THE BAR of NORTHERN IRELAND

CHIEF EXECUTIVE

David Mulholland

Fee Consultation
Finance Branch
Northern Ireland Courts and Tribunals Service
Laganside House
23-27 Oxford Street
Belfast
BT1 3LA

18 February 2019

Dear Sir/Madam,

Improving Cost Recovery in the Civil Courts

The Bar of Northern Ireland welcomes the opportunity to comment on the Department of Justice's consultation on proposals to improve cost recovery in the Civil Courts. We recognise that the plans outlined in the consultation document, if successfully implemented, are estimated to generate additional income of £2.5m by the end of 2019-20, increasing the cost recovery position from the current position of 82% to approximately 90% by the end of 2019-20.

The Bar previously responded to an NICTS consultation on proposals to increase court fees in June 2016 which outlined a phased approach of 10% in April 2017, 7.5% in April 2018 and 5% in April 2019. Paragraph 28 notes that following the recent increases in fees, income has risen to £21.7 million with cost recovery going from 73% to 82%. We highlighted our concerns in our previous submission that this staged increase in fees would have an impact on access to justice for court users in the civil and family courts. Consequently, we are disappointed by **proposal one** that the NICTS is now seeking to double the planned fee increase from a 5% uplift to a 10% uplift for all court fees from 01 April 2019 whilst also introducing new fees in a range of areas.

The Bar reiterates the view expressed in 2016 that the civil justice system should be funded by the state rather than litigants. We note the comment at paragraph 9 around the rationale for increasing fees at this time which states that "failure to achieve full cost recovery… places a burden on the taxpayer who would be subsidising individuals, companies or corporations who initiate court proceedings seeking a judicial remedy for a dispute". Whilst the Bar recognises that public sector finances are under pressure, we would highlight that it is not only those accessing the justice system who benefit from the

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Telephone
+44(0) 28 9056 2050

Email
clare.rice@barofni.org

Website:
www.barofni.com

existence, availability and proper administration of such a system, but all members of society as a whole.

In *Unison v Lord Chancellor* [2017] UKSC 51 the UK Supreme Court set out in clear terms why unimpeded access to justice is of vital importance to society at large, not just those who have resort to the courts. Therefore it is appropriate that a significant proportion of the costs of the maintenance of a proper civil justice system should be borne by the taxpayer. We remain concerned about this continued shift in paying for the justice system away from the state and towards litigants who use the system and appear before the courts to resolve their legal issues. Furthermore, we note references to the overarching review commissioned by the former Justice Minister, the 'Courts 2020' Transformation Portfolio, throughout the document yet the consultation fails to fully detail and justify how any funds raised through fee increases and the creation of new fees will be spent across the NICTS.

We note **proposal two** which suggests an increase in the fees currently charged by NICTS for searches of the Register of Judgments with the Enforcement of Judgments Office, aligning this to the search fees charged in other areas of NICTS business. This appears to be a significant increase with the online search fee rising from £10 to £26 and the office-based search fee rising from £22 to £40. Table 3 shows that these fees are in line with those charged for other search facilities provided by NICTS yet it is concerning that whilst law searchers and solicitors conduct the majority of searches, the financial impact will again likely fall to clients.

Proposal three refers to the creation of a number of new fees for work that is carried out by NICTS but for which no fee currently exists, including a fee for a review hearing in the High Court of £195 before a Master and £261 before a Judge. The Bar recognises that a number of procedural changes have taken place in recent years, including the reforms contained in Practice Direction 1/2008, aimed at enhancing the effective and efficient administration of justice in personal injury cases. The suggestion that fees should be charged for these hearings displays a lack of understanding as to how or why these reviews take place. Practitioners indicate that review hearings in these cases can greatly assist in ensuring that matters progress smoothly and they often significantly reduce the need for adjournment applications at a later stage which incur greater costs in terms of wasted judicial and court time. Reviews can also take place in a case to allow for date fixing or agreement between on the parties on certain matters and therefore practitioners would query whether it is envisaged that a fee would be paid on each occasion that the case is mentioned.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Telephone
+44(0) 28 9056 2050

Email
clare.rice@barofni.org

Website:
www.barofni.com

Consequently, the Bar is concerned that the creation of an additional fee for these hearings will disincentivise parties from requesting review hearings even if they are required to properly manage the case. In addition, practitioners indicate that review hearings are often arranged at the direction of the court and query whether it is appropriate in this instance for such a cost to be passed on to the parties. Practitioners can also envisage a scenario in which a review hearing will be sought by one party because of failings by the other party involved in the case and question whether this will necessitate a fee being paid upfront by the party seeking the review.

The Bar notes that **proposal three** also relates to the Small Claims Court. The specific changes to the fee structure outlined in table 6 do not appear to be disproportionate. However, despite the 5% discount for online applications, the additional introduction of new hearing fees, application fees and administrative fees for errors risk imposing a greater burden on court users. Meanwhile it also remains unclear as to whether the proposal contained in the Review of Civil Justice from 2017 of an increase in the jurisdiction of the Small Claims Court to £5,000 will be implemented.

Proposal four relates to the NICTS exemption and remission policy. The Bar takes the view that the system of court fees exemptions goes only a small way to protecting access to justice. Therefore we welcome suggestions to improve the policy around generating greater awareness to try to better promote it and increase the number of applications received.

We note the comment at paragraph 81 that just under 80% of the total fees waived were granted to personal litigants and that an “unusually high proportion” of these could be traced to a small number of individuals. The Bar recognises that some personal litigants are bringing cases to the courts which are entirely unmeritorious and that in some instances they may have several cases running concurrently. The Bar would be supportive of some form of merit test or threshold being applied from the outset of each application as referenced at paragraph 83. We would be supportive of point 1 in table 10 that the policy should not apply to appeals without the leave of the Court and point 2 of a ‘cap’ or financial ceiling on the number of fees or ‘cases’ that can be supported by the policy. We would welcome further detail on these when available.

However, we are concerned by some of the other suggestions contained table 10 given that the evidence base for their introduction in Northern Ireland is unclear, particularly given that several refer to emulating policies from England and Wales where litigants have been denied access to justice in recent years due to substantial increases in fees for civil proceedings in a range of areas. Court fees not only pose an absolute barrier to accessing

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Telephone
+44(0) 28 9056 2050

Email
clare.rice@barofni.org

Website:
www.barofni.com

justice for those who do not have the resources to pay them but also discourage potential users from bringing cases. Litigation is inherently uncertain and even those with strong claims may decide not to assert their rights in a court or tribunal if doing so will cost or risk their scarce financial resources.

Some of the suggestions around financial limits and the contribution by applicant detailed in point 4 are concerning, particularly the idea of a contribution regime at a rate of £5 for every £10 the applicant is over the income threshold, given that any changes could impact adversely on the numbers availing of the policy. In addition, we submit that a gross income test could be unfair given that it fails to allow for any assessment of disposable income, such as housing or childcare costs, which is permitted under the eligibility test for civil legal aid. We would welcome further information on any proposed changes to this before being able to comment in greater detail.

The Bar is also concerned by point 5 which notes that "Her Majesty's Courts & Tribunals Service are considering the removal of probate fees from the scope of the policy in E&W" and that the NICTS may consider the removal of some fees from the scope of the policy. We understand that this policy is awaiting approval from the House of Commons under the draft Non-Contentious Probate Fees Order 2018 but it is worth noting that the introduction of a new regime of fees for applications for a grant of probate has proven controversial in England and Wales, including the removal of these from the generally applicable remissions scheme, given that the additional fee income generated will be used to subsidise other court running costs. The Bar believes that any move towards implementing this in Northern Ireland through the removal of fees from the current eligibility criteria would have an adverse impact on access to justice.

We are also very concerned by the suggestion in point 8 to "abolish the policy and recognise that it has led to poor behaviours and evidence of abuse. Instead allow the Pro Bono system to provide support to meritorious cases". The Bar believes that this would have a detrimental impact on access to justice for the most vulnerable in our society and such a move would be unthinkable in other areas of public service. All practitioners are subject to the Bar's Code of Conduct which sets out the standards of professional conduct and practice required; it states at 4.8 that "a barrister in independent practice is under a duty to accept a brief to appear in any court in which that barrister holds out for practice (having regard to experience and seniority) and to mark a proper and reasonable professional fee having regard to the length and difficulty of the case".

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

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Telephone
+44(0) 28 9056 2050

Email
clare.rice@barofni.org

Website:
www.barofni.com

unmet legal need. Consequently, the Bar's 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. However, pro bono legal work is always only an adjunct to, and not a substitute for, a proper system of publicly-funded legal services. We would be opposed to any move towards abolishing the NICTS Exemption and Remission Policy.

Furthermore, in terms of the wider considerations contained in section six, the Bar would highlight the need for strategic direction and stability in Northern Ireland's legal aid policy to ensure that it is properly recognised as an indispensable part of our justice system. We note the inclusion of paragraph 103 around affordability research conducted by NICTS in light of *Unison v Lord Chancellor* [2017] UKSC 51. However, we would also point out that research from the Joseph Rowntree Foundation on Poverty in Northern Ireland in 2018 shows that almost a fifth of our population lives in poverty, including around 220,000 working age adults. The level of dependency upon legal aid, including the NICTS Exemption and Remission Policy, directly relates to the prevalence of poverty and social deprivation across our society. Meanwhile the outworkings of the Review of Access to Justice carried out in 2015 which focused largely on making cost savings within the system, alongside proposing additional changes to the scope of civil legal aid, levels of representation, money damages, and civil remuneration, remain unclear.

If I can be of any further assistance in this matter, please do not hesitate to contact me.

Yours sincerely,

David Mulholland
Chief Executive

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Telephone
+44(0) 28 9056 2050

Email
clare.rice@barofni.org

Website:
www.barofni.com