **I recommend that before any category of case is removed from scope the Department should set out:**
  i) Whether or not the policy intention is for the affected cases to be pursued by some other means; and if so by what means;
  ii) What steps have been taken to make any alternatives to legal aid available;
  iii) What consequences are expected to flow from the scope change, including any potential for increased costs to the justice system or elsewhere;
  iv) What other options have been considered for controlling costs if the cases had remained in scope and why these have not been pursued instead.

11. The Bar of Northern Ireland acknowledges that the overall control of the cost of legal aid is required for budgetary reasons. The Bar Council fundamentally disagrees with the approach taken in conducting the review, namely, to identify the bare minimum service required to fulfil statutory obligations.

12. However, we reiterate our contention that the services must be planned based on need, not budget. As yet, the Department has failed to accurately and appropriately profile and quantify the need for legal services in Northern Ireland. It is therefore impossible to design a service and budget in accordance with need.

13. Whilst we agree that the recommendations should form part of the decision making process in determining whether a category of case should be removed from scope, this is not a replacement for formal statutory consultation and conducting a thorough and appropriate impact assessment. We note the judicial comments and judgement in *The General Council of the Bar of Northern Ireland and the Council of the Law Society of Northern Ireland* [2015] NIQB 99 and the responsibilities upon the Department in this regard.

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Eligibility Limits

- I recommend that the proposals put forward in the 2013 consultation paper to simplify, harmonise and control civil income eligibility limits and impose a gross income cap be implemented. I recommend retaining the £1,000 limit for advice and assistance while imposing a strict £8,000 limit for representation. I also agree that benefit receipt should only be a passport for income, not capital. I recommend that the Department consult upon modest increases in the contributions due under civil legal aid.

14. We agree that steps to simplify the eligibility and means testing for legal aid would be helpful. We would defer to the views expressed by the Law Society on this matter, given their greater involvement in the application process undertaken by clients.

15. Given the length of time from the 2013 consultation, the changing budgetary and policy landscape and the recommendation for increases to contributions, the Department should consider an updated consultation on these issues.

Statutory Charge

- I recommend that:
  - The Legal Services Agency should engage with the Northern Ireland Land Registry to agree secure registration procedures and to identify any legal changes needed to guarantee the long term security and enforceability of the statutory charge;
  - Procedures for registration and enforcement of the charge should be formalised and set out in regulations, along the lines of those applying in England and Wales;
  - Regulations should provide for interest to be charged on all registered charges; the rate of interest should be subject to consultation and need not follow the rate charged in England and Wales.

16. The Bar agrees that steps could be taken to improve the enforceability and formalisation of the statutory change. However, we would be concerned at the suggestion to remove the current exemption provision and the introduction of an interest rate. Should the Department wish to proceed with public consultation, it would be useful for the impact of such changes on current cases to be assessed.

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Legal Aid as a Loan

- I recommend that the Department consult upon introducing a new financial obligation to repay the costs of their case to the fund. This would generally apply only to clients who own or have an interest in their home. It would be enforced exactly like the statutory charge.

17. In the event of such a consultation, the Bar will engage constructively with the Department. However, we would have reservations as to the potential cost versus benefit of such a proposal. Outside of the context of family cases, the number of cases where the legal aid client will own or have an interest in a property may be limited. We would also be concerned that such a measure will act as a deterrent to individuals bringing a case.

Merits Criteria

- I recommend that all funded services are subject to clear and strict merits criteria which target funding towards the highest priority cases. For civil legal services these criteria should follow the underlying policy of the proposed Northern Ireland Funding Code, but in a simplified form, reflecting the revised scope of services covered and the new legislative framework;
- I recommend that, when legislative opportunity allows, the merits provisions in the 2003 Order should be replaced by a general power to set merits criteria in regulations.

18. The Bar agrees that all funded services should be subject to clear merits criteria. It is disappointing that the joint work conducted in developing the Funding Code was not capitalised upon and steps taken to simplify the process.

Control of Supply

- I recommend that the Director of Legal Aid Casework be given a new reserve power in merits regulations to refuse or defer civil legal aid for a non-urgent very high cost case on the grounds that it is not affordable.

19. The Bar would express considerable concern at such a proposal as once again, budget is being prioritised over need. It is perhaps difficult to provide a clear view in the absence of context. It would be helpful to know whether the author or the Department could profile the type of case they consider the power would

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be exercised in and whether there is a current or past example of when they feel this power would have been advantageous.

Administrative Controls

- I recommend that the Legal Services Agency introduce as a matter of urgency a system of cost limitations on all new civil legal aid certificates;
- I recommend that, over time, the Legal Aid Agency introduce a comprehensive system of scope limitations on all new civil legal aid certificates.

20. The Bar does not agree with the proposals regarding limitations on costs as we believe this will significantly add to the administration of the Legal Services Agency. Limitations on scope are used at present and may be beneficial as part of a staged approach to potential long running, complex or high cost cases.

- I recommend that:
  - The separate procedural rules governing representation in the "lower courts" should be abolished so that there is a single procedural regime;
  - A client should never have more than one certificate during a single set of proceedings;
  - Similarly, no client should have more than one certificate relating to private law family proceedings;
  - One application form should be sufficient to apply for legal aid for multiple clients in a single set of proceedings.

21. The Bar welcomes changes in procedure which will reduce the administration and streamline the process under which certificates operate. For practitioners, this will prove beneficial in their practice management and in their engagement with the Agency on specific cases.

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Chapter 4: Remuneration Strategy

The Statutory Criteria

- **I recommend that, when legislative opportunity allows, the statutory factors governing remuneration in Northern Ireland are abolished.**

22. The Bar Council disagrees entirely with the proposal to abolish the statutory factors governing remuneration. The provisions contained in Article 47 of the Access to Justice (Northern Ireland) Order 2003 provide the framework under which the Minister can make remuneration orders. Meanwhile Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 makes similar provision in relation to criminal cases. When making such an order the Minister must have regard to:

47(1)(a) the time and skill which the provision of services of the description to which the order relates requires;
(b) the number and general level of competence of persons providing those services;
(c) the cost to public funds of any provision made by the regulations; and
(d) the need to secure value for money.

23. The Bar believes that the level of remuneration should always reflect all of the circumstances of a case, particularly if it involves very complex and time consuming preparatory work. It is vital that legal representatives are properly remunerated for the time and skill which they dedicate to their cases. We disagree with the review's conclusion that clauses (c) and (d) should always outweigh (a) and (b) as the time, skill and competence of legal professionals must be properly and fairly remunerated in all cases; the cost to public funds should not be used to undermine the foundation stones for fair payment to the profession. Time, skill and competence are well established markers of value for money across the profession and are essential for assessing the quality of work. Furthermore, the proper application of the statutory factors ultimately saves the public purse money as providing adequate representation to clients in the first instance reduces the likelihood of unnecessary appeals.

24. In addition, a number of recent judicial review cases demonstrate the importance that the courts place on the statutory factors governing remuneration. The High Court judgement from March 2015 by The Honourable Mr Justice Treacy in *Michael Burns* [2015] NIQB 24 found that the Minister's

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remuneration order, namely the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 as amended by the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011, did *"not have proper regard to the time and skill required to do the work involved in the Applicant's case"*.[1] Furthermore, this *"runs the risk that the legal teams involved could be grossly underpaid for the work they are required to do in their client's interests"*.[2] Meanwhile the UK Supreme Court stated in the case of *Raymond Brownlee* [2014] UKSC 4 that other statutory factors, such as the need to secure value for money, *"complement the obligation to have regard to the time and skill required to undertake particular forms of work; they do not extinguish it"*.[3]

25. Consequently, the Bar Council takes the view that it is essential that the statutory factors for remuneration remain enshrined in legislation. We believe this position is supported by the aforementioned recent judicial reviews which have highlighted the importance that the judiciary attaches to these factors.

26. We disagree with the suggestion in the review at paragraph 4.5 that they could be replaced with more general factors such as those contained in the Access to Justice Act 1999 in England and Wales which places a greater emphasis on the Lord Chancellor's regard for the cost to public funds and value for money when making remuneration orders with no reference to the time or skill dedicated by a legal representative to a case. There is only mention of *"the need to secure the provision of services of the description to which the order relates by a sufficient number of competent persons and bodies"*. We believe any move towards abolishing the current statutory factors for NI and replacing them with more general factors would devalue the work of legal professionals and ultimately harm the quality and accessibility of services for clients.

General Principles

- **I recommend that the Minister should adopt the following principles in future reforms of legal aid remuneration:**
  - **Fee levels should be set with the objective (subject to the relevant statutory framework) of paying the lowest rates possible consistent with securing access to good quality legal services from well run and efficiently structured providers;**
  - **Fees should, so far as possible, not exceed those paid in other comparable jurisdictions for comparable work;**

[1] *Michael Burns [2015]* NIQB 24 at para 38
[2] Ibid at para 31
[3] *Raymond Brownlee* [2014] UKSC 4 at para 33

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- **Lawyers working full time on legal aid should earn fees which are broadly justifiable in comparison with other public sector professionals such as nurses, doctors and teachers;**
- **When considering fee reductions, the categories of work undertaken by the highest legal aid earners should be targeted for the largest reductions so that overall earnings from public funds are restricted to defensible levels.**

27. The Bar Council disagrees that fee levels should be set with the objective of paying the lowest rates possible as we do not believe that this will necessarily be consistent with securing access to good quality legal services from appropriate providers. We would require more detail on how the Minister might seek to action such a principle if it were to be adopted.

28. The Bar is concerned with the level of comparisons made with other jurisdictions throughout the report, especially England and Wales. Such comparisons, in terms of statistics, legislation and practice, fail to acknowledge the significant differences in the operation of our legal system. Paragraph 4.9 notes that "*there is no obvious reason why a legal aid lawyer in Belfast should be paid more than a legal aid lawyer in London undertaking genuinely comparable work*". However, we do not believe that such an assessment ensures that due regard is given to the wide variation in work across the regions within a jurisdiction as large as England and Wales. It may be more useful to relate work undertaken in Belfast to a city in England which has a more comparable social and economic profile than London.

29. The Bar takes the view that the comparisons made at paragraph 4.11 of the report between the earning levels of barristers and other public sector professionals are entirely misguided and unhelpful. We do not believe that it is possible to make direct comparisons between the working practices, conditions, workloads and costs of barristers, nurses, doctors and teachers. Unlike the public sector professionals mentioned in the report, members of the Bar Library are self-employed and bear sole responsibility for their own tax, national insurance, pension contributions and professional membership fees. They do not enjoy paid annual leave or entitlement to sick pay. This stands in stark contrast to the greater security and employment benefits often offered by the other public sector professions referenced in the report.

30. We also note that the report author qualified and practiced as both a barrister and a secondary school maths teacher and comments that *"for what it is worth my experience was that teaching was an even more demanding job, but with*

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lower pay". We believe that this is unhelpful and only serves to demean the demanding and vital work of the legal professionals tasked with representing exceptionally vulnerable clients, for example in the family courts, many of whom suffer from mental health difficulties, addiction and histories of physical and sexual abuse. These highly charged and pressurised cases often involve discussions around contact with young children, those who will no doubt end up as students in a secondary school maths class one day, and they deserve a justice system which ensures the best possible outcomes for a stable and secure home environment.

31. Furthermore, the report asks "is *maintaining the remuneration or indeed lifestyle of legal aid lawyers a consideration?"* at paragraph 4.9 and we believe that framing this section in such a way implies that professionals are exploiting the legal aid fund with the sole objective of funding their own lifestyles. Despite this perception alluded to in the report, barristers are engaged in valuable work which makes a difference in ensuring access to justice for many vulnerable clients. Indeed it is often members of the Young Bar who are engaged in representing these clients in legally aided cases. Many young barristers who are just starting out in their careers are struggling to find regular work and earning very low wages.

32. A recently commissioned Young Bar Association survey demonstrated that the average taxable income for a barrister in their first five years at the Bar was £9,950. Furthermore, the Minister's threat of a proposed levy in the form of a 15% temporary reduction from all legal aid payments in early 2015 only served to display a lack of awareness of the practical reality and daily outworking of the Department's policies.

33. The Bar Council notes that paragraph 4.12 of the report lists figures disclosed by the Legal Services Commission (now the Legal Services Agency within DOJ) relating to payments to counsel for 2013-14. However, we would caution that these figures must be interpreted carefully and do not represent the personal earnings of the individuals listed in any one year. There are a number of reasons for this: firstly, the amount paid to each barrister listed in any one year may represent payments for work covering many years and for a variety of cases. Secondly, payments to barristers made by the Agency through a solicitor in any financial year may not necessarily be received by the barrister in the same financial year. Thirdly, the amount an individual receives in one year can fluctuate widely. Fourthly, barristers pay a percentage of their fees towards professional overheads and also face the same expenses as any other self-employed person, including Income Tax and National Insurance contributions.

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- I recommend that the Department enter discussions with the Law Society and other stakeholders, with a view to commissioning an objective study into the case profile of certain types of legal aid work and their cost basis, to identify the potential for improved business efficiencies and to inform future legal aid remuneration policy.

34. The Bar welcomes the proposal to commission an objective study into the case profile of certain types of legal aid work in order to inform future legal aid remuneration policy. We have repeatedly stressed the importance of evidence based reform with the need for any study to consider the work required to undertake a legal aid case and the viability of fees paid. Furthermore, if any such study is to be undertaken then we believe that there should be no further fee changes until the outcome is known.

A Comprehensive Fee Regime

- I recommend that the Department consult upon setting maximum prescribed hourly rates for all legal aid work not covered by existing remuneration regulations. The prescribed hourly rate should also operate as a binding ceiling on any non-prescribed fees payable on a brief fee or refresher basis. No exceptions or uplifts to the maximum rates should be permitted.

35. It is unclear as to nature and volume of cases that it is envisaged this maximum prescribed hourly rate would apply to. We would require more information to be able to comment on this proposal more fully. However, any change of this nature would need to be subject to a full public consultation.

Standard Fees

- I recommend that when developing new or existing standard fee schemes, the Department should aim to:
  - Achieve savings predominantly in the higher courts, narrowing the disparity which still exists between different court levels;
  - Impose tighter controls on cases at the top end of the complexity spectrum, aiming to avoid structures which generate exponentially high total fees;
  - Ensure that standard fees incentivise desirable behaviour, rather than simply rewarding legal activity;

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- Anticipate unusual cases and cater for them either through flexibility within a graduated fee approach, court powers to transfer cases to a new regime or by some form of exceptionality provision;

- **I recommend that the Department, in close consultation with stakeholders, undertake a review of all remaining legal aid fees and rates with the aim of simplifying and rationalising the payment regime;**
- **It should always be open to any solicitor in any legal aid case to instruct any number of barristers on payment terms agreed between them, on the basis that the solicitor will be responsible for payment and the instruction will have no impact on the amount the solicitor claims from the legal aid fund. I recommend that this principle should be more clearly set out in the legal aid regulations.**

36. The Bar Council believes that it is worthwhile to consider the recent history in relation to the development of standard fee schemes across the different court levels, particularly given the report recommendations outlined above to achieve savings predominantly in the higher courts, impose tighter controls on cases at the top end of the complexity spectrum and ensure that standard fees incentivise desirable behaviour. Looking to criminal legal aid, The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 were introduced to standardise fees and to simplify the administration of payments. At that time the proposals were advocated on the following basis:

    1. Whilst the standard "Brief" fees were less than those then being set by the "appropriate authority", payment would be guaranteed within 6 weeks;
    2. There was a rule, which allowed for some percentage uplift for exceptionality;
    3. There was a further mechanism, which would allow for greater remuneration in Very High Cost (VHCC) cases; and
    4. The rules would be the subject of a review in 2 years so as to address any inequities.

37. A significant number of inequities in the rules became obvious over the course of the next few years but no review took place in 2007 and these were never addressed. By 2011, concerns were properly being expressed as to the administration of the VHCC system. This aspect of the rules and the unrestrained manner of their operation caused a significant increase in expenditure. Understandably steps were then taken to address the levels of expenditure within the budget for Criminal Legal aid but the response at that time did not simply address the excess of the VHCC system with standard fees also being significantly reduced, the removal of provision for exceptionality and changes were also introduced to radically reduce the number of certificates for two counsel cases.

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38. None of the other inequitable parts of the original 2005 rules were addressed. These included stringent restrictions on when a "trial" was said to have commenced, when a full day refresher could be claimed, how the length of a trial was to be determined, when standby fees could be claimed and what fees could be claimed following dismissal from a case. Many of these restrictive rules do not apply in England and Wales and it should be noted that this jurisdiction has retained a mechanism for Very High Cost Cases. In addition, the Department has implemented subsequent changes to legal aid under the 2013 and 2015 Amendment Rules which have introduced further remuneration restrictions without allowing time for the 2011 changes to be fully felt.

39. Consequently, it is clear that over the course of the last decade significant savings have already been achieved in the higher courts through the development of standard fee schemes and tighter controls have been imposed on complex criminal cases with the abolition of any provision for VHCCs. However, attempts by the Department to impose yet more cost saving measures in 2013 and 2015 have only served to further threaten access to justice and the provision of legal aid as an important social welfare safeguard for the most vulnerable.

40. The Bar Council takes the view that the Department must ensure that flexibility is built into any new or existing standard fee scheme in order to cater for the particular circumstances of individual cases. We would also point to the recent judicial reviews of *Raymond Brownlee* [2014] UKSC 4, *Stephen Watters* [Unreported, declaration dated 5 February 2015] and *Michael Burns* [2015] NIQB 24 in which the judiciary has consistently highlighted the need for standard fee regimes to have proper regard for the time and skill required by counsel to conduct the work involved in any case.

41. The Department issued the results of its consultation on remunerating exceptional circumstances in the Crown Court in December 2015 which recognises the need to cater for these cases. However, we are concerned that the test for exceptionality set out in the consultation sets the bar too high and as a result it will be difficult for many cases to meet the required conditions. It will be very difficult for counsel to demonstrate that a case involves an unusual or novel point of law or factual issue and for that reason requires an additional amount of substantial preparation work which should qualify for additional payment. The Department must provide a clear definition by way of guidance to the legal profession on what "exceptional" looks like under the provisions of the

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current standard fee regime. However, ministerial guidance to be issued to the Legal Services Agency on exceptionality states that:

> 12. *It is not possible to precisely define, in advance, the types of circumstances which could come together to mean that a case may come within the Exceptional Preparation arrangements. It will be for the applicant to make out their entitlement to enhanced remuneration and to explain why the circumstances in the specific case cannot be appropriately remunerated within the standard fee matrix.*

42. Some example cases are listed in the guidance as warranting consideration by the Agency, including complex terrorist cases, cases involving an 'assisting offender' under Part 2 of the Serious Organised Crime and Police Act 2005, case involving a large number of defendants with (potentially) conflicting defence evidence, cases where there is a very high volume of disclosure and cases where an unusual number of expert witnesses are required. However, this does not appear to be an exhaustive list with the potential for certain circumstances to fall outside the remit of the scheme and for counsel to be left unclear as to whether work undertaken on a particular case will be adequately remunerated. Further guidance to the legal profession is required.

43. However, our fundamental position remains that provision for exceptional cases can only be fair remuneration if the fees for standard cases constitute fair remuneration. This issue is currently disputed with the Bar Council appealing the recent judgement in the Judicial Review decision of *The General Council of the Bar of Northern Ireland and the Council of the Law Society of Northern Ireland* [2015] NIQB 99 handed down by Maguire J in November 2015 on The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015.

44. Turning to civil legal aid, the Bar Council has been engaging with the Department since 2013 on the development of a standard fee scheme for all aspects of civil legal aid including children and family representation. However, a number of issues have already arisen in relation to this with the Department's most recent proposals highlighting that standard fees in the Family Proceedings Court will be deferred until "a suitable number of payments have been made to counsel post the changes in levels of representation" following the introduction of guidance by the Legal Services Agency in 2014. There is no further detail around how long the Department anticipates that a standard fee structure has been deferred at this court tier.

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45. In addition, we are conscious that a standard fee structure will not be able to cater for particular types of cases including cases in the High Court, some matrimonial cases and cases of an exceptional nature. The Department must recognise that there is a clear need to address the issues from developing a standard scheme in criminal cases which failed to make provision for exceptionality. The Department indicated that it intended to consider the responses to the recent consultation on remunerating exceptional circumstances in the Crown Court before finalising the approach for civil cases at each court tier and for children and family proceedings. However, we are concerned that the exceptionality proposals issued in January 2016 do not adequately reflect the very different nature of a civil case to that of a criminal case. Consequently, the standard fee scheme in this area cannot be finalised until the shape, nature and detail of exceptional circumstances is further clarified by the Department.

46. In summary, it is clear that there are a number of strands of work ongoing in relation to standard fee schemes and the Bar is disappointed at the disjointed nature of these. In addition, we believe that the policy proposals contained within this section of the report focus primarily on the financial implications of standard fee schemes, without seeking to determine any potential impact from the changes on the administration of justice, the operation of the courts, due process or the rights of vulnerable individuals. We appreciate the current economic climate and the associated difficulties in delivering a demand led service. Furthermore, we recognise that the importance and value of legal aid in providing appropriate legal representation to the public is not easily understood and is often criticised or sacrificed to the benefit of other equally important public services. The public has the right to seek effective legal redress but that is not necessarily achieved by adopting the cheapest method available across the different court levels.

Counsel in the Magistrates' Court

- **I recommend that the Department consult upon reform to the test for certification for counsel, including the three options listed below:**
  - **Restrict certification to those cases where the defendant requires representation by counsel in order to guarantee an article 6 compliant fair hearing;**
  - **Recast the test to require something like: "Exceptional gravity or complexity compared to the generality of indictable cases before the magistrates' court";**

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- Identify specific combinations of offence category or procedural situations (such as contested trials) which more routinely justify certification. Consultation with the young Bar might be particularly productive in defining such criteria;

- I recommend that the court be under a duty to record specific reasons for decision to certify, which could be periodically reviewed on audit;
- I recommend that the Agency develop proposals and a business case for a reliable and cost effective online system for criminal legal aid decision making. Until any such alternative becomes available, I recommend that decisions on certification for counsel in the magistrates' court should remain with the court.

47. The Bar Council welcomes the Review's recommendation that certification for counsel in the Magistrates' Court should remain with the court at present. We also welcome the recognition at paragraph 4.44 of the report that a move to abolish the system of certification with one case per fee payable to the solicitor would risk *"transferring spend from barristers to solicitors with limited net savings and a loss in the quality of advocacy services for the most serious cases at this court level"*.

48. In our response to the Access to Justice 2 agenda document we noted the important work of local Magistrates who have the power to grant legal aid when and where it is in the interests of justice, applying the Widgery criteria. We are concerned at the suggested approaches to be explored in further consultation on making the test for certification more restrictive as they could limit access to justice for vulnerable individuals, most notably in the example at paragraph 4.45 for certification to be limited to ensuring an article 6 compliant fair hearing.

49. In addition, there is also mention of identifying specific combinations of offence category which more routinely justify certification in a further consultation. We would request additional information on this suggestion before being able to respond in full. However, we would stress that the existing test for certification for counsel operates in the public interest and has been consistent with providing legal representation in the interests of justice for many years.

50. We note that the nature of a criminal case is unpredictable and the complexity of a particular case is not amenable to objective categorisation prior to appearance – the test of seriousness and complexity is, necessarily, a subjective test dependent upon the facts of the case, the legal issues arising in the particular case and the characteristics of the accused person. Therefore it would

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be difficult to try and identify specific categories of offence which more routinely justify certification given that the granting of legal aid in each case must be dependent on its own facts.

51. The Bar believes that the Judiciary is best placed to determine the merits test in criminal legal aid applications. The fundamental principle of the justice system in this jurisdiction is the independence of the judiciary. The responsibility for making such determinations must remain with the judges so as to prevent any allegation of undue influence from government and statutory bodies, to ensure that decisions on the merits remain the responsible of legally trained representatives and to preserve public confidence in the system.

52. The present system where the district judge makes the decision on legal aid and certification operates efficiently, without excessive administrative expense or delay. It ensures that the means and the circumstances of an accused case are assessed by an experienced judge before legal aid and certification for counsel is permitted. The seriousness, complexity and conduct of a case are best assessed by a district judge who has experience, first-hand knowledge and judicial skill. Consequently, the decision as to whether counsel is certified for a case in the Magistrates' Court should remain with the district judge.

53. The Bar disagrees with the suggestion that the Legal Services Agency should develop proposals and a business case for an online system for criminal legal aid decision making. There is a serious concern that any removal from the Magistrate to grant legal aid or certify for counsel will lead to practical difficulties with increased delays and costs for the Court Service. As we previously outlined in our response to the agenda document, for example, if a solicitor attends a first appearance charge sheet case after his client has been arrested for disorderly behaviour and assault on police the night before. He wishes to enter a plea of guilty and the Magistrate is prepared to accept the plea and sentence immediately. The use of district judges in the assessment of the grant of legal aid is precisely the type of provision, which saves on both administration and delay. Otherwise, the solicitor would be obstructed from doing so as he would have to apply to the Legal Services Agency for legal aid.

54. By way of further example, if a solicitor attends a review and legal aid has not yet been granted he would have to seek an adjournment in order to obtain legal aid. If legal aid is refused he may seek a review/appeal of that decision. In the intervening period he may have had to seek a further adjournment. If legal aid is subsequently granted and the case is a serious one then counsel will be instructed. Is it then the case that counsel will have to provide an opinion to the

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Legal Services Agency? If counsel is refused certification, then a review/appeal is lodged. This will add to further delay in having the case dealt with. Refusals by the Legal Services Agency may be more prone to judicial review challenges than a refusal by the local Magistrate. This will lead to satellite litigation and will again cause additional cost and delay.

55. The Criminal Bar Association is unaware of any challenge by counsel by way of judicial review of a Magistrate's decision to refuse certification for counsel. This is not because such refusals are always justified. Often the most deserving of cases, such as robbery or serious or sexual assaults are refused counsel. The reluctance towards a judicial review of such decisions is often down to the nature of the professional relationship with the judges. Such reluctance would not apply to the taking of judicial review proceedings if such decisions were being made by a body or agency.

56. There would be a myriad of issues to resolve if the decision making process was altered. What is the process that the grant of legal aid or certification is to take? Does it require an opinion from the legal representatives? Will it require the LSA to consider all case papers? What of cases in the Magistrates' Court where papers are not ready for a significant period of time – does the solicitor have to wait until the Public Prosecution Service has put the entirety of the file together before knowing whether legal aid will be granted?

57. In addition, the Bar would request further information as to the basis of having the judge justify in writing the reasons for granting legal aid under the suggestion at paragraph 4.46 to record specific reasons for decision to certify. We would query what level of delay is expected in the courts if the judge has to undergo a paper exercise of form filling for every legal aid application. Many Magistrates' Courts already operate a system where reasons have to be given on a pro forma when certification is sought.

Counsel in the County Court

- **I recommend that the current scale fees for counsel are retained but the Department consult upon a change to the system so that scale fees operate as a ceiling not as an entitlement.**

58. The present system in the County Court provides a forum in which the costs of proceedings and fees are both moderate and ascertainable to the parties involved. The principle of '*swings and roundabouts'* as an exercise of balancing out the costs over a number of cases has proved to be efficient and effective

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over the course of the last number of years. The Bar welcomes the recognition that the current scale fees for counsel should be retained and we do not believe that it is necessary at this time for the Department to consult on any further changes to the system. We would also caution against the suggestion of the introduction of a requirement for a certificate for counsel in all County Court work at paragraph 4.50 as this would represent an unnecessary administrative burden given that scale costs for counsel are not generally excessive and are on a sliding scale depending on the size of the claim from £180 up to £1,060 for claims of up to £30,000 under The County Court (Amendment) Rules (Northern Ireland) 2013.

- **I recommend that, as part of developing the new family fee schemes, the Department consult on options for the authorisation of counsel in family proceedings before the Family Care Centre or county court.**

59. Guidance on the reform of legal representation in the Family Court was introduced by the Legal Services Agency in 2014. Despite assurances from the Department at the time of consultation that counsel would be certified in serious and complex cases in the Family Proceedings Court, the reality of the reforms has been the almost complete removal of counsel. This has already impacted on families in the Family Proceedings Court failing to secure representation in the most serious of cases, including domestic violence, non-accidental injury to children and sexual abuse. The latest information from the Legal Services Agency indicates that certification in the Family Proceedings Court is 0.3% against a projected rate of 10%. We are also concerned that cases are being referred upwards to the Family Care Centre as a result in order to secure the certification of Counsel, or that cases inappropriately dealt with will be appealed to the Family Care Centre which only defeats the purpose of the cost savings.

60. Consequently, given the difficulties in the Family Proceedings Court at present around the certification of counsel we would have serious concerns around any move by the Department to further restrict the authorisation of counsel in the Family Care Centre. This will only further impact on vulnerable individuals with families failing to secure the requisite representation and expertise in a range of serious cases.

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Leading Counsel

- I recommend a radical reform of the rules concerning funding two counsel under the legal aid scheme. I propose consultation on the following approach:
  - It is essential that all decisions to authorise two counsel should be taken by the Legal Services Agency, who are of course accountable for the budget, not by the court; I do not think it is realistic to expect the court to exercise this discretion in a way which ensures consistency and budgetary control;
  - The test must be redrawn to make authorisation far more exceptional; in criminal cases it could remain routine for murder trials and consultation might identify other very serious Class A or D offences where two counsel might be expected;
  - The remaining discretion on the part of the Agency, which should be the same for civil and criminal cases, should be along the lines of whether two counsel are necessary to ensure a fair hearing, but in practice authorisations should normally be considered only when the other side / prosecution have a similar level of representation and the additional costs are reasonable and proportionate to the case;
  - There should be no right of appeal against a refusal of an authorisation of two counsel; this reflects what should in future be seen as a discretionary rather than entitlement system;
  - There should also be wider powers to authorise the funding of a QC without a junior;
  - Although it is a professional conduct matter for the Bar Council, nothing should prevent QCs being able to compete for and accept briefs as sole counsel at sole junior rates.

- In any consultation, other alternative approaches could be put forward, which could include:
  - Removing separate payment bands for QCs and applying the rates for leading junior counsel;
  - Abolishing separate payments for led junior counsel, requiring junior counsel to be paid by agreement out of the fees payable to leading counsel; this would no doubt greatly reduce payments for being led but would encourage seniors to manage their work efficiently and might increase the opportunities for the young Bar to participate in these grave and complex cases.

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61. The Bar Council disagrees with the comments at paragraph 4.56 of the report that senior counsel is authorised too often in legal aid cases with a recommendation for a radical reform of the rules concerning funding for two counsel. We consider that the proper approach to the engagement of senior counsel is to ask whether the interests of justice and the right to a fair trial require more than one counsel. In the arena of criminal law, this principle has rightly been accepted by the Northern Ireland Courts and Tribunals Service and it has been endorsed by countless pronouncements from the Judiciary. The suggestion at paragraph 4.58 to make authorisation for two counsel far more exceptional with it only remaining routine for murder trials and potentially other unnamed "very serious Class A or D offences" fails to recognise the effective distribution of labour between junior and senior counsel across a wide range of serious cases. In addition, the suggestion that the LSA should be responsible for authorising all decisions on two counsel rather than the court purely on the basis that they are "accountable for the budget" is entirely misguided and only seeks to undermine the rule of law and the proper administration of justice. The Bar is deeply concerned that this would allow funding constraints to take precedence over the fair trial rights of a publicly funded client. We believe that the court is the proper independent arbiter of the extent of representation required.

62. Furthermore, the report suggests that the LSA should also use its discretion in both criminal and civil cases to consider whether two counsel are necessary only in order to ensure a fair hearing. However, in practice this means that authorisations should normally only be considered when the other side/prosecution has a similar level of representation and the additional costs are reasonable and proportionate to the case. We would reiterate that this once again neglects to consider the facts of a particular case with a focus on cost cutting rather than access to justice.

63. The Bar believes that scope to allow for the provision of two counsel in both complex criminal and civil cases must be retained. There are a number of reasons for this with senior counsel able to bring their specialism to a particular case, ensuring expertise in relation to narrowing down further issues in dispute and the cross examination of witnesses. In addition, the distribution of labour between junior counsel and senior counsel is well defined given the serious nature of the cases when senior counsel is instructed. Senior and junior counsel work together in these cases but both have separate and necessary roles. For example, senior counsel and junior counsel perform different yet complementary roles which are both essential to the proper administration of serious children's cases in the High Court in relation to The Children (Northern Ireland) Order 1995, which can involve the removal of a child from a parent's care. These serious, complex and time consuming cases require the joint expertise, experience, time and effort of both counsel.

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64. The Bar is also opposed to the proposal that there should be no right of appeal against a refusal of an authorisation of two counsel by the LSA. We believe that this would be completely untenable in practice as it could result in judicial reviews being taken against decisions by the LSA which would ultimately be costlier than any savings generated by the removal of an appeal system.

65. The report also goes on to propose that there should be wider powers to authorise the funding of a QC without a junior. It also states that QCs should be allowed to compete with juniors for work which would put younger barristers at a disadvantage and is completely contrary to the Bar Council's own Professional Code of Conduct. These proposals would have an extremely detrimental impact on the Young Bar and barristers in the first five years of practice. We would highlight that barristers learn about skills and good judgement from sitting as a junior behind a senior counsel, in a similar fashion to the way in which junior doctors benefit from the guidance of consultants. Any move to authorise funding for a QC without a junior or allowing QCs to compete with juniors would seriously undermine the opportunities that will be available for barristers to gain valuable learning experience. Such an approach would damage the ability of new junior counsel to gain experience in the higher courts and create a gap in experience once the current more senior juniors and senior counsel eventually leave the Bar. This will ultimately impact on the quality of representation and access to justice in the future.

66. The additional proposal that separate payment bands for QCs should be removed with the rates for leading juniors applied represents a clear manifestation of the undervaluing of the input by a QC into a case in terms of skill and experience. This recommendation would mean that no distinction will be made in terms of the fees or cases in which senior and junior counsel appear on their own and will indirectly dispense with the need for having the separate rank of senior counsel. Consequently, we would question how the experience of counsel could be recognised under such a system. Will a simple banding system which arbitrarily lumps barristers together according to their year of call to the Bar be imposed, regardless of their ability, experience or the importance of a case?

67. The DOJ will be aware that the rank of a QC is attained by only the most outstanding within the profession. An applicant for silk must show intellectual excellence, an ability to work in a team, fairness and high quality advocacy amongst other qualities before appointment can be considered. It is only granted after soundings within the profession and those from outside and after rigorous interview. It is not granted automatically after many years' service to

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the profession. It is a rank recognised in all areas of law and is a quality mark respected worldwide. It is no less valid in the sphere of criminal advocacy than it is, for example, in the fields of commercial law or administrative law. To ensure that standards of advocacy are maintained and improved it is necessary to recognise this body of experience and ensure that all cases which merit senior counsel get such representation. The proposal for the abolition of separate pay bands for senior counsel undermines the rank of QC and fails to recognise the experience and confidence that these exceptional practitioners bring to the development of focused legal arguments in serious cases. They ultimately save the legal aid fund money by concentrating only on the good points in serious cases and not wasting the courts' time with spurious legal arguments.

68. Furthermore, we are entirely opposed to the suggestion of abolishing separate payments for led junior counsel with junior counsel to be paid by agreement out of the fees to leading counsel. This would only endanger relations between seniors and juniors working together as both would be put in a difficult position to agree how their 'one' fee should be split with the potential for conflict to be created. Junior counsel should be in a position of certainty regarding how much they will paid and to devise a system like this only creates the prospect of junior counsel not being paid or being paid different rates for work done on a case. It could also drive talented young barristers away from publicly funded work with senior counsel able to operate a bidding market for juniors who will do the work for the lowest rate. This will again only lead to a drop in the quality of representation for clients.

69. The proposals in this section of the report are confusing and misguided in their entirety. On the one hand they appear to undermine the role of senior counsel with the suggestion of the removal of payment bands for QCs and allowing QCs to compete for and accept briefs as sole counsel at sole junior rates. However, in parts they also shift the balance of power to senior counsel with the recommendation that junior counsel should be paid by agreement out of the fees payable to senior counsel. We would strongly advise the Department against implementing any of these recommendations.

Expert Fees

- **I recommend that in assessing expert fees, the Legal Services Agency take into account the prescribed rates for non London experts.**

70. The Bar considers that it would be legitimate and a source of significant cost savings to undertake measures to reduce the fees paid to experts. Whilst noting that experts play a vital role within the conduct of a case and that they add

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significant value, we believe that it is directly contrary to the ambition of creating access to justice to reduce the ability of citizens to gain adequate publicly funded legal representation under the review without first challenging the fees paid to experts involved in these cases.

71. The Bar notes that no reform has been made in this area despite a consultation carried out by the DOJ in 2015 on the use of expert witnesses in courts. In England and Wales, we note that specified fees for experts in legal aid cases are set out in the Civil Legal Aid (Remuneration) (Amendment) Regulations 2013 and the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013. These rates apply to any cases funded through the civil, family and criminal legal aid schemes and consist of a number of fixed fees and hourly rate fees that apply to different types of services. We agree with the suggestions made in the review at paragraph 4.60 that a framework of fixed fees to be paid for experts in publicly funded cases, taking account of market conditions and fee levels set in England and Wales, should be given consideration. However, further comprehensive data collection on the expert types used in the courts and the range in the total fees claimed by expert type is also necessary in order to ensure that any rates are developed appropriately.

Chapter 5: Delivery Models

Legal Aid Contracting

- **I recommend that no steps be taken for the time being to introduce contracting or tendering for the general provision of legal aid services in Northern Ireland.**

72. The Bar Council welcomes the Review's endorsement of the current model of delivery for the provision of legal services in Northern Ireland. As we highlighted in the agenda document, we believe that the use of private legal professionals offers many advantages to Government in terms of cost, coverage, quality of service, independence, choice and regulation. We welcome the recognition in the review that the introduction of contracting as the dominant means for the delivery of legal aid would not be appropriate in a jurisdiction the size of Northern Ireland where it would likely reduce the number of suppliers and be unable to provide adequate geographical coverage across the wide spread of rural areas.

73. The current competitive system promoted by the Bar Library ensures that there is a supply of quality representation with barristers in independent practice

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relying upon repeat instruction from a variety of firms of solicitors. The quality of representation provided by members of the profession in this way is of a very high standard. Members who fail to provide representation or advocacy to the highest standard do not receive repeat instructions and are effectively excluded from certain areas of work as a consequence of the normal market forces which the Bar Library encourages. Furthermore, the experience in England and Wales referenced at paragraph 5.7 of the review seems to suggest that the costs of a system of tenders and contracts are considerable and that it cannot deliver the range of internal competition and quality provided by the independent referral Bar.

74. Furthermore, the Justice Secretary Michael Gove MP announced in late January 2016 that he would not be going ahead with a proposed dual contracting system for the provision of criminal legal aid put forward by the previous Government given the significant concerns expressed by the legal professions. A judicial review, sought by the Fair Crime Contracts Alliance, of the Government's procurement process had been due to open in April 2016. The reversal of this decision clearly demonstrates that a competitive tendering approach to the provision of criminal legal aid services is not appropriate.

75. The Justice Secretary also highlighted that a fee cut of 8.75% which was introduced in July last year will also be suspended from 01 April for 12 months with fees returning to pre-July 2015 levels. Mr. Gove highlighted the positive impact of these changes, stating that it will be *"easier in all circumstances for litigators to instruct the best advocates, enhancing the quality of representation in our courts".*[4]

76. We note that the Access to Justice 2 Review also goes on to caution at paragraph 5.8 that "so long as a good range of legal services remain available in this jurisdiction I cannot foresee circumstances where the balance would tip in favour of a comprehensive contracting regime, but one should never say never. A major withdrawal or collapse in supply might cause this debate to be reopened".

77. However, we would oppose any attempt to reopen this issue. The current model for the delivery of legal services, whereby members of the public have direct and unrestricted access to a wide network of local solicitors who in turn have access to the independent referral Bar for advocacy or specialist advice, has

[4] Secretary of State for Justice, *Written Statement to Parliament: Changes to criminal legal aid contracting*, 28 January 2016 at https://www.gov.uk/government/speeches/changes-to-criminal-legal-aid-contracting (last accessed 02 February 2016)

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served this jurisdiction well and is best suited to its needs. This system has been endorsed by the Bain Review in its comprehensive investigation into the provision of legal services and reflected in the Assembly's Legal Complaints and Regulation Bill on oversight arrangements for the profession which is likely to complete the legislative process during this mandate. Whilst this review raises issues for reform, it has not challenged the future existence of the fundamental architecture. In our view, the DOJ's short term efforts to save money by reducing remuneration levels for counsel should not be allowed to threaten the current structures for the provision of legal services through the introduction of a competitive tendering and contracting model which would be disproportionate, inappropriate and ill-suited to NI.

The Registration Scheme

- **I recommend that the Department announce a definite but realistic timetable for the project, including the date after which registration will be compulsory. I tentatively suggest that 1st January 2017 might be a suitable date to work towards.**

78. The Bar Council welcomes the proposals for a statutory registration scheme. We responded to the Department's consultation on this matter which was issued in March 2015. Our main concern relates to the cost associated with the scheme and in response to the consultation we highlighted that the model of registration being devised means that the administrative burden will largely rest and be absorbed by the Bar Council and Bar Library.

79. It is our understanding that the Department does not intend to introduce an initial registration fee in the early stages of implementation in order to enable the scheme to bed in and to assist with securing the cooperation of practitioners. We support this stance given that the unprecedented downward pressures on income which the publicly funded Bar is presently experiencing makes any initial registration cost of this kind particularly unwelcome. We accept that as the audit and compliance process develops, there will be an associated cost and it is important that this should be self-financing and structured proportionately. We would suggest that the matter of a registration fee can only be determined following the first year of operation when it will be evident what costs are associated with the scheme.

80. The Bar Council would welcome further engagement with the Department on the development of a realistic timetable for the implementation of the statutory registration scheme.

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Legal Expenses Insurance

- I recommend that the Department engage with the insurance industry to ascertain the extent of legal insurance coverage in Northern Ireland and its potential to expand. I also recommend that the civil non family legal aid application form should require clients to declare whether any BTE exists.

81. The Bar welcomes heightened awareness of legal expenses insurance subject to safeguards which allows the general public to access legal representation of their choice. There must be proper supervision to guard against monopolies and conflicts of interests. However, we would caution that BTE insurance could act to restrict a client's choice of representative.

Pro Bono

- I recommend that the Law Society of Northern Ireland consider publishing a revised pro bono policy encouraging a greater commitment from larger firms. I recommend that the Department makes the necessary regulations to allow pro bono costs orders to be made in Northern Ireland.

82. We highlighted the importance of pro bono work in our submission to the agenda document. It is a tradition of the Bar for members to provide advice to both professional and lay clients on a 'pro bono' basis. The Bar of Northern Ireland Pro Bono Unit has been established to provide free legal advice and representation in deserving cases for those who cannot afford the legal help which they need, and who cannot obtain assistance from any other source. Advice and representation is provided by barristers who have volunteered to join the Bar of Northern Ireland Pro Bono Panel.

83. Pro bono legal work has always been an integral part of membership of the Bar of Northern Ireland, as part of its work in providing access to justice and meeting otherwise unmet legal need. In a recent enhancement, the delivery of pro bono legal work by barristers in Northern Ireland is now organised by the Bar of Northern Ireland Pro Bono Unit working with partner accredited referring advice agencies or solicitors also working on a pro bono basis.

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84. We believe that pro bono legal work is always only an adjunct to, and not a substitute for, a proper system of publicly-funded legal services. The availability of appropriately funded legal advice or representation will require to be considered before a barrister undertakes pro bono legal work. The Bar of Northern Ireland and its partner accredited advice agencies are committed to working for the improvement of publicly funded legal advice and representation for appropriate cases.

85. The recommendation that the Law Society should consider publishing a revised pro bono policy encouraging a greater commitment from larger firms is not a matter for the Bar to comment on. However, we are supportive of the proposal that the Department should make the necessary regulations to allow pro bono costs orders to be made in Northern Ireland. We would welcome further engagement with the Department in relation to this.

Chapter 6: Budget for Legal Aid

The Budget for 2015/16

- **I recommend that the legal aid budget for 2016/17 is based on the predicted cost of the scheme, taking into account all the planned reforms, not on earlier baseline budgets.**

86. We highlighted in our consultation response to Access to Justice 1 and the agenda document on Access to Justice 2 that it is vitally important that the Review is not used simply as an opportunity to cut costs or to address budgetary constraints. Access to justice should not be diluted by short term objectives to reduce spending in order to address the consequences of financial mismanagement elsewhere in society. The public has the right to seek effective legal redress and this is best served when justice is done. It is our view that a healthy, robust and independent legal profession can perform a major role in ensuring access to justice for all.

87. In our response to Access to Justice 1, we highlighted that data recorded in relation to legal aid cases is very limited, which restricts the ability to substantiate the need for change or construct proposals for efficiencies. Budgetary predictions have historically been based on inadequate data extracted from a sample of cases which may not be representative of the profile of legal aid cases for any defined period and are unlikely to be representative of any future profile. As such, projected spending and savings have been less reliable in recent years.

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88. The review notes at paragraph 6.7 that the Department of Justice has used the in-year monitoring process to reallocate Departmental resources to alleviate legal aid pressures in recent years. This amounted to £23.7 million in 2011-12, £24 million in 2012-13, £32.4 million in 2013-14 and £23.5 million in 2014-15. The Executive also provided extra funding to the Department in 2014-15 allowing a further £13.2 million to be allocated to legal aid. 2015-16 saw a one year budget agreed by the Assembly with a spend of £82.5 million for legal aid yet significant pressures remain. In addition, the Executive's latest 2016-17 budget agreed in December 2015 allocated an additional £15 million to the DOJ to address some of the pressures on legal aid.

89. However, we would highlight that despite the additional in year money allocated over the last number of years to meet pressures, spend on legal aid has been relatively stable in the last number of years. Consequently, the Department needs to do more to ensure that there is a realistic budget setting process given that there is a clear history of under allocation. We also believe that changes are still required to improve the accounting and forecasting mechanisms involved in setting and monitoring the overall departmental budget and specifically, spending on legal aid. Access to Justice 1 saw two projects developed under which new methodologies for forecasting spend were introduced in July 2014. However, we do not believe that this does enough to ensure that forecasting can play an appropriate role in the development and setting of realistic budgets for legal aid.

90. Furthermore, we have outlined above a number of times our concerns that the current fiscal realities are driving the Review to identify short-term savings in the legal aid budget. We outlined our views in the agenda document that there are other areas of expenditure in the budget that do not risk the quality of front line service and could be examined in further detail. For example, the efficiency and cost effectiveness of Legal Services Agency should be considered. The Agency's operating model should be benchmarked against private sector service standards and outsourcing of work should be used wherever it is economically advantageous to do so. The Agency should be encouraged to streamline processing and administration and there are obvious examples where this could take place such as the introduction of direct payments to counsel in civil matters.

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Chapter 7: Justice Reform – Some common themes

The Adversarial Tradition

- **I recommend that the Minister indicates his support for moving towards a more inquisitorial court system, especially in cases where one or both parties is unrepresented, with more active case management. I hope the Lord Chief Justice will also lend his support to this direction of travel.**

91. The Bar Council notes that paragraph 7.8 does not recommend that "*we scrap the adversarial model and move wholesale to a continental inquisitorial model*". This recognises that such a change would be a "*huge upheaval and massive investment... with no guarantee of a cheaper or better system than before*" and would evidently require much greater detailed consideration. We would contend that the justice system in Great Britain and Northern Ireland has been founded on an adversarial tradition with a tried and tested method of reaching results in criminal and non-criminal cases alike.

92. This system of justice has proven to be capable of providing a rational, objective and even-handed dispute resolution process. The judge (or jury) is distanced from the investigatory process and the factual presentation of competing accounts by different parties which guarantees that all the relevant considerations are adequately aired and tested. This separation of roles between the parties and the adjudicator ensures that the judge's role is limited to deciding between the competing cases that the parties have presented and supervising the process to ensure it is conducted in an appropriate manner.

93. The report also highlights at paragraph 7.9 and 7.10 that "*adversarial practices have been questioned with increasing frequency in recent years*" with quotes from judges and academics in England and Wales which focus on the family courts. However, we would also point to the approaches already being employed by practitioners in family cases in courts in Northern Ireland. These practitioners in the field of family law are not just lawyers or advocates. The skills for family counsel include the ability to give objective advice in a child centred inquisitorial forum. We believe that the suggestion in the report that the concept of counsel in family cases is adversarial is entirely inaccurate. Counsel represents a force for resolution, negotiation, mediation, objective realism in entrenched emotional dynamics. The vast majority of family disputes are resolved without the need for a final court trial, across all fields of family practice.

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94. The adversarial model also requires consideration in relation to the criminal justice system. The Bar takes the view that the adversarial approach is vital in order for justice to be served, allowing each side to advocate their case in the strongest, most persuasive terms in cases which are of paramount importance to the lives of individuals and their families, whether as defendants or victims of crime. Often the liberty of a defendant is at stake alongside the protection of the public from crime; the preservation of these factors is best served by high quality advocacy provided by an independent referral criminal bar. We would contend that this is supported by the *'Review of Independent Criminal Advocacy in England and Wales'* conducted by Sir Bill Jeffrey which states:

> *"Effective advocacy is at the heart of our adversarial system of criminal justice. If prosecution and defence cases are not clearly made and skilfully challenged, injustice can and does result. Effective advocates simplify rather than complicate; can see the wood from the trees and enable others to do so; and thereby can contribute to just outcomes, and save court time and public money".*[5]

95. Meanwhile the Justice Secretary Michael Gove MP highlighted the virtues of the adversarial criminal justice system in a speech to the Legatum Institute in June 2015 stating:

> *"It is vital that the institutions which sustain and uphold the rule of law are defended and strengthened. That means vigilance to make sure the judiciary maintain their independence and their insulation from politics. It requires understanding of the importance of a healthy independent bar, to make sure high quality advocacy. It means awareness of the special virtues of an adversarial criminal justice system, with arguments tested in open court and guilt having to be proven beyond reasonable doubt before an individual's liberty is curtailed".*[6]

96. The Bar contends that the adversarial tradition is central to the operation of the justice system in both Great Britain and Northern Ireland. We consider that

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[5] Sir Bill Jeffrey, *'Review of Independent Criminal Advocacy in England and Wales'* (published May 2014) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf (last accessed 14 January 2016)

[6] The Rt Hon Michael Gove MP, Speech to the Legatum Institute on *'What does a one nation justice policy look like?'* (23 June 2015) at https://www.gov.uk/government/speeches/what-does-a-one-nation-justice-policy-look-like (last accessed 14 January 2016)

preserving the right of courts to hear arguments from both sides before a judge or jury can adjudicate must remain at the heart of the justice system. However, we take issue with some of the unhelpful comments in the report which appear to be unfairly denigrating this model. This includes the statement at paragraph 7.7 that "*if Cicero himself were to wander, Tardis-assisted, out of the courts of Imperial Rome and into the Laganside Courts of the 21st Century, he would feel immediately at home*". This adds nothing to the debate on how to progress appropriate reforms to the justice system which could reduce delay and assist unrepresented litigants.

97. In summary, the recommendation that the Minister should indicate his support for moving towards a more inquisitorial court system would prove difficult to operate in practice. It lacks detail and fails to recognise that different approaches would be needed for different types of court. As outlined above, counsel and judges operating in the family and criminal courts already adapt their approach to suit the needs of a case within the adversarial system at present. Therefore such a general proposal for an inquisitorial court system may actually be very limited in its application, particularly within the criminal justice system. However, we are supportive of moves to reduce avoidable delay and steps to improve the justice process so as to make it easier for unrepresented litigants to understand and navigate. Our views on the different suggestions for the conduct of court business are outlined below.

Ineffective Hearing and Business by Phone and Email

- **I recommend that a general duty of engagement and pre hearing communication should apply to all proceedings.**

98. The Bar Council welcomes proposals aimed at improving communication between all parties to proceedings and the court. Paragraph 7.13 of the report notes the need for more "structured communication… to identify the main issues, clarify what each party is seeking to achieve and identify what exactly the court needs to determine". Whilst improved communication will always be a laudable aim, we believe that further detail is needed around how any general duty for pre hearing engagement might operate in practice. We take the view that there are a number of further considerations: Will such communication be appropriate in every case? Will there be guidance on a specific time period for engagement depending on the type of case? Will it mean additional work for counsel which they will not be remunerated for? Will a judge require evidence of engagement between the parties before a case reaches court? We would welcome further clarity from the Department around these issues.

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99. The Bar is also concerned that this suggestion presumes that both parties to the proceedings are willing to cooperate with such engagement. The experience of our practitioners suggests that this is not always the case. They often have to navigate the balance between their duty to the client and their duty to the court, particularly in cases where the client's instructions are to delay or to keep all issues live for negotiating purposes. We would highlight the need for pre hearing engagement to be flexible in these circumstances. For example, a party should not be precluded from issuing a writ if a time limit is about to expire and they have been unable to fully explore opportunities for pre hearing communication. We would also suggest that a duty of pre-proceedings disclosure by all parties could help to improve this proposal further and reduce delays within the court system.

- **I recommend that the Minister, I hope with the support of the Lord Chief Justice, supports the principle for the courts conducting far more business by email and telephone, reserving oral hearings for the most significant hearings where oral advocacy is needed.**

100. The Bar would point out that parties already often engage in telephone and email discussions to seek an agreed way forward in a case when appropriate. However, we would caution against any attempt to minimise the important role that oral hearings play in a functioning and effective justice system. We are concerned by the suggestion in paragraph 7.14 that "courts need to be more flexible in how they do business... oral hearings should be fixed only for final hearings and for important hearings where advocacy is appropriate". This could potentially result in hearings being arbitrarily restricted or employed sparingly which fails to recognise that fair and open justice necessitates a key role for oral advocacy. We would also query what the Department would consider a "significant hearing" for these purposes.

101. The Bar would also caution that email can be a difficult medium to navigate. It is not possible to determine the tone, facial expression or body language of the sender and often the quality of the communication is lost. Practitioners have also expressed concerns about the implications presented by email and telephone communication for open justice given the potential for unequal engagement in discussions between one party and the judge involved in the case. This is a problem which is not faced in oral hearings when both parties are present for face-to-face reviews. Consequently, we believe that whilst email and telephone communications can play an important role in improving the efficiency of court

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business, they cannot replace the need for oral hearings. These methods of communication are already being employed when appropriate and can only play a complementary role to hearings based on the circumstances of a particular case. In addition, we believe that the Department would need to give further consideration to how this proposal could limit access to justice for unrepresented litigants who do not have access to a computer or email.

Listing

- **I recommend that all courts stop listing their cases for the start of the day and instead operate time slots. This could even be as simple as dividing the lists into three chunks with 10am, 11.30am and 2pm start times;**
- **I therefore recommend that steps should be taken to enable the courts to move towards single/fixed listing.**

102. The Bar welcomes any suggestions for improved throughput and timing in courts lists. Many young barristers have highlighted that the hours spent in a court waiting room waste what would otherwise be productive working hours, which means that paperwork and case preparation must be done outside of working hours. We therefore believe that the concept of morning and afternoon time slots could be explored further. However, practitioners have pointed out that dividing the lists into three chunks of two hours is overly prescriptive and could prove hard to manage given that it is often difficult to know in advance if a case will settle or run all day. The courts must of course operate within reasonable time constraints and judges can case manage to ensure that time is not wasted unnecessarily but there is a need for some degree of flexibility in order to ensure that the courts can make best use of their time.

103. Fair trial rights cannot always be delivered within a pre-defined time period and a move towards time limiting cases for a period of two hours could also place a burdensome workload upon judges who will be required to read all of the papers for the cases the next day in advance and then to write several judgements in relation to each case. Furthermore, in some of these cases an early listing is essential to facilitate consultation and negotiation between the parties. Therefore for any system of time slots to work effectively the court listings will have to be considered more strategically and reflect realistic estimates of how long an individual case will take based on the parties and issues involved. They could be most appropriate in non-contentious issues and the Department might consider running a pilot scheme in order to test this. These proposals will also require further engagement and discussion with the judiciary.

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104. We would also caution that the Department's proposals for rationalisation of the court estate published in November 2015 could undermine attempts to improve efficiency across the justice system by exacerbating the causes of court delay. Once implemented these recommendations will see a number of courthouses close across Northern Ireland and we are particularly concerned that the remaining courts will struggle to cope with the additional workload. We highlighted in our consultation response that these proposals are purely aimed at being a cost cutting exercise to save money for the NI Courts and Tribunals Service without proper consideration being given to the longer term impacts on access to justice for court users and the pressures experienced by the existing courts.

105. We would also point to the particular situation at the Laganside Courts in Belfast given the upcoming transfer of all business here following the closure of Lisburn Courthouse. These courts are already extremely busy and putting further pressure on them to absorb the additional caseload will only exacerbate the significant issues already being experienced across the justice system of avoidable delay. We believe that it would be counter intuitive to exacerbate a current problem by concentrating more people and more cases in this one venue. Consequently, any suggestions for improvements around listings and time slots at Laganside will ultimately be futile once the courts are inundated with more cases than they can realistically manage as a result of the move to rationalise the court estate.

Maximising the Use of Judicial Resources

- **I recommend that judicial responsibilities be redefined so that, when lists and other work have been completed, judges at all levels should be engaged in active case management for the remainder of the working day**

106. Considerable efforts have already been made by the judiciary to ensure that the use of case management is maximised. Judges at most court levels are already spending the remainder of the working day engaged in preparing for cases the next day by reading papers, issuing directions by email and making telephone calls. The Bar has no further comment to make on this. Engagement and discussion is needed with the judiciary in relation to this recommendation.

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Plain English

- I recommend that for all legal changes and guidance arising out of this review, every effort is made to draft them in plain English.

107. The Bar highlights that the judiciary and legal professions have made considerable efforts in recent years to communicate with the courtroom in a clear and informal way. However, we would caution that judges and counsel are often dealing with complex areas of law and multifaceted issues which can only be simplified to a certain degree.

108. The Bar believes that members of the public interacting with the justice system should have access to relevant and easily understandable information. However, we would point out that a number of the changes referred to in this review will require primary or secondary legislation. The reality is that this will have to be drafted in a particular style and not the "plain English" which the author appears to favour. We note the comment at paragraph 7.27 which laments that "under LASPO [The Legal Aid, Sentencing and Punishment of Offenders Act 2012] the relevant schedule runs to a demoralising twenty pages of interminable statutory provisions". The Bar suggests that the Department's time could be better spent by improving the NI Courts and Tribunals Service website to make it more accessible to members of the public.

The "Problem" of Litigants in Person

- I recommend that the Northern Ireland Courts and Tribunals Service, in close consultation with the judiciary, draw up a statement and action plan setting out how all levels of court will seek to further facilitate access to justice for litigants in person. This statement should take into account the various recommendations of the CJC Report, the Trinder Research and the Justice Committee Report;
- I recommend that the Courts take a more flexible approach to their discretion to authorise a McKenzie friend to assist a litigant in person and should allow such assistance whenever it will help the litigant to get their case across to the court.

109. The Bar Council would disagree with the review's conclusion that litigants in person do not represent a "problem" for the justice system. Our practitioners highlight that additional time and money is already being spent accommodating the needs of litigants in person. Time in the courtroom is often greatly increased in these cases which creates delay for other cases and ultimately results in

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greater costs through the use of more resources, including judicial time and court accommodation. Litigants in person are frequently unclear as to proper practice and procedure. This means that judges are already required to take extra care and considerably more time to explain how practice, procedure, the law, rules and regulations pertain to any particular case.

110. The NI Courts and Tribunals System, in consultation with the judiciary, may wish to consider extra steps to deal with litigants in person in the justice system. We would require further information on any recommendations before we can comment in detail. However, we would caution that any steps to facilitate access to justice for litigants in person will need careful scrutiny to ensure that they do not place represented opponents at a disadvantage; adherence to the Rules of Court and clearly accessible Practice Directions must not be side-lined to the detriment of the court system. We would welcome the publication of further literature on court procedures for each level of the system, guiding litigants in person on their responsibility to have knowledge of the working of the court and some knowledge of the applicable legislation.

111. We are particularly concerned at the report's recommendation around McKenzie friends. Would the Department envisage that this would provide scope for a 'traditional' McKenzie friend, such as a family member or friend who provides a supportive presence in the courtroom and limited non-legal assistance? Or would this extend to fee-charging McKenzie friends, who provide a wider range of services including general legal advice and speaking on behalf of clients in court?

112. We believe that this needs to be approached with considerable caution as these individuals, unlike solicitors and barristers, are not Officers of the Court and therefore owe no professional duties to the Court. Allowing greater discretion to authorise McKenzie friends could open up a market for unregulated quasi-lawyers without the necessary training, insurance and statutory or professional body regulation. This will lead to the effective deregulation of the legal profession which will impact significantly on the quality of advice, assistance and representation available to the public. This could potentially place litigants in person in difficult and vulnerable positions. The Department might take the view that provision for McKenzie friends will save money in terms of a fee for counsel but we believe that this will ultimately only end up costing the court system more money.

113. We note the references to the reports from the Civil Justice Council of England and Wales (2011), the Trinder research (2014) and Justice Committee report on

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LASPO (2015) around recommendations relating to litigants in person. We would point to the clear concerns contained in these reports around the operation of McKenzie friends in England and Wales. The most recent report from the House of Commons Justice Committee entitled *'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012'* states:

> *"We are concerned that encouraging the use of McKenzie friends may in some circumstances amount to a counsel of despair: individuals who cannot afford properly regulated legal advice and feel unable to adequately put their own case could find themselves disadvantaged if relying inappropriately on people without legal qualifications. We are also concerned by the increase in the number of McKenzie friends in the courts".*[7]

114. The Trinder Report also states that it does not *"advocate more widespread use of paid McKenzie Friends acting as quasi-legal advisors without qualifications, regulation or insurance".*[8] It is clear that the experience in England and Wales has shown that there is considerable concern around the services provided by 'professional' McKenzie friends. Most notably, there is a lack of redress for litigants if the McKenzie friend makes a mistake. People are now starting to make a living out of providing legal advice, legal assistance and, if the court permits, legal representation but given that they are not regulated there is no avenue for a party to complain to the Legal Ombudsman if something goes wrong and they are not insured. The Bar Council would strongly caution against any move to introduce such a system in Northern Ireland given the difficulties experienced in England and Wales around the provision of guidance by these unregulated advisors. This is not something which we should seek to emulate in this jurisdiction as it will do nothing to facilitate greater access to justice for litigants in person.

[7] House of Commons Justice Committee, *'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012'* (published 04 March 2015) at http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf (last accessed 18 January 2016)

[8] Ministry of Justice: Trinder L, Hunter R, Hitchings E, Miles J, Moorhead R, Smith L, Sefton M, Hinchly V, Bader K and Pearce J, *'Litigants in Person in Private Family Law Cases'*, (published 2014) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf (last accessed 18 January 2016)

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The Role of the Judiciary

- I recommend that the judiciary of Northern Ireland should play an active role in the reform of criminal and civil justice. Judges should either lead or participate in any working parties arising out of this review.

115. The input of the judiciary will be vital in shaping the reform of criminal and civil justice. The Bar would require further detail on the nature of the working parties before we can comment further. However, we would point to Lord Justice Gillen's Review of Civil and Family Justice which is already underway and our aforementioned concerns that the reform initiatives contained in this will overlap and potentially conflict with the recommendations of Access to Justice 2.

Chapter 8: Comparisons with other jurisdictions

Legal Aid Statistics

116. The Bar is concerned with the level of comparisons made with other jurisdictions, especially England and Wales. Such comparisons, in terms of statistics, legislation and practice fail to acknowledge the significant differences in the operation of our legal system. Simple 'per capita' assessments around legal aid volumes and costs are effectively meaningless because no due regard is made for the wide variation across the regions within a jurisdiction as large as England and Wales or Scotland. We made a similar point in our response to the first Access to Justice Review, highlighting that it may be more useful to compare Northern Ireland with a region of England and Wales with a similar social and economic profile.

Economic Indicators

117. In our response to Access to Justice 1, the Bar also cautioned against considering legal aid expenditure in isolation when making comparisons with other jurisdictions. We welcome the brief recognition in the report at paragraph 8.32 that "there are particular and unique aspects of Northern Ireland society which may contribute to the higher average spend on legal aid". The report recognises that there are higher levels of poverty in Northern Ireland with the proportion of children in relative low income households in Northern Ireland at 23%, compared to 18% in England in 2013-14.[9] Meanwhile public expenditure in Northern Ireland was £10,961 per head during the same period (23% above the

[9] Department for Social Development, *'The Northern Ireland Poverty Bulletin 2013/14'* (published 25 June 2015)

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UK average).[10] These factors alone show that there is likely to be higher eligibility for legal aid in NI in comparison to England and Wales. Therefore this means that there will be a greater number of legally aided cases which will impact on figures relating to costs per head of the population. This could contribute towards explaining the figures in some of the tables, such as 8.8 which shows total legal aid costs per head of the population of £61.15 for NI in 2013-14 with a figures of £33.01 for England and Wales. We believe that these points should be given greater prominence in the context of comparisons with other jurisdictions.

Civil Legal Aid in Family Proceedings

118. Furthermore, the report quotes at length figures from 2013-14 around legal aid expenditure. However, we would caution that there have been considerable changes to the legal aid landscape in both Northern Ireland and England and Wales since then. For example, we would disagree with the comments at paragraph 8.31 that "the level of spend on representation in family cases in Northern Ireland is looking increasingly anomalous". In relation to the provision of civil legal aid in children and family cases, the Department of Justice has been engaged in a programme of work since 2014 aimed at reforming legal representation in the family courts with guidance introduced by the Legal Services Agency in May 2014.

119. The impact of this has been the almost complete removal of counsel from the Family Proceedings Court (certification is at a level of 0.3% against a projected rate of 10%) with cases already being referred upwards to the Family Care Centre. However, the full impact of these changes is not reflected in the figures used in the report for 2013-14 and is only likely to be seen in 2014-15 across the court tiers. Alongside this the Department has also been working towards a standard fee scheme for legal representation in the family courts with ongoing engagement with the Family Bar Association on this issue. Once finalised these changes will take also time to work through the system.

120. We would also point out that the report repeatedly makes inappropriate comparisons to the scope reductions which have taken place in England and Wales as a result of The Legal Aid, Sentencing and Punishment of Offenders Act 2012 and are reflected in the 2014-15 figures. This has seen a worrying reduction in the volume of private law children proceedings by over 50% from 16,662 in 2013-14 to 8,199 in 2014-15 with the House of Commons Justice Committee stating the evidence *"strongly suggests not only a significant increase in parties*

[10] House of Commons Briefing Paper, *'Public Expenditure by Country and Region'* (published 19 May 2015)

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without legal representation but also that litigants in person may be appearing in more complicated cases or be less able to represent themselves".[11]

121. Domestic violence proceedings have also dropped from 15,231 in 2013-14 to 13,854 in 2014-15. Despite private family law being removed from the scope of legal aid, those who can provide evidence of domestic violence are still eligible. However, this was also of particular concern to the Justice Committee which noted that a *"large proportion of victims of domestic violence do not have any of the types of evidence required".*[12] These scope reductions have left many individuals vulnerable and unable to gain access to legal representation. We are extremely concerned by the extent of comparisons between these figures and the provision of family civil legal aid in NI. We believe that the scope reductions implemented in LASPO have been particularly detrimental and we would be opposed to anything similar being implemented in NI in a short sighted effort to cut costs.

Wider International Comparisons

122. The Bar would also point to the comparisons made in the report at paragraph 8.36 with the legal aid spend across Europe. The report states that it is like "comparing apples and oranges" and we would add that it is highly problematic as these inquisitorial systems generally require less input from legal representatives. However, significantly more resources are expended on prosecution services and the courts which have a much greater role in investigating issues requiring determination. The report accepts this at paragraph 8.39 with an acknowledgement that "spending on legal aid is not the full story. Countries that spend comparatively little on legal aid often spend much more than the UK on their courts and judiciary". The figures contained in tables 8.19 and 8.20 appear to support this in a number of continental European countries, including the Netherlands (€28.79 per inhabitant for legal aid in 2012 and €58.6 per inhabitant for the courts in 2012), Germany (€4.29 per inhabitant for legal aid in 2012 and €103.5 per inhabitant for the courts in 2012) and Spain (€0.80 per inhabitant for legal aid in 2012 and €27 per inhabitant for the courts in 2012).

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[11] House of Commons Justice Committee, *'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012'* (published 04 March 2015), para 92, at http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf (last accessed 18 January 2016)

[12] Ibid at para

Chapter 9: Structure of the Legal Profession

- **I recommend that the DFP review the Law Society waiver and any other rules which allow professional bodies to override the choices of the client seeking legal advice or representation, with a view to liberalising or abolishing those rules.**

123. The Law Society waiver is a matter for the Law Society to comment on. However, we note the reference in paragraph 9.12 to *A's Application*[13] which involved a defendant in criminal proceedings who was assessed as eligible for criminal legal aid under Article 29 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. The District Judge certified that the interests of justice required that the applicant should have the services of two counsel to conduct his trial which the defendant challenged as it prevented him from instructing his representative of choice. The importance of two counsel in conducting a serious criminal trial is clearly reflected in the Bar's Code of Conduct which states at 20.11:

> *"In criminal cases where legal aid has been granted for two barristers one should be a Senior Counsel. Where, exceptionally, a Senior Counsel is unavailable, it is permissible for a Junior to lead. This Junior should be experienced and be of not less than 15 years' standing".*

124. We would dispute the implication in the review that this rule is aiming to "override the choices of the client seeking legal advice". The quality of representation in the most serious criminal cases through the retention of senior and junior counsel working together in cases that merit two counsel is an intrinsic part of ensuring proper representation is afforded to an accused in the system of justice. It is in the public interest that there are such high standards and this is aimed at the protection of defendants rather than limiting the choice of a client. The High Court also agreed with this position in *A's Application* by finding that the defendant in this case had not been deprived of counsel of his choice as his representative could remain as junior counsel at his trial. Instead he had the choice of also instructing senior counsel of appropriate expertise and experience. Consequently, we disagree with the Department's conclusion that the rules of the professional bodies are restricting the choices of the client seeking legal advice or representation.

[13] *A's Application* [2015] NIQB 4

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125. Furthermore, we note that the paragraph 9.14 highlights that the review does not seek to make recommendations around the structural reform of the legal profession. However, we would refer to our responses in chapter 4 on Remuneration Strategy in which recommendations are made for the "radical reform of the rules concerning funding two counsel under the legal aid scheme". This contains comment on professional conduct matters for the Bar, such as QCs competing for and accepting briefs as sole counsel at sole junior rates. The Bar takes the view that these recommendations clearly stray into the structure of the legal profession.

126. We would reiterate that throughout this consultation response we have strongly contended that the current model for the delivery of legal services, whereby members of the public have direct and unrestricted access to a wide network of local solicitors who in turn have access to the independent referral Bar for advocacy or specialist advice, is best suited to the needs of Northern Ireland. The structure of the legal profession was endorsed unanimously by the Bain Review in its comprehensive investigation into the provision of legal services and is reflected in the Legal Complaints and Regulation Bill currently before the Assembly.

Part B: Criminal Justice

Chapter 10: Criminal Justice Reform

The Leveson Review

127. This section of the Review outlines recommendations for reform initiatives for the criminal justice system in England and Wales emanating from the report produced by Sir Brian Leveson on the *Review of Efficiency in Criminal Proceedings* in 2015. However, we would caution against simply following the example set in this jurisdiction. The criminal justice system in England and Wales has been subject to much criticism in recent times with academic experts, parliamentary committees, the media, the Court of Appeal and the Supreme Court expressing concerns around cuts to funding and the impact on the quality of representation. An independent review of criminal advocacy conducted by Sir Bill Jeffrey in 2014 highlighted *"a level of disquiet about current standards among judges which was remarkable for its consistency and strength".*[14]

[14] Sir Bill Jeffrey, *Independent criminal advocacy in England and Wales,* May 2014, page 5 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf (last accessed 02 February 2016)

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128. As outlined above, significant changes have already been made in Northern Ireland and we have serious concerns that the cost reduction measures implemented by the Department under the 2011 and 2015 Crown Court Rules are jeopardising the provision of an efficient and quality service that the public can rely upon. These alone are having a damaging impact on the quality of representation for clients and the efficient operation of the courts. Consequently, any further suggested reforms to the criminal courts must be approached with caution.

Delivering Increased Efficiency in Criminal Proceedings

- **I recommend that a working party be established to propose the specific changes necessary to deliver improved efficiency to criminal proceedings before the magistrates' courts in Northern Ireland. This working party should be tasked with producing:**
  - revised criminal processes with process maps for the most common forms of procedure;
  - practical proposals to address the issues of communications between the parties and with the court, encouraging business by email, avoiding unnecessary hearings and better listing arrangements (in line with the recommendations set out in Chapter 7);
  - outlines or drafts of the Rule changes, Practice Directions or guidance needed to bring the changes about.

129. The Bar supports the proposal for the establishment of a working party in relation to efficiency in the Magistrates' Courts. We would welcome the potential for further suggestions to improve these proceedings provided that they do not impede the essential qualities of the system and access to justice. The Bar anticipates that the legal professions would be represented on any working party established by the Department.

130. However, we would also point out that greater efficiencies have already been achieved in recent years with the introduction of composite fees in the Magistrates' Courts which helps to ensure that practitioners are working as efficiently as possible in dealing with cases. There is a clear financial incentive in place for practitioners to conduct these cases as efficiently as possible.

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Further Potential Criminal Justice Reforms

- I recommend three options could be considered if future legislative opportunity allows:
  - Abolition of committal proceedings;
  - Reducing the range of offences triable either way; and
  - Giving defendants the option of judge only trials.

131. The Bar requires further information around the proposal for the abolition of committal proceedings in order to be able to comment fully. The suggestion in table 10 for "phasing in the reform over a period" appears only to deal with the question of how change should be introduced rather than defining what the "streamlining of committal proceedings in Northern Ireland" should ultimately look like. We believe that committal proceedings represent a significant and important procedural element in determining whether there is sufficient evidence to allow a case to proceed to trial. Therefore we dispute the assertion that committal proceedings are "obsolete and unnecessary" and believe that they should be retained. However, we would welcome further proposals aimed at improving the efficiency of committal proceedings.

132. The Bar is not aware of problems associated with offences being triable either way in Northern Ireland. The right to trial by a jury is vitally important and we do not believe that it is being subject to any abuse. Table 10 even notes that "relatively few defendants in Northern Ireland elect jury trial" and we would highlight that many defendants are often dissuaded from this course of action given the greater sentencing powers of the Crown Court. Therefore we see no pressing need to reduce the range of offences triable either way. Table 10 goes on to state that some cases proceed to the Crown Court for what "the public might regard as a very minor offence". Whilst an offence such as theft or shoplifting might be considered relatively modest in terms of monetary value, a conviction could have life changing consequences for a defendant. The significance of the right to trial by a jury must be protected.

133. The suggestion to give defendants the option of judge only trials must be approached carefully given the history of these in Northern Ireland. It could be a possibility if done solely at the election of a defendant who is being properly advised by counsel in certain cases. However, we would require further details on the operation of this proposal before being able to comment fully.

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Chapter 11: Criminal Advice Services

Police Station Advice Schemes

- I recommend that the Law Society publish details of the scheme together with guidance to ensure that there is transparency and fairness in how individual solicitors are allocated to clients and how new firms might join existing schemes. I also recommend that specific quality standards should be developed for duty solicitors and brought into effect as part of the Registration Scheme.

134. This is a matter for the Law Society to comment on.

Costs and Priorities for Criminal Advice and Assistance

- I recommend that all criminal advice and assistance, other than advice at the police station or a youth engagement clinic, is subject to merits criteria. I think that the "private client test" is the best approach;
- I recommend that regulations provide that: "Advice and assistance may only be provided where the issues are of such significance to the client that a reasonable client would be prepared to pay privately for legal advice, if they could afford to do so";
- I recommend that the Department reviews the procedural regulations governing advice and assistance to ensure that work cannot be duplicated between the two schemes.

135. This is a section of greater relevance to the Law Society than the Bar Council. However, we would point to paragraph 11.18 which states "the cost of criminal advice and assistance rose sharply last year. The volume of cases increased by 27% compared to 2012/13 (average cost per case remained unchanged). This is surprising at a time when the volume of criminal proceedings started in the magistrates' courts decreased by 10% over the same period. Claim processing patterns and criminal diversion may be part of the story behind these figures but further investigation is required". We would welcome further clarification in relation to this. In our response to the Access to Justice 2 agenda document, we highlighted that in a difficult financial landscape there may be a temptation amongst police or prosecuting authorities to divert relatively serious offences away from the court system and into a diversionary disposal as a means of saving on costs.

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136. The Bar welcomes the use of diversionary measures and recognises the considerable cost savings generated by such schemes. However, care must be taken to ensure the provision of proper levels of advice and assistance to all of those being presented with a possible diversionary course, in particular the young and the vulnerable. There is always the risk that in the absence of proper advice individuals may feel pressured or confused about their situation and may wrongly accept responsibility for offences if not properly advised by experienced legal representatives.

Chapter 12: The Interests of Justice Test

The Widgery Criteria

- **I recommend that the Widgery criteria as set out in article 29 should be retained as the basis for the interests of justice test;**
- **I recommend that tegulations should require a court, when granting or refusing criminal legal aid, to give and record reasons for its decision by reference to the Widgery criteria;**
- **Until any new online process becomes available, I recommend that decision making on the grant of criminal legal aid should remain with the court.**

137. In our response to the Access to Justice 2 agenda document we noted the important work of local Magistrates who have the power to grant legal aid when and where it is in the interests of justice by applying the Widgery criteria. We welcome the recommendation in the report that this test should be retained.

138. However, we are concerned by the proposal for the court to record reasons for its decision to grant or refuse criminal legal aid by reference to the Widgery criteria. This places an additional administrative burden on the court which is likely to be dealing with a large number of cases. We also object to a number of the assertions made in paragraph 12.9 around the report author's observations in court. The report states that decisions on legal aid are made "surprisingly quick and informally, although not inappropriately". It then goes on to note that the author has been told "anecdotally of cases where the court has unnecessarily encouraged defendants to seek representation". In addition, there is reference to "evidence to judicial inconsistency" in decisions made as to certification of counsel. What is this evidence? Can anecdotal tales of cases provide a sound basis for this proposal? The Bar does not think so.

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139. We take the view that the judiciary is best placed to make decisions on the granting or refusal of legal aid based on their experience and expertise. We object to any suggestion that "a judge, when faced with a lawyer who is being polite and helpful to the court, but who may well not get paid if legal aid is refused, is bound to lean towards a grant, possibly more so than the strict test requires". Placing an additional administrative requirement on the court without a sound evidential basis for doing so will do nothing to improve the efficiency of the criminal justice system.

140. Furthermore, we would query the proposal for a new online process for the granting of criminal legal aid. Reference is made to the system in England and Wales in paragraph 12.12 administered by the Legal Aid Agency. This states that "95% of correctly completed applications are dealt with within 48 hours of receipt". The report author states that "according to my discussions with the agency, it is working well". However, no other supporting evidence is offered to justify the operation of this system other than a perceived need to add a layer of bureaucracy to the system by removing the granting of criminal legal aid from the court. We would question how the addition of a 48 hour time delay to the processing of applications will increase the efficiency of the system. We would also ask for details of the projected cost of a similar online system for Northern Ireland.

Chapter 13: The Financial Conditions of Criminal Legal Aid

Financial Eligibility for Criminal Legal Aid

- I recommend that the Department of Justice carries out further consultation on the following approach:
  - The court should consider both income and capital, but capital should focus only on readily available assets (such as bank savings) i.e. capital which could reasonably be expected to be used to cover legal expenses;
  - A gross income figure should be set, with allowances for couples and dependent children, below which the defendant would be deemed eligible on income;
  - A capital savings limit could be set at £3,000, consistent with the free limit for civil legal aid;
  - As for civil legal aid, those on passported benefits should qualify automatically on income, but not on capital (see Chapter 3 at paragraph 3.11);

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- Defendants qualifying on both income and capital would be deemed to have passed the means test;
- Defendants above the limit on either income or capital would be required to explain to the court why they could not afford to fund their defence privately; the court would retain the final discretion and should record brief reasons for the decision;
- The thresholds and approach described above should be set out in regulations;
- The application form for criminal legal aid should be redesigned to address the test in a more structured manner.

- I recommend that article 31 of the 1981 Order should not be replicated in the reformed eligibility regime.

141. The Bar is concerned at the potential for an additional administrative burden to be placed on the court by these recommendations. In an attempt to address this paragraph 13.11 states "an initial analysis should be carried out by the Northern Ireland Courts and Tribunals Service to identify and cost the most cost effective administrative arrangements. Once introduced refusal rates should be closely monitored to ensure that the savings achieved justify the costs". However, we would question whether there is evidence to suggest that such administrative changes would achieve any savings. There is a clear risk that the NI Courts and Tribunals Service which is under financial pressure could lean towards refusing more applications in an effort to justify the costs of any new administrative arrangements.

Recovery of Costs from Convicted Defendants

142. The report also goes on to address the recovery of costs from convicted defendants. There is reference in paragraph 13.19 to the regime in England and Wales established under the Criminal Justice and Courts Act which requires the criminal courts to impose financial penalties on all adult defendants upon conviction. These are "not dependent on ability to pay or the seriousness of the offence" and range from £150 to £1200. They were subject to sustained criticism from the media, legal profession, Magistrates' Association, the Justice Select Committee and a number of penal reform charities. The Justice Secretary Michael Gove MP abolished the scheme in December 2015, stating that "while the intention behind the policy was honourable in reality that intent has fallen short".

143. The Bar would be entirely opposed to any similar system of financial penalties being imposed in Northern Ireland given that it clearly did not operate

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effectively in England and Wales. We would also request further information on the operation of the Offender Levy in Northern Ireland and the amount of money raised from this to date.

Chapter 14: Delivery of Criminal Legal Aid

A Public Defender Service for Northern Ireland

- **I do not recommend that a Public defender service is established at the present time, but do recommend that the Department engage in contingency planning in the event of a serious failure of supply.**

144. The Bar welcomes the acknowledgement in the report that a panel of advocates for Crown Court work is not appropriate for Northern Ireland. We take the view that open competition is the best guarantee of quality for clients. Panels operate in a more restrictive fashion by reducing the choice of legal representation and can effectively exclude skilled and experienced advocates from work. We do not believe that such a system is in the best interests of the justice system in NI. Furthermore, the Bar would query the source for the comment at paragraph 14.3 that "there is an argument that legal aid rates for defence work are being set too high in order to compensate for lower volumes of work".

145. The Bar also takes the view that a public defender service should not be employed in Northern Ireland. We welcome the recognition in the report that such a system should not be established at the present time. However, we would query how the Department would "engage in contingency planning in the event of a serious failure of supply". It is also worth noting that the Public Prosecution Service has recently moved away from the use of in-house advocates and has returned to the practice of instructing independent counsel for reasons of cost and efficiency.

146. Furthermore, the Bar notes the comment at paragraph 14.10 that "you only have to talk to public defenders to know that they are every bit as passionate about giving independent advice and doing their best for their clients as their colleagues in private practice". However, we would point out that the experience of the Bar has shown that just because a public defender is passionate does not mean that they are competent enough to deliver legal advice to the required level in certain cases. A public defender service does not encourage individual advocates to strive towards excellence as independent practitioners in competition with each other. An examination of

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the underfunded public defender system in the United States shows that it has long been plagued by issues with overworked lawyers often unable to provide adequate representation in serious cases.[15]

Part C: Family Justice

Chapter 15: Family Justice Reform

Divided Responsibilities

- **I recommend that all Departments responsible for family justice should meet to review the existing division of responsibilities and agree clear leadership for any reforms arising out of this review.**

147. The Bar of Northern Ireland has consistently highlighted the difficulties and inefficiencies created by the cross departmental responsibility in respect of family law and services. There are inherent difficulties with legislation ownership resting with DHSSPS yet operational delivery and responsibility for payment remaining with the Department of Justice. In our experience, this has led to delay, a lack of decision making and accountability and little evidence of communication or collaboration.

148. Given the pending reorganisation of government departments, there is perhaps an opportunity or scope to discuss the transfer or realignment of such functions. Alternatively, the Departments must provide leadership and direction on a range of issues, such as legislative development, reporting mechanisms and improving communication, not merely the reforms arising from this review.

Fundamental Review of Family Justice

149. The Bar disagrees with the view of the author that a fundamental review of Family Justice is not required in Northern Ireland. The issue at hand is the rights afforded to citizens under the current law. Previous reforms and "targeted

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[15] American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice - A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings,* December 2004 at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf (last accessed 04 February 2016)

initiatives" included within this Review have selectively focused on reducing the cost of legal aid. As stated previously, we believe this has led to duplication, ad hoc piecemeal reforms and restricting access to representation. The one issue which has purposely not been tackled is the current legal framework which underpins the operation of family justice in Northern Ireland, presumably because of the scale of the task and decisions which would be required.

150. We appreciate that this represents a significant project. However, in light of the impact of the significant reforms introduced or envisaged, the Department has redefined the rights of citizens and this should now be formally recognised. We believe that comments in 15.11 undermine the author's position that a fundamental review of family justice is not required.

The Tandem Model

- **I recommend that the Department should consult on the future funding of representation for children in public law proceedings. I recommend that the responsibility and budget for such legal representation should be transferred from the legal aid fund to the Guardian ad Litem Agency.**

151. We remain concerned about the emphasis of legal representation for the Guardian ad Litem in public law proceedings. The requirement of legal representation for the child seems to have been lost within the workings of the Children (NI) Order - the purpose of legal representation is for the child or young person, not the Guardian ad Litem.

152. Article 12 of the UN convention on the Rights of the Child 1989 states:

> *"1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
> *2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules."*

153. This right to be heard has been interpreted to mean the child's right to participate in all proceedings, judicial or otherwise which affect the child. Under the Children (NI) Order 1995, where children are involved in public law proceedings involving their parents, a Guardian ad Litem is appointed to speak for the child, which includes not only speaking on the child's behalf but extends

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to reporting to the Court on other matters including their view of what is in the child's best interests.

154. Legal representatives allow the child to effectively participate at the hearing. The child should have its own lawyer who not only speaks on its behalf but represents its case to the Court. If there is a divergence of opinion between what the child wishes and the Guardian ad Litem's opinion, it is the child who retains the lawyer and the lawyer continues to represent the child's views.

155. The role of the Guardian ad Litem is to report to the Court in relation to the child's wishes and to protect the child's best interests. The role of the lawyer is to ensure that the decision making process is legally correct and that allegations made during the course of the case are fully examined and that the statutory criteria are applied. The legal representative explains the legal process to the child and discusses with the child their options and consequences of what may or may not happen. The lawyer plays a major role in ensuring effective participation in the process by either speaking for the child or encouraging the child to speak for itself. The legal representative also undertakes to not only represent the child's views but to argue for those views and if necessary, challenge the position of the Trust or the parents. Children are entitled to a fair hearing with regards to the proceedings in relation to their future lives. This is safeguarded by the use of legal representation.

156. It is not helpful to assume that this role can be fulfilled by someone who is not legally trained. Expertise in child and family law is essential. Just as lawyers are not social workers but need a working knowledge of social work, social workers and Guardian ad Litems are not lawyers, although they need a working knowledge of child and family law.

157. In the Scottish Case of S-v-Millar Principal Reporter 2001, it was held that where legal representation was required for the child, it was not adequate to simply appoint a safeguarder (a role similar to the Guardian ad Litem) since the appointment is made only to safeguard the interests of the child and not to vindicate their rights. It was held that the absence of provisions for allowing children to apply for free, independent legal representation in children's hearings breached the child's rights to a fair trial under Article 6 (1) of the European Convention on Human Rights. In Northern Ireland, we provided for access to legal representation for the child as well as the use of the Guardian ad Litem, without the necessity of such a legal challenge similar to Scotland.

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158. We believe that the system in Northern Ireland whereby funding for legal representation is available to adequately safeguard the child's effective participation in the decision making process which impacts on their current and future care. Indeed in a review of the Scottish system, it was suggested that legal representatives should be appointed in more cases, more information needed to be provided to other professionals as to the role of the legal representative and allowing for young people to input into the appointment of their legal representative.

159. The current system, whereby solicitors are appointed on to the Children's panel and the cases are allocated by the Guardian ad Litem Agency, is the system which provides a child with legal representation. We suggest that the role of the Guardian ad Litem and the role of the legal representative for the child should not be confused and this may appear to be the case with regards to these proposals. This view represents a retrograde step in relation to meeting our international obligations and our responsibilities to the children concerned.

160. The Bar of Northern Ireland does not support the transfer of responsibility and budget for such legal representation to the Guardian ad Litem Agency.

A Unified Family Court in Northern Ireland

- **I recommend that the Department consult on the establishment of a unified family court in Northern Ireland;**
- **I recommend that the Gillen Review consider the options proposed in Chapter 7 and in this Chapter relevant to family justice.**

161. The Bar of Northern Ireland acknowledges that there is merit in exploring the establishment of a unified family court in Northern Ireland. We note that the author has contributed little in terms of substance to progress the debate further from the Agenda paper. It is highly unlikely that the Department is in a position to consult on this issue at present. It may be more beneficial for the Department to work towards such a consultation by conducting research, developing an informed evidence base and providing an assessment of feasibility. This matter will undoubtedly be considered as part of the Gillen Review and contribute further insight to the proposal.

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Streamlining Public Law Proceedings

- I recommend that the issues raised by the consultation responses to Agenda question 11 should be taken into account in establishing the pilot and evaluated during its operation.

162. The Bar welcomes the recognition of our views in the Agenda paper and will await the outcome of the pilot.

Lay Magistrates in the Family Proceedings Court

- I recommend that the Department consults upon the future of lay magistrates in the Family Proceedings Court.

163. The Bar acknowledges the role of lay magistrates in the operation of the family courts. The removal of this role to improve efficiencies is worthy of consideration. We will however, defer to the Lord Chief Justice in determining the ideal makeup of the court in this and other areas of law.

The Divorce Process

- I recommend that the responsible Department should take steps to make the operation of the divorce process in Northern Ireland more administrative and less court based;
- Subject to that, I also recommend that there should be a single point of entry at county court level for all divorce proceedings in Northern Ireland.

164. It is not for the Bar of Northern Ireland to determine the legal framework for the operation of divorce proceedings. The legislature must determine in accordance with the values of society and it is their responsibility to respond to such societal changes.

165. There are strongly held views in relation to the "family" and "marriage" in Northern Ireland. It is not our role to consider whether this is for religious and cultural reasons but it should be noted by the author that family breakdown in Northern Ireland and the dissolving of the contract of marriage is still viewed by many in society as the most drastic step that can be taken. This is perhaps somewhat different to England and Wales.

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166. We note with regret that the suggested substantive review of the family law which would include the issue of divorce has not been supported. Unless there are changes to the Matrimonial Causes (NI) Order, the Courts remains the only means of dissolving marriage contracts.

167. It is regrettable that the Family Law (Divorce etc.) Bill before the Northern Ireland Assembly in 2002 did not proceed any further as it included amendments which allowed the Court to adjourn proceedings for divorce or an Article 4 Maintenance Order to allow mediation with the consent of the parties with a view to securing agreement between them on any issues arising. An opportunity to increase awareness on the use of mediation and tease out any problems which may result in its use within the legal process was sadly missed.

Long Running Contact Disputes

- **I recommend that:**
  - **A practice direction is issued, applicable to all court levels, setting out a firm and consistent approach to enforcement;**
  - **As part of the new approach the court should be more prepared to impose financial penalties, which may well be more effective than threats of prison;**
  - **The options available to a court should include imposition of community orders.**

168. The Bar of Northern Ireland is yet to be convinced that the Court is dealing with a high volume of long standing contact disputes which are either frivolous or vexatious. Due to the family breakdown and often complex issues involved in such cases which require the intervention of the Court to determine matters of contact, it is unlikely to resolve at first instance for the duration until the child's maturity. The report fails to recognise that circumstances change over time, the needs of children change at they develop and the behaviour of all parties can adversely or favourably impact on contact arrangements.

169. We agree that there is a small minority of cases where a parent is implacably hostile or refusing to comply with the court order. In such cases, the Court has a range of options available. The Bar would welcome the opportunity to develop a practice direction which would be of benefit to the Court in identifying and managing such cases and provide consistency in the approach adopted across all tiers. We would expect this matter to be discussed as part of the Gillen Review.

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THE BAR of NORTHERN IRELAND

The Report of Access to Justice 2

Bar Council – Consultation Response

Summary

170. In regards to the Norgrove Report and the view that many of the recommendations of this review could be easily transferable to this jurisdiction, the Bar of Northern Ireland notes the following impact on Access to Justice in England and Wales since the introduction of the Norgrove proposals:

- An Increase in Litigants in Person - following the cuts, by December 2013, 42% of cases began with neither party represented, and only 4% had both parties represented. The number of private law disposals where both parties involved was represented dropped by 41% in April to June 2014 compared to April to June 2013, whilst the average duration has increased;

- Delay - Cases were less likely to settle and required longer hearings and more hearings;

- Lack of Preparation - Chaotic and incomplete bundles of evidence sprung on the court (and other party) in the hearing or simply no evidence at all. Delay inevitably ensued;

- Lack of knowledge/understanding of law and legal process - Judges had to take substantial time explaining matters at the start of the case, throughout the case, and at the end.

- Unpredictable and inefficient hearings - There was significant variation as to who picked up the tasks which a lawyer would normally perform, whether the litigant in person, the judge, a lawyer for the other party, or nobody;

- It was a real challenge for the court to ensure that the Article 6 ECHR principle of a fair and reasonable trial within a reasonable time was upheld due to a lack of knowledge of entitlements. When one party does not know what they are entitled to, the basis of the system collapses. An inability to do justice to their case. Particular problems were caused with litigants in person being unable to cross-examine effectively. Inconsistency in treatment of litigants in persons by judges led to unfairness. Wide variation between how litigants in person were treated between different judges and different cases leads to a source of unfairness. The litigant in person was pressured into an agreement in cases where a lawyer would have been able to make a strong case and deeply unpleasant and painful cross-examination by former partners where the process became a form of ritualized public argument especially where there has been domestic violence;

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- Difficulties for Victims of Domestic Abuse - victims of domestic violence are experiencing substantial barriers to obtaining legal aid. 43% of women who had experienced or were experiencing domestic violence did not have the prescribed forms of evidence to access family law legal aid. Obtaining all the relevant evidence to satisfy Legal Aid can be expensive;

- A Decrease in Family Mediation - the Ministry continues to fund mediations in England and Wales through civil legal aid. However, there were 17,246 fewer mediation assessments in 2013-14, a 56% decrease from 2012-13. People are no longer attending solicitors, and it was solicitors who made clients aware of mediation and referred them. Mediation was intended to be the resolution for many of the cases, which were no longer within the scope of legal aid. However this has not happened and the result has simply been even more unrepresented personal litigants appearing in the courts;

- Problems with Exceptional Funding - where a case is outside scope but where a lack of funding would, or could risk a breach of human rights, legal aid can be granted. However granting of exceptional funding has been very limited. The Ministry of Justice expected to receive approximately 6,500 applications a year. However in 2013/14 there were only 1,520 applications for exceptional funding. Just 69 were granted. 53 of these were for inquests. Only 9 family cases that fell outside the scope were funded.

Chapter 16: Public Law Proceedings

Criticism and Comparison

- **I recommend that the DHSSPS and the DOJ jointly commission a feasibility study into establishing an inquisitorial panel with jurisdiction over certain public law children issues in Northern Ireland.**

171. The Bar would have significant concerns at the prospect of the establishment of an inquisitorial panel with jurisdiction over certain public law issues in Northern Ireland. We recognise that this suggestion is modelled on the children's hearing system in operation in Scotland. However, we believe that there are serious problems with this given that decisions are reached by a "lay panel of three volunteers from the local community" as highlighted at paragraph 16.2. These individuals are not legally trained or from a social work background yet are dealing with serious public children law proceedings involving the welfare of young people.

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172. Paragraph 16.19 highlights that "what is needed is decision-takers who are intelligent, caring, have good judgment and have a good understanding of the issues faced by children with troubled backgrounds". However, we would contend that simply having a selection of caring and intelligent individuals will not do enough to ensure a human rights compliant approach to public law children proceedings.

173. The Supreme Court judgement of *Re B (A Child)* [2013] UKSC 33 provided guidance in relation to the decision making process regarding care plans in a range of circumstances, including adoption. Further to this judgement all decisions made at both pre and post care order hearings must be human rights compliant. We would query how the implementation of the Scottish system in Northern Ireland would allow for the ordinary individual to determine whether such decisions are said to be human rights compliant if no lawyers are there to question it.

174. Paragraph 16.6 states that "I was able to observe several Children's Hearings during my visit to Edinburgh" with the comments of one panel member quoted on the role of lawyers in the proceedings. The author highlights that "in my observation of children's hearings I was impressed by the standard of decision making" at paragraph 16.19. This appears to be the main basis for the recommendation that this system should be introduced in Northern Ireland. There is no evidence base or research to show the rationale for the imposition of an inquisitorial panel and how it would improve proceedings in Northern Ireland.

175. Furthermore, we would contend that this recommendation is purely cost driven given the statement at paragraph 16.16 that "the difference in legal aid costs of the two systems is extraordinary". This departure from the legal framework in Northern Ireland is clearly aimed at removing work from the court and cutting legal costs. The author also observes at the earlier paragraph 16.10 that legal representation is determined by the Scottish Legal Aid Board in the form of an "effective participation" test under which it will only be granted if required to ensure that the applicant can take an effective part in the hearing. Consequently, funding is restricted to a "small minority of cases". This contrasts with the current system in Northern Ireland under which representation of the child and parents is automatic. We would question whether following the Scottish system could see cases where the child secures legal representation but the parent does not? The Bar would resist any efforts to deny legal representation and access to justice to any party under such a system.

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176. The Court of Appeal case of *B (A Child)* [2012] EWCA Civ 632 highlights the potential difficulties of a case concerning the welfare of a child being presented as a 'fait accompli'. This case concerned an appeal by a grandmother against a residence order to be made in favour of the mother of her grandchild. The Court of Appeal took the view that the judge had reached the initial conclusion without sufficient evidence and without hearing full oral argument. We would be concerned that the implementation of an inquisitorial panel in NI could result in a greater risk of an adoption case (currently only adjudicated on by the court following consideration by the panel in Scotland) being presented to a court as a 'fait accompli' without full consideration of the issues involved by legal representatives. Furthermore, the High Court case of *TL v A Trust* [2007] NIFam 8 raises serious questions around whether legal representation for adoption freeing cases is so necessarily vital that it must be a non-means tested legal aid.

177. Consequently, the Bar is entirely opposed to the introduction of an inquisitorial panel. We believe that the current system sees the court providing the necessary checks and balances on a Health and Social Care Trust's exercise of its power regarding the removal of a child from the home. The inquisitorial panel does not offer the same level of protection in these serious cases with all decision making around care planning resting with a lay panel under which the right to legal representation is not guaranteed for the parties involved.

178. We would contend that the Department should instead concentrate its efforts on conducting a fundamental review of family justice in Northern Ireland. The Bar also believes that the DOJ could work with the DHSSPS on reforming adoption law in Northern Ireland. In 2006, the DHSSPS completed a two year review of adoption entitled "Adopting the Future". However, the recommendations emanating from this review requiring legislation have never been implemented with the proposed Adoption and Children Bill not receiving Executive approval for introduction into the NI Assembly during the current mandate.

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Chapter 17: Family Mediation

Developing the Family Mediation Service

- I recommend three main mechanisms to encourage this:
  - A new merits criterion;
  - The costs of mediation should be made exempt from the statutory charge;
  - Court procedures should be amended to require applicants to attend a meeting to learn of alternatives to the court;
- I recommend that the DOJ and DHSSPS should liaise with a view to agreeing a unified strategy for funding family mediation;
- I recommend that public funding should be available only for family mediators who are trained to standards approved by Family Mediation Northern Ireland the Family Mediation Council of England and Wales or the Mediators' Institute of Ireland;
- I recommend that:
  - A distinction should be drawn between assessments for mediation and substantive mediations;
  - No prior authority should be required to incur mediation costs;
  - Standard fees for substantive mediations should also be fixed after consultation;
  - An additional fee should be proposed for those cases which settle at or within 14 days;
  - The system of Early Resolution Certificates.

179. The report rightly describes our position as cautious in regards to family mediation. The Bar of Northern Ireland is open to all forms of dispute resolution. We operate the Bar Mediation Service where a number of practitioners are trained, accredited and regulated in the provision of mediation services. A significant number of Family law barristers have completed specialist training in family mediation.

180. Reservations remain about the potential for success with mediation as opposed to other forms of dispute resolution which includes litigation and negotiation by lawyers. The long term success of mediation agreements are more likely to be dependent on the willingness of the parties to compromise, the intensity of the dispute, the parties motivation to settle (normally for emotional reasons), if there is no domestic violence and finally the behaviour of the actual mediator. Family

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mediation is therefore not a panacea for all cases and is likely to have limited impact on the resolution of family disputes.

181. We note that in England and Wales after the Norgrove proposals the Government pledged to a total of £25million pounds per annum to pay for publically funded mediation with the aim of diverting cases away from the family courts and help parents reach lasting agreements.

182. The Government was warned that by removing solicitors from private law funding in particular would led to an increase in personal litigants who have little understanding of the process and who are without advice as to the likely or realistic outcomes and therefore the Court will remain the only option that they want.

183. We note that prior to the implementation of the Norgrove proposals, England and Wales had introduced a system in 2012 whereby there was an expectation that prior to issuing proceedings and unless the exemptions applied to the case, that the applicant and respondent should each attend either jointly or separately attend a Mediation Information and Assessment Meeting (MIAM) to receive information about and consider mediation.

184. At the same time the Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed most private family cases from the scope of legal aid after April 2013. The Children and Families Act 2014 has now made this a legal requirement, thereby forcing all separating parties into attending a Mediation and Information Assessment Meeting which would appear to be contrary to the ethos of mediation. We have yet to see the effectiveness of this compulsory component.

185. We have noted from some American and Australian experiences that mediation can be more successful if the person is allowed legal advice at the same time, indeed most mediators would suggest this as a matter of course.

186. We recall with some disappointment the Minister for Justice's comments on not providing funding for those mediators who were members of the Bar Mediation Service or the Law Society Mediation Service. Mediation is largely an unregulated profession and we have ensured appropriate regulation of our members who conduct such work. The same cannot be said for other providers.

187. Introducing a legal requirement for all separating parties to attend a Mediation Information and Assessment Meeting requires appropriate infrastructure. Further consultation is required in regards to providers, the fee arrangements,

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accreditation and delivery models. It is vitally important that the legal aid budget is not adversely impacted, causing further hardship to the legally aided client who either is not deemed suitable or where it does not work.

Chapter 18: Family Legal Aid

The Priority of Family Legal Aid

- For these reasons, supplemented by the powerful arguments put forward by the Law Society, Bar and others on consultation, I recommend that legal aid should remain available for the majority of family cases, subject to increased controls.

188. The Bar of Northern Ireland welcomes the endorsement of the author in the need to preserve legal aid provision and representation in family cases.

Family Advice and Assistance

- I recommend that pre proceedings meetings with a view to finding alternatives to care proceedings should in future be funded under a public law Early Resolution Certificate.

189. The Bar's concerns in relation to Early Resolution Certificates in private family law disputes are outlined in full below. However, the suggestion that this system should be extended into public law proceedings is something that we would be entirely opposed to. The idea that serious care proceedings or the removal of a child from the family home could potentially be subject to "negotiation or mediation" under an Early Resolution Certificate is completely unrealistic.

190. The Bar would also request further information around the number of pre-proceedings meetings which end up in court and those which do not.

Legal Aid for Public Law Proceedings

- I recommend that legal aid should only be granted where the Legal Services Agency is satisfied that: "It is necessary for the applicant to be represented to ensure that the court is able to determine the proceedings in the best interests of the children, taking into account the issues in the case, the importance of the case to the applicant, the case they wish to advance and the representation of other parties to

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the proceedings; OR Refusal of legal aid would result in a breach of the applicant's right to a fair hearing under article 6".

191. This proposal fails to take account of the Children (NI) Order 1995, article 9 and 10, 53 (3)(b) which gives the Court the power to grant leave to persons wishing to make a residence/contact order in relation to children.

192. Article 10(9) of the Children (NI) Order sets out the criteria which a court must consider when deciding to grant leave to a person without parental responsibility to make an application. Persons without parental responsibility include fathers whose name is not registered on the birth certificate, aunts, uncles cousins, siblings, grandparents, step parents or birth parents if the children have been freed for adoption. This filtering power given by the legislature to the Courts recognises the changing and evolving definition of family.

193. This proposal to restrict legal aid in public law cases to any person without parental responsibility unless they demonstrate that they have a distinct and different interest in relation to the welfare of the child is in effect changing the application of the Children (NI) Order 1995.

194. The European Convention on Contact concerning Children defines 'family ties' as meaning a close relationship such as between a child and his or her grandparents, siblings, based on law or on a de facto family relationship. There may be circumstances where their views can be adequately represented through a person with parental responsibility or the Guardian ad Litem. This is a consideration which the courts will look at when determining whether a leave application should be granted but in circumstances where there is a direct conflict between these persons, and these persons have a valid and reasonable contribution to make to effect the decision making process in the best interests of the child, then they should be afforded the opportunity to make representations.

Divorce Proceedings

- **Advice and assistance should remain available for general advice and for help with drafting a petition, but anything to do with process of obtaining or contesting a divorce should be removed from the scope of civil legal aid.**

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195. The Bar of Northern Ireland does not agree with the removal of divorce from the scope of legal aid.

The Problem of Multiple Hearings

- I recommend that when finalising the fee structure for private law children cases (at all court levels) the Department should aim to make remuneration for long running cases, particularly contact disputes, significantly less generous than for cases which resolve early.

196. We would challenge the assertion contained within 18.30. We fail to see how the author can conclude "*I am convinced this is a serious problem which needs to be addressed*" due to two submissions from members of the public. Prior to making recommendations in relation to the fee structures and perceived incentives, it would be more advisable to try to ascertain the true nature and extent of this issue. We are yet to be convinced that there is a significant volume of contact disputes which are long running due to the vexatious behaviour of one of the parties.

Ancillary Relief

- I recommend that ancillary relief remains in scope (at least for cases where children are affected). I recommend the following changes:
  - Early settlement of ancillary relief disputes should be facilitated under Early Resolution Certificates;
  - If an Early Resolution Certificate covers finance, the client must agree to eventual repayment of the costs; a new merits criterion should apply to any certificate covering ancillary relief (beyond an Early Resolution Certificate); this will provide for legal aid to be refused if it is reasonable for the proceedings to be fundrf privately or from the assets in dispute, having regard to the nature and value of those assets;
  - Regulations on financial eligibility should be amended to provide that the maximum amount which can be disregarded under the "subject matter of the dispute" rule is £100,000;
  - A Practice Direction should be issued encouraging the courts to use their existing statutory powers to make provision for the payment of legal costs out of the assets in dispute.

197. The Bar highlighted in our response to the Access to Justice 2 Agenda document that the assets at issue in ancillary relief cases do not represent a

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financial windfall but rather they are assets held or accumulated during the course of the marriage which must be divided at the end of the marriage to assist both parties rebuild their lives and those of their children.

198. We welcome the recommendation that ancillary relief remains in scope. The requirement for legal representation in is crucial in these proceedings given the nature of the assets involved and the legal obligations of both parties. The proposals outlined in the report refer to the early settlement of disputes through the use of Early Resolution Certificates. We would require further clarification around how this would work in practice given that early settlement is difficult in cases where family assets are under dispute. We would also reiterate our view from Access to Justice 1 that the use of mediation in ancillary relief cases can result in increasing the layer of costs in cases where mediation does not work at all, the agreement is unlawful or only partial agreement is reached.

199. Furthermore, we have concerns around the suggestions for a new merits criterion allowing for legal aid to be refused if it is reasonable for the proceedings to be funding privately or from the assets in dispute. This also extends to the additional recommendation that a Practice Direction should be issued encouraging the courts to use their existing statutory powers to make provision for the payment of legal costs out of the assets in dispute. This appears to suggest that the assets in the dispute could potentially be used to fund legal costs at the beginning of a dispute. We highlighted in our response to the agenda document that it is easy to suggest that some assets could be used to pay for legal costs but this cannot take place at the beginning of the proceedings, given the fact that the actual division has not been established. Endowment policies are inevitably tied up with mortgages and therefore cannot be cashed in until the matrimonial home is sorted out. Cases which involve pensions may have no ready available cash assets at all.

200. Furthermore, it would not be fair if the Legal Services Agency required the legally assisted person to sell their home (if in sole name) or use modest savings to pay for their legal representation at the beginning of proceedings again as it places that person at a distinct disadvantage, especially if they are the parent with care of the children and secondly. These assets are ultimately to be adjudicated by the Court.

201. We would also point to the very late arrival of the statutory charge to Northern Ireland has meant that the idea of ancillary relief proceedings supported by the tax payer is no longer the case and that these proceedings where the statutory

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charge applies will eventually pay for themselves. The charge has not had the time to bed in yet and therefore the potential gains to the legal aid fund are unknown.

The Role of the Family Lawyer

- I recommend that when the Registration Scheme is introduced, all lawyers who wish to undertake family work under the legal aid scheme, should be required to sign up to the Resolution Code of Practice (or similar principles arrived at after consultation) and to comply with Best Practice Guidance issued from time to time by the Children Order Advisory Committee.

202. We reject the view outlined in 18.41 that, "*lawyers in family proceedings need to see themselves less as warriors in the battleground of the courtroom*". Family law barristers do not adopt an adversarial approach but rather practice facilitation and collaboration to secure equitable resolutions for clients as quickly as possible. The author's disparaging view of lawyers and his personal view of practice based on past limited experience is unhelpful and lends little to the substantive issues under discussion. This is confirmed by the subsequent confirmation of his interaction with lawyers while observing Belfast cases.

203. Family law barristers are regulated and abide by the Code of Conduct for the Bar of Northern Ireland. Any proposal for recognition of any additional code of practice should first be directed to the Bar Council for scrutiny, approval and if appropriate, inclusion into the Code of Conduct. The registration scheme cannot represent a supplementary form of regulation.

Early Resolution Certificates

- A new form of family legal aid should be established, tentatively called 'Early Resolution Certificates'. All new non urgent certificates for private law family disputes should initially be issued in this form;
- I propose that the main criteria for an Early Resolution Certificate would be:
  - There must be a serious family dispute, in other words there must exist children or finance issues sufficiently serious that they would justify the grant of a certificate under the current regime;

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- **A cost benefit test, expressed in private client terms, namely that a reasonable private paying client would be prepared to pay for the work to be undertaken if they could afford to do so.**

204. The Bar would query the rationale behind the proposal for the introduction of Early Resolution certificates. We do not believe that the author makes clear what these are intended to address or any background research showing the need for the introduction of such a system.

205. The Bar notes the comment in paragraph 18.47 that "the solicitor would use this funding to try to resolve the dispute by any means, primarily negotiation or mediation". However, we would contend that this poses difficulties given that mediation can take place at any stage during legal proceedings and the presumption that it takes place in the early stages is incorrect. Would these costs still be covered under an Early Resolution Certificate?

206. We also point to the merits criteria outlined in paragraph 18.48. What would the Department consider to be a serious family dispute? What research is this based on? The Bar would be very concerned that the reference to "children or finance issues" is too vague and represents a considerable generalisation. Furthermore, the "reasonable private paying client" test seems to suggest that there is a presumption that a private client would cut back on legal representation. We object to such an implication and believe that it only serves to denigrate the important work of legal representatives.

- **I recommend that in the new fee schemes, there should not be a separate standard fee covering only those cases which generate the lowest costs under the current system; such cases should be taken into account in setting the main standard litigation fee;**
- **I recommend that the statutory charge exemption covering the first £2,500 of property recovered should be abolished for all cases except those resolved under an Early Resolution Certificate;**
- **I recommend that the wider obligation to repay costs under "legal aid as a loan" should not apply to cases resolved under a children only Early Resolution Certificate.**

207. The Bar would query the evidence base for the report author believing that these steps will incentivise clients to resolve cases at the earliest

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opportunity. There are often genuine reasons as to why a case cannot be resolved quickly. We would also request further information on the amount of money recouped under the statutory charge to date. Furthermore, we object to the use of the term "legal aid as a loan" in this context given that this downplays the role of the justice system in society and the importance of legal aid as one of the key pillars of the welfare state.

Part D: Civil Non Family Justice

Chapter 19: The Civil Courts

The Civil Courts in England and Wales

208. The Bar notes that the report author's commentary focuses on reforms to the civils courts in England and Wales with Lord Woolf's Access to Justice Report. This included reforms such as pre-action protocols, judicial case management and provision for out of court settlement and alternative dispute resolution. These were not introduced in Northern Ireland in their entirety although a number, including pre-action protocols, have been implemented. The report goes on at paragraph 19.11 to make no specific recommendations around court fees policy. We believe that court fees must remain affordable given the reductions in the scope of legal aid being proposed for implementation in the civil courts. We comment in detail on the proposals around the removal of money damages from the scope of legal aid later in this paper.

209. However, we are particularly concerned that fees in England and Wales for claims worth between £10,000 and £200,000 increased significantly in March 2015 and now incur a court fee of 5%. Claims over £200,000 now attract a fixed court fee of £10,000. These significant increases are something which we would be opposed to in Northern Ireland given the impact on access to justice. The Justice Select Committee in the House of Commons is currently conducting an inquiry into Courts and Tribunals Fees and Charges focusing on the civil courts, family courts and tribunals.

210. On 26th January 2016 the Committee took evidence from senior judges, Rt Hon Lord Dyson, Master of the Rolls, Rt Hon Sir James Munby, President of the Family Division and Rt Hon Sir Ernest Ryder, Senior President of Tribunals, on this matter. Lord Dyson told MPs that the higher charges risked denying access to justice to *"ordinary people"* on modest incomes, adding that he was particularly concerned about those who did not qualify for fee remissions and are being deterred from taking their cases to court. He also noted that the

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judiciary warned the Government of the *"real dangers"* of both implementing and increasing civil court fees.[16]

Conclusions

- **I recommend that the County Court is made the compulsory entry point for a much greater range of cases.**

211. We note that the report is "sympathetic to raising the county court limit, probably to £50,000". However, we highlighted in our response to the agenda document that recent changes to the County Court under the County Courts (Financial Limits) Order (Northern Ireland) 2013 are still bedding in and have made significant changes to the profiles of cases passing through the system. This saw the County Court given jurisdiction to deal with civil claims worth up to £30,000. We do not believe there would be any further benefits to raising the jurisdictional limits at this point. We also strongly oppose a single point of entry to the County Court and disagree with the suggestion that the onus should be on practitioners to demonstrate why larger damages cases could not be pursued within the County Courts scale costs regime.

212. Furthermore, we are very concerned by the potential impact of the proposals for conditional fee agreements referred to later in the report. This funding option adds another unknown element into the arena and further strengthens our contention that the financial limits should not be increased at this time and the County Court should not be made the compulsory entry point.

- **I recommend that the Gillen Review addresses the matters identified in Chapter 7 (Justice Reform – some common themes) and in this chapter relating to non-family justice.**

213. Lord Justice Gillen's Review of Civil and Family Justice was commissioned by the Lord Chief Justice in September 2015. We agree that the Gillen Review provides an opportunity to consider reform options for non-family justice. The scope of the review highlights that it will consider the jurisdiction of the small

[16] House of Commons Justice Select Committee, *"Senior judges give evidence on increased court and tribunal fees"* (26 January 2016) at http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-20151/courts-tribunals-fees-charges-fourth-evidence-15-16/ (last accessed 27 January 2016)

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claims and county courts, the types of business that should be conducted within these jurisdictions, the scale costs system and opportunities for the use of mediation and ADR. A Review Group, along with a number of sub-groups, have been established to consider these issues and the membership comprises representatives of the judiciary, Bar Council, Law Society, Departments of Justice, Health and Finance, the Legal Service Agency and NI Courts and Tribunals Service.

214. The Bar welcomes the work of Lord Justice Gillen in exploring these issues. We consider that it will aim to take a strategic and overarching view of the civil non-family court processes in NI and take the view that it will not be constrained by the same short sighted budgetary considerations as the Access to Justice 2 Review in this area. We would caution against pre-empting the outcomes and recommendations of the Review. However, we have indicated above our concerns around conditional fee agreements which will impact significantly on the civil courts. How will such Access to Justice 2 recommendations fit with the Gillen Review which isn't set to report until 2017? Will the Department seek to push ahead with CFAs regardless? Should the Gillen Review proceed on the basis that these will be forthcoming? Is there the potential for conflicting policy recommendations in this area?

Chapter 20: Alternatives to Civil Litigation

Complaint and Ombudsman Schemes

- **I recommend that the principles of the courts being used as the last resort is set out in a specific merits criterion for civil legal aid.**

215. We believe that there is an important role for complaint and ombudsman schemes to operate effectively. We outlined in our response to the agenda document our concerns that the role of the Northern Ireland Ombudsman is currently under review and subject to legislative change as part of the Public Services Ombudsman Bill. Whilst we are supportive of the potential for an extended role for ombudsmen to be involved in addressing disputes and complaints, we have concerns about any developments that might encroach upon the proper function of the Bar Council as a professional body and any powers being extended to an ombudsman at the expense of established legal principles and rights.

216. In particular, we are concerned by issues around the right to legal representation as part of the Ombudsman's investigation procedure. The Commissioner for

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Complaints (Northern Ireland) Order 1996 provides an automatic right to a hearing with Counsel and Solicitor, examination and cross examination of witnesses, where the Commissioner considers there are grounds for making a report or recommendation that may adversely affect any body or person. However, The Public Services Ombudsman Bill introduces legislation in relation to the conduct of an investigation procedure. Specifically, the draft Bill introduces the following paragraph at section 30: -

> *"(6) Subject to sub-sections (3) to (5), the procedure for conducting an investigation is to be such as the Ombudsman considers appropriate in the circumstances of the case.*
> *(7) In particular the Ombudsman may: -*
> *(a) Make such inquiries as are appropriate; and*
> *(b) Determine whether any person may be represented in the investigation by Counsel, Solicitor or otherwise."*

217. The Final Stage of this Bill has yet to be moved in the Assembly Chamber yet this section appears to be incompatible with the basic right to legal representation. Consequently, we are concerned at the proposal in the Review at paragraph 20.5 to set out specific merits criterion for civil legal aid containing the principle that the court should be used as the last resort. We do not believe that the inclusion of "An application [civil legal aid] may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued" should be considered given the attempt to limit the protections under the Public Services Ombudsman Bill. Restricting access to legal aid in favour of a complaint system which ultimately does not provide the same protections and right to legal representation cannot be considered the most sensible and proportionate approach to take.

Non Family Mediation

- **I recommend that the courts in Northern Ireland should impose costs penalties for unreasonable refusal of ADR;**
- **I recommend that regulations should place an obligation on a legal aid solicitor to report to the Agency if an opponent is offering to mediate but the legally aided client does not agree to do so.**

218. The Bar of Northern Ireland runs the Barrister Mediation Service which provides a pool of accredited independent barristers who have decades of professional experience of acting in all types of civil litigation. This covers a range of non-

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family areas, including commercial law, banking, debt, insolvency, intellectual property, employment issues and professional negligence. The service provides the general public, solicitors, professional organisations and companies with direct access to expertly trained Barrister Mediators who assist clients to achieve speedy, constructive and practical resolutions to conflicts.

219. We believe that mediation can play an important role in the legal aid scheme for non-family cases in Northern Ireland. However, we do not believe that it should is appropriate for all cases and therefore should not be compulsory. For example, mediation can be of limited value in money damages cases. One of the central roles of counsel in money damages cases is to try to achieve resolution of claims properly, fairly and cost effectively. Protocols and judicial case management are in place encouraging the meeting of experts and of lawyers well in advance of trial. This helps to achieve resolution of money damages claims without the need for facilitated settlement through Alternative Dispute Resolution.

220. The suggestion that costs penalties should be imposed for unreasonable refusal of ADR should be approached with care. Will the Legal Services Agency employ its discretion in refusing or limiting a certificate for legal aid based on the circumstances of the case? What will amount to an unreasonable refusal of ADR? Will the LSA be alive to the potential for mediation to be deployed as a tactical ploy aimed at delaying a trial?

221. The suggestion that regulations should place an obligation on a legal aid solicitor to report to the Agency if an opponent is offering to mediate but the legally aided client does not agree to do so is a matter for the Law Society to comment on.

Early Neutral Evaluation

- **I recommend that a legal aid solicitor should be under an obligation to report to the Agency if an opponent makes an offer of Early Neutral Evaluation which the legally aided party does not accept;**
- **I recommend that the Bar and Law Society cooperate to promote the use and provision of ENE by their members and consider the merits of establishing panels of experienced lawyers to provide an ENE service and a protocol for their instruction.**

222. The Bar believes that there is an important need for parties to be empowered to make informed and proportionate decisions around the most appropriate

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manner in which to deal with a dispute. However, we would contend that the suggestion for the Bar and Law Society to consider the establishment of panels of lawyers to provide an Early Neutral Evaluation service is entirely misguided. Such a proposal represents a clear misunderstanding of the model for the delivery of legal service in NI. Members of the public have direct access to a wide network of local solicitors who in turn have access to the independent referral Bar for advocacy or specialist advice. Our members are routinely engaged informally at a preliminary stage by solicitors, often before a legal aid certificate has even been applied for, to provide expert advice on the merits of a case. The suggestion that the Bar should seek to establish a panel of lawyers to provide an ENE service would only result in duplication and the creation of a formal process where there is no need for one.

223. Furthermore, the comment at paragraph 20.15 that ENE allows parties to obtain an "independent and non-binding evaluation of their dispute" and this is frequently conducted judicially within the court system. Consequently, we consider that any formal assessment panel would need to be comprised of independent experts with no vested interest in a case. We would be concerned that this proposal could potentially compromise the integrity and independence of members of the Bar to act as representatives and provide advice in a case.

Chapter 21: Judicial Review

Judicial Review in Northern Ireland

- I recommend that:
  - By means of a Practice Direction or otherwise, whenever the court decides to refuse an application for leave to bring a judicial review (either on the papers or way an oral hearing) the court must consider whether the application was totally without merit; if it is the court must so certify;
  - Remuneration regulations should specify that where a court has certified that an application was totally without merit, no costs may be claimed under the certificate, other than any disbursements incurred.

224. In our response to the Access to Justice 2 agenda document we highlighted the important role that judicial review plays in the justice system in Northern Ireland. It can be defined as the procedure through which the High Court supervises the public law actions and inactions of public authorities and

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other bodies that are exercising statutory powers, performing public duties and/or taking decisions on matters of public interest.[17] Consequently, judicial review represents the primary means through which the courts can supervise the exercise of public powers and the performance of public duties, thereby ensuring good quality public administration and finality in decision making. It performs a vital role in the Northern Ireland context where devolution has produced a unique form of governance in which recourse to the courts by way of judicial review acts as an essential check on Ministerial and Departmental power. We welcome the acknowledgement in the Review that judicial review should have a high priority within the legal aid scheme and should remain in scope.

225. The Bar notes the reforms introduced in England and Wales by regulations made under The Legal Aid, Sentencing and Punishment of Offenders Act 2012 which provide that if the court refuses permission in a publicly funded judicial review then no fees can be claimed under the legal aid certificate. We would be strongly opposed to the introduction of any similar system in Northern Ireland under which no payment would be made for cases refused leave and we welcome the acknowledgement in the Review that this would not be appropriate. However, we would support the recommendation that no legal aid costs should be recoverable when a court certifies that a case is totally without merit.

226. The Bar would also highlight that challenges that are totally without merit or vexatious are very rarely brought by practitioners, particularly publicly funded lawyers. As we highlighted in our response to the agenda document, the determination of what is and is not trivial or vexatious is highly subjective and what appears vexatious to a public authority or politicians can raise fundamental questions of Convention rights for minorities, the marginalised, vulnerable and oppressed. Consequently, we believe that the court would only certify an application as being totally without merit in a very limited number of cases.

- **I recommend that, under a Practice Direction or otherwise, the judiciary should be notified of the powers of the Legal Aid Agency to refuse legal aid for a judicial review on the grounds that the client should first pursue their concerns via a complaints procedure or ADR; in cases where this power has been exercised, but it subsequently becomes necessary to proceed by way of judicial review, the court should usually be prepared to exercise any discretion over time limits in favour of the applicant.**

[17] *Re Wylie's Application* [2005] NI 359, 362, para 7

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227. The Bar outlined above its concerns around any proposal to give the Legal Services Agency the power to refuse legal aid for a judicial review until a client pursues a complaints procedure or Alternative Dispute Resolution. We would reiterate that these options may not be appropriate in every case and discretion should be employed based on individual circumstances.

228. We highlighted in our response to the agenda document that the system of judicial review contains a built in mechanism for screening out cases that are demonstrably without merit in the leave application. The Pre-Action Protocol has been an effective mechanism in ensuring that applications are not brought before the court until all other attempts at resolution have been tried and failed thus ensuring that cases are resolved before the need for litigation, where possible. This also guarantees that the issues in the proceedings have been ventilated in detail before litigation is commenced. Consequently, the introduction of a power to compel a party to pursue a complaints procedure or ADR only represents an additional hurdle and could result in time delays for serious cases involving the exercise of power by a public authority in which judicial review proceedings should legitimately be pursued.

229. We note the suggestion of flexibility around time limits in cases where the Legal Services Agency exercises the power to refuse legal aid but it subsequently becomes necessary to proceed by way of judicial review. The court currently already has discretion to extend the judicial review time limit in appropriate circumstances, including time taken to pursue an alternative remedy. However, we would question whether adequate consideration has been given to the need for transparency and decisiveness in judicial reviews given the potentially serious issues under consideration and the impact of delays associated with ADR or complaints procedures. Has the Department considered how the use of this discretion over time limits will be dependent on the attitude of the respondent given that this is cited as an "important factor"? What if the respondent refuses to engage in ADR? What if a respondent only uses ADR as a delaying tactic rather than an opportunity for genuine engagement? How long should a respondent's refusal or reluctance to engage be allowed to delay a potential judicial review application? How would the Department envision this creating a "stronger case" for the granting of legal aid? These are all matters which we believe require further explanation.

- **The courts in Northern Ireland should make wider use of protective costs orders.**

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230. The Bar welcomes the suggestion for the wider use of protective costs orders by the courts in Northern Ireland. These orders can be used to protect an applicant against some or all of the other side's costs and have the effect of shielding the applicant from the financial consequences of the litigation. We also welcome the recognition that the reforms introduced under Part 4 of the Criminal Justice and Courts Act 2015 in England and Wales would not be appropriate in Northern Ireland. These reforms restrict the availability of protective costs orders which are reserved for cases where leave to apply for judicial review has been granted and also involving serious issues of general public importance which otherwise would not be able to be taken forward without such an order.

231. These reforms have the effect of limiting judicial review to the wealthy by increasing the financial risks associated with an application and therefore shield public bodies from proper scrutiny. They discourage contributions from non-governmental organisations, charities and others given that they may become liable for costs. This has created a situation which we would not like to see repeated in Northern Ireland and therefore we support the review's recommendation that these changes should not be introduced.

- **I recommend that:**
  - **All work under the judicial review pre-action protocol should be carried out under the Green Form scheme; civil legal aid should only be applied for once the case is ready to issue;**
  - **Applications for civil legal aid for judicial review should be accompanied by the respondent's response to the pre-action protocol letter; this would not apply in genuinely urgent cases but these would be exceptional;**
  - **All judicial review certificates should be subject to a condition requiring a report to the Legal Services Agency once the respondent has served its evidence; that is a key stage at which to assess whether the case has sufficient prospects to justify continued funding.**

232. The Bar highlighted in our response to the agenda document the merits of the pre-action protocol which has been an effective mechanism in ensuring that applications are not brought before the Court until all other attempts at resolution have been exhausted. Counsel is often involved in providing advice at this stage and therefore it is unlikely that incorporating the pre-action

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protocol under the Green Form scheme would work in practice to properly remunerate input by a barrister.

233. The pre-action protocol helps to ensure that cases are resolved before the need for litigation if possible or that the issues in the proceedings have been considered in detail in advance. The introduction of this measure has improved the consideration of issues in judicial review proceedings significantly and therefore we would dispute the suggestion in paragraph 21.23 that "certificates are being granted to too early and are not being reviewed at key stages". We are not convinced of the necessity of the measures outlined above and would query the problem which these largely administrative measures are aimed at addressing. We do not believe that they would do anything to "address the disappointingly low success rate of publicly funded judicial reviews".

Merits Criteria for Judicial Review

- **I recommend that the grant of leave by the court should be recognised in the legal aid regulations;**
- **I recommend that the Legal Services Agency should be primarily concerned with the prospect of the court granting the substantive relief sought.**

234. The Bar has considerable concerns around the merits criteria for judicial review contained in paragraphs 21.26 and 21.27. A range of options as to what "success" looks like in a judicial review are outlined with the indication that the Legal Services Agency should be "primarily concerned with the prospects of the court granting the substantive relief sought". We do not agree with this recommendation as a number of judicial reviews are brought as test cases in particular areas of law of significant public interest and such a provision would effectively stifle the likelihood of these challenges being heard in court.

235. Furthermore, we are concerned by the comment in 21.27 that "the application of this criterion would be affected if provisions similar to those in the [Criminal Justice and Courts] Act 2015 were brought into force in Northern Ireland. The court would then need to take into account the likelihood of the executive decision changing as part of its decision in deciding whether to grant relief". We would be completely opposed to the introduction of any provision similar to this in Northern Ireland. It would effectively give the Executive and political decision makers more influence over the court than should be considered appropriate.

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236. The replication of Section 84 of the 2015 Act in NI would remove judicial discretion when determining whether to grant relief on a judicial review claim. As noted in paragraphs 21.4 and 21.5, if it is "highly unlikely" that the outcome would have been "substantially different" for the applicant if the "conduct complained of had not occurred" then the High Court "must refuse to grant relief". Moreover, when determining whether to grant leave to bring a judicial review action the High Court must consider if a defendant asks it to do so (and may consider of its own motion) whether the outcome for the applicant would have been different if the conduct complained of had not occurred. If the court considers it "highly likely" that the outcome would not have been substantially different then it "must refuse to grant leave". There is an exception only if a case is certified as being of "exceptional public interest". The creation of a similar system in Northern Ireland should be resisted.

237. In addition, we note at paragraph 21.29 that the overall objective of the new controls should be to "reduce the number of judicial review certificates issued by 50%". This appears to be a percentage picked at random with no proper explanation or consideration given to the types of cases or issues being considered by way of judicial review. This admission that a reduction in the number of certificates issued is the sole objective appears to provide the rationale for the proposals aimed at cost cutting within the system rather than focusing on a holistic and strategic review of this area of litigation.

Research and Learning from Judicial Reviews

- **I recommend that, as and when resources allow, the Legal Services Agency should undertake a survey of legally aided judicial reviews over the last two to three years.**

238. We would welcome research being conducted into legally aided judicial reviews. Any changes or reforms to the present system and its operation must be underpinned by a robust evidence base.

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Chapter 22: Conditional Fees and Self-Funding

Funding arrangements in Northern Ireland

- I recommend the abolition of the indemnity principle in Northern Ireland.

239. The Bar takes the view that further information is required providing closer scrutiny as to the wider ramifications of the abolition of this principle before we can comment fully. For example, could the abolition of the indemnity principle have implications for other privately funded cases by giving the lawyers involved a financial incentive in the outcome of a case?

Financial Impact of CFAs on Defendants

- I recommend that the volume of new personal injury claims should be closely monitored over the first three years of the new system so that adjustments can be made at the earliest opportunity if required.

240. The Bar is completely opposed to the implementation of Conditional Fee Agreements in Northern Ireland. They are inherently unfair and the difficulties and complications that would inevitably arise from the implementation of such an inappropriate system in NI would ultimately necessitate adjustments.

Summary of CFA Policy Issues

- I recommend that CFAs should be made available in Northern Ireland by bringing into operation Article 38 of the 2003 Order;
- Claimants should be protected against adverse costs orders under a system of QOCS, bringing Northern Ireland into line with the equivalent safeguards in England and Wales and similar reform proposals in Scotland;
- The risk and extent of claimants losing a share of their damages through payment of a success fee is mitigated by regulation and binding restrictions on success fees as set out below:
  - I recommend that CFAs should be available for all types of case permitted under the 2003 Order, namely all proceedings except criminal and family proceedings (Article 39(1));
  - Although in England and Wales a success fee is allowed whenever a CFA is allowed I recommend no success fee should be permitted initially for road traffic claims;
  - Logically a success fee of up to 100% may be needed for cases with a 50% prospect of success; I recommend that this should be adopted for all cases where a success fee is allowed but a lower figure could

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be considered initially if that more cautious approach is strongly supported on consultation;

- As a minimum Qualified One-Way Cost Shifting (QOCS) must apply to all personal injury claims, as is the case in England and Wales. However, bearing in mind the potential for QOCS both to enhance access to justice and to contribute to legal aid savings I recommend that the Department should consult on applying QOCS more widely, in particular to claims made by individuals against public bodies concerning serious wrongdoing, abuse of position or power or significant breach of human rights, housing disrepair claims and judicial review;
- Subject to consultation I recommend following the approach set out at paragraph 22.15 above, which is a clear and objective test, protecting defendants against frivolous or dishonest claims;
- I recommend success fees should be capped at 20% of total damages; the tapered approach under the Taylor proposal at paragraph 22.21 above could also be considered but would only have an impact in the largest cases;
- Consideration should also be given to appeal costs where the 25% protection in England and Wales does not apply;
- No specific heads of damage should be ring fenced from the operation of the success fee because of the difficulty of identifying such damages in cases which settle (hence the proposal for a 20% rather than a 25% cap);
- If the claimant recovers damages but also becomes liable to pay costs, typically because he or she recovers less than the defendant offered, the stricter England and Wales approach should be followed (paragraph 22.15). The limited safeguard which applies in Scotland could also be considered;
- It is important that clients have the ability to challenge unfair CFAs, for example if the solicitor claims 100% success fee in a straightforward case – the risk of this happening is illustrated by the recent case of *A and M v Royal Mail*. The procedure could operate as a right for the client to apply to court for assessment of costs charged, but consultation may propose other mechanisms. However, regulations should be kept to a minimum to avoid technical and satellite challenges;

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- **I recommend that the 20% damages cap on success fees should also be applicable pre-issue; the Department should discuss with the Law Society how this is best achieved;**
- **Damages cap for non-personal injury claims – as a starting point I recommend that the 20% cap should apply for all types of case, but consultation may suggest a higher limit is appropriate for some categories.**

241. As highlighted above, the Bar Council is opposed to the introduction of Conditional Fee Agreements in Northern Ireland. The history of the CFA model in England and Wales has been a difficult one with the cost of litigation often being disproportionate to the size of the claims involved. The introduction of the Access to Justice Act 1999 saw the removal of legal aid from most personal injury claims with a range of changes brought in to make success fees and after-the-event insurance premiums recoverable from a losing defendant. One striking example of the exorbitant cost of litigation is exemplified by the Supreme Court case of *Coventry v Lawrence* [2015] UKSC 50. This case involved a nuisance dispute between neighbours under which the damages payable could never have exceeded £74,000. However, the success fees and ATE insurance involved in the case led to a costs bill of over £1 million for the defendant.

242. The Jackson reforms introduced under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 resulted in alterations to the operation of CFAs with success fees now payable out of the claimant's damages. This has resulted in an improved situation for defendants. However, the fundamental problem with such a system is that is give lawyers a financial interest in the outcome of the case and therefore places them in a position of potential conflict. We would contend that this does nothing to improve access to justice and in fact does the exact opposite. Evidence from England and Wales suggests that solicitors are turning away more valid but complex and difficult cases given that they represent an unreasonable commercial risk. This includes those with high early investigation costs, cases involving disputed liability, cases involving emerging and contested points of law and cases involving complex and difficult expert evidence on causation. Consequently, adequate legal representation is becoming more difficult to obtain and even when it is claimants are being pressured to settle cases so that lawyers get their success fee.

243. The Bar Council of England and Wales produced a report in September 2014 entitled *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On* which surveyed barristers on the impact of the changes

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with 716 respondents. This highlighted that in privately funded work where CFAs may have once been attractive due to the right to recover success fees and any ATE insurance premiums, they have now become much riskier to accept. Over a quarter (27%) of respondents indicated that they now require a higher prospect of success before accepting a case, while 27.86% of respondents suggested that the Jackson reforms had forced them to require a higher prospect of success as well as a higher quantum than they would have required prior to LASPO[18]. How would the creation of a similar situation in Northern Ireland improve access to justice for the report author's "Nigela" category of individuals who are not eligible for legal aid?

244. The answer to these difficulties was claimed to be the introduction of Qualified One-Way Cost Shifting (QOCS) under the Jackson Reforms. However, we would stress the fact that this is quite clearly *qualified* given that claimants can be liable to pay the defendants' costs in certain situations. This most typically happens when a claimants fails to beat a defendant's Part 36 offer to settle. In other words, the Part 36 offer regime "trumps" QOCS so that a claimant who refuses a defendant's Part 36 offer but fails to do better at trial is at risk for the defendant's costs from the end of the relevant offer period. The result of this is that it is still necessary to obtain ATE insurance and the premium for this can never be recovered from the defendant.

245. Furthermore, the suggestion that the implementation of CFAs in Northern Ireland should allow for fees to be claimed from the damages payable to claimants, particularly in personal injury cases, represents a complete anathema to lawyers. The fundamental objective of an award of damages is to compensate the plaintiff for pecuniary and non-pecuniary losses sustained as a result of the defendant's wrong doing. The principle that a sum of money will restore the plaintiff to the same position if she/he had not sustained the wrong does not apply in cases of personal injury. For example, damages can never adequately compensate a plaintiff who has suffered a life changing injury or brain damage as a result of an individual's clinical negligence. Despite the concept of restoration by way of damages being ill suited to personal injury claims, this remains the most effective method of compensating the injured claimant. Consequently, we believe it is impossible to justify any alternative funding mechanism which allows for a deduction from the claimant's damages.

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[18] The Bar Council of England and Wales, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On* at paragraph 65, September 2014, at http://www.barcouncil.org.uk/media/303419/laspo_one_year_on_-_final_report_september_2014_.pdf (last accessed 09 February 2016)

246. The Bar would contend that the system developed in England and Wales has been driven by the wholly disproportionate costs being charged by lawyers. The changes introduced under the Access to Justice Act 1999 and the subsequent Jackson reforms were designed to fix an English problem. The difficulties experienced in England and Wales, particularly in relation to disproportionate legal costs, are not a feature of the system in Northern Ireland which operates scale costs. There is simply no evidence to suggest that the legal fees being charged in NI act as a disincentive to litigate or otherwise impede access to justice. Consequently, we would query why the Department would seek to introduce a new system to address a problem from another jurisdiction which is not specific to Northern Ireland. There is no need for CFAs to be introduced in NI.

Chapter 23: The Scope of Civil Legal Aid

Civil Legal Aid in Northern Ireland

- I recommend that legal Aid is removed from the great majority of money damages cases;
- I recommend that if resources allow, the removal of legal aid from money damages should be timed to coincide with, or else follow, the introduction of CFAs, assuming it proves possible to bring these in without delay;
- Legal aid should operate as a supplement, not a full alternative, to CFAs;
- Only a very limited range of money damages claims should remain within scope, limited to those which can be regarded as a high priority in light of their importance to the individual or the state. The Department should consult upon only the following money damages cases remaining within the scope of legal aid:
  - Claims against public authorities concerning serious wrong-doing, abuse of position or power or significant breach of human rights;
  - Claims concerning the abuse of children or vulnerable adults or sexual assault;
  - Clinical negligence claims relating to babies with severe neurological injury;
  - Claims relating to diffuse mesothelioma;
  - Housing claims relating to disrepair or harassment.

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- Civil non family proceedings for injunctions should be removed from scope unless the injunction is needed to protect the physical safety of the applicant;
- Housing as a category should remain within the scope of civil legal aid but further consultation should take place with the Law Society, HRS and others to develop clearer signposting arrangements to identify what work is best undertaken by HRS and where solicitors can add greatest value in these cases;
- Unless falling within the housing category, debt cases are not a priority for civil legal aid and should be removed from scope;
- Civil legal aid should be removed for immigration matters other than:
    - Asylum applications;
    - Proceedings where the detention of the client is in issue;
    - Proceedings arising from domestic violence or human trafficking.
- Article 2 inquests should be brought within the scope of civil legal aid by amendment to Schedule 2 of the 2003 Order;
- The scope of civil legal aid is redefined so that, in future, it is available only for specified descriptions of case. Civil legal aid for non-family proceedings should be limited to categories of case where there is a clear policy basis for treating the category as a priority;
- Where the Director refuses an application for exceptional funding, the regulations should require the Director to review his decision if requested to do so by the disappointed applicant.

247. The Bar is strongly opposed to the removal of money damages cases from the legal aid scheme, given the relatively low costs and having regard to its valued and acknowledged role in providing access to justice for a significant proportion of the population. The removal of legal aid from the majority of money damages claims will inevitably deprive access to necessary legal services for those who are vulnerable and economically disadvantaged within society.

248. In Northern Ireland, the cost to the legal aid fund of money damages cases is relatively small yet legal services in respect of these cases are in high demand. The relatively low cost is due to the fact that costs in money damages cases are paid by the losing party and do not represent a burden to the legal aid fund. Furthermore, one of the central roles of counsel in money damages cases is to try to achieve resolution of claims properly, fairly and cost effectively. The present system for the disposal of money damages cases is a system where settlement is very much the norm. In straightforward cases, settlement is

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negotiated at a very early stage and before the issue of proceedings with opposing counsel, solicitor or insurer.

249. We also take the view that the list of money damages cases remaining within the scope of legal aid must not be exhaustive. Furthermore, clinical negligence claims remaining within scope should not be limited to babies with severe neurological injury. What is the rationale for restricting this to a baby as opposed to a 5, 10 or 15 year old or an adult? If legal aid is restricted to such a category of injury then all persons having that injury must be entitled. Why should this be restricted to severe neurological damage occurring as a result of clinical negligence? If a baby, child or adult suffers serious injury from, for example, exposure to a noxious substance then why is he or she not equally entitled to legal aid to pursue a case?

250. The Bar Council remains of the view that legal aid must remain available in all clinical negligence cases. This funding is critical for those claimants who have been injured as a result of clinical negligence. In most cases, liability, causation and quantum issues are extremely complex. Due to the potential costs involved in prosecuting a clinical negligence claim, counsel and solicitors are particularly diligent in ensuring that proceedings are instigated and advanced to hearing where there is a reasonable prospect of success. Consequently, we would be opposed to legal aid operating as a supplement to CFAs in such cases.

251. The Bar takes the view that careful consideration must be given to identifying the basis upon which the appropriate categories selected to remain within the scope of legal aid are decided upon, restricted and defined. We also agree that the following cases should remain within the scope of the legal aid fund:

- Claims against public authorities concerning serious wrong doing, abuse of position or power or significant breach of human rights;
- Claims concerning the abuse of children or vulnerable adults or sexual assault;
- Claims relating to diffuse mesothelioma. However, in respect of this category, it is difficult to see the rationale for removal of all other asbestos related claims. Why should lung cancer, asthmatic or other respiratory conditions be excluded? Why should a case such as injury from exposure to radioactive material be outside the scope?

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Chapter 24: Control of Civil Legal Aid

Prospects of Success

- I recommend that "success" is defined in terms of the likelihood of the client obtaining a successful outcome in the proceedings, assuming the case were determined at trial or other final hearing.

252. The vast majority of cases in respect of civil legal aid resolve based on negotiation and settlement and are actively encouraged to do so. The Bar agrees that success should be defined in terms of the likelihood of a client obtaining a successful outcome. However, we do not believe that this should be narrowly defined by success at trial or final hearing.

Prospects of Success

- I recommend that the bands of prospects of success are recognised, in line with the Funding Code.

253. The Bar has no specific difficulties with the bands for success as outlined. However, we believe that provision for exceptional circumstances must be accommodated for such cases, the nature of which does not readily allow for classification within the bands. We do not agree with the removal of 'borderline' cases and would suggest a further high priority area to cover complex or novel points or interpretation of law to be tested by the court, i.e. test cases.

Cost Benefit

- The proposed minimum ratios for legal aid in Table 24.1.

254. We reiterate our opposition to the removal of money damages from the scope of civil legal aid and the introduction of conditional fee arrangements in Northern Ireland.

- Under the draft Funding Code a minimum damages threshold of £5,000 was intended but I believe a more realistic figure would be £10,000.

255. The Bar requests additional information on the likely impact of such an increase to the damages threshold.

Category Specific Criteria

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- In light of all the above criteria, relatively few category specific criteria are needed for non-family cases. I recommend the following non family category specific criteria in Table 24.2.

256. The Bar does not support the criteria outlined in Table 24.12 and again, requests information on the resulting impact of introducing such additional measures. A comparison with the case profile of the most recent year would provide a helpful insight.

Remuneration – Risk Rates

- I recommend that an additional financial obligation is imposed on those damages claims supported by legal aid, designed to make such cases self-funding.

257. The Bar objects strongly to this proposal. We do not accept the premise of the introduction of conditional fee arrangements or the removal of money damages cases from the scope of legal aid. The measures outlined within the review would heavily restrict the access to funding for damages cases to the point that it is unlikely to support any. To add a further financial obligation is unnecessary and borders on punitive, with the suggestion that "the payment may event exceed the cost of services". We would also raise serious concerns about the level of administration and bureaucracy which will be created by the introduction of new or revised criteria.

Chapter 25: A Strategy for Advice and Assistance

The Future of Advice and Assistance

- I recommend that the Green Form scheme continues to cover a wide range of services. Unlike civil legal aid, advice and assistance should be available on all areas of Northern Ireland law unless specifically excluded;
- I recommend that advice and assistance on money damages claims is removed from scope;
- I recommend that advice on debt and welfare benefits be removed from scope;
- The following test should be of general application: "Advice and assistance may only be provided where the issues are of such significance

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to the client that a reasonable client would be prepared to pay privately for legal advice, if they could afford to do so".

258. The Bar Council concurs with the recommendation that the Green Form scheme should continue to cover a wide range of services given the importance of early advice and assistance. However, we do not believe that action should be taken on the removal of money damages claims from scope until a suitable alternative is put in place to deal with the proposal for these cases to be removed from the scope of legal aid provision. We would be content with the recommendation that debt and welfare benefits should be removed from scope provided that other mechanisms, such as advice agencies, remain funded in order to deliver this service.

Chapter 26: Development of Civil Justice and Legal Aid

Online Dispute Resolution

- **I recommend that the Department monitor the development of Rechtwijzer and similar initiatives, particularly if such systems becomes available within the United Kingdom or Ireland, and investigate the benefits and feasibility of making them available to the citizens of Northern Ireland.**
- **I recommend that the Department monitor the progress of the proposal for an Online Court, ensuring that if it is developed for England and Wales, consideration is given to the feasibility of extending the service to Northern Ireland.**

259. The Bar Council notes the Rechtwijzer project developed by Tilburg University and the Hague Institute for the Internationalisation of Law in the Netherlands which has been launched as an online dispute resolution tool, providing facilitated negotiation for parties going through separation and divorce. This initiative is operating as a pilot and is very much in its infancy. Consequently, we believe that much work would still need to be undertaken before any such system could be developed for Northern Ireland.

260. The Rechtwijzer project raises a number of questions which require further consideration. Can this system deliver a balanced and fair outcome if one party is weaker or at a disadvantage? Can parties be incentivised to cooperate with the system? Can the information exchanged then later be used in public court hearings? What role could the legal profession play in delivering

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value to individuals who need fair solutions? How will difficult family cases involving disputes around contact with children or allegations of domestic abuse be catered for? What is one party does not honestly disclose their assets? A system of online dispute resolution can only be effective in relatively straightforward family cases where both parties are willing to reach a settlement; it will not be appropriate in all cases. The Department should be mindful of these limitations and there must always be a role for the courts to adjudicate on disputes when necessary.

261. The Bar Council also acknowledges the potential that online dispute resolution provides for meeting the needs of the justice system and its users in the 21st century. However, we would caution that vulnerable individuals involved in a legal dispute may not have access to a computer or the internet. The lack of face-to-face interaction also removes the opportunity to evaluate the credibility of parties and witnesses which increases the potential for miscommunication in certain cases. Consequently, such a system might only be suitable for resolving a limited range of disputes which are not unduly complex.

262. The Review cites the Civil Justice Council's Report in England and Wales into online dispute resolution for low value claims at paragraph 26.7 which envisages a three tier service involving online evaluation, facilitation and determinations by judges supported by telephone conferencing. However, we would point out that it remains to be seen whether these proposals will be taken forward. In addition, these low value non-family claims are unlikely to have a significant impact on the legal aid fund.

263. We would also point out that Lord Justice Gillen's Review of Civil and Family Justice will also make recommendations specific to the court system in Northern Ireland around the use of new technologies and greater opportunities for digital working. This is likely to provide guidance on how modern technology can be further integrated into the court process.

Courts as ADR Providers

- **I recommend that the Department, in close liaison with the judiciary and the Northern Ireland Courts and Tribunals Service, develop proposals for a pilot scheme to test the effectiveness and potential of the Registrar model within one of the courts or tribunals of Northern Ireland.**

264. The Bar notes the Review's proposal at paragraph 26.12 for a dispute resolution officer to be integrated into the court service which emanates the

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Delivering Justice in an Age of Austerity report in England and Wales. We would require further information on how any pilot scheme might work in practice, particularly given that the officer would have a "degree of autonomy and authority, subject to judicial supervision". Is it envisaged that this will assist litigants in person? How would this work in conjunction with the earlier proposal for McKenzie friends? Would the dispute resolution officer be legally qualified, subject to professional regulation or required to obtain insurance? Counsel already undertake resolution, negotiation and mediation in a range of cases; how would the Department envisage that the dispute resolution officer would interact with legal representatives?

265. We would also dispute the assertion at 26.12 that the courts must develop a "much wider role than that of mere adjudication machines". The Bar contends that there are already mechanisms in existence to assist the court in this role. For example, Courts Children's Officers work with the family courts in relation to care and contact arrangements for children when separating parents are unable to come to an agreement. These officers carry out mediation, advise the court as to what may be in the child's best interests and provide an important link-in service with the local child contact centres.

Development and Innovation of Legal Aid in a Period of Austerity

- **I recommend that in the proposed new structure for grant funding, priority should be given to initiatives which protect the rights of children and vulnerable adults, including older people, those with physical or mental disabilities and the homeless;**
- **I recommend that in future the Department should use its grant making powers more widely with the general aim of supporting new and innovative initiatives to enhance access to justice in Northern Ireland. I recommend that out of the savings generated from civil legal aid the Department should establish a cash-limited fund for this purpose, which could be called the Access to Justice Development and Innovation Fund;**
- **I recommend that a panel be established to review all applications to the AJDIF and make (non-binding) recommendations to the Minister.**

266. The Bar would require further information before we can comment in full on the proposal for an Access to Justice Development and Innovation Fund. However, we are concerned by the comment that "savings generated from civil legal aid" should be used for this purpose. Whilst we welcome innovation and new thinking across the justice system, there is a need to ensure that this is not

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used to divert funds which would be better spent on supporting legal aid provision.

Chapter 28: Delivering the Strategy

A Single Reform Programme

267. The Bar expressed concerns in our response to the agenda document that there has been significant overlap and duplication between Access to Justice 1 and 2, alongside the additional Departmental consultations on the scope of civil legal aid, levels of representation, money damages, legal aid in the Crown Court and court house closures. These have only served to complicate and confuse the position in respect of legal aid policy. Unfortunately we do not believe that the publication of this report has done anything to allay our fears that it would not provide strategic direction and stability to this important area of public policy.

268. The number of conflicting and ill-advised recommendations contained in the final report are of great concern to the Bar and will do little to provide an overall long-term improvement to the administration of justice. We find it difficult to see how a "single coordinated reform agenda which sets a clear path for the legal aid scheme" referenced at paragraph 28.2 will emerge from the publication of this report.

Implementing this Strategy

269. We find the suggestions for implementing this strategy beginning at paragraph 28.6 to be problematic. There is also a suggestion that each recommendation should be categorised by the Minister as either support in principle, disagree in principle or neutral. The reference to the categorisation of the recommendations into groups to aid implementation in chapter 17 appears disorganised and unclear, particularly given the comment at paragraph 28.7 that some of these are "more of a smorgasbord of options to consider as resources allow". This includes the recommendation in group 16 that "the Bar Council should liberalise the rules for QCs acting alone". This is something which is a professional conduct matter for the Bar and not something that the Department would have any authority over.

270. Paragraphs 28.8 and 28.9 of the review once again highlight that the priorities for this review have been monetary savings based on short term financial pressures. The comment that the Department should be "firm on its financial objectives" is particularly concerning and appear to place savings above the protection of access to justice. We would reiterate that these financial

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priorities should not be allowed to constrain the provision of high quality front line legal aid services.

An Approach to Justice Reform

271. We note that the review states at paragraph 28.10 that the recommendations contained in groups 2, 3 and 4 on civil and family legal aid, improved criminal legal aid controls and a strategy for remuneration should be pursued at the "earliest opportunity". Conditional fee agreements should also be introduced "under the same timetable". The comments that "some nifty drafting" would be needed to bring these about given that "a raft of reforms can often be covered in a single statutory instrument" seem to underestimate the amount of work and the range of major reforms that these groups cover.

272. We are concerned at the comment at paragraph 28.11 around stakeholder engagement on these suggested changes that "in a period of austerity... a more streamlined and driven process may be needed". This appears to minimise the important need for consultation, engagement and collaborative working with the legal professions and wider justice sector.

273. The further suggestion of a "decision and political will and means to see through" the introduction of conditional fee agreements despite "no prospect of consensus" once again shows a lack of consideration for support from the professions and the wider justice sector. In addition, the duplication of the Access to Justice 2 recommendations issued in a separate DOJ consultation in November 2015 on an Alternative Method for Funding Money Damages Claims only serves to add to the confusion in this area.

A Legal Aid Scheme to be Proud of

274. Finally, the section "a legal aid scheme to be proud of" states at paragraph 28.17 that the "impact on the Bar will be particularly significant. I am very sorry about this, but I cannot find a better alternative". We consider this to be a disappointing statement given that the quality and accessibility of our justice system is a precious asset, in which the public has as much of a stake as the legal profession. The review has allowed current fiscal realities to drive the identification of short-term savings in areas of expenditure which risk the quality of front line service for defendants, victims and users of the justice system. It is disingenuous for the review to conclude that these changes will create a legal aid scheme which will be "far more sustainable in the longer term" and will represent something that Northern Ireland "can be proud of"; the only outcome will be the systematic degradation of the justice system and it is the most

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vulnerable members of society who will suffer as a result by losing legal aid as an important social welfare provision through which to assert their rights.

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