Access to Justice Review Northern Ireland

The Report

August 2011
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Executive Summary

The content of this executive summary follows the structure of the main report and is divided into the respective chapter headings.

Introduction

We were appointed by the Minister of Justice, David Ford MLA, in September 2010 to review access to justice in Northern Ireland, including criminal and civil legal aid, with a particular emphasis on alternative approaches to resolving disputes and securing value for money. We published a Discussion Paper in November 2010 to stimulate debate and a Progress Report in March 2011. During the period of the review we received submissions from, and held meetings with, 65 organisations and 10 individuals in Northern Ireland as well as observing sittings at each tier of court and meeting with members of the judiciary to gain a better understanding of the possible implications of our proposals for the management of cases. We visited London, Edinburgh and Dublin to learn from the experiences of government and delivery agencies in those jurisdictions and researched relevant documentation (referenced in the main body of the report).

The review covers a wide range of issues across the justice field and beyond and we have not had the time or capacity to examine all of the issues to the depth we would have liked. We therefore make the point that our recommendations should not be seen as a straitjacket, but rather as a basis for further consideration and discussion. However, that cannot be a recipe for delay. It is apparent that change in this field has in the past not always proceeded at the desired pace – we stress the importance of establishing at the outset effective programme and project management machinery, jointly owned by the Department of Justice and the Legal Services Commission, to facilitate and secure speedy, effective decision-making and implementation, not least because of the need to bring about early changes to bring spend within budget by the end of the spending review period.

Our objective is to produce effective and affordable access to justice and legal aid systems which help resolve disputes at the earliest possible stage consistent with sustaining the quality of justice.

Guiding Principles

When reviewing and considering major changes across a policy and delivery function, it makes sense to start by identifying the principles and strategic objectives that underpin the exercise. Chapter 2 of the report sets out a number of key principles and human rights norms that have guided us during the review and most of which have been endorsed by those whom we have consulted. They include fair and equal access to justice for all, regardless of means, gender, age or of community background, and compliance with Article 6 of the European Convention on Human Rights providing the right to a fair hearing in criminal proceedings and in proceedings where rights protected by the Convention are at issue. We also include in the key principles systemic issues such as early dispute resolution, the avoidance of delay, a mixed model of service provision and the desirability of maintaining a high quality, efficient and independent legal profession. We stress the importance of adherence to the rule of law and the need for decisions on granting legal aid to be taken independently of government or sectional interests.
We make no apology for highlighting *value for money* and effective budgetary management as key objectives and we identify the principle of proportionality – ensuring that public funds are used wisely, targeted on where they will make a difference, not on the trivial or on prolonging disputes unnecessarily. Incentives and systems should be in place to ensure that publicly funded clients pursue cases with due regard to costs and benefits as if they were paying for them out of their own private funds. There will be tensions between some of the principles we have identified, requiring good sense and judgement to resolve them.

**Financial Resources**

In chapter 3 we elaborate on the financial considerations which must be taken into account in an assessment of what can be achieved through access to justice and legal aid in the future; to do otherwise would be to run the risk of producing a set of unrealistic recommendations with little prospect of their being taken seriously. However, we do think it important that those responsible for financial management appreciate the *demand led nature of legal aid* where a range of external factors beyond the control of those delivering the service can impact on spend and make forecasting a challenging exercise. While we hope that our recommendations will tighten and improve the coherence of financial control systems, such developments as increased police clear-up rates, the impact of the recession and changes in policies on children in care mean that there will always be the need to allow for a margin for error in forecasting and budgeting for expenditure. This places a particular emphasis on financial forecasting, monitoring and identifying trends that require corrective action at the earliest possible stage; we note the need to address civil and criminal legal aid separately for financial management purposes.

As things stand, and based on forecast volumes and costs of legally aided cases, a *projected budget deficit* of £20.3 million in the current year is expected to reduce to around £5 million in 2013/14 and 2014/15; these figures take account of savings accruing from reforms to criminal legal aid including the ending of very high cost cases and reduction in standard fees in the Crown Court and stricter rules governing the certification of senior counsel. Given the substantial lead in time between decisions to make changes and their effect on expenditure, we believe that our report should be used as a basis for making the £5 million savings, primarily in civil legal aid, that will bring spend within budget by 2014/15. This will place a premium on early implementation of change, but also on identifying funds to make up the shortfall in budget in the earlier years of the spending review period.

At the end of this chapter of the report we comment on the validity of *comparisons between spend per capita on legal aid in Northern Ireland and in other jurisdictions*. For example, while spend per head here is likely to remain substantially higher than in England and Wales as a whole, that jurisdiction does not publish its legal aid spend on a regional or country basis; we think it likely that if such data were available it would reveal significant variations amongst the regions in England and Wales (as is the case with social security spend). Moreover, average earnings in Northern Ireland are over 10% below those in the UK as a whole, while the percentage of the workforce on incapacity benefit is greater here than elsewhere in the UK; such indicators would point to a higher take up of legal aid in Northern Ireland. However, such considerations, while important, should not give rise to complacency; the high level of spend here places a greater premium on value for money and budgetary control, while it is of critical importance to develop average cost per case as a key indicator covering all types of legal aid.
Criminal Legal Aid

We work on the basis that criminal legal aid will stay within scope, as now, in line with the UK's human rights commitments and that the "Widgery criteria" will remain the basis for determining whether the circumstances of the case are sufficiently serious or complex that the accused, if unable to fund the defence, should receive legal aid. We do not recommend any immediate change to the procedure whereby District Judges (Magistrates' Courts) decide on the merits of whether legal aid should be granted; but we do suggest that research be carried out to assess the reasons behind the increase in volume of criminal legally aided cases in 2010/11, with the possibility of corrective action being taken if any drift towards certifying less serious cases is identified.

The report notes that the Justice Act 2011 provides for the introduction of a fixed means test to replace the current arrangements where, before granting legal aid, the District Judge (MC) satisfies himself that the applicant is of insufficient means to fund his own defence, but without reference to statutory criteria or specified income limits. On implementation of this provision, we suggest that responsibility for the financial assessment should pass to the Legal Services Commission; it will be important to develop procedures for establishing financial eligibility that keep running costs to a minimum and do not interfere with the efficient dispatch of court business. In line with one of the themes of the review – that wherever possible decisions with expenditure implications should be taken by the spending body – the decision to certify the use of counsel in magistrates’ courts should be moved from the judiciary to the Legal Services Commission, working to clearly defined criteria.

Spend on legal aid in the magistrates’ courts rose by around 38% between 2009/10 and 2010/11 largely, but not wholly, because of an increase in the volume of cases. A significant increase in average costs appears to have played a part in this, possibly associated in part with the introduction of a new standard fee regime through the 2009 Rules. The reasons for the rise in average costs should be researched as part of the statutory review of the 2009 Rules and, if necessary, some corrective action taken; but any revision of the level of standard fees will also need to take account of our expectation (if this is agreed) that solicitors should be remunerated on the basis that they take full carriage of all but the most exceptional cases in magistrates’ courts.

It is Crown Court cases that have been the main focus of Department of Justice initiatives to bring the legal aid bill within budget – through the abolition of very high cost cases, a substantial reduction in standard fees and proposals to tighten the criteria for granting certification of senior counsel. We see such measures as necessary if spend is to be brought under control but can appreciate concerns over the impact of the pace and scale of change on business models to which practitioners are working. We have listed some principles that we think could usefully inform decisions on levels of remuneration in criminal cases. Our comments on the recovery of defence costs orders and other means of securing contributions to the legal aid fund from convicted offenders are particularly relevant to the Crown Court although the possibility of an offender levy would be relevant to all court tiers.

The availability of expert legal advice to those under arrest and held in police stations is particularly important for defendants and has been endorsed as a requirement by European human rights case law. We make recommendations to improve the current arrangements, particularly in respect of the establishment of a duty solicitor scheme across Northern Ireland for those defendants who want advice but who are unable to
access a solicitor of choice. We make recommendations for quality assurance in this important specialist area.

We understand the concerns expressed about what appear to be disproportionate costs to the legal aid fund, and to the justice system as a whole, when defendants elect for trial by jury at the Crown Court in cases of alleged dishonesty involving goods or cash of relatively low value. However, we are not attracted to using a small number of highly publicised instances to justify a more restrictive approach in this area. Such cases are likely to be of major importance to the accused and, from the perspectives of access to justice and confidence in the system, we think that the right to elect for trial by jury should remain as now. We do suggest some ways of keeping the incidence and costs of these cases within bounds.

Our terms of reference encourage us to examine the scope for alternative approaches and structures, which is as relevant to criminal as to civil justice. In the report we examine diversionary measures and alternatives to prosecution for the less serious first and second time offenders, including such interventions as fixed penalty notices, prosecutorial fines and conditional cautions. We note that some progress has been made in Northern Ireland in recent years, especially in the field of restorative justice, but suggest that a more ambitious approach could yield positive results; Scotland is particularly well advanced in this area and may hold some lessons for Northern Ireland. From an access to justice perspective we draw attention to the importance of defendants being able to secure independent advice on the implications of agreeing to diversionary measures.

The report looks at the arrangements in place to facilitate and incentivise lawyers to advise on the merits of early pleas. We note the possibility of introducing one standard fee to apply whether there is a plea or the case goes to trial (as is the case in Scotland) and suggest that the way this works in other jurisdictions and its possible application in Northern Ireland should be further researched. Pending the outcome of such research and any resulting decision, it will be important to ensure that differentials between remuneration levels for early or late pleas and contests are sufficiently narrow not to appear to incentivise the prolonging of cases. Other measures, such as the timely provision of information by the prosecution, can also help place the defence lawyer in a position to give early advice on a plea.

While stressing the desirability of sustaining the position of the independent private sector legal profession as the providers of defence services, our report discusses a public defender service in the context of measures to safeguard supply in the future.

We wish to emphasise the importance of victims and witnesses from an access to justice perspective and note that a separate programme of work has been under way, involving a range of public and voluntary sector agencies, to develop and implement a revised Code of Practice for Victims of Crime.

**Civil Legal Aid**

Our focus in civil legal aid was on the related objectives of prioritising the most vulnerable (where we endorse the priorities set out in the draft Funding Code), early resolution of disputes and making the best use of limited resources. We have sought so far as is possible within the resource envelope to retain, and in some cases enhance, the current comprehensive coverage of legal advice, assistance and representation for those who would not otherwise afford it, although not always through publicly funded solutions and with a stronger emphasis on controlling the level and cost of services.
The one significant area that we suggest should be taken out of scope includes cases where money damages are sought, for example those concerning personal injury. Our reasoning is that such cases, when successful, yield financial compensation and costs, opening up the prospect of introducing self-funding arrangements. Our report recommends the introduction of conditional fee arrangements (no win, no fee) in Northern Ireland with safeguards along the lines of those recommended by Lord Justice Jackson in England and Wales to prevent an escalation in costs and exploitation by claims management processes – and/or the development of an insurance based solution enabling plaintiffs to insure against losing. As well as securing significant savings for the legal aid fund, such arrangements have the added advantage that they work for potential claimants who, while falling just outside the financial eligibility limits for legal aid, may not have sufficient funds to pursue a sound claim.

Cases concerning family and children accounted for around 70% of the spend on civil legal aid in 2010/11. We gave serious thought to whether, following proposals in England and Wales, we should recommend removing from scope private family law cases (primarily matrimonial and associated matters) other than those where domestic violence or child abuse was a factor. If this were to happen, legal aid would remain for mediation in matrimonial cases. However, largely as a result of our observation of proceedings in court, we came to the view that an increase in unrepresented parties would impede the effective management of a court system already under pressure and render more difficult the resolution of differences between the parties, especially where children were involved. We therefore recommend that private family law remains in scope, but with procedures and remuneration arrangements in place that: discourage the use of the courts to prolong or re-open disputes; incentivise mediation, collaborative interventions or other pre-court solutions; and secure the economic and proportionate use of legal resources.

Public law children cases, involving children where local authority intervention is at issue, are a priority and should remain within scope. We do, however, believe that much could be done to address the cost of these cases without risking harm to the quality of the outcome and make recommendations about: the number of parties able to receive publicly funded representation; the levels of representation; and some ways of securing quality representation for children through the Guardian ad Litem Agency while addressing the associated costs to the legal aid fund. In particular, for public and private law cases, we suggest a remuneration system based on solicitors having carriage of cases in the Family Proceedings Court while senior counsel would not be funded in the Family Care Centre other than in the most exceptional circumstances.

Family and children matters are an example of where the substantive law can have a major impact on access to justice and legal aid costs. Scotland’s lower spend on legal aid can partly be explained by their greater dependency on inquisitorial processes through their children panels as opposed to our court based systems, while it is possible to envisage divorce procedures that are purely administrative in nature. We did not think it appropriate, and nor did we have the resources, to comment on the substance of the law, but we do think that the time might be right for a major review of family law and justice in Northern Ireland along the lines of that being carried out in England and Wales.

The ability to challenge allegations of serious wrongdoing on the part of public authorities or human rights abuses should remain in scope as a priority funding objective. However, in the administrative law field we lay emphasis on the importance
of considering other forms of resolution before cases reach a court for judicial review, including, where appropriate, the ombudsman and complaints mechanisms. A number of those we consulted referred to a “whole systems” approach on the part of public authorities: - encouraging quality decision-making processes; seeking early resolution of disputes; and learning the lessons of complaints and disputes to improve decision-making and service delivery. We believe this has much to commend it and can reduce associated costs both to the legal aid fund and to the authorities concerned.

We make recommendations for retaining procedures for the exceptional grant of legal aid where the case would otherwise be out of scope, but with tightly drawn criteria for determining such cases; and we address the issue of legal aid for relatives at inquests where Article 2 issues are at stake. In both of these instances we believe it important that decisions on whether to grant legal aid are taken by the legal aid delivery body, independently from government.

Advice and assistance at an early stage can help facilitate negotiation, other means of resolving disputes or a realistic appraisal of chances of success before proceedings are instituted. There are some weaknesses in the “green form” scheme through which solicitors may be remunerated for advising financially eligible clients on any point of Northern Ireland law and there may be issues about the channels through which advice is given. While we have examined the possibilities of setting up telephone advice lines or promoting more community based law centres, we have concluded that the best and most cost effective approach is to build on what we have through the availability of a network of solicitors and voluntary sector providers throughout Northern Ireland. Our recommendations do suggest some changes, in particular the availability of contracts or grants for the provision of advice and, in some cases, help at tribunals in the priority welfare areas; such funding would be open to competition from solicitors, the voluntary sector and private sector organisations. We suggest that all providers, registered for legal aid purposes, should commit to provide a limited period of free and unfunded assistance to clients on a pro bono basis, for example by directing them to the right place to secure more detailed assistance. Any advice that is given under a successor to the “green form” scheme should be of demonstrable benefit to the client if it is to attract funding. It will be important that mechanisms for publicly funded legal advice and assistance are developed in partnership with other relevant departments and agencies such as DSD.

A major theme running through the report is the promotion of alternative dispute resolution mechanisms, including mediation, collaborative interventions (in the family context), arbitration and conciliation. ADR is already used in Northern Ireland to some extent, is actively encouraged by the judiciary in many contexts and is championed by a range of organisations; but its development has been at best piecemeal and it has not assumed the level of prominence which we feel would be desirable in the family and other fields. The Irish Law Reform Commission has produced an excellent report on ADR, published in November 2010, which we would recommend as worthy of close study from the perspective of this jurisdiction. Our recommendations focus on establishing machinery to promote ADR, address supply and demand issues in relation to mediators (who may or may not be lawyers), develop an agreed approach to accreditation and quality control and incentivise its use in appropriate cases. We also suggest that government departments could have a big role in adopting and promoting ADR mechanisms for resolving disputes with suppliers and members of the public.
One particular area we see as suited to forms of community based ADR is that of neighbour disputes and anti-social behaviour of the type that might otherwise result in applications for injunctions or prosecution. This could be developed on a partnership basis with the voluntary and community sectors as part of the community safety strategy.

The case for ADR is founded on the positive outcomes it can secure rather than as a money saving exercise. Clearly if the right cases are routed into ADR and it secures positive results in the large majority, then there should be some scope for savings as have been secured in England and Wales in family cases. However, we have a word of caution which is that procedures must be in place to avoid the twin dangers of cases that would otherwise have been quickly and cheaply resolved through informal negotiation being submitted for mediation – or of cases with little chance of success through mediation (perhaps because of implacable hostility) going through a fruitless mediation process and then onto a full court hearing, thus substantially adding to costs.

We do examine the cost side of the equation for civil legal aid. On remuneration for the providers of publicly funded legal services, we concentrate on suggesting systems that place the maximum predictability and control in the hands of the Legal Services Commission or successor body. That means a codified standard fee structure covering all case types at each tier of court and, in the meantime while this is being developed, specifying the hourly rates the Commission is prepared to pay in cases that are taxed. We set out in the body of the report the considerations to be taken into account in setting standard fees. If, in order to live within the available budget, it proves necessary to reduce the overall level of fees we suggest that, rather than a blanket percentage reduction, each area of work should be examined on its merits. We also suggest the development of a strategy to better control the use and cost of expert witnesses in the family, criminal and other spheres.

In examining financial eligibility for civil legal aid, we take account of the need to secure access to justice for those who would not otherwise afford it, the need for transparency, the impact on the budget and the desirability of encouraging those in receipt of public funds to behave as they would if funding the case themselves. We support the work being carried out on simplifying and harmonising the financial eligibility criteria that currently apply. But the report makes suggestions for including in the financial modelling a number of devices aimed at reducing the financial burden on the department, including increased contributions from those who can afford them and the inclusion of housing equity in the calculation of capital limits.

We suggest that there should continue to be a system of appeals against refusal to grant legal aid or on remuneration matters, coupled with the provision of reasons for decisions (both in the first place and following appeal). However, our recommendation is for early action to bring appeals “in house”, albeit with an independent element, with no need for oral hearings.

Towards the end of chapter 5, the report identifies those matters that are being taken out of scope in England and Wales. While we do not recommend following suit, we do suggest an approach to identifying those cases that might be considered for being taken out of scope if the financial imperatives make this unavoidable.

We also discuss the implications of our recommendations for the Legal Services Commission’s reform work in the civil arena, including the Funding Code, financial eligibility, the statutory charge, registration and a remuneration order.
Service Providers, Quality and Value for Money

While the arrangements we envisage for the provision of advice and ADR services include a potentially significant input from the voluntary sector and, possibly, private sector organisations, it is the independent legal profession that will continue to supply the bulk of publicly funded legal services. A comprehensive review of access to justice must therefore include consideration of the structure and size of the solicitors’ and barristers’ professions, their capacity to provide quality services and the arrangements for regulating their performance in the public interest.

Chapter 6 of the report points to the growth in both branches of the profession over the last two decades and notes the high dependence on small generalist solicitors’ practices able to access specialist services from other firms or the independent referral bar. It is not always easy for lay clients to assess whether they have received services from the profession at an acceptably high standard and we do not think it sufficient for a procurer of legal services on behalf of the public to rely solely on the regulatory regime to ensure quality and value for money. We therefore endorse the establishment of a statutory registration scheme for all providers of legally aided services associated with the application of proportionate, cost effective systems for monitoring quality.

As for procurement mechanisms, we suggest the retention for now of arrangements whereby clients eligible for legal aid can choose a registered solicitor who, having secured the legal aid certificate, will be paid according to standard rates; and there is provision for the remuneration of counsel in appropriate circumstances. However, we recognise that contracting and best value tendering could play a part in enabling market pressures to secure efficiencies in service provision, possibly including some restructuring of the delivery model; and we suggest that such options are kept under review. In the meantime, the remuneration levels for publicly funded work should be set on a basis that provides reasonable margins for well run businesses that take advantage of efficiencies that can be secured from specialisation, rationalisation, economies of scale and new ways of delivering services.

The structure of the legal profession was addressed in the Review of Legal Services carried out in 2006 by a group led by Professor Sir George Bain. That report argued against following the Clementi reforms in England and Wales which provided for the establishment of alternative business models enabling solicitors, barristers and other professionals to work together in one entity and to be financed externally. Other jurisdictions have since started down this path. While we have not considered these matters in sufficient depth to make firm recommendations now, we do suggest that there may be a case for examining them in more detail in future; at the very least the experience of other jurisdictions should be kept under review. The Bain review also addressed issues of regulation in the light of the Clementi conclusions that regulation and representation of the legal profession by the professional bodies should be separated, with regulation overseen by an independent supervisory body and a new body established to handle complaints. Bain did not go so far in his recommendations on regulatory matters as Clementi but did make proposals for a Legal Services Oversight Commissioner and greater lay involvement in regulatory work. We suggest in our report that government in Northern Ireland should as a matter of urgency come to a view on whether to implement these
recommendations, with or without modification to secure greater separation between regulation and representation.

We end chapter 6 by addressing the role of solicitor advocates and the position of advocacy in the legal market place on the basis of maximising competition, while sustaining the supply of quality advocacy services at all tiers of court.

**Structures for Delivering Legal Aid and Developing Policy on Access to Justice**

The report analyses the strengths and weaknesses of the current architecture for the administration of legal aid services and for the development and implementation of policy on legal aid and access to justice. It focuses on the need for policy responsibility to be located unequivocally in the core of the Department of Justice as part of an Access to Justice Directorate, albeit that the delivery arm should have the capacity to feed into policy development from an operational perspective. This should facilitate the timely development and implementation of change, give the Department and Minister clear control over matters with major spending implications and help ensure that the impact on legal aid and the court system of policy and legislative change elsewhere in government is fully taken into account. More generally, at the end of chapter 7 we discuss the desirability of putting in place some machinery through which the justice agencies and stakeholders with an interest in civil justice matters can work together on a co-operative basis.

It remains critically important that individual decisions on the grant of legal aid are taken independently of government or political influence and for that reason we believe that the body charged with delivering legal aid should remain at arms length from the core of the Department. We consider a number of options but come down in favour of a form of next steps agency, with the Chief Executive charged with a statutory responsibility for determining legal aid applications, a structure that is being implemented in other jurisdictions. We think that there are advantages in this model which, while retaining the separate identity of the delivery body, brings it within the department, opening up opportunities for economies of scale, staff development and access to skills and facilities within the DoJ.

The Chief Executive and management board of the agency will have accounting officer responsibilities and be responsible to the departmental management and the Minister for performance. We believe, however, that independent input from advisory board members with suitable expertise could bring added value in such areas as providing assurance on independence of decision-making, appeals and being a source of advice to the Minister on access to justice matters; a non-executive member of the agency’s management board could be drawn from the advisory board as could a member or chair of its audit committee.

We identify significant investment in IT on the part of the agency as of vital importance from a spend to save perspective, to improve the quality of service delivery through such devices as on line forms and to provide fully integrated financial and management information. The development of a model for business processes to support and inform IT planning should take place alongside an organisation-wide review of staffing levels and grades; while this may demonstrate the need for increased resources in some areas such as quality control, overall we would expect such a review to demonstrate the scope for significant savings when implemented alongside the IT changes. At a time when economies are being sought
in spend from the legal aid fund it is essential to exert the same downward pressure on running costs.

**Living within Budget and the Options for Further Savings**

In the final chapter of the report we return to resource issues. While we have been unable precisely to cost the financial consequences of our recommendations, we give an indication of the resources at issue and believe that on balance our recommendations will, if not achieve, make at least a substantial contribution towards making the savings necessary to come within the projected budget in 2014/15. We suggest that as a matter of urgency more work is done on modelling the effect of our proposals on spend. In the event that significant further savings are deemed necessary, we set out some options centring on scope, remuneration and financial eligibility. We also identify family justice (including public law children cases) as an example of an area where fundamental reform of the substantive law and the associated processes might achieve cost savings.
1. Introduction

1.1 This document constitutes the final report of the team appointed in September 2010 by the Minister of Justice, David Ford MLA, to conduct a review of access to justice in Northern Ireland. Our terms of reference are to review legal aid in Northern Ireland and develop proposals to improve access to justice which will:-

- ensure that defendants have adequate representation to secure the right to a fair trial in criminal cases;
- in civil cases provide adequate, appropriate, efficient and cost-effective mechanisms for resolving legal disputes, whether by action in the courts or otherwise;
- examine previous review work to determine what recommendations and proposals remain relevant;
- examine the scope for alternative approaches and structures as set out in the Minister’s speech of 7 June 2010 (see Annex A for the Minister’s statement to the Assembly announcing the review and an extract from his speech of 7 June);
- make proposals for an efficient and cost-effective system of administration to develop policy and support access to justice;
- make proposals to achieve value for money in the use of public funds within the available budget, including identification of possible future savings to reduce the legal aid budget.

The review team comprised Jim Daniell, Angela Ritchie and Catherine McClements.

1.2 In such a wide ranging review we began by researching background documentation and meeting with relevant government departments, public agencies and stakeholders, including the Law Society and Bar Council. This enabled us to scope the parameters of the exercise and to identify the key issues which we set out in two documents published in November 2011 – the Agenda and the Discussion Paper. These papers formed the basis of a consultation process that was to finish at the end of January 2011.

1.3 During this first consultation period over 40 organisations and individuals made written submissions to the review and we participated in over 50 meetings with interested parties. We conducted two workshops (on alternative dispute resolution and on the delivery of advice and assistance through partnership mechanisms) and welcomed the opportunity of a number of meetings with the judiciary to discuss the operational implications of the issues under discussion for the workings of the courts.

1.4 While we are clear that this review should produce outcomes suited to the particular circumstances of Northern Ireland, it makes sense to take account of the experiences of the other jurisdictions in these islands which have legal systems bearing many similarities with our own. During the consultation period, we undertook visits and had discussions with government...
departments, legal aid authorities and other organisations in the Republic of Ireland, Scotland and England and Wales; we wish to record our appreciation for the time given to us during those visits and subsequently in answering our questions and requests for further information.

1.5 In March 2011, we published the Progress Report outlining our emerging thinking and narrowing some of the options, allowing for further consultation to take place until mid May. During that period we also undertook visits to different tiers of criminal and civil courts throughout Northern Ireland and had further meetings with stakeholders, including some who were participating in the review for the first time. A list of those who have made submissions to the review or contributed at meetings is attached at Annex B; a synopsis of the written responses received during the consultation periods is published alongside this report at www.courtsni.gov.uk/en-GB/AboutUs/A2JReview. Throughout the process we have consulted a large number of documents and reports originating in this jurisdiction and elsewhere; where appropriate they are identified and referenced in the text of this report.

1.6 We wish to place on record our appreciation of the quality of the submissions and strength of commitment to sustaining and improving access to justice demonstrated by organisations and individuals in the public, private and voluntary sectors. This can only bode well for the future wellbeing of justice in Northern Ireland.

1.7 The remainder of the report follows broadly the same format as the Discussion Paper and Progress Report. However, we take two chapters at the outset to give separate consideration to the fundamental guiding principles behind quality access to justice in a democratic society and the financial context which needs rather more analysis than was the case with our previous publications. Also, Annexes C and D contain important data on budgets, financial forecasts and trends in volume and costs of different categories of civil and criminal legal aid. We should stress that data quoted in the review are taken from a range of sources including the Commission’s management information, its financial records and forecasting material and judicial statistics; while it has not always been possible to reconcile the material as precisely as we would like and we have not attempted any independent verification of it, we are confident that any discrepancies are not sufficient in scale to call into question trends identified and conclusions drawn.

1.8 We are conscious that this review covers a very broad range of issues across the civil and criminal justice systems and beyond, affecting a number of departments, agencies and sectors - and that it has been conducted over a relatively short timescale by a small team. Moreover the financial environment has been particularly challenging in the context of a demand led service that is liable to be under increased pressure at times of economic hardship in the community. In the circumstances it has not always been possible to research our proposals, assess their operational and financial consequences, test them with stakeholders and produce roadmaps to implementation, all to the precision, depth and extent that we would have liked.

1.9 We are also conscious that, for reasons we will touch on later in the report, change and reform in the legal aid field can take a long time to bring to fruition. In the light of this and the considerations outlined in the previous paragraph, if the Minister wishes to proceed in line with the thrust of the
report that follows, we suggest that the Department of Justice and Legal Services Commission establish a joint task force to manage small teams with policy and project management expertise that will each take ownership of groups of related action points. These teams would test the proposals, assess their financial implications, prioritise, project plan and manage implementation to an agreed timescale. Our recommendations should be seen, not as a straitjacket, but rather as a menu from which to choose and one which can be varied in the light of further consultation and testing; however, especially given the budgetary constraints, it will be essential that decisions are taken within a closely defined timescale and that there is a disciplined approach to implementation.

1.10 Finally, in this introductory chapter, we wish to place on record our gratitude to the Northern Ireland Legal Services Commission, the Courts and Tribunals Service, the Law Society and the Bar Council for the help and support they have given us throughout this review at a time when there have been many other pressures.
2. Guiding Principles

2.1 Access to justice is an indispensable feature of a democratic society committed to fair and equal treatment of all its citizens regardless of their background. Backed by the rule of law and the oversight of an independent judiciary it facilitates: the protection of fundamental freedoms and human rights; fair treatment and trial for those accused of criminal offences; the ability of individuals to assert or defend their rights in relation to public authorities and those who may be economically more powerful; and transparent, safe and fair means of avoiding or resolving disputes. In his speech of 7 June 2010, David Ford MLA committed to this vision and said: “The objective of the review will be to go back to first principles, and to decide how best to help people secure access to justice”. In this part of the report therefore, we outline the key principles underpinning access to justice on which we have consulted and which have informed our approach to the review. We suggest that the Department of Justice and any agency with responsibility for delivering legal aid and access to justice should commit to these guiding principles against which policy development and decision-making can be benchmarked.

2.2 The aspiration of fair and equal access to justice contained in the Legal Services Commission’s mission statement is our starting point – referring to the ability of all, regardless of means, to secure fair and equitable solutions to justiciable issues and disputes through the courts, tribunals or other mechanisms including negotiation and alternative dispute resolution arrangements.

2.3 The review takes account of human rights instruments incorporated in UK law or ratified by the UK and associated case law - in particular Article 6 of the European Convention on Human Rights providing for the right to a fair hearing before an independent tribunal established by law in criminal proceedings and in proceedings where civil rights protected by the Convention are at issue. This includes the right to free legal representation in criminal proceedings where the defendant does not have the means to pay and the interests of justice require it. Other rights in the Convention that come into play include the right to life (Article 2), the right to liberty (Article 5) and the right to privacy and family life (Article 8).

2.4 As stated in the Progress Report, we endorse the views expressed in the responses to our consultation that a number of other international instruments assert rights that are relevant to this review. They include:-

- The UN Convention on the Rights of the Child – including the right of the child to be heard or represented in judicial and administrative proceedings affecting their interests (Article 12) and that the child’s best interests should be the determining factor in decision-making.

- The UN Convention on the Rights of Persons with Disabilities (incorporated in UK law) – the obligation of states to ensure effective access to justice for persons with disabilities, including through the provision of procedural and age-related accommodations (Article 13).

- UN Basic Principles on the Independence of the Judiciary.
UN Basic Principles on the Role of Lawyers – states to ensure the availability of sufficient resources to provide legal aid to the poor and disadvantaged and the legal profession to co-operate (Principle 3).

Resolution 78(8) of the European Council of Ministers and Article 47 of the Charter of Fundamental Rights of the European Union - right to a fair trial, representation before the courts and legal aid where necessary to ensure access to justice.

International Covenant on Civil and Political Rights – equality of all before courts and tribunals and the right to legal assistance in criminal matters (Article 14).

2.5 The commitment to equal access to justice includes adherence to the requirements of sections 75 and 76 of the Northern Ireland Act 1998 in relation to the promotion of equality of opportunity. While we have been mindful of these provisions in carrying out the review, we have not had the time or resources to carry out screening and equality impact assessments; we recognise that such assessments will be a necessary part of the procedure in implementing measures flowing from the review.

2.6 Access to justice and commitment to the rule of law are inextricably linked in protecting the individual from the arbitrary use of power by the executive branch of government and the economically powerful, and ensuring that all are equal before the law. This has particular salience in criminal and administrative law (including judicial review) but is applicable in all fields. It follows from this principle that decisions on granting legal aid should be taken against objective criteria and independently of government or sectional interests.

2.7 In an adversarial legal system, where issues are determined on the basis of arguments put by or on behalf of the parties to a dispute, the principles outlined above will be reinforced by securing (where feasible) equality of arms – in the sense of each party in civil and criminal proceedings having access to similar levels and quality of legal assistance and representation. The availability of legal aid for those who could not otherwise afford legal representation follows from this; but we also take account of the potential for unfettered access to public funds to upset the balance if it enabled a legally aided party to pursue proceedings against a non-legally aided party beyond the point at which a reasonable outcome could be secured. Equality of arms, and the imperative to safeguard the public purse, require that legally aided clients and their lawyers should be in the position of having to take account of the costs of publicly funded proceedings as they would if they were funding them privately.

2.8 Proportionality is a concept well known in human rights law and in the context of legal aid and access to justice follows naturally from the “privately funded client” approach to decision-making outlined in the previous paragraph. It means that those responsible for developing policy and taking decisions ask the question whether the scale and impact of the remedy or outcome being sought are sufficient to justify the possible cost to the legal aid fund and whether there might be other less expensive ways of resolving the matter.
2.9 Economic considerations and the interests of the parties will be served by arrangements that incentivise the prevention or early resolution of disputes and problems, keeping them out of the courts and tribunals where possible. The availability of advice services, effective complaints mechanisms and a strategic approach (especially on the part of public authorities) focused on quality and minimising the likelihood of litigation, will contribute to this objective. Also we believe that central to an access to justice strategy should be the availability and promotion (for suitable private and publicly funded cases) of a range of alternative dispute resolution services such as mediation, conciliation, arbitration, collaborative law and other more informal mechanisms.

2.10 We believe it axiomatic that those responsible for developing policy on access to justice and for delivering legal aid services should be committed to supporting the efficient workings of the justice system and in particular to minimising delay. This means ensuring that processes for decision-making on the grant of legal aid are streamlined and efficient, but also that fee structures, quality assurance and the policy framework should reinforce the efforts of the judiciary in case management.

2.11 With a broad interpretation of access to justice as being about advice, prevention, alternative dispute resolution and help and representation in cases going to court and tribunals, we see advantage in commitment to a mixed model of service provision open to private and voluntary sector providers including, in certain areas, non lawyers. The public sector would retain its commissioning and policy development role, acting in partnership with the providers, and we would not rule out direct provision of a service by a public body if that were to be demonstrated the most efficient and effective approach. As well as bringing diverse skills into play and enhancing choice, openness to a mixed model provides an important safety net to ensure that assistance can always be made available to vulnerable clients and could act as a counter-balance to market dominance by any one sector or group of providers.

2.12 While committing to a mixed model, we recognise that the bulk of publicly funded legal services are likely to continue to be provided by solicitors and barristers operating in the private sector. Moreover we see the availability of a high quality, efficient and independent legal profession as of critical importance in sustaining access to justice and the rule of law now and into the future. Whatever may be achieved through early action to prevent disputes and ADR, it remains the case that the ability to seek redress before the courts is the ultimate safeguard; that in turn is dependant on an independent judiciary but also on lawyers acting in the interests of justice and their clients at all levels. This does mean taking account of the implications of decisions flowing from this review for the legal market place and for the structure and make up of the legal profession, as a critical element of access to justice. We address these points later in the report (chapter 6).

2.13 It is important that legal aid is viewed as an integral and important component of the Executive’s strategy for safeguarding and supporting the vulnerable in society and targeting economic and social need. This has consequences for the way in which funding is viewed but also in emphasising the importance of partnership and co-operation between those in the Department of Justice family responsible for this field and the social departments and agencies concerned with such issues as advice, welfare, housing and family issues.
2.14 As in any area of public service, value for money and budgetary management must remain central considerations. We deal with these in the next chapter.

2.15 We recognise that there may on occasion be tension between some of these principles and there will be a need to exercise judgement on how to prioritise between them. For example “equality of arms” and “proportionality” might not always sit well together, while “value for money and budgetary management” might limit the scope for achieving other objectives. However, we believe that they provide a sound basis for determining policy and delivering services.

2.16 Responses to the Discussion Paper and the Progress Report indicated strong support for most of the principles outlined above. However, two themes came through strongly from a number of responses and have been raised with us at meetings with stakeholders. The first concerns delay. It is clear that there remains considerable concern about delay in the criminal and civil justice systems, with particular emphasis on its impact on victims and witnesses in criminal cases and on children in public and private law matters on the civil side. We appreciate that there have been, and are, initiatives in train to address the problem and do not propose to give it separate in depth treatment in this report. However, it does affect the quality of access to justice and does give rise to additional costs; in the light of views expressed to us, we felt it right to draw the Minister’s attention to continuing concerns about delay in the civil and criminal justice systems.

2.17 The second point is about financial issues. Some responses expressed concern that the content of the Discussion Paper and the Progress Report placed too much emphasis on a “cost cutting” agenda and the same point arose on occasion at meetings. Our terms of reference are clear and we believe that our earlier reports reflect what we were being asked to do. This review is an opportunity to improve and explore new ways of delivering critically important services effectively for the benefit of the community. But we have to recognise the financial realities and we note that (quite rightly in our view) words like “value for money”, “cost effective”, “efficient” and “within the available budget” appear in three of the six limbs of our terms of reference. It is far more likely that this review will safeguard access to justice and secure improvement if it is linked to the available resources and the necessity of achieving value for money than if it consists of aspirations and an uncosted wish list.
3. Financial Resources

3.1 We believe it important that from the outset those considering the review do so with a clear understanding of the resource framework within which the final limb of our terms of reference requires us to operate. We will also take the opportunity in this chapter of the report to make some observations about budgetary management in a service that is demand led and where the level of demand is affected by extraneous factors, not all of which are within the control of, or even open to influence by, the management of the Legal Services Commission or the Department of Justice.

3.2 The table below provides a summary of actual spend against budget from 2005/06 to 2010/11 and projected spend against budget from 2011/12 to 2014/15. Annex C disaggregates these figures further, while Annex D contains graphs that show trends in volume and average costs of payments supporting different types of legal aid.

Table 1 - Legal aid expenditure - Figures to the nearest £0.1 million

<table>
<thead>
<tr>
<th></th>
<th>05/06</th>
<th>06/07</th>
<th>07/08</th>
<th>08/09</th>
<th>09/10</th>
<th>10/11</th>
<th>11/12</th>
<th>12/13</th>
<th>13/14</th>
<th>14/15</th>
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</thead>
<tbody>
<tr>
<td>Civil</td>
<td>27.4</td>
<td>27.7</td>
<td>27.5</td>
<td>32.7</td>
<td>36.9</td>
<td>42.5</td>
<td>47.9</td>
<td>39.3</td>
<td>39.2</td>
<td>39.4</td>
</tr>
<tr>
<td>Criminal</td>
<td>30.6</td>
<td>41.7</td>
<td>44.5</td>
<td>50.6</td>
<td>60.0</td>
<td>50.8</td>
<td>48.1</td>
<td>39.6</td>
<td>34.2</td>
<td>32.4</td>
</tr>
<tr>
<td>GIA</td>
<td>5.1</td>
<td>5.3</td>
<td>5.7</td>
<td>6.5</td>
<td>7.3</td>
<td>7.8</td>
<td>8.2</td>
<td>7.8</td>
<td>6.9</td>
<td>8.3</td>
</tr>
<tr>
<td>Total</td>
<td>63.1</td>
<td>74.7</td>
<td>77.7</td>
<td>89.8</td>
<td>104.2</td>
<td>101.1</td>
<td>104.2</td>
<td>86.7</td>
<td>80.3</td>
<td>80.1</td>
</tr>
<tr>
<td>Budget</td>
<td>40.0</td>
<td>65.0</td>
<td>65.0</td>
<td>65.0</td>
<td>103.9</td>
<td>105.2</td>
<td>83.9</td>
<td>83.4</td>
<td>75.2</td>
<td>75.0</td>
</tr>
<tr>
<td>(Shortfall)</td>
<td>(23.1)</td>
<td>(9.7)</td>
<td>(12.7)</td>
<td>(24.8)</td>
<td>(0.3)</td>
<td>+4.1</td>
<td>(20.3)</td>
<td>(3.3)</td>
<td>(5.1)</td>
<td>(5.1)</td>
</tr>
</tbody>
</table>

Notes:
1. Actual spend for civil in 2010/11 includes payment for a number of high value medical negligence cases which are unpredictable in terms of frequency and value.
2. The projected spend for civil in 2011/12 includes several million pounds worth of payments in respect of a single case – some or all of that could instead fall to be paid in 2012/13.
3. Figures in the civil row include legal advice and assistance (including PACE) on criminal matters.
4. Payments in respect of criminal cases from 2008/09 include significant sums in respect of Very High Cost Cases of which there was a backlog dating back to 2006/07.
5. The figures in the criminal row take account of recoupments of payments in very high cost cases and of appeals.
6. Grant in Aid (GIA) refers to the running and administrative costs of the Commission where increases in VAT, national insurance charges and capital additions are reflected.
7. The budget figures for 2009/10 and 2010/11 include £20m added to the baseline for each year as part of the devolution settlement and an additional £18.9m and £20.1m respectively from the devolution contingency fund. The conditions attached to the contingency fund mean that the £4m surplus in 2010/11 can be netted off against the deficit in the following year.
8. The forecast spend on criminal takes account of savings accruing as a result of implementation of standard Crown Court fees through the 2011 Rules. It also incorporates projected savings in respect of new regulations on the assignment of senior counsel in the Crown Court (£1.5m by 2013/14), new arrangements for means testing in the magistrates’ courts (£0.5m) and recovery of defence costs orders (£0.2m).

3.3 The shortfall in budgetary provision against actual spend from 2005/06 to 2008/09 reflects a practice of allocating budgets in the knowledge that they were not going to be sufficient to meet financial commitments in a demand led service, but with a tacit understanding that the shortfall would be made up in
year. The result was invariably a debilitating period of negotiation between the Commission and its sponsor during the autumn of each year as sufficient funds were identified in the centre to meet the estimated deficit. This did not inspire confidence on the part of the providers of legal services and nor, given that the budgets were clearly seen to be unrealistic and liable to be topped up as necessary, did it create an atmosphere conducive of rigorous financial forecasting and monitoring. These shortcomings were recognised in the devolution settlement through which the baseline was increased to a more realistic level and contingency funding made available. **We believe it important that the Legal Services Commission should enter each financial year with a budget that reflects a reasonable assessment of spend in the light of projected volumes, remuneration levels for providers, contributions from those in receipt of legal aid and running costs.** At the same time there must continue to be a commitment from the Commission to a rigorous approach to forecasting and financial monitoring and to working with the Department of Justice in securing value for money and identifying ways of controlling and, where necessary, reducing costs in the future. In particular, with realistic budgets having been set, it will be incumbent on the Commission to plan and manage its services with a view to staying within budget, albeit that absolute precision in determining future spend in a demand led environment may not be feasible.

3.4 We recognise that from the current year, until 2014/15, the projected spend exceeds budgetary provision. The figures discount a number of measures that have already been put in place, or are planned, to control costs, especially in the area of criminal legal aid. The recommendations that follow later in this report take account of the need to develop services in a way that will sustain and, where possible, enhance access to justice, while bringing expenditure down by a further £5.1 million in 2014/15. However, given the lead-in time for legislation and policy change and the time lag before such changes impact on expenditure levels, our proposals will not make up the shortfall in the current financial year and can only have a limited impact on spend in 2012/13. **The financial shortfalls in the current year and next year need to be resolved as a matter of urgency** as to a large extent they reflect commitments already made, as required by law. The legislative framework for legal aid does not allow for rationing (nor should it) and, for many reasons, delaying payment into the subsequent financial year is not an acceptable way forward.

3.5 Financial management in a demand led service is challenging, especially when demand can be heavily influenced by events outside the control of the legal aid provider and its sponsor department and which cannot be predicted with any certainty. However, for those determinants of spend that can be influenced by the spending organisation, the recommendations flowing from this review should help reinforce work that is already in train to bring about greater predictability and control. For example, there is the drive towards standard and fixed fees set by the Commission or Department, as opposed to remuneration for lawyers being dependant upon time records, brief fees and/or decided by authorities who do not have accounting officer responsibilities; standard fees, paid on a “swings and roundabouts” basis for cases of varying lengths and complexity, are more easily administered and verified, assist with financial forecasting and incentivise efficiency. Tightening the criteria for key decisions with significant expenditure consequences, such as authority to employ counsel and instruct experts, helps control spend and makes it easier to predict and manage. Also, resource budgeting on a partial
provisions basis, combined with efforts to close old case files, will enable financial management to be focused on the point at which liabilities accrue rather than when bills are presented and paid (which can be several months or even years after the completion of a case).

3.6 Expenditure on legal aid and on the justice system generally, will be influenced by the substantive and procedural legal framework within which we operate, as well as by policy and operational decisions within and outside the justice family. Examples include the Children (NI) Order 1995 with its emphasis on court process to determine issues concerning the welfare of children and the Criminal Justice (NI) Order 2008 resulting in an increase in the caseload of the Parole Commission with a commensurate requirement for legal representation for those whose cases come before it. Later in the report we will be referring to the role of legal aid impact assessments to be conducted in relation to legislative and policy proposals across government. On an operational note, we are aware of the increased resources going to the police over the remainder of the spending review period; if this were to result in an increase in clear-up rates at the serious and organised crime end of the spectrum it could have a significant effect on legal aid spend on Crown Court cases.

3.7 Nevertheless, no matter how far decision-making on legal aid is brought within the ambit or influence of the accounting officer and the impact of policy change is taken into account, it would be naïve to suppose that the volume and case mix of legally aided work can be forecast with certainty. For example, it may be the fall out from the Baby P case in Haringey Council that has resulted in an increase in public law children cases where several parties can often be legally represented; and, at a time of reducing crime, increased clear up rates on the part of the police produced a rise of over 12% in the volume of cases going through the magistrates’ courts over the past two years, thus increasing the defence costs borne by the legal aid fund. Such developments, and other instances of legal disputes associated with the recession or social change, can have a big impact on legal aid spend but cannot be predicted and their financial consequences forecast with precision. Another factor that can introduce volatility into the spend profile is the influence of a small number of complex high cost cases whose influence on overall spend in a small jurisdiction is liable to be disproportionate and uneven over a period of years.

3.8 While it is unreasonable to expect precision, we do not believe that the circumstances outlined in the previous paragraphs detract from the importance of day to day financial management and long term planning – quite the opposite. We recommend that, drawing on much good work done for this review by the Courts and Tribunals Service and the Legal Services Commission, a forecasting model, agreed between the Commission and the DoJ, should be used to support quarterly reviews of spend with in year and longer term forecasts tested and, where necessary, amended in the light of trends and taking account of known or likely future developments liable to impact on volumes and average costs. This would help ensure the availability of funds in the short term while providing early warning of the need for corrective action in the event of pressures being identified for subsequent years. It also means integrating forecasting on, and budgeting for, criminal legal aid spend into a justice-wide model which recognises the close inter-relationship between spend and performance across the system, including the police, PPS, courts and
legal aid. We further recommend that, drawing on past trends, a sensitivity analysis should be carried out to assess the extent of variances from future financial projections that might occur as a result of changes in demand for criminal and civil legal aid that cannot be foreseen. This should be used by the Department as a basis for assessing the degree of flexibility in financial provision needed to sustain a statutory service.

3.9 We consider there to be a case for establishing separate funds and budgets for criminal and civil legal aid. The rationale for such an approach would be that criminal legal aid is not discretionary, but a requirement if we are to remain compliant with the European Convention on Human Rights; and the associated volumes and costs are inextricably linked to policies and performance in other parts of the criminal justice system, which should be reflected in the financial structures. Moreover, it is open to question whether the vicissitudes of spend on the criminal side should impact on the ability to fund civil legal aid (which can also have human rights implications). There are different cost drivers in criminal and civil legal aid and separate mechanisms are needed for financial forecasting, monitoring and taking corrective action in respect of each. The machinery through which criminal and civil legal aid can be addressed separately for financial purposes should be considered as part of the organisational restructuring we recommend in chapter 7.

Comparison with other jurisdictions

3.10 In the period leading up to devolution and throughout this review there has been interest in comparisons between jurisdictions of legal aid spend per head. Such comparisons are fraught with difficulty as they rarely compare like with like. For example inquisitorial legal systems, with their emphasis on fact finding by the courts, might spend more on their judiciary and courts but less on legal aid than would common law jurisdictions with their adversarial approach where the focus is on facts and argument presented by advocates representing the parties. Even in common law jurisdictions comparisons can be difficult if, for example, the legal aid budget in some does not include expenditure on community law and advice centres funded from other sources.

3.11 Nevertheless, given the interest in this, we thought that we should include some figures comparing spend per head in the three UK jurisdictions where the legal systems and structures supporting legal aid are broadly similar. Each of the jurisdictions is planning reductions in spend on legal aid and, based on the planned levels of spend after those reductions have been achieved, we estimate that the spend per head would be as follows:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Spend per head</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern Ireland</td>
<td>£42</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>£32</td>
</tr>
<tr>
<td>Scotland</td>
<td>£27</td>
</tr>
</tbody>
</table>

The relatively low level of spend in Scotland is partly attributable to their inquisitorial approach to public law children’s cases, heard by the children
panels, which are much less dependent on legal representation than court based systems (although administration of the panels themselves carries costs that are not reflected in these figures).

3.12 There are also caveats in the comparison with England and Wales. If expenditure there on legal aid were to be broken down on a regional basis, we expect that this would reveal significant variations, with the more economically deprived regions producing figures much closer to Northern Ireland. By a number of indicators Northern Ireland comes out as more deprived than any other region or country in the UK. 5% of the working population here receive incapacity benefit (2.9% in the UK as a whole), 27.8% are economically inactive (23.2%) and average earnings here are £441 per week (£499)\(^1\). This results in a higher eligibility for legal aid amongst the Northern Ireland population than in England and Wales and, therefore, the likelihood of a greater number of legally aided cases with a consequential impact on costs per head of the population.

3.13 Data produced by the Treasury\(^2\) on public expenditure across the regions and countries of the UK shows spend per head disaggregated by function. Expenditure plans for 2008/09 were based on a planned spend per head in Northern Ireland of £3,883 on social protection (social security and benefits) compared with £3,222 in the UK as a whole and, in the English regions, a range of £2,816 in the south east to £3,573 in the north east. The comparators for total public expenditure per head identifiable by region are £10,003 for Northern Ireland and £8,219 for the UK as a whole, with similar differentials applying in the outturn for previous years. Against this background, it is not surprising that spend per head on legal aid in Northern Ireland is higher than in England and Wales.

3.14 The position outlined in the previous paragraphs is supported by data from 2008 analysed by the European Commission for the Efficiency of Justice\(^3\) which indicates that there were substantially more legally aided cases per head of the population here than in England and Wales. As pointed out by the Law Society in their submission to us, this study also suggests that in 2008 (before the full impact of very high cost cases had been experienced) average costs were less in Northern Ireland than in England and Wales; we should however caveat this by noting that we have not been able to establish whether the methodology for recording the data in the different jurisdictions was the same. While we believe that the differences in the figures quoted in paragraph 3.11 above can, to a degree be explained, we recognise that the extent of the disparity between Northern Ireland and the other jurisdictions is such as to give added impetus to the need to control costs. Moreover the debate adds urgency to the need for the development of a reliable mechanism for measuring and recording average case costs in Northern Ireland, a critical part of the value for money equation and a meaningful means of benchmarking against other jurisdictions.

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1 Figures derived from the Office of National Statistics employment data.

25
4. Criminal Legal Aid

4.1 The availability of criminal legal aid in Northern Ireland is currently governed by Articles 28 to 31 of the Legal Aid, Advice and Assistance (NI) Order 1981. They provide for the grant of legal aid in a magistrate’s court, the Crown Court and on appeal in circumstances where the court considers the defendant to be of insufficient means to pay for legal representation and that it is in the interests of justice that legal aid be granted. While an applicant for legal aid is required to provide the court with a statement of means, unlike in civil cases, there are no prescribed limits on income or capital governing the grant of criminal legal aid. In a magistrate’s court legal aid is granted in respect of a solicitor and may only include representation by counsel in the case of an indictable offence where the circumstances of the case are unusually grave or difficult and therefore warrant an increased level of representation; counsel is invariably assigned in the Crown Court, where in serious cases two may be assigned. We should also draw attention to Article 31 of the 1981 Order which provides that in cases of doubt over whether the interests of justice or means test have been met, the doubt should be resolved in favour of granting legal aid.

4.2 The “interests of justice” were not defined in the 1981 Order but successive Lord Chancellors have endorsed what are commonly referred to as the “Widgery criteria” which are that:-

- the charge is a grave one in the sense that the accused is in real jeopardy of losing his liberty or livelihood or suffering serious damage to reputation;
- the charge raises a substantial question of law;
- the accused is unable to follow the proceedings and state his own case because of inadequate knowledge of English, mental illness or other mental or physical disability;
- the nature of the defence involves tracing and interviewing of witnesses or expert cross-examination of a witness for the prosecution;
- legal representation is desirable in the interest of someone other than the accused, for example in a case involving a sexual offence where it would be undesirable for the accused to cross examine the witness.

When the relevant part of the Access to Justice (NI) Order 2003 is commenced, these criteria will be given statutory authority through Article 29. We believe that the Widgery criteria, as replicated in the Access to Justice (NI) Order 2003, continue to provide a sound basis for determining whether the circumstances of a case merit the grant of legal aid to financially eligible defendants. In particular they are compliant with case law supporting Article 6 of the ECHR which identifies the seriousness of the case, complexity and the gravity of the penalty as the issues to be taken into consideration in addressing the merits of granting free legal representation in criminal cases.
4.3 Legal aid is available to enable persons interviewed at police stations under PACE provisions to secure the services of a solicitor at the place of custody or to secure telephone advice. In addition those who are financially eligible may use the legal advice and assistance (green form) scheme to seek advice from a solicitor on any matter relating to the criminal law of Northern Ireland.

4.4 All criminal proceedings begin in the magistrates’ courts and the large majority are disposed of in that forum. Judicial statistics show that over the last decade the number of defendants dealt with at magistrates’ court level remained relatively stable at around 55,000 per annum with a variation either way of little more than 5%; while at the Crown Court since 2004 the figure has ranged between 1,500 and 1,800. However, the past year has seen signs of an increase in business as police clear up rates continue to rise. In 2010/11 the number of cases received in the Crown Court rose by 21% and defendants in magistrates’ courts disposed of following prosecution by the PPS after a police investigation (as opposed to departmental prosecutions) increased from around 39,000 in 2008/09 to about 45,000 in 2010/11. If these increases were to be sustained, there would be significant implications for the volume and therefore cost of legally aided cases, an example of why the recommendation for integrated justice wide financial forecasting is so important (paragraph 3.8 above).

4.5 In assessing trends in the cost of criminal legal aid, it is of interest to compare spend on criminal defence services with that of the Public Prosecution Service, (PPS). Given the different nature of prosecution and defence work, there is no reason to expect the expenditure levels to be the same; but it would be surprising if there were not a relationship between the volume of prosecutions and defence cases, and therefore trends in overall costs. The table below shows actual and projected criminal legal aid spend for 2006/07 to 2014/15, together with actual spend and budget for the PPS over the same years.

Table 2 - Spend on the PPS and Criminal Legal Aid

<table>
<thead>
<tr>
<th></th>
<th>06/07</th>
<th>07/08</th>
<th>08/09</th>
<th>09/10</th>
<th>10/11</th>
<th>11/12</th>
<th>12/13</th>
<th>13/14</th>
<th>14/15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal legal aid (£m)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>41.7</td>
<td>44.5</td>
<td>50.6</td>
<td>60</td>
<td>50.8</td>
<td>48.1</td>
<td>39.6</td>
<td>34.2</td>
<td>32.4</td>
</tr>
<tr>
<td>PPS (£m)</td>
<td>35.4</td>
<td>38</td>
<td>35.5</td>
<td>32.3</td>
<td>37.6</td>
<td>37.3</td>
<td>36.3</td>
<td>35.5</td>
<td>34.3</td>
</tr>
</tbody>
</table>

Prior to 2006/07 the figures are not comparable as the roll out of the PPS was still in train, but it is worth noting that expenditure on criminal legal aid ranged between £27 million and £33 million between 2002/2003 and 2005/06. We note from annual reports that in England and Wales the spend on criminal defence services and the Crown Prosecution Service in 2009/10 was £1,120.5m and £687m respectively.

4.6 In the remainder of this chapter we will address access to justice issues in the magistrates’ courts and the Crown Court and then cover some topics of general applicability in the criminal sphere.
4.7 In order to provide some context, the table below provides information on the volume of bills paid to solicitors and counsel in magistrates' courts over the previous 4 financial years and the overall cost (including bills to solicitors and barristers, disbursements and VAT); the final column provides the forecast for 2014/15 that feeds into the projected figures for that year in Table 1 at paragraph 3.2 above. Figures 12 to 14 at Annex D show the historical data on overall cost graphically.

Table 3 - Volumes and cost of legal aid in magistrates' courts

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Bills (solicitors)</td>
<td>24,855</td>
<td>22,353</td>
<td>23,296</td>
<td>27,909</td>
<td>24,700</td>
</tr>
<tr>
<td>Bills (counsel)</td>
<td>4,918</td>
<td>5,063</td>
<td>5,110</td>
<td>5,960</td>
<td>5,440</td>
</tr>
<tr>
<td>Cost £m</td>
<td>14.3</td>
<td>14.8</td>
<td>14.8</td>
<td>20.5</td>
<td>17.8</td>
</tr>
</tbody>
</table>

The increase in volume in 2010/11 might in part be attributable to the introduction of standard fees through the 2009 Rules, resulting in faster submission of claims and payments than under the 1992 Rules; and the increase in the volume of PPS prosecutions flowing from police investigation (paragraph 4.4 above) may also have had an impact. However, it is noteworthy that the number of legal certificates registered (not influenced by remuneration arrangements) increased from 27,415 in 2008/09 to 34,464 in 2010/11. Also, the average cost of payments to solicitors, after holding steady at between £415 and £495 from 2004/05 to 2009/10, rose to £580 in 2010/11, with a similar increase over the same period for counsel. There is some logic in the forecast for 2014/15, given that a combination of one-off factors may have resulted in unusually high figures for 2010/11; but it is indicative of the uncertainties in forecasting that a variation in 2000 bills would amount to over £1 million in costs.

4.8 In addressing access to justice and legal aid in the magistrates' courts we recognise the points made to us by the Law Society and Bar Council about the case mix that can be tried at that tier of court. With a salaried judiciary, magistrates' courts in Northern Ireland have greater sentencing powers than would be the case in England and Wales and can deal with serious cases ranging from domestic burglary to possession with intent to supply and indecent assault (which can attract special measures applications for the benefit of witnesses)\(^4\). Moreover, they point out that in the past decade legislation such as the Criminal Justice Order 2004 has contributed to greater procedural complexity at this level through the introduction of applications for hearsay and bad character evidence. We also note and take into account their reasoning for leaving decision-making on the grant of legal aid and certification for counsel with the judiciary.

4.9 We will consider the following four key issues in relation to legal aid in the magistrates' courts:- the locus of the decision on the merits test for legal aid; financial eligibility; certification for counsel; and standard fees under the 2009 Rules.

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\(^4\) In England and Wales in 2009/10 872,585 defendants were prosecuted by the Crown Prosecution Service in the magistrates' court and 110,146 in the Crown Court. The corresponding figures for Northern Ireland were 42,513 and 1,932.
4.10 In the Progress Report we suggested that the judiciary were best placed to determine the interests of justice test for the grant of legal aid in accordance with the Widgery criteria, both in terms of expertise and the avoidance of bureaucracy. This position, while contrary to that which applies in England and Wales and for summary cases in Scotland (in those jurisdictions responsibility for this decision lies with the legal aid body or court staff), has the support of the Law Society and Bar Council. However, in recent weeks figures on the volume of legally aided cases in magistrates’ courts for 2010/11 have become available, (paragraph 4.7 above) and we are not convinced that the scale of increase can be attributed solely to rises in the number of police initiated prosecutions; we are also conscious of the point that so far as possible decisions impacting on public expenditure, while in line with the framework set by legislation (i.e. Widgery criteria), should be taken by the body that will be held to account for that spend. In the light of these considerations and concerns about the implications of uncertainty over volumes for the 2014/15 forecast, we decided to re-open this issue.

4.11 In addressing the “interests of justice test” and where the decision should be taken, we have been assisted by research carried out for the Northern Ireland Courts and Tribunals Service by Professor Richard Young, completed in May 2010. The research drew on statistical material relating to grants of legal aid and case mix during 2005/06, court observations and extensive interviews with practitioners and the judiciary carried out in 2007 and early 2008. While the research is now a little dated, we believe from our own observations and what we have been told that its general conclusions hold good today.

4.12 Young notes that legal aid for financially eligible defendants is ultimately granted in around 97% of applications and that there is seldom any mention of the Widgery criteria in applications made by solicitors or when the decision to grant is made. However, the research recognises that this is due to a clear understanding on the part of solicitors about the type of case that will qualify through the interests of justice test and a recognition that their interests will not be served by making fruitless applications. Young suggests that in general decision-making on this issue is stable and consistent between courts, largely driven by whether the nature of the offence is such as to carry the possibility of loss of liberty in the event of conviction. Where there may be some inconsistencies, this is at the margins, for example, in relation to certain types of motoring offences. While there appear to be some differences in the propensity to grant legal aid in respect of particular offence types in Northern Ireland (more generous) compared with England and Wales, in some cases that may be justified by local circumstances, for example, the potentially more serious implications here of a conviction for disorderly behaviour. Young does not find convincing evidence to support the “Widgery drift” thesis that over time there is an increasing tendency to grant legal aid for less serious offences.

4.13 The Young research is in our view of considerable value in contributing to an understanding of how the merits test is carried out; but its findings do not of themselves lead us to conclude that predictability and control of spend would be substantially enhanced by moving responsibility for decision-making from the judiciary to the body responsible for administering legal aid. Moreover,

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5 “A Review of the Arrangements for the Assessment of the Interests of Justice Test for Access to Criminal Aid – Final report” 18 May 2010. Ref: 33961. Professor Richard Young of the University of Bristol with the Assistance of Dr Aidan Wilcox.
from a human rights perspective, there should be no implication that such a move is being contemplated in order to make it more difficult for those who qualify by virtue of the Widgery criteria to secure legal aid. However, the research is based on field work that is some years old; and we do not have a clear understanding of what lies behind the upsurge in legal aid registration over the past two years. It may be, as some have suggested, that not only has there been an increase in the volume of cases coming before the magistrates courts but the case mix is becoming more heavily weighted towards the serious end of the spectrum; but, equally there could be other factors at work that are producing an element of “Widgery drift”.

4.14 Transferring the locus of decision-making on the merits test for criminal legal aid from the judiciary to the body responsible for administering legal aid would entail additional running costs and some additional pressures on solicitors who would be required to make formal applications; and procedures would need to be put in place that did not interfere with the efficiency of the justice system. Visits to other jurisdictions suggest that such problems can be overcome and we have noted with interest the clear guidance that is given by the Scottish Legal Aid Board on applications for legal aid in respect of summary legal proceedings.

4.15 Based on Young and one year’s worth of data, we do not believe that a case has been made out at present for moving responsibility for determining the merits test in criminal legal aid applications from the judiciary to court staff or an executive body. However, we recommend that the DoJ and the Legal Services Commission should research the factors that lie behind the increase in volume of legally aided criminal cases in 2010/11 with particular reference to the case mix. This will be essential for purposes of financial forecasting and to enable informed judgements to be made about whether trends in volumes will return to levels experienced in previous years. If such research were to reveal a tendency to grant legal aid in circumstances where it would not previously have been available, then it will be necessary to consider corrective action including the possibility of stricter statutory controls or changing the locus of decision-making.

4.16 Aside from the merits test the other key decision to be taken in determining the grant of legal aid is whether the applicant is of insufficient means to fund his own defence. At present that decision is taken by the District Judge (Magistrates’ Courts), based on consideration of a statement of means handed into the court by the applicant’s solicitor. There are no statutory limits on income or capital and the decision on the issue of means is a matter of judgement to be exercised in the light of the circumstances of the case.

4.17 Section 84 of the Justice Act 2011 enables the introduction of a fixed means test for criminal legal aid with clearly stated financial eligibility limits and the ability to require the defendant to furnish detailed financial information in order to allow a more structured test to be applied than is currently the case. While we recognise concerns that have been expressed about the introduction of a formalised means test and its implications for access to justice, the financial situation requires us to prioritise finite resources on the most vulnerable and those who cannot otherwise afford legal representation. Means tests have been introduced in the other UK jurisdictions. With the availability of procedures for defraying the cost of publicly funded defendants who are acquitted, we believe this to be a reasonable and proportionate measure,
provided that the financial gain significantly outweighs the costs associated with administering the scheme.

4.18 Research commissioned by the Courts and Tribunals Service identifies two main options for introducing a statutorily fixed means test. Both models work on the basis that if the applicant is in receipt of a "passported benefit", the test is automatically passed. For those not in receipt of such benefits, the approach, based on the England and Wales model, involves initial screening of gross income whereby people above a certain limit (£22,235) are automatically excluded from legal aid while those below the lower limit (£12,475) are deemed to have passed; between those two limits a simplified disposable income test is applied. The second option, drawing on the Scottish scheme, is based on a disposable income test. We note that both models have similar impacts in respect of targeting assistance on those with low incomes and in relation to section 75 groups – with the caveat that the English model would require a hardship provision to bring into scope the very small number of people who might be excluded by the initial screening but whose financial circumstances (e.g. serious debt) are such that they could not reasonably afford legal representation.

4.19 Given the similar impact of the two options, the choice between them will probably come down to simplicity of administration and process, which may favour the screening approach. Some doubts have been expressed to us about whether the financial benefits from this would be sufficient to offset the additional running costs associated with fixed means testing and to justify introducing a procedure that might interfere with the efficient running of the courts. The research suggests additional running costs of around £543k per annum (largely through the employment of 13 additional staff) to produce savings of about £1.2 million; and we note that savings of about £500k resulting from implementation of this measure have already been factored into the financial projections at paragraph 3.2 above. Moreover we understand that Scotland can turn financial eligibility decisions around in an average of 1.7 days. **We recommend that the Department of Justice and Legal Services Commission plan on action to implement a fixed means test in the magistrates' courts. They should pay particular attention to introducing efficient business processes, maximising the use of IT to keep running costs to a minimum, and ensuring that the business of the courts is not impeded.** A key issue to be determined will be whether to centralise decision-making on this in the Legal Services Commission or employ court based staff to carry out the necessary assessment of means, as in England and Wales.

4.20 **While the current arrangements for consideration of means continue in place, responsibility for deciding on sufficiency or otherwise of means should remain with the judiciary. When fixed means testing is introduced, responsibility for the decision should pass to the Legal Services Commission or to court based staff acting on behalf of the Commission.** Direct access to the DSD database by those carrying out the means test would be essential to put them in a position to confirm without delay that applicants were in receipt of passported benefits (paragraph 7.21 below). The applicability of means tests in the Crown Court could be considered in the light of experience in the magistrates’ courts, although we

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6 Fixed means testing was introduced into the magistrates’ courts in England and Wales in 2006.
recognise that at that tier there is a reduced likelihood of defendants being able to afford the higher costs of legal representation.

4.21 The introduction of the new means test in the magistrates’ courts will throw into sharp relief the availability of costs for defendants with privately funded legal representation who are acquitted or against whom charges are dropped. The Costs in Criminal Cases (Northern Ireland) Act 1968 gives the court discretion to order costs against the prosecutor at such levels as appear to the court reasonably sufficient to compensate the accused for the expenses properly incurred by him in carrying on the defence (including, in the case of a trial, any proceedings preliminary or incidental to such trial). We agree with the Bar Council and the Law Society that this appears to provide the necessary vehicle for meeting privately funded defence costs, although we should record that the Bar Council has identified a possible legislative lacuna in the lack of a right of appeal from a decision of the Crown Court not to award costs. The words, “reasonably sufficient”, should ensure that the prosecution service is not laid open to excessive costs; although we note that a judicial review in England, in respect of similar legislation, has overturned an attempt to limit costs to legal aid rates. We suggest that, as part of the planning for implementation of the fixed means test, the suitability and operation of the provisions in this legislation for defraying the costs of privately funded defendants who are acquitted or where the case is dropped should be researched.

4.22 The third key decision on legal aid in the magistrates’ court, after the interests of justice test and financial eligibility, is that of certification for counsel. Article 28(2) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 provides, “Free legal aid given for the purposes of any defence before a magistrates’ court shall not include representation by counsel except in the case of an indictable offence where the court is of the opinion that, because of circumstances which make the case unusually grave or difficult, representation by both solicitor and counsel would be desirable.” It is against this legislative background that we view the statistics at Table 3 above and in Figure 12 of Annex D. They demonstrate that the number of bills paid for certified counsel has been running at about 5,000 per annum since 2007/08, with a significant increase to nearly 6,000 in 2010/11 (at a cost of £3.85 million), in other words over 20% of cases where legal aid had been granted for representation by solicitors; this contrasts with earlier years where certification for counsel in magistrates’ courts was running at around 3,000 per annum. Figures provided by the Legal Services Commission show that in 2009/10 in hybrid cases disposed of by the magistrates’ court, counsel was certified in 1,197 contests (solicitors in 3,107), 627 guilty plea 17 cases (5,891) and 727 guilty plea 2 cases.

4.23 The Bar Council rightly points to the increasing complexity of matters arising in the magistrates’ courts. However, it is difficult to reconcile the extent of certification with the legislative requirements of “unusually grave or difficult”. This issue was addressed in the research carried out by Professor Young, (paragraph 4.11 above), who concluded that there were examples of cases being certified which, although they might be grave or difficult, were not unusually so. He concluded that there was a tendency to apply for certification in circumstances where counsel were being used for economic

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7 Guilty plea 1 fees are paid where the plea is entered before a case is listed for trial. A guilty plea 2 fee is paid where the plea is entered after the case is listed for contest but before the contest takes place.
and case management reasons, for example to avoid the solicitor having to spend a disproportionate amount of time in court awaiting reviews and adjournments. He also drew attention to differences in practice over the timing of decisions on certification, with some applications being considered right at the end of proceedings; the Bar Council in its evidence to the Review noted that the reality of practice today is that certification is rarely granted in advance of a trial. All of these observations are consistent with points made to us anecdotally and with what we saw during our observations of court sittings. It is noteworthy that the Criminal Justice Inspectorate in a recent report referred to an increase in the use of counsel by the PPS in the magistrates' courts in 2010/11 as being explained in part by a general increase in caseload and maternity leave issues (both factors adding to a shortfall in coverage by in house lawyers) rather than an increase in the complexity of cases.

4.24 We believe that where solicitors accept instructions in publicly funded cases in the magistrates’ courts, they do so on the basis that they have the experience and expertise to maintain carriage of the case from start to finish, including contested cases. We will address what this may mean for the registration of solicitors with criminal practices and accreditation in a later chapter. Should they wish to employ counsel as agents to carry out work in the courts on their behalf for work management reasons, that is a matter between solicitors and counsel, with remuneration arrangements to be determined between them. Where unusually grave and complex cases arise, then it seems to us reasonable that these cases will attract additional remuneration, not because counsel is carrying out work on behalf of the solicitor, but because the case requires additional and specialist expertise. We recognise that District Judges (MC) with their knowledge and experience are well placed to identify cases that fall into this category, but question whether decisions on certification are best made in the midst of court proceedings, sometimes during a succession of case reviews.

4.25 We believe that it should be possible to draw up objective criteria for identifying the cases which require certification by virtue of their unusual gravity or complexity, thus enabling solicitors to brief counsel. The Bar has produced some material that would be a starting point. We suggest that the Department of Justice consults with the legal profession and the judiciary, (from the case management perspective), about the production of clear objective criteria for identifying those cases in the magistrates’ court which merit certification by virtue of their unusual gravity or complexity; and about moving the locus for taking decisions on certification to an adjudication function in the Legal Services Commission.

4.26 The Magistrates’ Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009 came into operation in September 2009. The 2009 Rules, as they are known, introduced standard fees for solicitors and certified counsel, to be determined by the classification of the offence and the manner of disposal (i.e. contest, guilty plea 1 or guilty plea 2); they replaced the time based and composite fees, previously paid under the 1992 Rules. The intention was that the 2009 Rules would be broadly cost neutral.

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8 The Use of Legal Services by the Criminal Justice System, June 2011
4.27 We understand from the Commission, and comments made by practitioners, that the 2009 Rules have already had a positive effect in terms of streamlining assessment processes and speeding up payments to solicitors and counsel. However, we note that in 2010/11 the average payments made to solicitors and counsel for magistrates’ court work were £580 and £647 respectively, (see Figure 14 of Annex D).9

4.28 The increase in average costs is a significant contributor to the rise in overall spend on legal aid in the magistrates’ courts from £14.8 million in 2009/10 to £20.6 million in 2010/11, although the increase in volume is the predominant factor in this. From a brief examination of data made available to us at the beginning of September 2011, we think that a number of factors have contributed to the increase in average costs, not all of which are connected to the 2009 Rules. Rule 16 requires the Court Service to initiate a formal review of the operation of the 2009 Rules by September 2011, two years after they became operative – taking account of any representations from the Lord Chief Justice, the Legal Services Commission, the Law Society and the Bar Council.

We recommend that the review should analyse the cause of the rise in average case costs for magistrates’ courts cases and, to the extent that the increase is attributable to the 2009 Rules, some corrective action is considered.

4.29 We are conscious that our recommendations on average costs and certification of counsel, taken together, might have the potential to result in a reduction in income for defence lawyers working in the magistrates’ courts, albeit that this would mean returning to the levels of remuneration more comparable with earlier years. If overdone, this could impact negatively on access to justice and/or quality, especially as it would come on top of the reductions to Crown Court fees. Some savings against current trends in spend will have to be achieved, but we would not support a simplistic approach focusing on average costs and aimed at reducing fee income to a level equivalent to that which was being secured before the 2009 Rules.

We therefore recommend that the review of the operation of the 2009 Rules should have broad terms of reference, enabling it to take account of the impact of other changes and the model of service delivery in the magistrates’ court, outlined in paragraph 4.24 above.

Crown Court

4.30 The Crown Court, usually sitting with a jury when trying cases, conducts trials of the more serious criminal offences. The most grave, or indictable offences such as murder and rape, must be tried at this level while for other serious offences (indictable triable summarily) such as assault it is for the district judge, after hearing any representations from the prosecution or defence, to decide whether to deal with the case summarily or to move it to the Crown Court. There is also a category of offences such as criminal damage where the prosecution can determine the mode of trial. In addition Article 29(1) of the Magistrates’ Courts (Northern Ireland) Order 1981 provides that where a person is charged with an offence that may attract a sentence of more than 6 months imprisonment, for example theft, the defendant may elect for jury trial.

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9 For cases paid under the 2009 Rules, the average total bill paid to solicitors was £533 and the average payment to counsel was £604.
4.31 The table below provides an indication of the volume and costs of cases being tried before the Crown Court, including projected volume and expenditure levels to 2014/15.

**Table 4 - Volumes and legal aid costs of cases heard in the Crown Court – historical and projected**

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases completed</th>
<th>Certificates Issued</th>
<th>Standard fees costs (£m)</th>
<th>Very High Cost case fees (£m)</th>
<th>Total Cost (£m)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004/05</td>
<td>1,257</td>
<td>2,215</td>
<td>22.7</td>
<td>0.3</td>
<td>23.0</td>
</tr>
<tr>
<td>2005/06</td>
<td>1,313</td>
<td>1,813</td>
<td>18.9</td>
<td>0.1</td>
<td>19.0</td>
</tr>
<tr>
<td>2006/07</td>
<td>1,292</td>
<td>2,153</td>
<td>32.5</td>
<td>1.3</td>
<td>33.8</td>
</tr>
<tr>
<td>2007/08</td>
<td>1,394</td>
<td>2,507</td>
<td>24.1</td>
<td>6.5</td>
<td>30.6</td>
</tr>
<tr>
<td>2008/09</td>
<td>1,379</td>
<td>2,117</td>
<td>18.7</td>
<td>17.5</td>
<td>35.6</td>
</tr>
<tr>
<td>2009/10</td>
<td>1,259</td>
<td>2,293</td>
<td>16.2</td>
<td>28.4</td>
<td>44.6</td>
</tr>
<tr>
<td>2010/11</td>
<td>1,271</td>
<td>2,642</td>
<td>16.7</td>
<td>12.8</td>
<td>29.5</td>
</tr>
<tr>
<td>2011/12</td>
<td>2,669</td>
<td>19.5</td>
<td></td>
<td>10.3</td>
<td>29.8</td>
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<tr>
<td>2012/13</td>
<td>2,696</td>
<td>17.0</td>
<td></td>
<td>6.8</td>
<td>23.8</td>
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<tr>
<td>2013/14</td>
<td>2,723</td>
<td>15.7</td>
<td></td>
<td>2.7</td>
<td>18.4</td>
</tr>
<tr>
<td>2014/15</td>
<td>2,750</td>
<td>16.5</td>
<td></td>
<td>0.0</td>
<td>16.5</td>
</tr>
</tbody>
</table>

**Notes:**

1. The main reason for certificates issued exceeding the number of cases is the number of multiple defendants in individual cases. In examining figures in this area it is important to bear in mind that numbers of cases, certificates, bills paid and defendants will not be the same. Some cases where certificates are granted do not proceed. One case can result in a number of bills being paid to solicitors and counsel. One case can involve multiple defendants, while sometimes one defendant may face more than one case.

2. The increase in certificates from 2010/11 reflects a general increase in volume experienced by the Commission and is consistent with the 21% increase in cases received by the Crown Court in that year.

3. Projected costs for 2011/12 onwards are calculated by applying a multiplier to certificates issued to reflect the number of bills that can be expected per certificate (solicitor, counsel, senior counsel) and taking account of the new Crown Court rates in the 2011 Rules.

4. The cost figures for 2006/07 and 2007/08 were influenced by a small number of protracted and expensive cases.

5. The impact of recoupments and appeals is factored into these figures.

4.32 It can be seen from Table 4 that **Very High Cost Cases (VHCCs)** were responsible for a major spike in expenditure, compounded by delays in assessing the cases that resulted in a backlog that was for the most part cleared in 2009/10. VHCCs were introduced by the 2005 Rules through which cases certified by the Commission (or, on appeal by the Taxing Master) as likely to last for more than 25 days if they proceeded to trial were to be assessed for costs by the Taxing Master. Other cases were to be determined through a standard fee regime. It had been expected that only a handful of cases would fall into the VHCC category, but it transpired that on average over 50 very high cost case certificates were issued per annum while the costs associated with these cases usually ran to six figures and sometimes more.
4.33 New rules were introduced in 2009 to exert greater control on the rates paid in respect of VHCCs and to enable the Courts and Tribunals Service to make representations to the Taxing Master where they were concerned about the scale of payments being assessed in individual cases. Nevertheless this continued to be a major drain on expenditure, threatening the viability of other areas of legal aid, and resulted in levels of payments being made to some practitioners that were by any measure hard to justify. We do not consider that the level of payments made to a limited number of practitioners as a result of the VHCC regime provides a credible benchmark against which to judge future fee levels. Moreover we believe that lessons should be learnt from the experience of VHCCs, including the need for legislation and rules concerning fee levels to be drafted with objective and tight criteria to govern decision-making and, where this can be achieved consistently with the interests of justice, for decision-making with financial implications to be located with the spending body. This is not just about keeping expenditure in check; such an approach also facilitates accurate financial forecasting.

4.34 It is against this background and in the light of the challenging budgetary situation that, following lengthy discussions with the Law Society and Bar Council, the DoJ introduced the 2011 Rules that abolish VHCCs and subject all Crown Court cases to the standard fee regime (although special provision is made for the very rare case where the trial might last more than 80 days). In addition the standard fees have been reduced by 25% for solicitors and 20% for barristers. The outcome is expected to be a saving of some £18 million per annum by 2014/15 and has been taken into account in the projections in Tables 1 and 4 above.

4.35 We should record that the Law Society and the Bar Council have told us that they willingly engaged in discussions with the DoJ about achieving substantial reductions in spend on Crown Court cases and submitted their own proposals consistent with achieving what they believed to be the required cost savings. However, they expressed concern about the further reduction in the legal aid budget that occurred in the course of the negotiations and questioned whether the outcome would produce a viable basis for sustaining legally aided services in the Crown Court.

4.36 Some who commented on our Discussion Paper and Progress Report expressed concern that we had decided not to question or express a view on the proposals for changing remuneration arrangements for solicitors and barristers in the Crown Court. At the time we did not see merit in our seeking to influence an ongoing negotiation between the parties and we remain of that view; and we doubt that it would be helpful for us to comment on a process of negotiation to which we were not a party or comment on the merits of rules that have just been made and placed before the Assembly. We should however confirm that, after completion of our Discussion Paper in November, the budget for legal aid was further reduced from £79m to around £75m in 2013/14 and 2014/15; it is unfortunate that this should have occurred in the midst of discussions about Crown Court fees but in the current financial environment, with competing demands for resources, it is inevitable that adjustments of this sort will occur from time to time.

4.37 The complications involved in forecasting expenditure in this area are illustrated by the fact that, despite VHCCs having been ended by the 2011 Rules spend on outstanding very high cost cases is shown in Table 4 as
continuing into 2013/14. We have discussed with the Legal Services Commission the calculations that lie behind the forecasts for the current financial year and the three following years, based on the introduction of the 2011 Rules and the increased volume of cases that is expected. While we remain of the view that the uncertainties about volume and case mix will always mean a significant margin for error in such forecasts, we believe that the methodology used in assessing future costs as shown in Table 4 is credible. Without the projected savings of some £18 million associated with the 2011 Rules, it would be necessary to identify further cuts elsewhere in the legal aid budget (over and above the £5 million that still have to be made) or in other areas of spend on justice matters.

4.38 We do of course agree that the figures shown for 2013/14 and 2014/5 in Table 4 above represent a very sharp reduction in overall remuneration, especially when taking into account higher volumes and that what were formerly very high cost cases will have been subsumed into standard fees. It is also noteworthy that in those years expenditure on criminal defence services falls below that of the PPS (see Table 2 above). This will inevitably have an impact on business models and we believe it important that the workings of the 2011 Rules and any implications for access to justice and the provision of quality defence services are reviewed as soon as sufficient numbers and a representative mix of cases have passed through the system to make such a review meaningful. Such a review should take place with an understanding that should it reveal problems or anomalies requiring correction then the necessary action will be taken.

4.39 We comment further in chapter 6 on procurement mechanisms and the potential role of the market in establishing fair remuneration levels and business models that support the efficient delivery of quality services. For the present, however, standard fees will continue to be set through statutory rules and in our Discussion Paper we identified some principles to inform an approach to determining remuneration in criminal cases. We reiterate and elaborate on them here:

- **Reasonable but not excessive remuneration**, taking account of what trained and experienced professionals might reasonably expect to earn from working full time on criminal legal aid cases and of the overheads associated with a practising barrister or a well run firm operating to a business model that secures a high level of efficiency.

- Remuneration that reflects the **skills and professional expertise** required in this area of work.

- **Broad comparability** with remuneration for publicly funded cases in similar jurisdictions and with that paid by the Public Prosecution Service.

- A system and levels of remuneration that **sustain the quality and expertise of representation**, including at the highest levels, now and into the future.

- The need to **encourage and incentivise efficient business models** supporting quality service delivery by legal professionals.

- **Affordability and value for money.**
• Remuneration mechanisms that are straightforward to administer in a way that supports prompt payment.

• Mechanisms that enable verification that bills are properly paid and that the work to which they relate has been carried out to the requisite standard.

We believe that the advent of standard fees, combined with a selective and risk based approach to verification, provides very real opportunities for efficiencies and reductions in running costs within the Legal Services Commission. These principles are of general applicability across the civil and criminal systems, not just within the context of the Crown Court (see paragraph 5.144 below in relation to civil cases).

4.40 Another proposal currently under consideration concerns the reform of arrangements whereby certification may be granted for two counsel (senior and junior) in the Crown Court. A Courts and Tribunals Service consultation paper\(^{10}\) noted that in comparable indictable offences heard in their respective Crown Courts two counsel were instructed in 58% of cases in Northern Ireland compared with 5% of cases in England and Wales. Legal Services Commission data supports the estimate of a significant proportion of Crown Court cases in Northern Ireland where two counsel are assigned; in 2009/10 there were 801 payments to senior counsel (including acting seniors) at a cost of around £4.4 million in non-VHCC cases, while the equivalent figures for 2010/11 were 644 cases at £3.8 million.

4.41 The current legislative framework governing the assignment of counsel in Northern Ireland is set by the Legal Aid, Advice and Assistance (NI) Order 1981, which provides for a legally aided defendant in the Crown Court to have a solicitor and counsel in accordance with rules made under that Order. As no such rules were made, the assignment of senior counsel (with junior) is determined by earlier rules which apply an “interests of justice” test in cases of exceptional difficulty. The consultation paper proposed making rules similar to those in England and Wales where, for a QC to be assigned, the court must be of the opinion that the case involves “substantial novel or complex issues of law or fact” - and is exceptional compared with the generality of cases involving similar offences; or the prosecution has engaged a QC and the number of pages of evidence exceeds 1,000. Such a formulation was considered by the Justice Committee of the Assembly for Northern Ireland but we understand that the drafting is now being re-visited.

4.42 We do not propose to comment on the detail, save to point out that the draft of the regulations will need to be tight and precise if it is to have the intended consequence of limiting the assignment of two counsel to those exceptional Crown Court cases where they are needed for purposes of effective representation and/or equality of arms with the prosecution. This approach is consistent with that of the Public Prosecution Service whose savings delivery proposals for 2011 -15 include a reduction in the use of senior counsel. We note that savings of £1.5 million per annum attributable to the reduction in use of senior counsel have been factored into the financial projections noted at Tables 1 and 4 above. Whether such savings are secured, or indeed exceeded, will depend on a range of factors,

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\(^{10}\) Reform of legal representation provided by way of criminal legal aid in the Crown Court – August 2009
including the drafting of the regulations, judicial interpretation and future case mix.

**Election for Trial at the Crown Court**

4.43 In 2009 143 adults and 15 youths, who would otherwise have been tried summarily, elected for trial in the Crown Court in accordance with Article 29(1) of the 1981 Order (paragraph 4.30 above). To put this into perspective, that compares with over 50,000 defendants dealt with in the magistrates’ courts that year and 1,682 in the Crown Court. A small number of cases of election for trial by jury have attracted negative publicity because of concern about what is perceived to be the disproportionate cost of such trials where the matter at issue is the alleged theft of low value items.

4.44 We can appreciate the frustration that is felt at these cases attracting the full panoply of jury, defence solicitor and counsel paid at Crown Court standard rates, as well as the prosecution costs. However, for the defendant the matter can be extremely important notwithstanding the apparently trivial nature of the alleged offence or the low value of the money or goods involved. A conviction might be deeply upsetting and could affect reputation, employability and the trust of friends and neighbours while, if the defendant believes that the best chance of a fair hearing is at Crown Court level in front of a jury of 12 people, then their confidence and trust in the justice system is likely to be enhanced by having that choice. We note that attempts to restrict jury trial in England and Wales have met with fierce opposition. On balance we support the retention of the option of trial by jury for defendants accused of offences carrying a maximum sentence of more than six months imprisonment. Moreover we do not think that the PPS should be criticised for pursuing low value cases where there is an election for trial and they have sufficient evidence to support a prosecution; to conclude otherwise would to send a message to offenders that electing for trial increases the likelihood of the case being dropped.

4.45 In the event that there remains concern to address this issue, we have identified two possible courses of action, although make no recommendation about their introduction. The first is that reduced remuneration (perhaps to the level of a magistrate’s court contested case fee) might be available in cases where the defendant elects for trial by jury, on the ground that if the district judge and prosecution would be content for a trial at the magistrates’ court it is likely that the case is less complex than the generality of matters tried at the Crown Court. (We should stress, however, that low value does not always mean less complexity.) The other possibility is to remove the option of election in very low value cases. The Magistrates’ Court Act 1980 identifies a limited number of criminal damage offences in England and Wales where, if the value of the damage is less than a specified amount, then the option to elect for jury trial is removed. It would be possible to introduce similar legislation in Northern Ireland and extend its coverage to include theft. It is also possible that the availability of alternatives to prosecution for first time minor offenders could reduce the instances of election for trial (see paragraphs 4.56 onwards below).
Police Station Advice

4.46 In 2010/11 some 23,893 bills were paid to solicitors in respect of attendance on, or telephone advice to, suspects held at police stations compared with an average of around 15,000 bills per annum over the previous 4 years. These bills, including expenses, cost over £3 million and figures 1 to 3 of Annex D show the proportion of legal advice and assistance attributable to PACE work and other forms of advice on criminal matters. The reasons for the sharp increase in PACE work are not wholly clear, although the trend is consistent with the increased throughput of criminal cases demonstrated by the rise in cases received by the Crown Court and the rise in the volume of legally aided cases going through the magistrates' courts.

4.47 European case law has confirmed that access to independent legal advice before being questioned by the police is a necessary component of the right to a fair trial under Article 6 of the Convention11; and we are in no doubt that informed and expert legal advice at this early stage in proceedings can be of critical importance to the defendant's case. We confirm our view, expressed in the Progress Report, that there should be no change to the arrangements whereby legal aid is available to persons held in custody by the police to enable them to be advised in person or over the telephone by a solicitor of choice, provided that the solicitor concerned meets any accreditation requirements (paragraph 4.49 below).

4.48 We are conscious that, as part of the green form scheme, fees paid to solicitors providing police station advice have remained static at £43.25 per hour for many years, with separate rates for unsocial hours and telephone advice. Also we are aware that the process of making and verifying claims for payment is disproportionately time-consuming for solicitors and administrative staff at the Commission. We suggest that, consulting the Law Society, the Commission should conduct a review of PACE payments with a view to setting fixed fees and (if possible) establishing arrangements for verification of claims based on access to police custody records through IT; in circumstances where attendance is not judged to be necessary, the arrangements should encourage the provision of advice over the telephone. It should be possible to fix fees based on averaging past payments and allowing for a modest increase while taking account of limitations imposed by affordability; there will be scope for some savings in running costs in the Commission as a result of this. The review should be extended to include criminal advice outside police stations given the importance of providing access to those who may not have chosen to seek advice in the police station or who may have been summoned as opposed to being charged and arrested. In 2010/11 there were around 9,000 bills for cases where advice was given in these circumstances at an average cost of less than £60; we agree with the Law Society's contention that sound advice at this stage can help avoid complications when cases go to court.

4.49 In the Discussion Document and Progress Report we noted that where a suspect held in a police station wishes to access legal advice but is unable to choose a solicitor (or the solicitor of choice is unavailable) a variety of local arrangements are in place to assist in the identification of a suitable solicitor.

11 Salduz v Turkey 2008 49 EHRR
Often the custody sergeant will have a list of solicitors willing to provide police station advice, while in Belfast and some other areas lists have been made available under the auspices of the Legal Services Commission or the Law Society. We do not think it right to put the custody sergeant in the position of having to help suspects in their choice of solicitor. Rather, we recommend that the Law Society should assist the Legal Services Commission in drawing up duty rotas of suitably experienced solicitors across Northern Ireland willing to provide police station advice and that arrangements should be made to ensure availability at all times. The Law Society, in their response to the review, point to the preponderance of experienced criminal practitioners in providing police station advice, the Society’s efforts in facilitating CPD seminars on police station work and the role of the Solicitors’ Criminal Bar Association. They are not convinced of the need for formal accreditation as a pre-condition of membership of a duty solicitor rota. However, authoritative advice at this early stage in proceedings is critically important and dependant upon the availability of practitioners with the necessary expertise and experience in criminal law and procedure; and we are conscious that a choice of solicitor is in effect being made for the defendant which adds to the importance of quality assurance. We recommend that a demonstrable record of criminal work and commitment to ongoing training and development in that field should be a pre-condition of membership of an official duty solicitor rota, the precise details to be determined as part of the review of PACE and the process of establishing the rota lists. Moreover, given the importance of police station work, the review of legal aid arrangements for PACE advice should include consideration of whether all public funded work in this area should be subject to accreditation requirements.

**Early Guilty Pleas**

4.50 Article 33 of the Criminal Justice (NI) Order 1996 requires a court when passing sentence to take account of the stage in proceedings when an offender stated his intention to plead guilty; and there is case law on what this means in terms of reduced sentences. This has relevance in the context of legal aid remuneration in that standard fees are paid at different levels depending on whether there is a contest, a plea of guilty before the case has been listed for trial (guilty plea 1) or a plea after listing but before the trial (guilty plea 2). It was suggested to us that replacing these fees with one standard fee (as in Scotland), payable whether or not there is a contest or plea, might focus minds earlier on the question of a plea and discourage any tendency to prolong a case unnecessarily before a plea is entered. This would help reduce pressure on the courts and produce a downward pressure on fees.

4.51 It would be naïve to suppose that remuneration arrangements do not affect behaviour and one of the drivers for standard fees (as opposed to time-based payments) was to encourage timely preparation and help tackle the adjournment culture. However, we are in no doubt that it is the duty of a solicitor to advise the client at the outset of the implications for sentencing of

12 The fees for solicitors and counsel in respect of an indictable offence in the magistrates’ courts are £300 for guilty plea 1, £450 for guilty plea 2 and £600 for a contest. Similar differentials apply for other classes of offence and in the Crown Court.
an early plea and, in our observations of court proceedings, it appeared to us that this was given due attention by legal representatives and the judiciary. It is arguable that one standard fee might be perceived to carry the perverse incentive of encouraging legal advisers to think in terms of a plea before being in a position to provide advice based on the availability of all relevant information. This is a complex area and we do not think it right to make a firm recommendation about the adoption of a single fee without having considered in more detail the background and implications for this jurisdiction, including whether Scotland’s circumstances are comparable with Northern Ireland. We recommend that the case for and against introducing a single fee covering pleas and contests is researched as a matter of urgency. This would include consideration of the extent of late pleas and changes of plea at the trial stage and an assessment of the experiences of other jurisdictions. Pending decisions based on the outcome of such research and consultation, Northern Ireland should retain the three levels of fee for guilty plea 1, guilty plea 2 and a contest, provided that the differential between them fairly reflects the amount of work likely to be involved and is not so great as to provide an incentive to prolong cases unnecessarily.

4.52 We do not consider that the extent of sentence reduction for an early guilty plea, or the relevant legislation, is a matter for this review. However, we do wish to draw attention to the importance of the prosecution making information available to the defence at the earliest possible stage in order to place defence representatives in a position where they can give clients informed advice on pleas and can consider whether there are grounds to seek a reduction in charges in order to facilitate a plea. This point is well understood by the PPS.

Contributions towards the cost of criminal legal aid

4.53 Paragraphs 4.17 to 4.21 above address the issue of a fixed means test for those seeking criminal legal aid to be introduced, initially at least in the magistrates’ courts. The question arises, however, of the circumstances in which it would be reasonable to expect those who are in receipt of legal aid to defray some or all of the costs in the event of conviction. It is difficult to justify the payment of large sums of legal aid in respect of the defence of convicted offenders who are in funds and able at least to contribute towards the cost. Section 81 of the Justice Act 2011 enables the DoJ to make regulations for the recovery of defence costs orders. We recommend that regulations are prepared and made as soon as possible to enable recovery of defence costs orders to be made and to establish procedures for identifying those defendants who have sufficient funds to be made subject to such orders in the event of conviction. They are likely to be of particular application in the Crown Court. Savings of £200,000 per annum attributable to orders for recovery of defence costs have been factored into the financial projections for the latter part of the spending review period. Further, we suggest that consideration is given to whether there might be scope for using assets frozen under Proceeds of Crime legislation to defray legal aid costs and for the legal aid fund having the first charge on any assets that have been confiscated.

4.54 We note that there is provision in the Justice Act 2011 for an offender levy to be imposed by the court on offenders sentenced to imprisonment, a
community order or a fine. The proceeds, expected be around £500,000 per annum, are to be used to support a victims’ fund. This raised a question in our minds about whether it might be appropriate to legislate for a similar levy to be imposed at the point of sentence on offenders who had benefited from legally aided advice or representation, with the proceeds going to the legal aid fund. On balance we believe that, given the financial circumstances of many offenders, this might prove a step too far and increase pressures of the kind associated with fine defaulting (which in the long run could cost the public purse more than the financial benefits accruing from this measure). Nevertheless our terms of reference require us to identify potential future savings in the event that there are further reductions in the legal aid budget and we therefore recommend that the option of developing an offender levy to contribute to the legal aid fund should be held in reserve for further consideration in the event that additional budgetary pressures arise.

4.55 Another possibility that has been suggested is to require the payment by defendants of a small up front fee in all cases where they seek legal aid. However, while we can see a role for such an approach in areas of civil legal aid to help introduce private client realism into proceedings, we think that in the criminal context, where the state is initiating proceedings, this could mean inhibiting access to justice for those with limited means. Moreover we doubt whether the amount that might be collected would make this a proportionate measure.

Alternatives to Prosecution

4.56 Our terms of reference require us to examine the scope for alternative approaches and structures. We believe these to be potentially as significant in the context of the criminal process as in civil cases. The capacity to deal with non-habitual offenders who admit guilt by means of such interventions as warnings, cautions, fixed penalty notices and restorative justice can bring many benefits to the justice system and society at large. These include:- reducing administrative burdens on the police; reducing the throughput of cases in a court system under pressure; speedy response to crime and anti-social behaviour; lower rates of re-offending; in some instances the avoidance of criminal records for first time offenders; reduced spend on legal aid; and, in some cases, better outcomes for victims. However, if these outcomes are to be secured and public confidence is to be maintained in the justice system, care is needed in targeting such interventions on appropriate offences and offenders, ensuring consistency in approach and in ensuring that offenders are properly advised about the implications of what they are being offered. Particular attention also needs to be given to the position of victims of crime and their views. In the ensuing paragraphs we will say a little about experiences in England and Wales and in Scotland before addressing Northern Ireland and the relevant provisions of the Justice Act.

4.57 A joint inspection carried out by HM Inspector of Constabulary and the CPS Inspectorate\(^\text{13}\), published in June 2011, reviewed the workings of alternatives to prosecution in England and Wales. It notes that 38% of the 1.29 million offences cleared by the police in 2009 were dealt with by disposal outside the court system and that such disposals more than doubled in number over a

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five year period to 2008. In fairly small sample sizes the inspectorate noted lower re-offending rates for those subject to alternative disposals than for those processed through the courts and significantly less police time spent on administering the disposals than for those charged and prosecuted. Public opinion is reported as strongly supporting alternative disposals focused on rehabilitation and reparation for minor first or second time offenders, in contrast to support for harsh punishment for serious and persistent offenders. The downsides to the way the system has been working in that jurisdiction, however, include inconsistency between police force areas in determining which offences/offenders are suited to diversionary measures, some areas where persistent offenders were being repeatedly given cautions and some confusion about the appropriate application of the menu of measures: - penalty notice; simple caution; conditional caution and restorative justice.

4.58 Despite the reservations in the inspection report, it is clear that the use of a menu of diversionary options has had a major and positive impact in many parts of England and Wales. Moreover, the comprehensive guidance\(^{14}\) on conditional cautions issued by the Crown Prosecution Service to police officers and crown prosecutors is a good example of what can be done to ensure that the disposal is administered appropriately in the right circumstances.

4.59 Scotland has had a sophisticated and well documented approach to diversionary measures for many years, in particular its system of fiscal fines and other pre-court interventions (including some that are restorative) offered to offenders at the instigation of the Procurator Fiscal. It is a testament to the success of this approach that legislation introduced as part of the summary justice reform programme in Scotland introduced new and expanded diversionary options for the police and the fiscals, for example: - anti-social behaviour fixed penalty notices, formal police warnings, increases in the maximum fiscal fine from £100 to £300 and a fiscal compensation order to rectify loss or damage up to a value of £5,000. Figures from July 2010 show that 58% of summary disposals, or some 15,000 cases, were dealt with through these “direct measures” in that month. The arrangements have been the subject of positive evaluation in a Scottish Government sponsored publication\(^{15}\) which we would recommend as being well worth reading from a Northern Ireland perspective.

4.60 It was in 2000 that the Criminal Justice Review recommended that consideration be given to the introduction of prosecutorial fines in Northern Ireland along the lines of the Scottish model. While fixed penalties were introduced for motoring offences, progress in this area has been disappointingly slow. It is encouraging however that, following on from a consultation on “Alternatives to Prosecution” carried out by the NIO in 2008, the Justice Act 2011 has included provision for an expanded system of fixed penalty notices to be issued by the police in relation to seven offences including theft (to be limited to first time shop lifting), indecent behaviour, criminal damage, disorderly behaviour, drunk in a public place and obstructing a police officer. The penalty notices will be £40 or £80. The Act also makes provision for conditional cautions which can be issued by a police

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officer or person authorised by the PPS in cases (other than offences triable only on indictment) where the PPS determines that there is sufficient evidence to charge the offender and that the matter is suitable to be dealt with in this way. A conditional caution contains conditions aimed at rehabilitating the offender or repairing damage or loss caused by the offence; if the offender fails to meet the conditions without reasonable excuse he may then be prosecuted before the courts.

4.61 We believe that Northern Ireland is particularly well suited to this kind of initiative and, with its single police service and centralised prosecution service, is less likely to suffer from inconsistent application of statutory diversionary measures than England and Wales. In that context we find the suggestion made in the NIO consultation paper that these measures should remove up to 2,000 cases from the court system each year\textsuperscript{16} lacking in ambition. We do appreciate that for the conditional caution to work properly resources will have to be devoted to ensuring that rehabilitative and restorative programmes are available and that the PPS will need to be closely involved in this type of work. However the potential benefits are considerable and the Scottish evaluation of their expanded scheme does suggest that the additional costs are more than outweighed by savings elsewhere. \textbf{We recommend that high priority is given to developing guidance for the use of fixed penalty notices and the Code of Practice on conditional cautions as required by the legislation. And we suggest that urgent consideration is given to legislating to enable the introduction of prosecutorial fines in Northern Ireland and to assessing whether other direct measures of the type deployed in Scotland might be applicable in this jurisdiction.} There is an issue about capacity and the rate of change, but having such measures on the statute book provides an impetus to moving forward. If an alleged offender does not wish to accept a fixed penalty or conditional caution, then the case would go to court. \textbf{Legal aid should enable the provision of advice to financially eligible people who may have been offered fixed penalty notices, conditional cautions or other diversionary interventions, but should only be available to support legal representation at court if it would have been available in the event of the matter being prosecuted in the first place.}

4.62 \textbf{Northern Ireland is well advanced in the areas of restorative justice and youth conferencing for children and young people, pre and post court, and we would commend the continuing development of these services.} This will no doubt be addressed in the Youth Justice Review. From an access to justice perspective, a number of organisations representing the interests of children have stressed to us the importance of independent advice being available so that children are fully aware of and understand the implications of the diversionary or restorative process that they are being invited to embark upon and of the consequences if they fail to follow it successfully. Also there is concern that the child’s legal adviser or an appropriate adult should be included in any communication from the police or PPS about possible diversionary measures to reduce the likelihood of the opportunity being lost because of a failure to respond (in which case the matter would go to court by default). \textbf{We suggest that the Department of Justice reviews the procedures for offering diversionary measures, including restorative youth conferencing, to children and young people to ensure that they}

\textsuperscript{16} Justice Bill as introduced in the NIO Assembly on 18 October 2010 – Explanatory and Financial Memorandum, paragraph 80
have access to appropriate advice and are in a position to give informed consent to such measures. Legal advice to children and young people offered diversionary interventions should be available on the same basis as for adults (paragraph 4.61 above).

4.63 There are issues about mediation and restorative interventions in neighbourhood disputes. These are addressed in the next chapter.

Victims

4.64 We wish to record our view that the interests of victims are central to the criminal justice system and that access to justice is a concept that applies to them as much as any other party. We do not address their position in detail in this report because victims' issues have been the subject of a separate consultation exercise conducted by the Department of Justice, culminating in the publication in March 2011 of a revised Code of Practice for Victims of Crime, covering the duties and responsibilities of criminal justice agencies in relation to victims. We also note the work of the Victims and Witnesses Steering Group, a sub group of the Criminal Justice Board which includes on its membership Victim Support and the National Society for the Prevention of Cruelty to Children. The work of such a group, including its commitment to monitoring performance and seeking feedback, will ensure that effective implementation of the Code of Practice remains a high priority for the agencies.

A Public Defender Service for Northern Ireland

4.65 Public defence solicitors' offices acting under the auspices of, but operationally independent from, the Scottish Legal Aid Board have been operating in Scotland since 1998 and there are now seven offices across the country employing fifteen solicitors. They actively market their services and handle the range of legally aided criminal work from murder to summary cases. The public defender system in England and Wales, run by the Legal Services Commission there, is less well developed, now operating out of offices in Cheltenham, Darlington, Pontypridd and Swansea. Evaluations of both services have indicated high levels of satisfaction and that they are respected for their ability to give independent advice and service. Key benefits include the ability to provide defence services in geographical areas where there may be a shortage of private sector criminal practitioners, the capacity to bring a greater understanding of the market place to the public sector and the ability to test new ideas. However, there were concerns about the cost of the English service in the early days.

4.66 We have considered whether there would be advantage in introducing such a service in Northern Ireland. For the present we believe there to be particular benefits for this jurisdiction in relying on criminal defence services provided by the independent private sector legal profession with both real and perceived independence from the state. We see this as an important factor in sustaining confidence in the justice system. However, the legal landscape may be liable to change in the coming years and, in the interests of ensuring a supply of quality legal representation it is right that the Department of Justice should undertake contingency planning to fill any gaps in supply. Such planning will inevitably include the possible establishment of a public defender service at some point in the future.
as well as other means of ensuring supply such as contracting and best value tendering. We do wish to emphasise the importance of solicitors and barristers supplying criminal legal services having the requisite experience and expertise to advise and represent the accused in this area of law that is so critical to meeting our human rights obligations.

**Solicitor Advocates**

4.67 Some points have been made to us about solicitor advocates in the criminal courts. We address this issue in chapter 6.
5. Civil legal Aid

5.1 Articles 3 to 8 of the *Legal Aid, Advice and Assistance (NI) Order 1981* enable financially eligible persons to secure legal advice and assistance, short of representation, from a solicitor on any point of Northern Ireland law. Articles 9 to 14 provide for legal aid to be made available to those who are financially eligible (the means test) for the purposes of preparation for, and/or representation in, court proceedings where there are reasonable grounds for taking or defending the action (the merits test) and to arrive at or give effect to a compromise to avoid or bring an end to any proceedings. A very small number of categories of case, such as defamation, are excluded from the ambit of civil legal aid. Solicitors are reimbursed by the Legal Services Commission for services provided through legal aid, with provision for contributions from those legally aided clients who can afford them.

5.2 In 2010/11 about £1.46 million was spent on over 16,000 acts of advice and assistance on civil matters, compared with around £1 million on 9,100 items the previous year. Some £36.9 million was spent on the other forms of civil legal aid, involving preparation for or representation at court proceedings, in 2010/11 around 70% of that sum being devoted to family or Children Order cases. As noted above we are seeking to develop alternative delivery and funding mechanisms that place the focus on early resolution of issues while at the same time making savings of around £5 million per annum in the field of civil legal aid. This will inevitably involve prioritisation and a focus on value for money.

5.3 As noted in our Discussion Paper, at the time the review was announced work was well advanced on major reforms to civil legal aid under the auspices of the Access to Justice (NI) Order 2003, in particular through the preparation of a *Funding Code* setting out the criteria for granting legal aid and prioritising the types of case to be funded. This draft document will need to be revisited in the light of our report and consideration given to whether the Code is the right vehicle for taking forward decision-making on the merits of legal aid applications. Nevertheless we can say now that we endorse the approach to prioritisation proposed for the draft Funding Code with its classification of special children order proceedings where the child is at risk and of cases where the client’s liberty is at stake as being top priority; while high priority matters would be social welfare, domestic violence proceedings, other cases involving the welfare of children and cases involving allegations of serious wrongdoing, abuse of power or breach of human rights by public authorities. We also note the other reform initiatives already under way, such as: - simplifying the rules on financial eligibility for legal aid, reform of the statutory charge (enabling the Legal Service Commission to recoup costs from assets that are recovered or preserved in the course of legal proceedings); a registration scheme for suppliers of legally aided services; and a comprehensive statutory remuneration scheme for setting fees. This and subsequent chapters of the report will contain recommendations that affect some of those initiatives.

5.4 Within those priorities, the scope of legal aid, eligibility for assistance and means of delivery need to be addressed with an understanding of the type of legal issues faced by people in the community, in particular by the most

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17 The Northern Ireland Funding Code Consultation paper on the Proposed Criteria – published by the Northern Ireland Legal Services Commission on 29 June 2009.
vulnerable. Article 6 of the Access to Justice Order requires the Legal Services Commission to “inform itself of the need for, and the provision of, civil legal services”. In 2005 the Commission commissioned a Legal Needs Survey\textsuperscript{18} aimed at identifying the incidence of legal problems faced by the adult population, their nature, how they were resolved and how the incidence of legal need varied between different segments of the population. The outcome of the survey was comparable with other jurisdictions, with experience of legal issues (35.5% of the population facing a justiciable problem over the previous 3 years) being higher than the norm amongst disadvantaged groups, while family and welfare issues were having the greatest impact. The survey also noted the prevalence of multiple inter-related issues being experienced by individuals, varied degrees of satisfaction over the outcomes of the problems and legal need being unmet in about 16% of cases. Importantly, the survey did not reveal any particular problem type or section of the adult population where unmet need\textsuperscript{19} was significantly higher than the norm.

5.5 An assessment of need, mapped against supply of services, is of value in informing the development of legal aid and advice services and there have been suggestions that the needs survey should be updated. However, on the basis of what we have learnt in the course of the review, it is questionable whether a further exercise of this sort carried out now would reveal anything new, except perhaps an increase in debt, welfare and family issues associated with the recession; also, much can be learnt from trends in the volume of legal aid and advice applications in different fields which we will address as we progress through this chapter. \textbf{While we do not suggest a further legal needs survey now, we do believe that, once any new initiatives have bedded in following our review, a further survey benchmarking against the 2006 research would be informative in assessing outcomes.}

5.6 We agree with submissions from the Children’s Law Centre and others that the original research (which was concerned with adults) should be supplemented now with a researched assessment of the legal needs of children and young people, paying particular attention to accessibility of advice and assistance, the way in which it is delivered and their experience of the justice system as it affects them (for example in family proceedings). We are conscious of concerns about expensive and lengthy research initiatives and suggest that discussions are initiated with interested organisations such as the Commissioner for Children and Young People, the Children’s’ Law Centre and the Voice of Young People in Care about the modalities of a proportionate and quick exercise. Such a project would also feed into consideration of the extent to which decisions about legal aid and assistance to children should be taken independently of parents’ means.

5.7 The submission from the Older People’s Advocate referred to the finding from the Legal Needs Survey that older people were experiencing a lower incidence of justiciable problems than other age groups but that just under


\textsuperscript{19}Unmet need is defined as occurring where advice on an identified need is not sought and the issue is not resolved satisfactorily. On a broader definition that includes cases where advice was sought but the matter was not resolved satisfactorily, the figure rises to 32%; but we feel it inevitable that advice will not always be what the client wants to hear, and there will always be problems that cannot be resolved to everyone’s satisfaction.
20% of people over 60 had experienced one or more such problem over the previous 3 years. It also drew our attention to research by Subhajit Basu et al (2009) identifying such issues as estate management, wills and care home fees as of being of particular concern for those over 60 and that there was a general reluctance on their part to engage with the legal system or even to recognise that they had a legal problem. We hope that our focus on multiple channels of access to advice and on ways of resolving problems without going to court will address some of the issues raised in the context of this growing segment of the population.

5.8 The remainder of this chapter will address:- legal advice services; alternative forms of dispute resolution; public and private law relating to families and children; money damages cases; administrative law; arrangements for granting legal aid in exceptional circumstances where it would not otherwise be available; financial eligibility for legal aid in civil matters; and remuneration issues. Our proposals in this area will be framed in a way that we believe will improve access to justice in a number of ways while at the same time offering opportunities for budgetary savings; we will also draw on lessons from other jurisdictions and benchmark against proposals for reform in England and Wales, while recognising the distinct needs of Northern Ireland.

Advice, the Voluntary Sector and Partnership - Background

5.9 The Minister’s speech on 7 June 2010 emphasised the need for choice in the sources of legal help available to those in need and talked of “bringing law to the people” through advice centres and legal clinics. In addressing the Advice Service Alliance on 20 November 2009, the Right Honourable Sir Declan Morgan, the Lord Chief Justice of Northern Ireland, talked of the strength of the voluntary sector being that it worked “close to the ground” and “can build expertise on issues which are not viable for private law firms”. We are also well aware of the contribution that private sector commercial organisations can make in this field. It is with these considerations in mind that we explore the scope for a mixed model of service delivery in the area of legal help and advice, taking account of evidence that problems requiring advice often arise in clusters, sometimes without a clear dividing line between the legal and non-legal. We will start with a brief outline of current service provision.

5.10 On the legal side, solicitors across Northern Ireland provide advice and assistance (it would be classified as legal help under the funding code) on any point of Northern Ireland law, short of instituting legal proceedings, to financially eligible people through what is known as the “green form” scheme. The solicitor is responsible for confirming the client’s financial eligibility based on evidence of income supplied by the client. Remuneration out of the legal aid fund has been unchanged for many years at £43.25 per hour with small sums for letters and telephone calls and the ability to claim expenses. From management information on bills paid over the past two years, we estimate that solicitors are providing around 12,000 acts of assistance on civil legal matters per annum under this scheme at an overall cost of about £1.2 million. We believe that the increase in volume of civil green form payments from about 9,100 in 2009/10 to about 14,000 in 2010/11 may have been in part due to administrative factors, so for planning purposes make an assumption that the numbers will settle roughly mid way between those two years.
5.11 We should record here some reservations about the workings of this scheme that have been expressed to us. The administrative processes that support it do not work well for solicitors or the Legal Services Commission, partly due to what we are told is a poorly designed paper form and a high error rate in completing it, resulting in forms often being returned for correction and resubmission. The negative impact on efficiency and running costs seems out of proportion with the scale of the scheme. Moreover, the processes required by the current legislation do not provide for information capture to enable outcomes of the advice or assistance to be measured which means that it is difficult to assess the value for money of this type of assistance. The scheme applies only to face to face advice provided by a solicitor in private practice or a solicitor working for a law centre or similar organisation with the benefit of a Law Society waiver. The criteria for legal help adopted in the draft funding code would not of itself radically change the nature of the scheme, although it does make clear that the advice or assistance must be of demonstrable benefit to the client and more than merely the provision of general information about the law or legal system.

5.12 The Law Society has rightly drawn our attention to the *pro bono work* carried out by solicitors in this area and we are aware that many solicitors adopt a practice of providing free time limited advice at a first consultation for all clients. This is an important contribution to access to justice and merits further consideration although we appreciate that this cannot be a substitute for remunerated services.

5.13 The *advice sector in Northern Ireland* is well developed, with an extensive network of providers across urban and rural areas bringing advice to the people on a wide variety of matters, many with some legal content. The main advice providers (Citizens Advice and organisations operating under the auspices of Advice Northern Ireland) assist over 200,000 people each year, with help and representation at tribunals an increasing feature of their workload. The Department of Social Development, in partnership with local councils, supports front line advice providers through the Community Support Programme and estimates that cross departmental funding for advice services in 2009/10 amounted to around £9.3 million. They also provide funding to the Law Centre (NI) to put it into a position to assist the advice sector on legal issues arising from its work. The DSD’s strategy for advice services is set out in a series of consultation documents “Opening Doors” (2007), “the Number and Location of Advice Centres” (2009) and “Consultation Document on Guidance on the Voluntary Provision of Local Generalist Voluntary Advice” 2011. In short, the model is one of supporting generalist advice organisations which, when faced with a query requiring specialist input, are able to refer on to specialist providers in fields such as housing and debt.

5.14 In setting the scene for this part of the review, we should make some mention of *tribunals* which will also feature when we address administrative law (paragraphs 5.117 to 5.118 below). Tribunals have developed as an alternative to the court system to enable the resolution of disputes, usually between the individual and a public authority, but also in the work place, where a more inquisitorial approach to resolving issues can be suitable. Members of tribunals, while having judicial status, tend to be appointed for their expertise in the issues at stake rather than because they have a legal background. The most used tribunals are those processing appeals against decisions on benefits provision (13,436 cases in 2009/10) and industrial and
fair employment tribunals (4,762 cases). However, some of those with lower case loads service particularly vulnerable or disadvantaged groups, for example the Mental Health Review Tribunal (319) and the Special Educational Needs and Disability Tribunal (SENDIST) (79 cases).

5.15 Submissions to the review have suggested that, notwithstanding the philosophy behind tribunals, some of them have become legalistic in their approach and daunting for members of the public who wish to bring cases before them. SENDIST received particular mention in this context where we were told that the education and library boards were not infrequently represented by barristers and brought along medical and other experts to hearings, raising serious issues about equality of arms. Also, there is research to support the view that applicants appearing before tribunals who are represented have a higher success rate than those who are not – both because of the quality of assistance at the tribunal and, we believe, because well advised applicants are more likely to withdraw cases which have little chance of success or find ways of resolving the issue before they reach the tribunal. A number of people have told us that it is specialist understanding and expertise that makes for good advice and help at tribunals, which may be provided by non-lawyers as effectively as those with a legal background. For financial reasons and because we do not want to encourage their development in a more legalistic direction, we do not recommend that full legal aid be made available to users of tribunals, other than those where liberty is at stake (such as the Mental Health Review Tribunal), but we do propose that advice and assistance in case preparation for, and where appropriate help at, tribunals should be included in the consideration of the mixed model for advice and assistance.

5.16 We feel it right to draw attention to one initiative that may be of wider applicability. Legal aid has been of limited assistance to those facing repossession of their homes, in part because many in this position are not financially eligible and also because once it has become apparent that the grounds for repossession are established, application of the merits test precludes the grant of legal aid (although we should stress that advice and assistance would be available under the green form scheme). It is in just those circumstances that sound advice and negotiation can at least postpone and often avoid repossession. Against this background the Lord Chief Justice announced in 2009 a pre-action protocol designed to encourage resolution of matters before such cases were brought to court while in parallel the Courts and Tribunals Service has facilitated the Housing Rights Service in providing court representatives to operate in the Royal Courts of Justice and Laganside Court to provide support, advice and representation for those facing mortgage repossession or ejectment. The scheme is funded by the Department of Social Development. These staff, employed because of their expertise rather than because they are lawyers, appear regularly before the Chancery Judge and Master where they are well received; and Housing Rights has produced analysis and evaluation demonstrating positive outcomes from pre-court advice and negotiation in avoiding repossession in substantial numbers of cases. We believe that the advice services provided by the Housing Rights Service should be sustained in place and consideration given to whether lessons learnt from its operation might be applicable in other contexts.

5.17 We also wish to record another important example of effective partnership working with the voluntary sector. It is the Legal Services Commission’s
contract with the Law Centre (NI) for the provision of legally aided services on asylum and immigration matters, where that voluntary sector organisation has become an authority in this area of work.

5.18 Before looking at the options, we thought that it might be helpful to identify some of the key considerations in developing a mixed model that have been raised with us by stakeholders in the context of increasing demand for advice and help, especially in welfare areas affected by the recession. Accessibility for all, regardless of location, age or social and economic background is seen as critical, as is the availability of different channels for seeking and delivering advice. Children and young people are likely to be comfortable with web based systems and telephone advice and help-lines, while the telephone may be good for the elderly and infirm if they face mobility issues. Face to face advice is seen as necessary when complex issues are being addressed and has an advantage over the telephone in some types of case where the advisor may not be confident that the client has the ability to absorb information and advice remotely (for example, if there are language or educational issues). The Law Society points out that the network of solicitors throughout Northern Ireland is a good basis for sustaining accessible face to face advice. On the other hand we are informed of high satisfaction rates with help lines which do of course help overcome problems of geographical accessibility; we have seen some financial data to support the contention that acts of assistance over the phone can be substantially cheaper than when given in person, although one business model presented to us does not necessarily support that view.

5.19 There is a strong feeling from many who commented that any changes should build on what already exists rather than seek to create a new infrastructure with all the associated uncertainties over costs and effectiveness. And we have sympathy with a point made by the Law Society that resources emanating from the Legal Aid Fund should be used to secure advice and help on genuine legal issues, rather than supporting generalist advice that should be funded from elsewhere. Indeed, in times of financial stringency, we should be alert to the danger of any redirected legal aid funds being used to plug gaps left by shortfalls in finance from other sources. We have been struck by the complexity of the generalist and specialist advice market in our relatively small jurisdiction, with a range of province wide and community based organisations involved in delivery, and we therefore endorse comments about the need for partnership and information sharing between organisations so that clients are directed to the best source of advice to address their circumstances.

5.20 We should refer to some developments in other jurisdictions. In England and Wales the “Proposals for the Reform of Legal Aid”, published by the Ministry of Justice in November 2010, envisaged access to free legal advice being available solely through the Community Legal Advice help-line, that has been in existence since 2004. Under this scheme the caller reaches a trained operator who operates a triage system, establishing the nature of the problem and whether the person is financially eligible for legally aided advice. If eligible, and if the issue cannot be resolved immediately, the caller may be routed to a specialist adviser who can provide assistance over the phone and

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21 CHALKY, the Children’s Law Centre advice service, receives on average 170 calls a month despite not being available outside of working hours and DETI has contracted with a private sector provider to deliver debt advice from a call centre.
who may write letters or contact creditors or landlords on their behalf; in a small number of cases face to face appointments with a lawyer might be arranged. Importantly from the access to justice perspective, even if the caller is not financially eligible, the operator will advise on where paid for advice and help to deal with the problem can be sought.

5.21 In Scotland the government there has allocated an additional £3 million to the Legal Aid Board over a two year period to support initiatives targeted at the fall out from the recession. This has been used to grant aid a variety of mostly local initiatives aimed at providing help and advice in such areas as housing, debt, benefits and employment; some of the projects involve the provision of in-court advisers and support the employment of both expert lay advisers and solicitors.

Advice, the Voluntary Sector and Partnership – Proposals for Northern Ireland

5.22 In developing an outline for a mixed model we have been conscious of the financial constraints and of the infrastructure that already exists. We have been assisted by the provisions of the Access to Justice (NI) Order 2003 which allow the Legal Services Commission much greater flexibility than is the case at present in the means by which services are funded (including grant aid, contracts) and the types of providers who can be funded.

5.23 In the light of the references to legal clinics, advice centres and “bringing law to the people” in the Minister's speech of 10 June 2010, we considered whether to recommend pro-active action on the part of government to facilitate the establishment of law centres and advice networks to add to the Law Centre (NI) and Children’s Law Centre, that are already well established. The Community Legal Advice Centres (CLACs) in England and similar bodies in other jurisdictions provide possible models. However, we understand that the contractual arrangements with such bodies (which in England involve local councils as well as the Commission) have proved complex to operate; and, given what we already have in Northern Ireland, we are not convinced that diverting scarce resources to such initiatives would secure value for money. CLACs and CLANs may well be more appropriate in jurisdictions starting from a baseline where there is minimal provision of publicly funded legal advice or where there are gaps in provision in particular locations. Nevertheless, as will be apparent in the following paragraphs, we should emphasise the importance we place on the voluntary sector’s role and potential in providing legal advice and help through directly employed lay experts and, where appropriate, qualified solicitors. An essential part of our approach to the mixed model of service provision is that the Law Society should be proactive in operating its waiver in a way that facilitates voluntary sector bodies in employing solicitors able to give advice to third parties, while ensuring that the necessary client protection arrangements are in place.

5.24 As noted in the Discussion Paper and the Progress Report, we have considered the idea of a system of triage operated through a telephone service similar to the CLA help-line in England and Wales or through some other central body. We have been shown a business model that supports such an approach, similar to the process outlined in paragraph 5.20 above. From a financial perspective, this model is dependent upon unit costs at the
triage stage being sufficiently low, and enough cases being resolved at that point so that the savings bring the costs in below those of the current system. While this idea may be open to testing in the future, we think that such a model in Northern Ireland might simply add another layer to the advice process – and we are conscious of concerns expressed by a number of providers about any mechanisms that stand in the way of people seeking direct access to expert advice. We believe that it should be possible to achieve many of the objectives of the triage or gateway approach through using the existing infrastructure, reinforced as necessary by new providers. The characteristics of a legal advice and assistance model that we seek are as follows:-

- **Targeted** on priority areas where need is greatest.

- **Accessible**, making use of communication tools (telephone, web, face to face) and available at times suited to the needs of the user.

- **Speedy identification** of issues that can be resolved quickly without the need for lengthy engagement.

- **Signposting** to the most suitable provider.

- **Initial access for all**, regardless of means but subsequent legal advice to be available to the financially eligible.

- **Availability of advice from experts**, and specifically from solicitors when required in cases of legal complexity or where professional legal advice is essential to the desired outcome.

- **Limited to genuine legal advice on justiciable or potentially justiciable issues** but in partnership with and complementary to the broader advice sector.

- Arrangements that provide for **accountability in value for money terms** and where outcomes can be assessed.

- Commitment to **early resolution of issues**.

5.25 We do not believe that the green form scheme as it stands fully meets these requirements. In order to aid consideration of this issue, we record in the table below the volume and cost of legal advice and assistance on civil matters provided through the green form scheme over the last two financial years by (high level) category of case.
Table 5 - Legally aided Advice and Assistance in 2009/10 and 2010/11

<table>
<thead>
<tr>
<th>Topic</th>
<th>Volume 09/10</th>
<th>£ 09/10</th>
<th>Volume 10/11</th>
<th>£ 10/11</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family/children</td>
<td>2,615</td>
<td>206,760</td>
<td>3,653</td>
<td>267,978</td>
</tr>
<tr>
<td>Money damages</td>
<td>1,308</td>
<td>198,063</td>
<td>2,340</td>
<td>349,737</td>
</tr>
<tr>
<td>Welfare/housing</td>
<td>1,697</td>
<td>147,379</td>
<td>2,598</td>
<td>189,478</td>
</tr>
<tr>
<td>Immigration/asylum</td>
<td>512</td>
<td>131,341</td>
<td>846</td>
<td>136,194</td>
</tr>
<tr>
<td>Education</td>
<td>39</td>
<td>24,737</td>
<td>111</td>
<td>38,803</td>
</tr>
<tr>
<td>Employment</td>
<td>181</td>
<td>16,722</td>
<td>229</td>
<td>20,184</td>
</tr>
<tr>
<td>Wills, probate</td>
<td>305</td>
<td>22,528</td>
<td>444</td>
<td>28,807</td>
</tr>
<tr>
<td>Human rights, issues with the police/prisons</td>
<td>755</td>
<td>90,982</td>
<td>1,209</td>
<td>115,223</td>
</tr>
<tr>
<td>Injunction/neighbour dispute</td>
<td>638</td>
<td>37,319</td>
<td>935</td>
<td>62,147</td>
</tr>
<tr>
<td>Criminal injuries/damage</td>
<td>453</td>
<td>36,853</td>
<td>712</td>
<td>60,285</td>
</tr>
<tr>
<td>Other</td>
<td>718</td>
<td>76,853</td>
<td>1,627</td>
<td>140,548</td>
</tr>
</tbody>
</table>

Notes: The difference in numbers between the two years may be a factor of the speed with which claims are submitted and then assessed rather than a big increase in acts of assistance. The data for immigration and asylum do not include advice and assistance provided under the contract with the Law Centre (NI).

5.26  Before examining these headings in a little more detail, we wish to record our ambition that, subject to the exclusions contained in Schedule 2 of the Access to Justice (NI) Order 200322, it should remain possible for a person, regardless of means, to secure advice and assistance on any point of Northern Ireland law provided that, if the advice is publicly funded, it secures demonstrable benefit for the client who, if in funds, could have been expected to want to pay for it privately. The taxpayer should not be expected to fund the trivial or matters of uncertain relevance to clients' interests. However, we recognise that if sufficient savings cannot be found elsewhere our ambition will have to be modified and that lesser priority areas such as immigration (but not asylum, which is concerned with life and liberty), contract and criminal injuries compensation may have to be excluded from all forms of advice and assistance for the purposes of legal aid.

5.27  We envisage that access to advice from solicitors on family and children related legal matters should remain as now; early advice and help in these areas, if properly directed, can facilitate the early resolution of problems and, where matters remain outstanding, help direct parties to effective dispute resolution mechanisms at the outset. Legal help in these fields of law is best considered alongside other gradations of family help and legal representation in such cases and might be best administered by the Commission as part of that strand of work. In particular we would expect those giving help and advice on private law family issues to be familiar with, and actively to promote, mediation and other forms of alternative dispute resolution if, and only if, initial attempts to resolve issues informally do not work. This could be a condition of their being registered for the purpose of providing publicly funded advice and assistance in these areas.

22 Paragraph 1 of Schedule 2 precludes the Commission from funding advice and assistance (beyond the provision of information about the law) in respect of conveyancing, boundary disputes, making wills, trust law, defamation, company or partnership law and any matter relating to the running of a business.
5.28 Under the current arrangements it might seem reasonable to plan on expenditure of around £300,000 per annum on advice and assistance on matters such as negligence that could give rise to claims for money damages. Some of this spend would be recouped as part of costs in cases won at a later stage in the process. However, we recommend later that most money damages categories are taken out of scope of full legal aid and suggest that the extent to which advice and assistance is available at the early stages of such cases should be considered in the context of the new insurance based and conditional fee arrangements that we will be proposing; we do not believe that money damages cases will be suitable for a generic legal help or green form scheme if our recommendations on money damages are accepted. Even after discounting recoupments we would envisage some savings in spend under this head.

5.29 Injunctions and neighbour disputes are recorded in the table as a separate category and we address these in our consideration of alternative dispute resolution and full civil legal aid below. While it is reasonable that people should be able to approach solicitors for advice on any legal implications of neighbour disputes, our emphasis will be on seeking mediated solutions through community based dispute resolution initiatives; it is important that solicitors, as with other advice providers, are equipped to sign-post clients to appropriate services.

5.30 There are other priority matters where we believe it important to retain facilities for early advice and assistance as now, including human rights issues, asylum, inquests, complaints against the police or prison service and judicial review. Wills and probate issues can be of particular concern to older people; we believe it important that arrangements are in place to ensure that sufficient information and signposting is available on these topics, although do not propose that assistance with the making of wills should be legally aided. Employment issues can be complex from a legal perspective and have the potential to have a serious impact on an individual's well-being, so we remain of the view that advice on such matters should be available for the financially eligible through the legal help provision in the Funding Code. In the employment field, it is particularly important that advice takes account of the Department of Employment and Learning and Labour Relations Agency initiatives aimed at encouraging the resolution of issues before the tribunal stage.

5.31 Legal issues arising out of the priority areas of welfare, debt, housing and education raise particular considerations in the context of an advice and assistance model. The advice and voluntary sectors are already strong in these fields, often with extensive networks for the provision of generalist and specialist advice, including the capacity to advise on legal matters. We have been told, and not just by the agencies themselves, that their lay staff tend to be highly expert in their specialist areas and, in certain contexts, can be as effective as lawyers, or more so, in providing advice and sometimes in assisting in court and at tribunals. Solicitors employed by the voluntary sector, the law centres for example, provide in depth expertise in their specialist areas. Another factor to bear in mind is that it is in these areas that there is an element of unmet, or partially met, legal need in relation to advice and assistance in preparing for and appearing at tribunals and in housing repossession cases.
5.32 We see no reason to limit the ability to provide publicly funded legal advice and assistance in these welfare related areas to solicitors. There is a case for publicly funded advice and assistance on legal issues arising from benefits, debt, housing and education to be provided to financially eligible people by expert suppliers through contracts or grants administered by the Legal Services Commission. It will be important that, in administering such funding, DoJ and the Commission work closely with DSD and other departments to ensure that funding supporting legal help and advice operates in a way that is complementary to other funding streams in the advice sector and avoids duplication. At present “green form” advice in these welfare areas seems to average about 2,000 acts of assistance per annum at a cost of around £200,000. In order to make this approach viable, and extend the capacity to provide tribunal and court focused help, additional funds would need to be levered in, perhaps from some of the savings accruing as a result of the money damages proposals; but we also think that other relevant government departments should be prepared to make contributions in these areas. Indeed there is a particular responsibility on departments to assist when there are policy developments that increase the likelihood of tribunal appeals or other forms of dispute. The positive support of DSD in supporting the housing court representation service is an example of what can be achieved on a co-operative basis.

5.33 The bidders for these “welfare” contracts or grants might be existing suppliers in the advice or law centre sectors, commercial undertakings and/or solicitors in private practice (possibly acting in consortia). Key contractual requirements would include accessibility, both in the geographical sense and through the use of appropriate channels of communication (face to face, telephone, web etc) and the contracts would support legal as opposed to generalist help. Where appropriate there would be a particular focus on advice, preparation, negotiation and help in relation to tribunal hearings. We sympathise with concerns that this approach carries with it a danger that the legal aid fund might support services that should more properly be funded from other sources and so tender documents would need to demonstrate how the legal aid funds would be applied in addition to any existing funding streams. As we have made clear, we do not see this work as being the preserve of solicitors but organisations, other than solicitors’ practices, tendering for this work would be expected to show that, if necessary, they could access advice from qualified lawyers, whether employed direct by them under a Law Society waiver, or in private practice. We do not think it likely that sufficient funding will be available to guarantee representation or help at all relevant tribunal hearings, so criteria for prioritising help and assistance where it is most needed and will have greatest impact will have to be developed and included in the contracts or grants mechanism.

5.34 We suggest that all recipients of funding for legal advice services, including solicitors and the voluntary or private sector, should commit to providing a limited period of free advice to all who approach them regardless of means (as many solicitors do now on a pro bono basis). This would enable existing providers to carry out the sort of triage function that is undertaken in England and Wales by the Community Legal Advice Line (paragraph 5.20 above) including, where necessary, signposting the client to another source of help and advice. We expect that the combined effect of the proposals in this section of the report will be to focus legal advice and assistance, paid for by legal aid, on a smaller number of cases where a significant input will be required. In the circumstances we believe it
reasonable to review the structure and rates of payments for legal advice and assistance, or legal help as it may become, to ensure a system that is straightforward to administer and, through standard rates, fairly reflects the level of service in cases that extend beyond the period of free advice.

5.35 In the welfare cases that are the subject of a contract, it is likely that most clients will be financially eligible and there is a case for making such advice available without a means test. In other cases, however, a financial eligibility test should continue to apply. We recommend that the mechanisms whereby solicitors, and in future other sectors, assess financial eligibility for advice and assistance are reviewed in order to ensure that they are manageable and provide sufficient assurance from the accounting officer’s perspective. We understand that there may be IT based tools for this purpose in other jurisdictions, including on-line financial eligibility calculators. Also we suggest that the green form is redesigned in consultation with the Law Society to ensure that it meets the needs of the Commission to verify that work has been properly done and with clear information on outcomes – while at the same time being manageable for the supplier. This will be more easily attainable once satisfactory IT systems are in place (see chapter 7 below).

5.36 Given the number of generalist and specialist advice suppliers and the variety of funding streams associated with advice provision, it is axiomatic that inter-departmental machinery should be in place to help ensure that funding is used in the most efficient and effective way possible for the benefit of the public. As legal advice and assistance is part of this picture, we believe that the Department of Justice should be a member of the DSD led Government Advice and Information Group. This group should take on one necessary task that was identified in our partnership and advice workshop, which is the preparation of guidance on the availability of sources of generalist and specialist advice for use by advice organisations and solicitors in considering whether to refer or signpost clients to other providers appropriate to their needs. This is particularly significant in addressing clusters of problems where one provider may not have all the answers. Also, it is in the public interest that advisers on legal issues should be well placed to refer clients on to specialist help to address some of the social or economic problems that might be associated with or lie behind legal problems – for example the Parents Advice Centre and debt help-lines. We should also point to the value of co-operative and partnership working between organisations and sectors in this field as demonstrated by the success of the Community Housing Advice Project involving the Housing Rights Service, Citizens Advice Bureau and Advice Northern Ireland.

5.37 Within a shrinking budget there have been limits to our ambition in addressing the provision of legal advice and assistance short of representation. However, if sufficient funds become available, from whatever source, the Department of Justice and Legal Services Commission should be open to the possibility of piloting new ideas to assess their impact (the Housing Court Representation initiative is an example of what can be achieved) or identifying local projects to grant aid as in Scotland (paragraph 5.21 above). Some ideas and issues that may be worthy of consideration in the future include:-

- Duty solicitors to be available at court to advise litigants in person.
• Acting on the outcome of the assessment of the legal needs of children.

• Legal clinics – lawyers and law students available, perhaps on a pro bono basis, to provide basic legal advice at local facilities – perhaps linked to the university law schools and with appropriate indemnity provisions.

• Piloting and evaluating a telephone help-line to provide initial advice and signposting services.

**Alternative Dispute Resolution – the Principles**

5.38 Our terms of reference and the Minister’s speech of 7 June 2010 point us clearly in the direction of “alternative approaches and structures” and of “finding solutions to problems outside court……with less emphasis on fighting cases inside court”. It is in this context that we address alternative dispute resolution (ADR), although we regard the term ADR as something of a misnomer since we see its various manifestations as being integral parts of the justice system. At the outset we wish to refer the reader to the Irish Law Reform Commission report, “Alternative Dispute Resolution: Mediation and Conciliation”, published in November 2010 and which we regard as an authoritative work on ADR with many proposals and ideas that are potentially applicable to this jurisdiction23.

5.39 As has been pointed out by the Law Society and the Bar Council, negotiation and seeking agreement in advance of any court proceedings are an integral part of the lawyer’s business and in most areas of law the majority of issues are resolved in this way. ADR however is a more structured approach that applies before, or sometimes during, the court process whereby an independent third party assists the two parties with something at issue between them to reach a decision or makes a decision on their behalf; it may also apply where the representatives of the two parties adopt a structured approach to negotiating a solution. The principal forms of ADR are as follows:-

• **Mediation** – the two parties are facilitated in reaching an agreement themselves through the offices of an independent third party.

• **Conciliation** – the third party takes a more proactive role and advises on possible solutions that might be adopted by the parties who have an issue – but the decision on whether to agree to adopt the proposed solutions remains theirs.

• **Collaborative Law** – operates in the family context where, following an agreement not to go to court and identification of the issues by the couple’s respective legal advisers, they engage in 4 way co-operative dialogue (involving the couple and their advisers) with a view to resolving the points at issue and incorporating the outcome in a legally binding agreement.

23 The legislation to give effect to the report, the Alternative Dispute Resolution Bill, is included in the Government’s Legislation Programme and is due to be published next year.
• **Arbitration** – a procedure where by agreement between those in dispute, the matter is referred to the independent third party for decision.

5.40 Our primary focus from an access to justice perspective, will be on the first three of these methods\(^{24}\) which, if employed in the right cases, can bring the following benefits:-

- The parties remain in control of the process and outcomes are more likely to have their *genuine consent*, with no winners or losers – the resulting commitment to making the agreement work should enhance its durability and reduce the likelihood of future disputes.

- The *voluntary* nature of ADR mechanisms, essential if they are to work, gives the parties a sense of ownership – under the principle of self determination, they decide what is happening rather than having things decided for them.

- There can often be greater *flexibility over outcomes* than would be the case with a court process.

- The process of seeking an agreed outcome, rather than fighting it out in court, is more conducive of *sustaining workable relationships between the parties* into the future, of particular importance in family cases where children are involved.

- The process should be *less stressful* than appearance in court and operate within a *timescale to suit the parties*.

- ADR can be *cheaper* and *reduces pressure on an overcrowded court system*. But there are caveats to the cost point which we explore below and we do not think that cost saving can or should be the key consideration in expanding the availability and use of mediation and conciliation services.

5.41 There was near unanimous support for the principle of ADR amongst those who responded to our request for views, provided that it was deployed in appropriate circumstances. The caveats were that it should not detract from the right of individuals to pursue cases in court if they wished and there were some comments about the importance for people of the opportunity for their day in court. We note that ADR has the strong support of European institutions demonstrated through a variety of resolutions and instruments, including the EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters\(^{25}\) which encourages member states to establish systems for resolving disputes outside the courts and requires them to establish a legislative framework for mediation in cross border disputes. The United States is typical of a number of other countries in making legislative provision for ADR in its federal jurisdiction\(^{26}\) and in requiring federal agencies to promote, adopt and train staff in the use of ADR in resolving disputes\(^{27}\). In

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\(^{24}\) Arbitration is more often deployed in company and commercial cases and is an important intervention. The other three ADR tools mentioned here tend to be more applicable where at least one of the parties is an individual and where relationships may be a significant factor.

\(^{25}\) EU Directive 2008/52/EC

\(^{26}\) Alternative Dispute Resolution Act 1998.

\(^{27}\) The Administrative Dispute Act 1996.
England and Wales government departments and agencies have signed up to the mandatory “Dispute Resolution Commitment” requiring the use of dispute avoidance mechanisms in contract management and in relations with the public and the development of appropriate ADR processes for avoiding litigation where disputes do occur28.

5.42 We conclude that the availability of a menu of ADR mechanisms for use in differing types of legal dispute enhances access to justice and should be promoted by the department and stakeholders in the justice system. But it is not a panacea, should not be seen as a substitute for routine negotiation and does not replace the court as the ultimate means of resolving justiciable disputes.

5.43 Case selection is of critical importance. **ADR is suited to those cases where there is a reasonable prospect of the parties being able to seek an agreed way forward and where they both consent willingly to going through the process.** It will rarely work where there is implacable hostility or where the points at issue are complex matters of law, and great care would be needed in cases where, for whatever reason, there is a serious imbalance in capacity between the parties. We agree with points made to us that in cases where domestic violence or child protection matters are involved, they should be addressed in the courtroom. Selecting the wrong cases for mediation, conciliation or collaborative intervention will increase costs, delay and, in all probability, exacerbate the problems between the parties. It is noteworthy that the estimated saving of £10 million per annum to the England and Wales budget attributable to mediation in 2009/10 was achieved on the basis of around 20% of eligible family cases being mediated (with 70% of those reaching a full or partial settlement).

5.44 A key characteristic of ADR is **confidentiality**, the ability of parties to engage in full and frank discussion in the knowledge that details will not be disclosed outside the process or exploited in subsequent court proceedings. This issue is addressed comprehensively in the Irish Law Reform Commission publication29. **We believe it important that, subject to certain exceptions, discussions within the confines of an ADR process are treated as privileged by the parties and the mediator and not to be disclosed, except by agreement between the parties before or after the process.** Exceptions would apply if, for example, the issues needed to be disclosed to facilitate enforcement of the agreement, if child protection or domestic violence issues were at stake or if disclosure was needed to facilitate the prevention or investigation of a crime. **We suggest that the current legal position on privilege in these circumstances is confirmed and that, if necessary, legislation is enacted.**

5.45 We believe it important that those entering a mediation/conciliation process do so with a full understanding of what is involved and, if there are complex issues at stake, with an appreciation of their legal position. This latter point is particularly significant if discussions are to be properly informed, if each of the participants is to be protected against agreeing something inappropriate and to help ensure that whatever is agreed does not unravel because one of the parties discovers later that they were manoeuvred into the wrong outcome.

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29 Paragraphs 3.13 to 3.73 and clause 7 of the draft bill appended to the report.
Also *the agreement* that flows from a successful process needs to be drafted in unambiguous terms as it will have the status of a contract or may have to be converted into a court order, (as in divorce proceedings, for example). While we see no reason for the mediator or conciliator being legally qualified, these considerations point to the desirability in many cases of the parties having access to legal advice at appropriate points during the ADR process.

**Alternative Dispute Resolution – Application in Northern Ireland**

5.46 There is already momentum behind the development of ADR in Northern Ireland, although there is a tendency for it to move forward on a piecemeal and uncoordinated fashion. The judiciary have been supportive, with the development of *pre-action protocols* across a range of different types of action, focusing on the need for an early exchange of information between the parties and the exploration of mediation and other forms of dispute resolution as an alternative to litigation in appropriate circumstances. We should also draw attention to the deployment of *Early Neutral Evaluation* by judges as a means of focusing minds in the early stages of certain types of proceeding. For example, it is used by Masters of the High Court in ancillary relief hearings\(^30\) where, on the basis of an examination of the papers, the Master gives an indication of the likely outcome of the case to provide the parties with the basis for informed negotiation or mediation; we understand that this produces a positive outcome, in the sense of agreement being reached without formal hearing, in nearly 90% of cases. We understand that the judiciary are actively developing the Early Neutral Evaluation model for use in commercial disputes.

5.47 In the course of the review we have had drawn to our attention several ADR initiatives under way or planned, involving organisations and practitioners from a range of legal and non-legal backgrounds and covering a variety of case types. We note some of them here:-

- DHSSPS provided funding in 2007/09 to Family Mediation (NI) to train and build capacity in *family mediation*, primarily amongst legal practitioners and social workers – while the HSCB funds the provision of free pre-court mediation under the “Family Matters” strategy.

- *Collaborative law*, already established in England and Wales and in the Republic of Ireland, has its origins here in 2005 when the first training course was established. There is now a network of around 100 trained collaborative family lawyers in Northern Ireland.

- The *Law Society’s Dispute Resolution Service* has an approved list of solicitors and barristers trained in mediation and operating primarily in the commercial field; and the Law Society is actively promoting ADR through training and seminars.

- *Government departments* are embracing ADR in certain areas, for example:- DEL in introducing processes to identify employment tribunal cases susceptible to early resolution through mediation; the work of the

\(^{30}\) Ancillary relief refers to the financial settlement that occurs when couples divorce.
Labour Relations Agency; DSD’s work to encourage, wherever possible, voluntary agreements between separated parents for the support of their children, and plans for subordinate legislation under the Housing Amendment (No. 2) Bill that will apply ADR processes in resolving disputes over deposits in rented accommodation.

- Mediation (NI)’s work has focused on the provision of trained mediators in more community based non-family environments and in helping other organisations develop their capacity in this field. The Housing Executive has played a lead role in supporting mediation across Northern Ireland in addressing anti-social behaviour and neighbour disputes through some 25 accredited mediators and working with community based organisations such as Community Restorative Justice and Northern Ireland Alternatives.

- The Royal Institute of Chartered Surveyors is exploring the possibility of extending to Northern Ireland its mediation service aimed at property, boundary and neighbour disputes.

- The Northern Ireland chapter of the Chartered Institute of Arbitrators has over 100 members drawn for a range of disciplines including law, construction, commerce, HR and sport.

There is a wide variety of services being provided under the heading of alternative dispute resolution in Northern Ireland with disparate sources of private, public and charitable funding.

5.48 We are aware that, despite the momentum behind ADR, there remain concerns about obstacles in the way of its development. For example a family mediation pilot carried out by Relate and funded by the Court Service and Trusts in 2002/04 did not attract the level of business from cases destined for the Family Proceedings Court that had been expected; and the judiciary have expressed disappointment about a reduction in opportunities to refer cases from court to mediation. The Legal Services Commission has been reluctant to include family mediation as a separate level of service in the Funding Code, in part because it lacks confidence in the capacity of the system to supply sufficient trained mediators. On the other hand, some mediators and collaborative lawyers have commented that interpretation of the current legal aid funding framework is inhibiting the development of ADR in the family context; for example, they feel that more could be done through Article 9(3) of the Legal Aid, Advice and Assistance (NI) Order 1981 which supports the payment of legal aid in respect of representation by a solicitor, including such as is usually given in “arriving at or giving effect to a compromise to avoid or bring to an end any proceedings”.

**Alternative Dispute Resolution – Costs to the Legal Aid Fund**

5.49 Before addressing the steps we think should be taken to help develop the provision of quality services in this field, we must consider the cost implications of providing public funding to support ADR where the parties or one of them is financially eligible for legal aid. In this context we will

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concentrate on private law family cases as this is where much of the spend on civil matters, that would be suitable for ADR, occurs.

5.50 We have already referred to the savings which the Ministry of Justice has secured as a result of promoting the mediation option (paragraph 5.43 above). However, if significant numbers of cases that go through mediation are not fully resolved and go on to court, then that has the potential to cost a great deal more than if they had gone straight to court. While this danger can be mitigated by selecting the right cases for mediation, the outcome will be very uncertain until sufficient cases have been processed for reliable patterns to develop. A further imponderable is the possibility that there might be a temptation to refer to mediation cases that are currently resolved at much lower cost through informal negotiation.

5.51 The uncertainties mentioned in the previous paragraph are complicated by the significant costs that may be associated with family mediation. A number of comments received by the review team have stressed the importance of realistic levels of remuneration for family mediators and some have suggested that rates employed in England and Wales are on the low side. From what we can glean from the unified family mediation contract used by the Legal Services Commission there, the rates could well result in payments of £1,000 in a mediation where more than one session is required - to cover the initial assessment of whether the case is suitable for mediation, meetings with the parties and drawing up the agreement. The respective solicitors’ fees for advising the parties would come on top of that, although, in a collaborative process there would be no third party to pay in addition to the solicitors. We note that the Government’s proposals for England and Wales envisage solicitors’ fees of £150 to support the mediation process and an additional £200 where the terms of a financial settlement need to be set out in a court order. Some submissions to the review note that experts could be an additional cost. From some comments that have been made to us, we are concerned that there may be unrealistic expectations about the funding model related to ADR in family cases and it is not difficult to imagine a scenario where a mediation with a satisfactory outcome could cost the legal aid fund more than a court case.

5.52 We recommend that before committing to funding family mediation under Family Help or through a bespoke funding regime, the Legal Services Commission and Department of Justice should, in consultation with stakeholders, develop a funding scheme and financial model so that potential costs can be assessed. This could be carried out under the auspices of the co-ordinating body recommended at paragraph 5.54 below. It will not be feasible to proceed with legal aid funding for ADR in family cases unless it can be established that the outcome will at worst be cost neutral; and we are in no doubt of the necessity to demonstrate that for most cases there is a significant cost saving through mediation when compared with a court hearing, not least to make up for any additional costs associated with failed mediations that go on to court. Further we suggest that, as part of this modelling, options for controlling costs should be considered, including cost capping and/or fixed fees and reduced payments in cases that are not resolved. An option to be considered might be a presumption that legal aid is not granted for a case that has already been through mediation.
5.53 We should stress that our concern to establish a reliable model for costing mediation and ADR generally should not be taken as indicating anything less than enthusiasm for this approach to resolving justiciable issues.

**Alternative Dispute Resolution – Next Steps**

5.54 It is clear from the way in which ADR has so far developed in Northern Ireland that there are issues over capacity and relating supply to likely demand in a range of very different areas. There is also the important question of quality control, to protect the public, safeguard the integrity of the justice system and to provide assurance on value for money in relation to any publicly funded ADR processes. With such considerations in mind **we endorse the view that there should be a coordinating body with membership drawn from the principal suppliers of mediation services, public bodies with a funding role and relevant training providers, with a remit to promote ADR and help ensure that the right infrastructure is in place to support it.** Specific tasks would include:-

- Promoting ADR and ensuring the availability of information to the public on the available options.

- Mapping the role of ADR across different areas of law and assessing the capacity to deliver against likely demand.

- Address training and accreditation standards, where appropriate adopting standards set by such bodies as the Mediation Institute of Ireland and the College of Mediators, but recognising that different types of ADR in different areas of law will require different types and levels of expertise (e.g. family mediators will need to demonstrate a capacity to work effectively with children).

We welcome the Law Society’s initiative in establishing a Mediation Council for Northern Ireland and think that this may be the basis of the sort of body we have in mind. Given the number of suppliers in this area, however, we think it important that this initiative is not seen as associated with any particular organisation or with a legal discipline, which may have implications for the constitution of the body and for how its chair is appointed.

5.55 **We recommend that consideration is given to a number of other initiatives aimed at enhancing the use of ADR:**

- **Establishing a pilot family ADR scheme, perhaps associated with a particular court** (as has been done in Dublin where there are on the spot facilities to assess the suitability of cases for mediation before they go to court and to provide mediation services). This might help provide reassurance about workability and cost.

- **Making it a condition of legal aid in particular categories of case that the options for ADR should have been considered** and requiring reasons if that option has been rejected.

- **Financial incentives to encourage mediation in publicly funded cases** – e.g. removal of the statutory charge liability if a case is successfully mediated and requiring a small “up front” contribution from
All government departments in Northern Ireland to commit to taking an active role in adopting and promoting ADR mechanisms to resolve disputes with the public and suppliers – this should be incorporated in staff training and covered in annual reports. In addition to spreading existing best practice adopted by some departments here, the guidance supporting the Dispute Resolution Commitment (paragraph 5.41 above) in England and Wales might provide a basis for this recommendation. Implementation of recommendations at paragraphs 3.17 and 3.22 of the recent Criminal Justice Inspectorate Report would put the Department of Justice in a strong position to lead this work.

Alternative Dispute Resolution – A Community Dimension

5.56 In reviewing the volume and cost of legally aided cases by category we noted that in 2010/11 legal aid was granted in respect of 487 cases of applications for, or defence against, injunctions at a cost of around £1.4 million. We have not been able to analyse these cases in detail but understand that a significant number of them relate to neighbour disputes and civil actions brought under the Protection from Harassment (NI) Order 1997 – this legislation provides for a choice of criminal prosecution (following a complaint to the police) or civil remedy by injunction in cases of persistent harassment, which can range from name calling, through forms of anti-social behaviour to the worst types of hate crime. Research carried out within the Commission in 2007 suggests that, in some cases at least, the police were advising complainants to go down the civil route; and it appears that many of the civil cases settle without a court order being made, with the attendant danger that they could be re-opened at further expense.

5.57 We were given one (no doubt extreme) example of a case of multiple applications for injunctions in respect of one group of people over a period that is likely to cost tens of thousands of pounds in legal aid. It seems to us in cases such as this, (and in some family cases), that the courts are being used as the means of perpetuating conflict rather than resolving it. We commend the Legal Services Commission for taking action to limit the fees being claimed by solicitors and counsel in these cases but we think that a different approach may be called for.

5.58 We considered suggesting that cases involving neighbour disputes were taken out of the scope of legal aid altogether. But we recognise the seriousness of some of these matters and have been influenced by the decision in England and Wales not to include cases brought under the Protection from Harassment legislation in the significant number of categories which will no longer qualify for legal aid. Nevertheless we do think that action is needed to reduce this drain on the public purse and improve the outcomes being experienced by people involved in this type of dispute. On a broader

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32 The Use of Legal Services by the Criminal Justice System, June 2011. Paragraph 3.17 recommends that the criminal justice agencies collectively review the procurement of legal services and determine the scope for greater use of ADR. Paragraph 3.22 recommends that the Department of Justice adopts a shared services approach to the procurement of legal services and seeks to align its approach with other parts of government.
front, we see community dispute resolution, where appropriate with a restorative element, as being applicable in a range of scenarios, including:- high hedges; boundary disputes; neighbour/neighbour problems such as noise, parking and children; anti-social behaviour; criminal damage; (low level) hate incidents; problems between groups in the community; and relationship issues in the workplace. The aim should be to address what are often emotional and relationship issues before they escalate into more formal legal disputes.

5.59 There is already in Northern Ireland a strong community infrastructure on which to build. For example, we were impressed by the work of the Housing Executive in using some 25 accredited outsourced mediators across Northern Ireland to deal with neighbour/neighbour disputes – and their work with Community Restorative Justice Ireland and Northern Ireland Alternatives in establishing Mediation and Community Support (MACS) in various areas. There are several funding streams supporting this activity including some provided by the statutory agencies, the police and charitable bodies. We are also aware of the projects run by Mediation (Northern Ireland) working with the Social Partnership Programme in six council areas to advance community cohesion through mediation. These sorts of approaches, consistent with the department's community safety strategy33, seem far more likely to produce positive outcomes than repeated appearances at court.

5.60 We recommend the following action to be developed and overseen on a partnership basis as part of the community safety strategy in Northern Ireland:-

- Map the coverage of community based dispute resolution schemes and their funding arrangements, and develop a funded plan to fill gaps.

- Agree proportionate mechanisms to secure quality control, training and accreditation of those providing mediation at the local level.

- Develop referral mechanisms so that appropriate cases of neighbourhood dispute, anti-social behaviour or harassment are routed through such schemes for resolution.

- Any grants of legal aid to pursue injunctions in relation to neighbour disputes should be conditional on genuine attempts at mediation having been made and on the case having merit – and, where legal aid goes to the complainant, the objective should be to secure an enforceable court order, as opposed to negotiated settlement thus avoiding repeated court appearances.

- The police and other statutory agencies would issue guidance supportive of this approach and Community Safety Partnerships would actively promote mediation as a means of resolving neighbourhood disputes.

Nothing in what we say is intended to detract from the need for vigorous action by the authorities where personal safety is judged to be at risk, but we assume that in such circumstances, if the Protection from Harassment legislation is deployed, the criminal rather than civil route will be taken.

**Family and Children**

5.61 Private law issues in family justice concern matters arising out of the break-up of family relationships including divorce, separation, financial settlements (ancillary relief) and residence and contact arrangements for children. Much of the legislation governing these matters dates back to 1980 and beyond, but we should also note the significance of the Domestic Violence (NI) Order 1998 which provides for non molestation and occupation orders. The protection of spouses from domestic violence and children from risk of abuse or neglect is of critical importance when addressing issues of family law.

5.62 Public law provides a mechanism for the Trusts to protect children who might be at risk through abuse or neglect or are beyond parental control. The Children (NI) Order 1995 establishes a framework and court based procedures whereby Trusts can take children into care or instigate other interventions such as supervision orders. The Order, largely modelled on the Children Act of 1989 in England and Wales, also contains provisions relevant to the treatment of children in private law proceedings including residence and contact issues. In accordance with the UN Convention on the Rights of the Child, Article 3 of the Order provides that the child’s welfare shall be the paramount consideration in any decision by a court concerning the upbringing of a child or the administration of his/her assets.

5.63 Proceedings in public and private family law matters relating to children may be handled in the Family Proceedings Court, the Family Care Centre or the High Court, depending on the issues at stake and their complexity. Divorce and related matrimonial matters go to the county courts or the High Court. Legal aid spend on representation in family and children cases in 2010/11 accounted for about £26 million out of £36.9 million spent on representation in the civil courts, a sharp increase from £22.5 million the previous year. Regrettably the management information available to us does not allow for a reliable split between public and private law costs, although it is apparent that the big increase in legal aid certificates granted for Family Care Centre cases since 2006/07 is in large part a reflection of a more interventionist approach on the part of social services in the wake of the Baby P case. Whereas in private law legal representation is generally confined to the two parties whose break-up is at issue, in public law matters there can be representation of multiple parties, including the Trust, parents (sometimes separately), other relatives with parental responsibility or who have been joined or have applied to become party to the proceedings and the child (through the offices of the Guardian ad Litem). With the exception of lawyers representing the Trust, all of these are liable to be paid for out of legal aid, as well as the cost of expert witnesses.

5.64 In the course of the review we visited Scotland and saw the children’s panel system in operation there. In public law cases if matters of fact are at issue they are determined by the courts, but once the threshold for intervention is established, decisions on care and supervision are taken by a lay panel, usually in the presence of social services, parents, the child, an independent social worker and an official whose task it is to ensure that correct procedures
are followed. Lawyers are rarely present in the panel proceedings. This is in contrast to Northern Ireland (and England and Wales) where, once proceedings have been instituted, the whole process, from determining whether the conditions require intervention through to approving the content of the care plan, is court based. As noted in paragraph 3.11 above, this is partly responsible for the lower legal aid bill in Scotland, although we have not assessed whether there are increased costs elsewhere in the system such as in the administration of and support for the panels. While the panel system is well embedded in Scotland and appears to work well, that does not necessarily mean that it would be equally applicable in the Northern Ireland context and, if there were a desire to pursue the option further, we suggest that a fundamental review of family justice would be the appropriate vehicle (paragraph 5.92 below).

**Family and Children – Public Law**

5.65 Views expressed to us on the workings of the public law arrangements bear remarkable similarities to those reflected in the interim report of the Family Justice Review being carried out for the Ministry of Justice in England and Wales and published in March 2011. There is recognition of a system under pressure and comments made to us include the following inter-related matters:-

- Serious concerns about *delay* with full care orders often taking over a year to process, although it was recognised that on occasion “purposeful delay” had a role in enabling problems within the family to be addressed.

- The *repeated use of interim care orders* requiring frequent court hearings and creating an atmosphere of uncertainty for the child.

- The *number of parties* involved in the process, often with separate legal representation including, in some cases in the higher courts, senior and junior counsel.

- A (perhaps natural) *tension* in the public law field between lawyers and the judiciary on the one hand and the social work ethos on the other.

- A perceived over-involvement of judges and lawyers in the detail of *care plans* (but we should point out that there is strong case law on the need for the court to be satisfied as to the content of care plans before full care orders are made)\(^3^4\).

- Over-use of expensive *expert witnesses* who add to costs and delay, especially if brought in from other jurisdictions.

5.66 On the positive side, and borne out by our own observations, there is a strong sense that, despite the adversarial setting, judges work very effectively to adopt a more inquisitorial approach to addressing the issues before them; and there was support from most who commented on these issues for the pre-court processes introduced by the “Guide to Case Management in Public Law Proceedings (Practice Guide)”\(^3^4\). We note that specific provision is made in

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\(^3^4\) AR v Homefirst Community Trust, 2005 NICA 8
the Legal Services Commission remuneration arrangements for work in relation to correspondence and attendance at meetings as part of these case management processes. This is the kind of mutually reinforcing approach (involving a judicial initiative, backed by stakeholders and with a positive contribution from the Legal Services Commission) within the justice system that should be encouraged.

5.67 While mediation in its traditional form may not be appropriate in the public law scenario, we have received positive comments on the use of family group conferencing, with social workers and family brought together in a less formal atmosphere to address the needs of children before or during the proceedings. This involves social workers employed by a Trust or by a voluntary sector body discussing with the family the options for addressing an issue that is putting the child at risk before leaving family members to identify a proposed way forward; the Trust’s social workers then determine whether the solution is sufficiently robust to meet the child’s needs and, if so, work with the family on implementation. The system has been working in Northern Ireland for some years and we endorse family group conferencing as a partnership based means of identifying and resolving issues in suitable cases in the interests of the child outside the court environment. Indeed this is one way of bringing some of the positive benefits of the Scottish children’s panel system into the Northern Ireland without altering our formal legal framework.

5.68 Any matter relating to children at risk is top or high priority (paragraph 5.3 above) and in these cases it is a public authority that is instigating action to which those with parental responsibility are joined as parties. We have no hesitation in saying that legal aid should continue to be available to children, parents and anyone exercising parental responsibility, without reference to means or merits, in specified public law children cases. However, we do not think it necessarily follows that parents should be given legal aid to be represented separately from each other unless it can be clearly demonstrated that they have separate interests in relation to the welfare of the child. Moreover, we are conscious that sometimes relatives or others will seek leave to be joined as parties. Again we do not think that anyone apart from those with parental responsibility and the child should be granted legal aid in public law cases other than in circumstance where they can clearly demonstrate that they have a distinct and different (from other parties) interest in relation to the welfare of the child. This will require an amendment to the Legal Aid, Advice and Assistance (NI) Order 1981 as it currently provides for legal aid to be granted to other parties subject to a means test, but not to a merits test. We recommend that this legislative amendment be taken forward at the earliest opportunity.

5.69 The welfare of the child is the paramount consideration in these cases which means that they should be properly represented and, where there is sufficient capacity, there must be arrangements to ensure that the child has the opportunity to express a view (Article 12 of the UN Convention on the Rights of the Child). In Northern Ireland the Guardian Ad Litem Agency provides the independent officer of the court, safeguarding the interests of children who are the subject of public law and adoption proceedings, acting as the voice of the child and ensuring that the child’s views are heard. In doing so the Agency, while carrying out a social work function, acts independently of the

35 Paragraph 10(5)(C) of the Order
Trusts whose approach in care cases may or may not coincide with the guardian ad litem’s view of the best interests of the child.

5.70 The guardians ad litem are required by statute to appoint a solicitor for the child in each specified public law case. They appoint solicitors from about 170 who are accredited to the Children Order Panel administered by the Law Society of Northern Ireland. The solicitors apply for legal aid to the Commission on behalf of the child. In those circumstances, where the child wishes to express an independent view distinct from that of the Guardian, the latter may arrange his own legal representation (not legally aided) while the legal aid follows the child. In 2010/11, 1,759 legal aid payments were made to solicitors and barristers appointed by the Guardian to represent the child at a cost of around £3.6 million; that figure included £1.2 million in counsel fees (including VAT). These figures represent a significant increase from 2008/09 when less than £2 million was spent on legal aid fees for lawyers appointed to represent the interests of children.

5.71 We have a concern about a situation where the legislation stipulates that a guardian ad litem shall appoint a solicitor for the child who is the subject of public law proceedings but accountability for the proper use of the associated funding lies with another organisation, namely the Commission. One option that we considered was a transfer of budget to the Guardian Ad Litem Agency which would then be responsible for directly hiring and funding (or possibly employing) solicitors to act on behalf of the child and also for deciding when counsel should be briefed. However, this met with some concern on the part of DHSSPS and the Guardian Ad Litem Agency on the ground that children had the same right as others to legal aid and that subjecting them to a finite budget could compromise their rights to representation. We are not wholly convinced by this and think that this is an issue that should be addressed as part of the wider review of family justice arrangements that we are going to recommend. In the meantime in the next paragraph we suggest some arrangements that might reduce expenditure and, more importantly, enhance value for money.

5.72 We support the Guardian Ad Litem Agency’s wish to depart from the existing Children Order Panel of solicitors and establish a smaller specialist group from which to appoint. Children could only benefit from the continuous professional development of such a group of solicitors, experienced in this work, committed to actively taking carriage of a case from start to finish and able to carry out their instructions in the Family Proceedings Court and the Family Care Centre without briefing counsel. In managing this resource the Guardian Ad Litem Agency would no doubt take account of the need for economy in those circumstances where the interests of the Trust, the guardian and the child clearly coincided. While we have no wish to compromise the quality of representation afforded children in these most difficult circumstances, the legal aid budget is finite and under pressure and we therefore recommend that the Legal Services Commission engages with the Guardian ad Litem Agency with a view to finding ways of securing effective representation for children in public law cases, while significantly reducing the level of spend. Reduced use of counsel will be part of this strategy, provided that this can be achieved without compromising the interests of children.

5.73 Expert witnesses can play a big part in public law children proceedings, for example in providing psychological and medical assessments. We do not
have separate figures to identify their overall cost but we believe that payments to experts will have accounted for a significant proportion of the £965,000 that was paid in disbursements for cases in the Family Care Centre and Family Proceedings Court in 2010/11 - (in England and Wales, the cost of expert witnesses is estimated to be about two thirds of total disbursements). We comment later in this chapter on work to set up a register of expert witnesses and to keep costs under control that is of relevance across all areas of law. It is important that expert witnesses are authorised only where they will add value and that in public law cases, other than in exceptional circumstances, one witness is selected to provide impartial input on an issue for the court, rather than individual parties each seeking their own experts. **We support the idea that a lead solicitor, probably representing the interests of the child on behalf of the Guardian ad Litem, should have responsibility for securing the services of any expert witness required by the court.** Where it is not possible to identify a suitable expert within this jurisdiction, the presumption should be that evidence will be given by video link. This should help with scheduling of cases and reduce costs; especially in the more inquisitorial environment of the family courts, we are not convinced by arguments that the physical presence of an expert assists in the quality of the examination of the evidence. **Where a single expert is appointed, we would expect costs to be shared between the parties.**

**Family and Children – Levels of Representation**

5.74 As for the level of representation in public and private law cases, we favour the strong presumption that solicitors who are competent in the family law field have the capacity to take full carriage of a case in the Family Proceedings Court (in public and private law). As with the magistrates’ court, we can see that it might be convenient for a solicitor to brief counsel to handle court work, but that is not in itself a reason for granting authority to pay an additional sum for counsel out of the legal aid fund. Nor do we believe that equality of arms should be a reason for authorising counsel at this level – where, for example, a trust is represented by counsel because a solicitor is not immediately available, equality of arms does not require that other parties should be funded to secure additional representation at that level. In 2010/11 we understand that while around £6 million (including VAT) was paid to solicitors in the Family Proceedings Court out of the legal aid fund, some £1.4 million went to counsel, some at least of which we believe could be saved without detriment to quality of service. The guidance currently available to staff in the Commission is over a decade old and in need of revision. **We suggest that requests for counsel in the Family Proceedings Court in public and private law cases should be refused other than in the most exceptional circumstances where, for example, there may be related criminal proceedings concerning allegations of serious sexual or physical abuse.** If, in other circumstances, a solicitor wishes to brief counsel for case management reasons or because he/she is not a specialist in this area of law, then remuneration for counsel is a matter between the two lawyers.

5.75 We agree that counsel should continue to be authorised at the Family Care Centre. However, if a solicitor, competent in this area of law, wishes to take carriage of a case at this level without briefing counsel, (where counsel would otherwise have been authorised), then remuneration from the legal aid fund should be uplifted by a percentage to be agreed
to reflect the additional work and responsibility. We understand that the county court scale fees have a similar provision.

5.76 We consider now the circumstances where authorisation is sought for senior counsel, in addition to junior, in the Family Care Centre and for Children Order and family cases in the High Court. We have not been able to secure reliable data about the numbers of cases where senior counsel are certified in the Family Care Centre or the High Court. However, research from within the Legal Services Commission identified a sample of 335 applications for authorisation of senior counsel in the High Court and 148 in the Family Care Centre from 2007 – 2010, mostly involving Article 50 (care order) proceedings. Of these requests 424 were granted by the Commission; of the remaining 59, in a figure that raises issues about the appeals process, 51 were granted after appeal. (We address appeals procedures later in this chapter). While we do not doubt that many cases coming before the Family Care Centre and High Court raise difficult issues of complexity and of law, we are not persuaded that such matters would be outside the competence of experienced junior counsel. Moreover we have had suggestions from several quarters that authorisation should not be given to pay senior counsel out of the legal aid fund to appear in the Family Care Centre – and, given the breadth of view on this from all parties who are in a position to seek authorisation for senior, we think it unlikely in public law cases that equality of arms issues will arise.

5.77 We are loathe to suggest absolute prohibitions, not least because we do not wish to exclude the discretion to deal with the truly exceptional, but also because we would not wish to see a position on legal aid remuneration have a perverse outcome through incentivising moves to push cases into the High Court. However, we do not believe authorisation should be granted by the Legal Services Commission to fund senior counsel in the Family Care Centre other than in the most exceptional circumstances, to be authorised by a member of staff at director level in consultation with a legally qualified member of the Board. For the High Court, authorisation for senior counsel should be granted only where there are complex matters of law or fact on an issue affecting the applicant, the case is wholly different from the norm at that level of court and it is judged that the issues could not be reasonably presented by junior counsel. It would not follow in such circumstances that other parties would receive authorisation for senior counsel unless they were engaged with the complex issue in question. The Commission should explore the extent to which, when it proves necessary to brief senior counsel, it would be reasonable for the senior to take the case alone, without the support of a junior. These recommendations, on the use of senior counsel, are also applicable in the generality of civil cases and we suggest that the matter is consulted upon at the earliest opportunity.

Family and Children – Private Law

5.78 We regret that we cannot provide a full picture of the scale of legally aided private law family cases as the management information available to us does not distinguish between public and private law cases in the Family Care Centre. However, we can confirm that £4.7 million was paid out of the legal aid fund in respect of divorce cases in 2010/11, £3.1 million on contact and residence proceedings (in the Family Proceedings Court) and £1.5 million on non molestation orders.
5.79 Where domestic violence or potential risk to a child is at issue, we are in no doubt that legal aid should be available to fund proceedings whether under the relevant domestic violence legislation or under general provisions relating to matrimonial or children issues (contact and residence orders etc.). We welcome the Minister’s decision to remove the upper income limits for people applying for legal aid in relation to non molestation order proceedings. However, we have had to consider carefully whether the generality of private law issues should remain in scope of legal aid for proceedings beyond the level of mediation, not least because of the budgetary implications. The Government has decided to remove ancillary relief and private law proceedings from the scope of legal aid in England and Wales except where domestic violence or child abuse is at issue and with a number of other limited exceptions.\(^\text{36}\) Mediation on family matters remains in scope.

5.80 We are persuaded by some well argued submissions that there are sound reasons for retaining the generality of private family law cases within scope. There is a strong public policy argument in favour of helping ensure that, once breakdown has occurred, it is managed in a way that minimises conflict and produces sustainable solutions benefitting both parties and, more importantly, any children. We believe that, so long as the current legal framework applies, this is most likely to be achieved through the availability of legal advice, negotiation between solicitors and, if needed, mediation or collaborative intervention, with recourse to court if that is the only way of securing a resolution. This increases the likelihood of domestic violence or child protection issues being identified at an early stage. Also, from our own observations in court, it was apparent to us that with highly congested lists, the judges’ ability to manage the business and encourage agreed solutions was greatly enhanced where the parties were legally represented. However, while we recommend that private family law should remain within scope for the financially eligible, legal aid needs to be structured in a way that facilitates resolution but does not involve the taxpayer in funding parties to use the courts as a means of perpetuating and exacerbating disputes. In particular, we do not believe that legal aid should be available to enable contact issues to be repeatedly re-opened or allow a publicly funded party to exert unreasonable pressure on a party who, while not financially eligible for legal aid, does not have the funds to pay for legal representation over a protracted period.

5.81 We suggest a structure for legal aid that incorporates incentives for the parties and their solicitors to secure early agreement on the key issues, while incorporating disincentives against protracted court proceedings and against issues being brought back to court unnecessarily. The detail would have to be discussed and negotiated between the stakeholders, but we set out some possible elements of such an arrangement here:

- **Stage 1 – the negotiation** of residence, contact and financial arrangements between solicitors. If agreement is reached, a standard fee to be paid to the solicitor pitched at a level sufficient to encourage meaningful negotiation. No financial contribution would be required from the legally aided client and no statutory charge applied. If not successful, no fee to be paid to the solicitor at this stage and the case is

\(^{36}\) Paragraphs 44 to 51 “Reform of Legal Aid in England and Wales: the Government Response” June 2011.
screened for mediation or collaborative intervention. This stage would replace ‘green form’ or legal help where family matters are concerned.

- **Stage 2** – if assessed as suitable and if available, **mediation or collaborative law**. If this produces a positive outcome, a standard fee is paid to the solicitor and to the mediator, no statutory charge applies and no contribution is required from the legally aided parties. No fee is payable to the solicitor in respect of an unsuccessful mediation, and the matters go to court (a reduced fee would go to the mediator or collaborative lawyer).

- **Stage 3** – **court proceedings** (if the case is not suited to mediation or mediation fails). The statutory charge and contributions apply. All legally aided parties pay a small contribution in advance. The solicitor is paid a standard fee to reflect the work required in the generality of cases. Time and line fees would no longer be available and, only exceptionally, would uplifts be paid when the solicitor produces evidence of major additional work that was outside the norm and justified in terms of resolving the issues at stake. If the case goes to the Family Care Centre, then standard fees for solicitors and counsel at that tier apply.

There will clearly be details to be addressed, such as the rules to apply where partial agreement is reached, and how to ensure that cases where domestic violence is demonstrated to be an issue reach court quickly. The solicitor would receive a fee at the end of the stage when the matter is resolved or a court order made; provision would need to be made for cases where a client dismisses a solicitor or the case is dropped before final resolution. Also, it will be necessary to research and provide guidance on how to advise clients on the respective merits and availability of mediation and collaborative law; this might be a task for a group working under the auspices of the co-ordinating body on ADR (paragraph 5.54 above).

**5.82 Once agreement is reached or a court order made** at the end of any of the stages noted in the previous paragraph, **legal aid would not normally be available to fund further proceedings to reopen the issue, unless directly related to domestic violence or the safety of children**. Financial constraints may remove any possibility of flexibility in this area. If that is not the case, the Commission would need to consult on drawing up very tight guidelines on the circumstances where **limited** legal aid might be available to reopen a case where there were allegations that an agreement or court order was being breached or circumstances had arisen where a variance in the agreement or order was merited. **If, exceptionally, legal aid is made available to re-open matters, an option for consideration is a requirement that the court should consider making orders for a contribution towards costs by any party held to be behaving unreasonably.** Solicitors would need to warn clients of such a possibility. Where a party is reopening a case with privately funded legal representation and the other party would qualify for legal aid, then it should be open to the court to order the first party to fund the other’s equivalent representation. Negotiations in establishing procedures and fees would have to proceed on the basis that these arrangements will reduce costs to the legal aid fund, but the key will be to incentivise early and lasting agreement. We appreciate that this approach will not be welcomed in some quarters and if there are other means of achieving the same objectives, they
should be placed on the table for discussion. The alternative is to follow England and Wales in removing much of this work from scope.

5.83 We have heard many positive comments about the role of Court Children Officers (CCOs) in the Family Proceedings Court, including their contributions to pre-court negotiations on contact and residence issues – so much so that there have been a number of suggestions that they should be introduced in the higher courts. Our observations in court support the view that they make a positive contribution, not only to the specific issues relating to children but also to encouraging a more conciliatory approach on the part of the parents. The Official Solicitor is available to act on behalf of children in the Family Care Centre and the High Court (but not the Family Proceedings Court); and there is provision in Articles 4 and 56 of the Children Order for any court to ask social services to investigate the child’s circumstances should issues arise in the course of private law proceedings. While all of these tools are available and working in the interests of children we did see some evidence of confusion about the role of the respective agencies (and the Guardian ad Litem) and we think these arrangements, that seem to have developed on a piecemeal basis, are now in need of attention.

5.84 We are aware that in private law matters the judiciary take steps, not only to ensure that the interests of children are taken into account, but that they have the opportunity to express their views on issues that are of central importance to them. We have already referred to the importance of mediators in family matters having the skills to give children their place in the process. In 2005 a sub committee of the Children Order Advisory Committee produced a report intended to open up a debate about the separate representation of children in private law proceedings, while recognising the resource implications and suggesting that it was not always necessary. We have also been referred to a Legal Services Commission multi-agency conference report from 2006 that made a series of recommendations about the needs of children when parents are separating, with questions about the extent to which they were followed up. We do not propose to make recommendations for immediate action in this area, except to suggest that Court Children’s Officers could play a valuable role in the Family Care Centre if the resources were available to deploy them there; but the arrangements for safeguarding children’s interests and enabling them to be heard in private law cases could be included in matters to be covered in the policy review of family justice, which we have recommended (paragraphs 5.89 to 5.92 below).

5.85 In the Progress Report, we raised issues about the tier of court where divorce proceedings are lodged (county court or High Court) and the level of representation required for undefended divorces. Some responses suggested that retention of the High Court option was important as it gave the parties access to the Masters whose contribution in ancillary relief matters was rated highly; there was also concern about overloading the county courts. There was some opposition to moving in the direction of “postal divorces” as in England and Wales. We do not feel strongly about which tier of court should take divorce proceedings except to make the point that levels of representation and fees paid out of the legal aid fund should reflect the

nature of the work rather than the tier of court. In particular, we suggest that undefended divorces heard in chambers in the county courts or the High Court would normally require a minimum of legal input and certainly do not warrant the presence of counsel. An appropriately pitched standard fee should suffice. Further, we endorse the view that legal aid should not normally be available to support contested divorce proceedings where a “no fault” ground is available or where it will become available within a reasonable timeframe; arrangements would need to be in place, however, to address the situation where a privately funded client was determined to proceed with a contest which the other, legally aided, party had grounds to defend.

5.86 There were some suggestions that if the substantive law were to be shifted further in the direction of enabling “no fault” divorces at an earlier stage than the current two years, this might reduce a tendency in some cases to issue fault based proceedings at the start (making a conciliatory approach more difficult), only to agree later to the two years with consent option. The law on the grounds for divorce and on the process itself has implications for access to justice and legal aid, but this is a matter for in depth policy review.

Family and Children – Remuneration

5.87 We have referred to remuneration arrangements at a number of points in previous paragraphs and are aware that the Commission is arranging a review of fees paid to barristers and solicitors at all tiers of court in private and public law family cases. This will subsume a commitment made to the Bar to review the operation of fees for the Family Care Centre in “Article 3 cases” that were negotiated in 2008. Certification by the judge of a case under Article 3 of the 1981 Remuneration Order occurs when the case is assessed to be exceptional and that limits on remuneration applying elsewhere in the Order should be disapplied; the number of Article 3 certificates increased from 1,147 in 2008/09 to 1,510 in 2010/11.

5.88 We see the Legal Services Commission review as an opportunity to develop a system of standard fees in family and children cases that is coherent and applies consistent principles across the court tiers. While it will be necessary to allow for the truly exceptional case where special arrangements are needed to reflect the amount of work required, the guidelines for such cases should be sufficiently tight that they will not permit drift away from the standard fees norm for the large majority of cases; and we would expect a review to work to the “swings and roundabouts” principle in a way that might eliminate the need for Article 3 certification in the Family Care Centre. The remuneration review should consider cost capping for Family Proceedings Court cases or other means of ensuring that costs do not reach excessive levels at the FPC level, especially in cases that could be referred at an earlier stage to the Family Care Centre for resolution. The financial modelling will have to be rigorous, shared with stakeholders and produce an outcome which can be accommodated within budgetary projections. Given the scale of spend on legal aid in family and children cases, we think it inevitable that there will have to be some reduction in average payments for particular categories of family work if £5 million is to be saved from the projected budget for civil legal aid by 2014/15. It will be important that fee levels and relativities are set fairly and, while they were framed with criminal cases in mind, we think that the principles outlined at paragraph 4.39 above and 5.144
below will be applicable, perhaps with an additional emphasis on incentivising the early resolution of issues.

**Law and Policy on Family Justice**

5.89 As we stated in the Progress Report, we do not think that it would be right for a wide ranging review of the type we are undertaking, carried out over a relatively short timescale, to attempt to make recommendations about such fundamental issues as the role of the courts in public law children cases or the law on divorce. However, a theme running through our review is the significance of the substantive law and policy as a driver for the quality (or otherwise) and costs of access to justice and we look briefly at some developments in recent years. The Office of Law Reform carried out a rolling review of family law in the late 1990s and early part of the last decade, culminating in the Family Law (NI) Act 2001 which dealt with parental responsibility, and The Family Law (Divorce etc.) Bill in 2002, which sought to make certain reforms to divorce law and other areas of family law but which did not proceed to enactment. More recently the DHSSPS has been working on its strategy for adoption, “Adopting the Future”. However, with some exceptions for example in relation to domestic violence, the legal framework on family issues has remained broadly the same for the past two decades.

5.90 In the course of our review, we have identified a number of major systemic and policy issues in the family field that impact on the quality and cost of access to justice, for example:-

- The pressures faced by the courts which seem to have to spend as much time reviewing progress as addressing issues; delay; and the respective roles of the different court tiers.

- Whether the adversarial basis of the court system, albeit modified by the inquisitorial approach adopted by the judiciary, is right, especially for public law children cases.

- The extent to which the court, having established the facts that meet the threshold requirement for taking a child into care, should have to engage in detailed consideration of the care plan.

- The respective roles of the Guardian ad Litem Agency, the Court Children Officers and the Official Solicitor in ensuring that the child’s interests are properly safeguarded and that the child’s voice is heard in public and private law proceedings – and whether there is scope for more integration between these services.

- The circumstances in which experts provide added value.

- The law on divorce, including the procedures for processing undefended divorces.

5.91 In England and Wales, matters such as these are currently the subject of a fundamental Family Justice Review led by David Norgrove and with a membership that includes a High Court Judge, senior figures from social services and the voluntary sector and officials from the Ministry of Justice, Department for Education and the Welsh Assembly Government. It published
its interim report in March 2011 as a basis for consultation and will produce a
dfinal report in the autumn of this year. As well as addressing detailed issues
such as how to ensure that the child’s voice is heard, mediation, parenting
agreements and divorce procedures, the interim report proposes an
integrated family justice service and consults on the creation of a single family
court.

5.92 **In our view, the time is right for a fundamental review of family justice in Northern Ireland which could be carried out under the auspices of the interested departments and/or the Northern Ireland Law Commission.** While we do not believe that proposals in England and Wales are invariably applicable in Northern Ireland, there are similarities between our systems and there would be advantage in a review here at least being informed by the outcome of the Norgrove review. **Therefore, we recommend that the fundamental review commences as soon as the Norgrove review reports and that the review should be time limited with clear terms of reference.**

**Money Damages**

5.93 Legally aided money damages cases for the most part involve claims for negligence, often in the context of road traffic accidents, tripping, medical negligence and accidents at work. There is usually a cost to the legal aid fund only where a case is lost, as in successful claims costs are invariably awarded against the other party – and, even in cases lost, cost protection for legally aided work usually means that the other side is required to bear its own costs.

5.94 Over the past decade (until 2009/10) there was an overall reduction in the number of legal aid certificates granted for cases in the main money damages categories; but it is noteworthy that since 2009/10 that downward trend has been reversed, particularly in respect of road traffic accidents and medical negligence cases. Spend out of the Legal Aid Fund on money damages has fluctuated between £1.5 million and £2 million, although it is not clear whether the increase in the number of certificates granted in the past two years has yet fully fed through to the expenditure figures. The table below gives an indication of these trends based on the figures available to us.
Table 6 – Trends in main categories of legally aided money damages cases

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<td>£725</td>
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<td>Traffic accidents</td>
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<td>£216</td>
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<td>£157</td>
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<td>£1,817</td>
<td>£1,519</td>
<td>£2,049</td>
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**Total certificates**

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<td></td>
<td>£2,296</td>
<td>£1,752</td>
<td>£1,299</td>
<td>£1,152</td>
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**Notes:**

1. We do not have disaggregated expenditure figures going back beyond 2005/06. However, the numbers of certificates granted in these categories for 2003/04 and 2004/05 were 1,770 and 2,396 respectively.

2. The figures given above do not enable average costs to be calculated. There may be more than one certificate per case and bills often do not fall for payment in the year when the certificate was granted.

Based on the figures given in Table 6, we think it reasonable to assume that if the current arrangements remain, the overall cost to the fund of full legal aid in money damages cases, added to advice and assistance (see Table 5 at paragraph 5.25 above), will be about £2 million per annum. These payments include fees for solicitors and barristers, expert witnesses and other expenses. On top of that, it is necessary to take into account that adjudicating on the grant of legal aid in money damages cases and administering consequential payments into and out of the fund add to the running costs of the Commission.

The Commission’s proposed *Funding Code* (paragraph 5.3 above), that has been the subject of extensive consultation, does not include money damages in one of its priority categories for legal aid. This means that if the Code were operative, the decision on whether to grant legal aid in particular cases where the client was financially eligible would be determined by applying a merits test based on consideration of the interaction between likelihood of success, the scale of damages likely to be awarded and the projected costs. Thus, if the prospects of success were assessed as very good (80% or more), legal aid would be awarded provided that damages were expected to exceed projected costs; but if prospects of success were moderate (50 – 60%), there would be no legal aid unless the damages were likely to exceed costs by at least a factor of four. There was also a stipulation in the draft Code that grants for investigative help, necessary in some cases to establish prospects for success, would only be made where likely damages were in excess of £5,000. All of this was designed to secure that decisions on spending public money were made on a proportionate basis against the considerations that would apply if the cases were being funded privately.

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[39] Consultation papers issues by the NI Legal Services Commission on the Funding Code (November 2006), proposed criteria (June 2009) and proposed procedures (June 2009).
In *England and Wales* personal injury cases (apart from clinical negligence) were removed from the scope of legal aid in 1999 on the basis that such cases could be pursued under conditional fee agreements (CFAs), first permitted in that jurisdiction in 1995\textsuperscript{40}. Under the CFA, solicitors and barristers do not receive a fee in the event of a case lost; but, to compensate for taking that risk, if the case is won they receive a success fee as an uplift on top of their normal hourly rates. The plaintiff is able to secure after the event insurance (ATE) to cover the opponent’s costs and the cost of the ATE premium itself should the case be lost. Under the original system, if a case was won, then the litigant would pay the success fee and the ATE premium out of the damages. In a move designed to enhance access to justice for claimants at a time when the legal aid option was being removed, the Access to Justice Act 1999 provided that ATE insurance premiums and success fees could be recovered from the losing opponent as part of costs; recoverable success fees varied as a percentage of standard fees depending on the point at which the case was concluded, rising to as much as 100% in cases that went to trial (although capped at 25% of damages in accordance with Law Society guidance). The success fee compensates the lawyer for the risk of being paid nothing in the event of a lost case.

It is generally agreed that CFAs, as operated in England and Wales, had a positive impact on access to justice, in particular by bringing litigation within the reach of those people whose financial circumstances meant that they were marginally over the financial eligibility limits for legal aid but who could not easily afford to fund litigation on their own account. However, recent years have brought increasing concern about the overall cost of litigation there and about the emergence of a compensation culture associated with claims management companies and referral fees.

In June 2008, the Master of the Rolls appointed Lord Justice Jackson to conduct a *Review of Civil Litigation Costs in England and Wales*. His final report (January 2010) was wide ranging and comprehensive and most of its recommendations, including those relating to personal injury claims and money damages cases, have been accepted by the Government\textsuperscript{41}. In short the proposals *retain the CFA concept* (and end the ban on contingency fees – where the lawyer’s fee is linked to a percentage of general damages) but *end the recoverability of success fees and ATE* which in future will be paid out of damages, thus giving claimants a financial interest in controlling costs and seeking early settlement; there is a related proposal that general damages should be uplifted by 10% to mitigate the effect of claimants having to pay success fees\textsuperscript{42}. *Qualified one way costs shifting* means that the plaintiff will not be liable for the defendant’s costs in a lost case, unless the case is pursued unreasonably or the relative financial means of the parties are such that it would be reasonable for costs to be paid. (The defendant is often economically stronger than the plaintiff or covered by insurance). It is also intended to amend the civil procedure rules to strengthen financial incentives and costs sanctions to *encourage parties to make and accept reasonable offers*. Other measures taken in England and Wales include a scheme for

\textsuperscript{40} CFAs were first made enforceable under a provision of the Courts and Legal Services Act 1990 that was commenced in 1995.


\textsuperscript{42} It is widely accepted that general damages for injury in Northern Ireland are significantly higher than in England and Wales.
regulating claims management companies, while consideration is being given to requiring greater openness in the use of referral fees.

5.100 Clinical negligence was the one significant type of money damages case that was kept within the scope of legal aid in England and Wales after 1999 – because of the expense and complexity associated with some of these cases and the vulnerability of those affected. Under the reforms to be implemented there, it is now to be removed from scope but, in recognition of concerns about the high cost of expert witnesses in such cases, the Government is considering retention of recoverability of ATE insurance premiums covering the costs of experts in this category of case. There is also discussion of exceptional funding for very complex clinical negligence cases where failure to do so might raise issues in relation to compliance with the Human Rights Act 1998 or European Union law.43

5.101 In the Discussion Paper and the Progress Report we canvassed a number of options for the future of money damages in Northern Ireland, including:-

1. Retain money damages in scope as envisaged in the Funding Code and give further consideration to the limitations on investigative help for lower value claims.

2. Remove money damages from the scope of legal aid and introduce conditional (and contingency) fees with the qualifications and safeguards recommended by Lord Justice Jackson – Article 38 of the Access to Justice (NI) Order 2003 makes provision for CFAs.

3. Remove money damages from the scope of legal aid and introduce an insurance based scheme whereby the solicitor joins the scheme and insures against loss for each case. In a case won, the solicitor for the applicants receives the county court scale fee enhanced by 20% and the applicant pays the insurance premium. In a lost case there is no premium payable, the solicitor does not receive a fee, but the insurance scheme pays the defendant’s costs and the plaintiff solicitor’s disbursements, including counsel fees.

4. Introduce a Contingent Legal Aid Fund (CLAF) or Supplementary Legal Aid Scheme (SLAS) whereby losing cases are funded out of a ring fenced fund which is maintained out of a levy on damages in successful cases – such funds could be administered privately or by the Commission and could replace the legal aid fund in these cases or operate alongside it.

It is important to bear in mind that options 3 and 4 above are dependant on solicitors demonstrating that they are successful in selecting cases to run with that have a good chance of success – and also on their not “cherry picking” strong cases to operate outside the scheme. That is because all parties involved commit to a degree of risk sharing where the successful cases subsidise those that fail. Option 2 would bring about a similar result through economic incentives on lawyers to run cases with reasonable chances of success.

5.102  As noted in the Progress Report, we have decided not to pursue further the option of a statutory body to determine quantum of damages along the lines of the Personal Injuries Assessment Board in the Republic of Ireland; while that system appears to be working well, it was established to meet the particular requirements of that jurisdiction and we do not think that circumstances here warrant the potential expense and risks associated with setting up such a scheme. Also, we appreciate that in some jurisdictions Before The Event (BTEI) or legal expenses insurance is taken up so widely that it effectively acts as the legal aid scheme. This type of insurance is unlikely to reach a level of take-up here, especially amongst lower income groups, that would enable it to be relied upon for access to justice purposes. Nevertheless, we suggest that the Department of Justice should take steps to heighten awareness of the potential role of Legal Expenses Insurance. It is already an integral part of some motor and home insurance policies.

Money Damages – Discussion

5.103  Before examining the options for money damages, we will record some of the key points made to us and issues that we have identified in the course of the review. They are as follows:-

- Several organisations representing lawyers commented that, with cost protection, costs awarded to the plaintiff in successful cases and sound application of the merits test, the current arrangements provided good value for money in terms of benefits secured for vulnerable clients at a relatively small overall cost to the legal aid fund. This value for money argument was supported by the fact that over 80% of legally aided money damages cases were successful in that they were settled or were won in court, resulting in no charge on the legal aid fund.

- The taxpayer benefits by more than the cost of legal aid in money damages cases through the Compensation Recovery Unit’s ability to recover NHS and social security benefits costs from damages won as a result of accidents. While we are unable to quantify how much of the CRU’s income (£13.6 million in 2009/10) comes from legally aided cases, we think it a valid point and support this joined up approach to assessing value for money.

- There is concern that the combined effect of the merits calculation under the Funding Code and the ending of funding for investigative help for cases worth less than £5,000 would effectively remove lower value cases from the ambit of legal aid, with a disproportionate impact on those with very low incomes for whom such sums are very significant.

- On the other hand we are conscious of concerns expressed by the Public Accounts Committee about the costs of litigation especially in low value cases such as tripping where claimants’ and defendants’ costs taken together can exceed the damages that are at issue. We can envisage situations where, with the impact of costs protection, it is cheaper to settle a case with little merit than to fight it.

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We heard a counter argument, supported by some limited research, that government departments were much less inclined to settle at an early stage than insurance companies, with the result that additional costs associated with expert evidence and counsel were being unnecessarily incurred.

There was strong support across the various stakeholders for the court system in Northern Ireland, the introduction of pre-action protocols for High Court actions and for the transparency and predictability of the county court scale costs system for fixing levels of remuneration, which fitted one of the review’s key principles of proportionality. We heard one expression of concern about county court scale costs being determined and reviewed by a committee of judges and lawyers, but note that recommendations of the Rules Committee are consulted upon and require the approval of the Department of Justice.

There was support for the planned extension of the county court jurisdiction to include cases worth up to £30,000 in damages (from the current £15,000 limit). However, we received a number of comments about the importance of extending the use of case management tools such as pre-action protocols to the county courts; and concern was expressed about the paucity of information that appeared on civil bills and an absence of detail on documentation served by defendants at this tier. A positive requirement for full and early exchange of information and attempts at negotiation and mediation would focus minds on the possibilities of early resolution.

A number of consultees stressed the complexities associated with some clinical negligence cases and the desirability of retaining them within the scope of legal aid.

There was opposition to the introduction of referral fees and to the development of a claims management industry in Northern Ireland.

Some respondents expressed unease about any solution that involved some or all of lawyers’ fees being taken out of damages awarded to clients.

Taking account of these views, we have given careful consideration to the options at paragraph 5.101 above, researched experience in other jurisdictions and conducted discussion with a number of interested parties. We start from the propositions that in general money damages cases do not fall within one of the high priority categories for legal aid purposes and that, when successful, as most are, they yield funds for the claimant, thus opening up the possibilities of “no win no fee” and/or insurance based solutions. The losing cases do constitute a significant, if not large, cost to the legal aid fund. Moreover, we are conscious that adjudicating on the merits test, which will not be any easier under the proposed Funding Code, is a drain on administrative resources in the Legal Services Commission. If financial arrangements and incentives can be put in place enabling lawyers to exercise their professional judgement on which money damages cases have merit, rather than having to make a case to the Commission, that would constitute progress. There is also the point that the financial eligibility requirements for legal aid, as they stand and as they would be under the Funding Code, are such that people with
moderate incomes, who may not qualify for legal aid but cannot easily afford lawyers’ fees, are at a particular disadvantage.

5.105 The Legal Services Commission, conscious of these points, invested some time between 2005 and 2007 in discussing and developing with stakeholders the concept of a Supplementary Legal Aid Scheme for Northern Ireland, to be administered by the Commission. The Northern Ireland Alternative Legal Aid Scheme (NIALAS) would involve the creation of a ring fenced fund out of which lawyers’ fees and costs would be paid in cases that were lost; to replenish the fund and keep it in a self-financing state, a proportion of damages in winning cases would be paid into it. All litigants in money damages cases would be able to pursue cases through NIALAS regardless of means, thus meeting the objective of improving access to justice. If it operated as envisaged, the scheme would secure savings for the fund, although the Commission would remain responsible for its administration. The scheme would require significant seed funding to make it viable at the outset and the financial modelling that was carried out demonstrated how, if it was to remain self-funding, it would be dependant on the maintenance of a high percentage success rate; a small under performance would have a significant impact on costs and risk triggering a need for subsidy from the legal aid fund. The possibility of lawyers “cherry picking” their stronger cases to run outside the scheme would by definition threaten the viability of NIALAS.

5.106 We think that the financial risks and administrative complications associated with a Supplementary Legal Aid Scheme or a CLAF are too great to justify our recommending option 4 at paragraph 5.101 above as a means of replacing legal aid in money damages cases. However, we remain of the view that, largely for the reasons outlined in paragraph 5.104, most money damages cases, except for the more complex clinical negligence cases, should be removed from the scope of legal aid, provided that an alternative means of securing and improving access to justice can be implemented. If the Minister were to declare a target date for the removal of money damages from scope, that would help focus minds on developing suitable alternatives.

5.107 In England and Wales, the conditional fee provision, with associated insurance and success fee arrangements, was seen as a viable alternative to legal aid in cases involving money damages. It has not been without its problems with issues about costs and a rash of satellite litigation. However, we can learn from the experience of that jurisdiction while the changes recommended by Lord Justice Jackson (paragraph 5.99 above) address most of the difficulties that have been identified. We believe that introduction of conditional fees in Northern Ireland through commencement of Article 38 of the Access to Justice Order (NI) 2003, together with implementation of the relevant recommendations in Lord Justice Jackson’s Review of Civil Litigation Costs, would offer a sound basis for securing and improving access to justice in money damages cases. We do appreciate that this would mean some costs being paid for out of general45 damages subject to a percentage limit but, especially in circumstances where the level of damages is generally greater in Northern Ireland than England and Wales, this does not seem unreasonable if it helps enhance access to justice.

45 Special damages relating to such matters as the cost of future care or loss of earnings would be ring fenced and not liable to deduction to cover costs.
5.108 There is another possibility on the table. Preliminary discussions have been taking place between the Legal Services Commission, representatives of the legal profession and some insurers about an insurance based solution, (option 3 at paragraph 5.101). In essence this is a risk sharing option not dissimilar in concept to a SLAS or CLAF, with a private sector organisation taking on the administration and risk sharing element. Solicitors would be invited to join the scheme administered by a private insurer. They would have delegated authority to decide whether to take on a money damages case. If they decided to proceed there would be a deferred premium to be paid to the insurer, under which in a case lost the defendant’s costs (including solicitors’ and counsel fees), the plaintiff solicitor’s expenses (including the cost of counsel) and the cost of the premium would be covered. If the case was won, the solicitor would receive county court scale costs, enhanced by 20%, while the client would be expected to pay the insurance premium out of damages (typically the premium might be in the region of £150 to £250). The scheme is dependant on lawyers making sound choices about which cases to run and about the point at which to settle; should a particular firm produce an unsatisfactory success rate, it would be open to the insurer to exclude it. Interestingly the scheme is not dependant on qualified one way costs shifting; if the case is lost, then the insurance premium covers the fees of the other side’s lawyers, thus dealing with concerns about whether it is worthwhile to defend actions with poor chances of success in court.

5.109 Insurance based arrangements are available in Scotland, although they run in parallel with legal aid where money damages cases remain in scope. We are attracted to aspects of the insurance based solution in money damages cases, but think that more details need to be fleshed out on its workings and that full consultation should take place before decisions are taken on whether or not to adopt it. In particular, while there may be issues about commercial confidentiality, financial modelling would need to be sufficiently transparent to demonstrate that charges were reasonable and that the scheme was viable on a long term basis; and with the private sector so centrally involved in the process, contractual arrangements would need to be watertight and commitment absolute if this were effectively to replace legal aid in these cases. Consideration needs to be given to the applicability of this approach to higher value claims that would go to the High Court. There are also issues of detail such as how to fund preliminary investigations where they are necessary to inform a decision on whether to run a case.

5.110 We understand that at the time of writing there is a debate in England and Wales about whether referral fees should be banned completely or rules introduced to make their use more transparent. In Northern Ireland they are effectively banned by Article 28 of the Solicitors (NI) Order 1976. It is difficult to draw any other conclusion than that referral fees and the claims management industry add to costs, whether borne by the profession, the client or the insurance industry (as well as having the potential to ramp up a litigation culture) and we suggest that the ban on referral fees in Northern Ireland is maintained. In this context, we are conscious of concerns about a compensation culture, about the scope for fraudulent claims (especially in road traffic accidents) and the impact on insurance premiums and public expenditure. While these matters are not strictly within our terms of reference, it is important that they are taken into account in any development of new approaches to funding money damages cases through appropriate consultation with stakeholders, including relevant public authorities and the insurance industry.
Money damages – Clinical Negligence

5.111 Clinical negligence cases, especially those at the more serious end of the spectrum, can be particularly complex, expensive, long running and harrowing for those involved. It is for such reasons that they were originally kept within the legal aid scheme in England and Wales when other money damages cases were taken out of scope. While we appreciate that it is planned to remove most such cases from scope there now (although retaining recoverability of ATE insurance costs), we suggest that, at least until new arrangements for funding money damages cases have bedded down, clinical negligence cases involving quantum at a sufficient level to bring them into the High Court jurisdiction in Northern Ireland should remain within the scope of legal aid. We are aware of concerns about how long it takes to resolve some of these cases, (sometimes delay is purposeful, when necessary to assess how an illness or disability is going to develop), and about the expertise of lawyers in running those at the more complex end, of which there are relatively few. The Law Society, in recognition of the special challenges posed in this area, has set up a Practitioners’ Group. We recommend that, if the more serious and complex clinical negligence cases remain within scope, a panel of solicitors should be established, suitably accredited to take carriage of legally aided cases in this area of law. It may be that a relatively small number of practices would have the experience and case-load to qualify. We will say more about accreditation and quality issues in chapter 6.

5.112 We mentioned in our Discussion Paper concerns that early resolution of less serious clinical negligence cases was being impeded by an over-defensive approach on the part of medical staff and trusts, when sometimes all that was wanted was an apology; while there were suggestions from the other side that over zealous solicitors firms were using complaints procedures and any early sign of admission of fault as a means of gathering information to support litigation, thus inhibiting a constructive approach to responding. And there were suggestions that the complaints process was being suspended as soon as litigation was instigated. The recommendation at paragraph 5.55 about government departments and public authorities committing to early dispute resolution may be relevant here. Also we recommend that DHSSPS establishes the applicability to Northern Ireland of Department of Health work in England and Wales to consider changes to the NHS Redress Act 2006 and to improve the fact finding phase at the early stages of claims to facilitate early resolution where appropriate.46

Money Damages – County Court Jurisdiction

5.113 We have already noted the positive response to the increase in county court jurisdiction to cover cases worth up to £30,000 and the supportive comments about the workings of the county courts in Northern Ireland. A consequence of the increase in jurisdiction is the need to review the scale costs awarded to winning parties which are linked to quantum and will now have to accommodate a broader band of cases. The County Court Rules Committee is engaging on an extensive round of consultation with proposals for new bandings and for a general increase in allowable costs to reflect inflation.

since the last review in 2007. If most money damages cases come out of scope of legal aid this will not have a major impact on the Fund, although it is important to recognise that the costs of litigation generally have an impact on access to justice. Given the breadth of consultation taking place, which includes relevant government departments and public authorities, we do not propose to comment on this exercise other than to note that under Articles 47 and 48 of the County Courts (NI) Order 1980 the Rules Committee is required to submit any proposals on costs to the Department of Justice which may allow or disallow them after consulting the Lord Chief Justice.

5.114 There may be a slight tension between the merits of the straightforward procedures associated with the county courts and the comments we have received about applying the principles associated with pre-action protocols in that court to facilitate early resolution of cases. There is also the issue of the applicability of cost penalties and incentives in cases where offers of settlement are bettered, or not as the case may be, in subsequent stages of the proceedings. **We suggest that** in the light of comments made to us, **consideration is given to case management tools in the county courts, processes to secure the early exchange of information between parties, appropriate details on civil bills and defence responses and the use of incentives to encourage the early settlement of cases where this is possible.** Some (but not all) of the thinking about early dispute resolution and introducing “pre-action directions” contained in the consultation paper on solving disputes in the county courts in England and Wales is potentially relevant and would be worthy of consideration in the Northern Ireland context. The description of the RTA scheme for personal injuries is particularly noteworthy with its focus on the use of an electronic portal as a means of facilitating early exchange of confidential information between insurance companies and claimants’ solicitors and on appropriate litigation behaviours. **We suggest that the DoJ keeps in touch with the evaluation of the RTA personal injuries scheme being conducted by the Ministry of Justice to assess whether it contains lessons for Northern Ireland.**

**Administrative Law**

5.115 In paragraph 2.6 we identified “commitment to the rule of law” as one of the guiding principles supporting this review and referred to the importance of mechanisms to protect the individual against capricious and arbitrary use of power on the part of public authorities. We have also endorsed one of the Funding Code criteria for identifying high priority cases in the legal aid context which is to support cases involving allegations of serious wrong doing, abuse of power or breach of human rights on the part of public authorities. The instruments of administrative law are of central importance in this context, including those that address matters that might fall short of “serious wrong doing” but which nevertheless raise issues of importance to the individual in his or her relationship with the state. We agree with comments made to us that at a time of economic stringency, when public services are liable to be pared back, the machinery for addressing disputes between the individual and public agencies is likely to assume increased significance.

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47 Solving disputes in the county courts; creating a simpler, quicker and more proportionate system – a consultation paper on reforming civil justice in England and Wales – March 2011.
5.116 Judicial review, the Ombudsman function, tribunals and effective complaints and redress systems in public agencies are the main component parts of the administrative justice system.

5.117 We discussed tribunals in the context of advice and assistance above (paragraphs 5.14 to 5.16 and 5.31 to 5.33) but take the opportunity here to provide further background. Tribunals constitute a big part of the administrative justice system and can have a major impact on the life of individuals in a variety of settings, ranging from employment, through social security issues to education. They have been the subject of a review, “Redressing Users' Disadvantage”, published by the Northern Ireland Law Centre in June 2010. That exercise drew on the review conducted by Sir Andrew Leggatt in England and Wales in 2001 and focused strongly on the interests of users as well as the importance of independence and training for tribunal members; the transfer of responsibility for administering tribunals from departments whose areas they covered to the Northern Ireland Courts and Tribunals Service is an important development in reinforcing their independence. A Tribunal Reform Reference Group has been established under the auspices of the Courts and Tribunals Service, with a remit, inter alia, to map the administrative justice landscape and improve the quality and timeliness of information available to tribunal users. Research into users’ experiences of tribunals continues. We welcome and support these initiatives.

5.118 Rather than trying to second guess work that is ongoing, we thought it worth highlighting a small number of themes that came across during our discussions with interested groups. The issues of early advice and help at hearings featured particularly strongly in relation to the Appeals Tribunal (social security), where concern was expressed about the possible impact on business of changes to the benefits regime. The Special Educational Needs and Disability Tribunal (SENDIST) drew comment, being described by some as legalistic, highly complex and often daunting for those appearing before it. There was a suggestion that a cadre of expert (not necessarily legally qualified) advocates might be funded to assist appellants at appeals tribunals and a strong plea for legally aided support to be available in the relatively small number of SENDIST cases where the education authorities tend to appear with lawyers and experts. We note that in England and Wales the Government has modified its original decision to exclude educational matters from the scope of legal aid by deciding to retain it for Special Educational Needs cases. While we remain of the view that it is not feasible, or desirable, to offer publicly funded representation in all social security appeal cases, we do suggest that the contracts or grants for advice and assistance in welfare matters (paragraph 5.32 above) should include provision for enhanced advice and advocacy services in this area as well as at SENDIST hearings. The relevant government departments should contribute towards such funding, not least because it would give them a stake in seeking to secure early resolution of issues, for example through ADR.

48 The following are the main tribunals in Northern Ireland: Lands Tribunal (180 cases received in 2009/10); Care Tribunal (10); Mental Health Review Tribunal (319); Special Educational Needs and Disability (79); Appeals Tribunals (benefits) (13,436); Rent Assessment Panel (19); Industrial and Fair Employment Tribunals (4,762); Planning/Water Appeals Commissions (575); Police Medical Pensions Appeal Tribunal; Social and Child Support Commissioners (300); Pensions Appeal Tribunals (290); Traffic Penalties Tribunal (500); NI Valuation Tribunal (25); Criminal Injuries Compensation Appeals Panel (612).
5.119 We received mixed messages about the commitment of departments and agencies to securing early resolution of issues. The Department for Employment and Learning is committed to early identification of cases that might be amenable to informal resolution before they reach the Employment Tribunal; its consultation and policy documents on disputes in the workplace seek to promote and enhance the use of mediation and arbitration through the Labour Relations Agency as well as helping firms develop their own dispute resolution processes. On social security matters we heard of differing approaches with some staff being keen to work with appellants to resolve issues before the tribunal hearing while others took the view that as soon as a matter was appealed no further dialogue was possible. A researcher told us that little use is made of the Dispute Avoidance and Resolution Service, an independent body established by statute to provide informal assistance to parents and education authorities in helping them resolve disagreements about special educational needs provision; and there is a concern about matters being resolved “at the door of the tribunal” when the ingredients for agreement had been present for some time.

5.120 **If our recommendation at paragraph 5.55 about departments committing to ADR is accepted, the commitment should explicitly include the establishment and promotion of mechanisms to secure early dispute resolution in cases that might otherwise go to tribunals.** The Tribunal Reform Reference Group could also have a role in encouraging tribunals to concentrate minds on the merits of ADR and negotiated agreement, much as happens with pre-action protocols in the courts.

5.121 We should draw attention to comments made to us about the workings of the Mental Health Review Tribunal where legal aid is available across the United Kingdom for those who appear before it, because issues of liberty may be at stake and because of their vulnerability. There was a view that remuneration for solicitors taking on these cases was insufficient to ensure a supply of lawyers with the necessary expertise in this specialist area. Also, there was a suggestion that new mental capacity legislation for Northern Ireland, following the recommendations of the Bamford Review and legislative developments in England and Wales, might significantly increase the caseload of the Tribunal and demands for legal representation. It is not our role to assess the merits of introducing new legislation, but **if legislation is introduced concerning mental capacity with implications for the Mental Health Review Tribunal, the responsible department should work with the Department of Justice to carry out a legal aid impact assessment and should be responsible for providing additional funding required to cover any expected increase in spend on legal aid.**

5.122 **The Northern Ireland Ombudsman (and Commissioner for Complaints) has powers of investigation following complaints of maladministration against public bodies, including such matters as avoidable delay, faulty procedures, failure to follow procedures, discourtesy, bias and unfairness; the matters within his jurisdiction can include medical errors. The process is inquisitorial, usually conducted on paper and, if the complaint is upheld, possible outcomes include recommendations for an apology, explanation, reconsideration of the issue and consolatory payments (which are not**

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49 Disputes in the workplace: a systems review. Public Consultation May 2009
Disputes in the workplace: a systems review. Policy response by the Department of Employment. 2010
compensation as much as recognition of inconvenience and nuisance). Investigations do not take place where there is recourse to a tribunal and they are concerned with administrative mistakes rather than the merits of decision-making. From our meeting with the Ombudsman and his deputy it is apparent that they are committed to seeking early resolution of issues where possible and to ensuring that lessons learnt from the investigatory process are fed back into departments and agencies to encourage good practice for the future.

5.123 It was apparent that in some comments made to us there was a tendency to see the Ombudsman’s role as somehow competing with judicial review and action in the courts. Yet the Ombudsman is very clear on the importance of complainants understanding his role and the nature of the redress available. While some people may want their day in court, we are convinced by the argument that for others it is about securing recognition that something was handled badly, an apology and/or an assurance that whatever went wrong will not happen again. That no department or agency has failed to carry out an Ombudsman’s recommendation is evidence of the regard with which this office is held. In 2010/11 his office (and that of the Commissioner for Complaints) handled 695 written complaints about alleged maladministration in a range of organisations and received over 2,000 telephone calls about complaints related issues.

5.124 We were interested to read the advice note issued by the Ombudsman on how to issue a meaningful apology and in particular its reference to section 2 of the Compensation Act 2006, that applies in England and Wales:-

“An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.”

We understand that similar provisions exist in other jurisdictions that are committed to creating an atmosphere amenable to early dispute resolution. This bears on an issue that was raised with us in a number of contexts, including clinical negligence, that those complained against can be loathe to engage in early dialogue with the complainant in case something that is said might be used against them later in court. It is also a similar point to that raised in paragraph 5.44 above about discussions in mediation being privileged and not open to exploitation in any subsequent court proceedings. We recommend that consideration is given to introducing legislation that would prevent apologies or offers of redress made during an attempt to secure a negotiated settlement, a mediation or an Ombudsman investigation from being used in subsequent court proceedings to imply an admission of negligence or wrongdoing.

5.125 Consideration is currently being given to proposals for legislation, amongst other things merging the Ombudsman and Commissioner for Complaints offices and giving the Ombudsman a more proactive role in being able to initiate complaints. It is not for us to engage in those issues where consultation has already taken place, but we should like to mention the outward looking approach of the office holders and their approach to engaging positively with others in the area of administrative law.

5.126 The Prisoner Ombudsman has a wide role in addressing prisoner complaints after other avenues have been exhausted and in investigating deaths in custody; again a positive side of her role, evident from annual reports and the
responses from the Prison Service, is the importance attached to using the complaints process as a mechanism for securing service improvements. One issue that has been raised with us, relevant to ombudsman posts in general, is the time taken to investigate complaints which is why sometimes judicial review might be favoured as a way forward. Given the requirement to seek leave for judicial review within three months, a complainant may not wish to go down a route which can take considerably longer than that to negotiate; and, in a prison context there are issues such as compassionate home leave that may need to be resolved over a very short time span. It would be worth exploring whether, if the Prisoner Ombudsman were resourced to deal with time bound issues on a fast track basis, that might reduce the number of prisoner cases going to judicial review.

5.127 The third pillar of the administrative justice structure is judicial review. We see access to judicial review as of central importance in maintaining the rule of law and safeguarding the individual against arbitrary or perverse actions by public authorities; as such it is a priority for remaining within the scope of legal aid. But we recognise the danger that it could become a tool for the vexatious and those determined to pursue trivial issues through the courts at disproportionate expense to the taxpayer. In 2010/11 the Legal Services Commission paid 149 full bills in respect of judicial review at a cost to the fund of £1,049,072.

5.128 From the perspective of the courts, we believe that the requirement to seek leave for judicial review, together with the Practice Direction and pre-action protocol issued in 2008, provide safeguards against the misuse of this remedy. The pre-action protocol requires an exchange of correspondence between the parties so that the opportunity is taken to resolve the matter before it goes to court; and it says that litigation should be the last resort, warning against the premature issue of an application for judicial review where a settlement is actively being explored, for example, through discussion/negotiation, the Ombudsman, early neutral evaluation or mediation. Where the applicant’s conduct runs contrary to this guidance, that can be taken into account in awarding costs.

5.129 Cost penalties carry little weight in legally aided cases. It is important, therefore, that the decision on whether to grant legal aid in judicial review cases should take account of whether the opportunity has been taken to resolve the matter by other available means prior to seeking leave to make a full application. We recognise that other routes to resolution, if they are to be applicable, will need to be capable of producing an outcome within the three months time limit for seeking judicial review or sooner if the decision at issue is time critical (as it might be, for example, in a matter concerning compassionate home leave for a prisoner). The proposed Funding Code contains specific criteria for granting legal aid for judicial review – full legal representation is to be refused if there are administrative appeals or other procedures which should be pursued before proceedings are considered, or if the respondent has not been given a reasonable opportunity to respond of deal with the complaint. We think that these criteria meet our desire to ensure that other avenues are explored before litigation is undertaken.

5.130 We believe that the merits test proposed in the Funding Code meets our concern to ensure that public funding for judicial review is concentrated on matters of genuine import. There is a presumption of funding to the financially eligible for a full judicial review, provided that the standard criteria for granting legal aid are met (including that the application must be for the benefit of the client) and that the case has a significant wider public interest or is of overwhelming importance to the client or raises significant human rights issues. If none of those last three conditions is met, then under the Funding Code legal aid will be refused if the prospects of success are borderline or poor or if the likely costs do not appear proportionate to the likely benefits of the proceedings. Funding will not be granted for full judicial review where, in the light of information becoming available after leave was granted, it would be unreasonable to do so. The approach outlined in this paragraph strikes a balance between enabling individuals to pursue matters of importance to them, including issues such as interpretation of policy that could have a wider impact on others who are not parties to the judicial review, and targeting limited public funds where they can have proportionate and positive impact.

5.131 In England and Wales the Judges Council, in responding to the consultation on legal aid reform, suggested that there was a case for withholding legal aid in some judicial review applications concerning asylum and immigration where there had already been an oral hearing on the same issue. They also drew attention to cases where challenges to removal directions or detention pending removal were designed to frustrate the removals process rather than raise a point of genuine merit. The Government, while retaining legal aid for judicial review in the generality of immigration and asylum cases in England and Wales, intends that public funding should not be granted where the matter in question has been before a court or tribunal within the previous twelve months and will not grant legal aid to challenge removal directions unless there has been a delay of more than a year between decision to remove and the giving of removal directions. We do not think that this would affect more than a small number of cases but have not had the opportunity to research or consult on the implications for Northern Ireland as the matter only came to notice in June 2011. We recommend that the Department of Justice considers whether proposals to restrict the granting of legal aid for judicial review in certain immigration and asylum cases in England and Wales should also apply in Northern Ireland. There is some logic in applying the same approach to the granting of legal aid for these cases in each of the UK jurisdictions.

5.132 While we have been able to use the Legal Services Commission’s management and financial information to assess the level of spend on judicial review, the data does not disaggregate the figures by public authority or type of issue that is the subject of publicly funded applications. That is a pity because such figures could give an indication of whether there were particular problem areas that needed attention or where more cost effective dispute resolution procedures might be applied. This is in contrast to the Ombudsman and Prisoner Ombudsman whose annual reports demonstrate the value of an accountability and feedback loop to the authorities that are the subject of their investigations and can act as a source of service improvement. We suggest that the Legal Services Commission (or the Courts and Tribunals Service in respect of all judicial reviews, whether publicly funded or not)

should develop case codes and recording systems that enable them to report annually on the numbers of judicial reviews taken out against each public agency or department and the nature of the issue.

5.133 That brings us back to the “systems thinking” approach commended by some who responded to our Discussion Paper, which fits well with what this review is about. This refers to organisations developing a commitment to understanding what they are in business to achieve for their customers, building on what adds value and removing the causes of failure. Transparent and effective complaints mechanisms, dispute resolution and feedback loops from the complaints and external processes for adjudicating on disputes are central to this – and if the right lessons are learnt public services can be improved and the costs of handling complaints and legal actions reduced. The Public Accounts Committee report on the Management of Personal Injury Claims, with its linkages between the maintenance of roads and footpaths and the legal costs associated with claims for tripping and road accidents, is an example of what this can mean.

Exceptional Grants and inquests

5.134 The current arrangements for the exceptional grant of legal aid in Northern Ireland are governed by Article 10A of the Legal Aid, Advice and Assistance (NI) Order 1981 which enables the Lord Chancellor (now the Minister of Justice) to direct the Commission to provide legal aid in cases that would otherwise be outside of scope. In other words, through this power of direction he can delegate the decision-making role to the Commission in respect of a class of case not included in the legal aid scheme. Article 10A also enables the Commission to recommend that the Lord Chancellor (Minister) should authorise legal aid in any proceedings that would not otherwise qualify. For such cases the Lord Chancellor issued guidance setting out the criteria that he would expect to be met:-

- Significant wider public interest in the resolution of the case, or
- The case is of “overwhelming importance” to the client, or
- Exceptional circumstances where lack of funding would make it impossible to bring or defend proceedings, leading to obvious unfairness.

5.135 The one delegation given under Article 10A sets out the circumstances where the Commission is required to fund representation on behalf of the immediate family of the deceased at an inquest in relation to death in police or prison custody or during the course of police (or other security services) arrest, search, pursuit or shooting. Funding is only to be granted, however, where legal representation is necessary to assist the Coroner to investigate the case and establish the facts. It is under this delegation that the Commission determines applications in respect of “Article 2” inquests where there may be controversy or allegations about the possible role of state employees in the circumstances of the death. Unlike in England and Wales, deaths during compulsory detention under mental health legislation are not included in these criteria. Also, in a departure from England and Wales, the Commission may not waive or vary financial eligibility requirements without seeking authorisation from the Minister.

5.136 We received a number of important comments on this topic to which we have given careful consideration. There was general support for the continuation of an exceptional grant provision, especially if there were to be any reductions in the scope of mainstream legal aid and because it was impossible in a funding code to anticipate all the circumstances where funded legal representation was in the interests of justice. The case of Steel and Morris v United Kingdom was mentioned, where the European Court of Human Rights held that failure to grant legal aid to indigent defendants in defamation proceedings constituted a breach of their right to a fair hearing, given the importance to them of the issues at stake and the complexities of the matter.

5.137 A number of those who commented pressed for representation at inquests to be included as part of mainstream legal aid. There was concern about the impact of delays in processing requests for legal aid in these cases, compounded by confusion over the proximity of the relationship to the deceased that was expected of the person seeking representation and over financial eligibility. It was noted that while an inquest is essentially an inquisitorial process, where there were allegations of fault on the part of the state or public authorities, those organisations would arrange a high level of legal representation that could not be matched by relatives out of private funds. This was seen as particularly important in so-called legacy inquests which had a critical role in helping determine the facts where there were allegations of state involvement or collusion in the death. There was some concern about whether dedicated funding would be available to support legal aid at inquests, which can be costly.

5.138 We agree that exceptional funding should continue to be part of the legal aid architecture, not least because it may be necessary to ensure ECHR compliance in individual cases that fall outside the normal scope of legal aid. However, we are conscious of the dangers of creating an alternative route to legal aid that could defeat the purpose of decisions on scope and become the cause of speculative appeals and satellite litigation. With one caveat, therefore, we suggest implementation of the England and Wales proposal which is that there should be an exceptional funding scheme for excluded cases where, in the particular circumstance of the case, failure to do so would be likely to result in a breach of the individual’s right to legal aid under the Human Rights Act 1998 or European Union law. Our caveat concerns the circumstances where an individual might have proceedings initiated against him/her by a much more powerful plaintiff on a matter of fundamental importance to the respondent – this could be of significance in the context of taking money damages out of scope. We suggest that the Department of Justice consults the authorities in England and Wales and gives further consideration to how the exceptional grant provision might be framed in such a way as to retain criteria that are tight and objective while protecting the individual who is the subject of proceedings initiated by an economically more powerful plaintiff on a matter that is out of scope but is of fundamental importance to that individual. Merits and financial eligibility tests would apply in cases of exceptional grant.

5.139 We recommend that decisions on exceptional grant should be the responsibility of the statutory appointee at the head of the legal aid delivery organisation (paragraph 7.21 below) without reference to the Minister or any political body. This is to ensure independence of decision-
making against objective criteria and to protect the Minister from any external attempts to exert influence on the decision-making process.

5.140 As for inquests, **we agree that there should be explicit recognition of a presumption that where Article 2 issues are at stake, the immediate family of the deceased would receive legal aid to support legal representation at the Coroner's Court.** We think that the current guidance on these matters (paragraph 5.135 above) provides the right basis for decision-making subject to the addition of deaths of persons detained under mental health legislation. However, we should stress the second limb of the guidance which is that representation must be necessary to help the Coroner in the investigation and in establishing the facts; not every death in police or prison custody would qualify the immediate family for representation at the inquest, especially given that other investigations might have taken place, for example, under the auspices of the Prison Ombudsman or Police Ombudsman.

5.141 **Decisions on legal aid for inquests should be entirely for the legal aid authority without Ministerial involvement; transparent guidelines should be drawn up defining what is meant by “immediate family” and to ensure that speedy and fair decisions are taken on financial eligibility.** It would not be reasonable for example for a grant of legal aid to be delayed while the financial circumstances of every sibling were being investigated to establish if anyone in the close family might be able to afford to pay for representation. We understand that financial provision for legal aid to be granted at “legacy inquests” was included in the devolution settlement; these cases can be costly to the legal aid fund and it is right that discrete funding should be made available to meet the costs of representation in such circumstances. There may, on rare occasions, be inquests that do not meet the criteria outlined at paragraph 5.135 but where Article 2 issues might be at stake, in which case the exceptional grant procedure would apply.

**Remuneration in non-family civil cases**

5.142 In 2010/11, some £13.16 million, (including VAT), was paid to solicitors in respect of representation in civil cases at county court level and above, of which £4.44 million was for non-family cases; the figures for counsel were £8.93 million and £2.86 million, respectively. The removal of most money damages cases from scope would have reduced the figures by about £0.55 million in the case of solicitors and £0.36 million for barristers.

5.143 **As with family cases, we believe that if there is to be control and accountability in relation to expenditure, the Commission’s objective should be to develop a codified standard fee structure for solicitors and barristers to be formalised in a Remuneration Order, covering all civil cases at the different tiers of court.** For cases in the High Court where the Commission has not set fees, taxation applies with the result that the determination of fees in individual cases and the basis for assessing them are outside the control of the Commission. This means that there is only a limited information base on which to come to an informed view on how standard fees in such cases might be set, together with appropriate arrangements for very long running and complex cases. We do not see that as a reason for delaying progress towards implementation of codified fees for all cases, but in the short term, while the necessary research and preparations are taking place, we recommend that the Commission should determine an hourly rate
which it is prepared to pay in publicly funded taxed cases and require that full records are kept of the work undertaken by solicitors and barristers. In the case of counsel, the principles of financial accountability are not met by reliance on a claim for a brief fee that is unsupported by full documentation.

5.144 As for how the rates are determined, we again point to the principles outlined in paragraph 4.39 above in relation to criminal cases and which for convenience we replicate here, (slightly amended to take account of the civil context):

- **Reasonable but not excessive remuneration**, taking account of what trained and experienced professionals might reasonably expect to earn from working full time on legal aid cases and of the overheads associated with a practising barrister or a well run firm operating to a business model that secures a high level of efficiency.

- Remuneration that reflects the *skills and professional expertise* required in the area of work being remunerated.

- **Relativities** that fairly reflect differences and similarities in types of work.

- **Broad comparability** with remuneration for publicly funded cases in similar jurisdictions.

- A system and levels of remuneration that *sustain the quality and expertise of representation*, including at the highest levels, now and into the future.

- The need to *encourage and incentivise efficient business models* supporting quality service delivery by legal professionals.

- **Affordability and value for money**.

- Remuneration mechanisms that are *straightforward to administer* in a way that supports *prompt payment*.

- Mechanisms that enable *verification that bills are properly paid and that the work to which they relate has been fully carried out to the requisite standard*.

We will discuss in the next chapter the potential impact on rates of remuneration and the structure and efficiency of legal services if *competitive tendering* were the adopted method of procurement.

5.145 We recognise that some of these principles pull in different directions and have to work on the basis that overall remuneration must produce an outcome that is within budget. In England and Wales, it has been decided to reduce all civil fees, including codified barristers’ rates, by 10%. Depending on the financial modelling of other proposals arising out of this review, it may prove necessary to identify a percentage figure by which overall remuneration in civil and family cases will have to reduce in Northern Ireland and which will have to be taken into account as standard fees are set. However, if it proves necessary (as we think likely if the current scope of access to justice is
to be retained) to aim for a quantified reduction in remuneration levels in civil payments, we think that the exercise should be carried out by examining each area of work on the merits, rather than by seeking a blanket across the board percentage reduction. From what we have seen, there are areas with little scope for reducing rates of remuneration without threatening viability, while in others there may be significantly greater margins for making reductions. For example, we find the differences between the remuneration arrangements for representing clients at the Mental Health Review Tribunal and those that apply in cases going before the Parole Commissioners difficult to understand.

**Expert Witnesses**

5.146 We referred to expert witnesses in the context of public law children cases at paragraph 5.73 above; what follows is of general applicability although some solutions have particular relevance to public law issues where expert evidence can play a big part in proceedings. Expert evidence across the range of cases comes from a disparate group, some of whom provide the service on a near full time basis, while others carry out the work as an adjunct to practice in the field concerned. They include psychologists, psychiatrists, other medical disciplines, forensic accountants, engineers and forensic scientists. We do not have discrete financial information on how much they cost the legal aid fund; in England and Wales it is estimated that experts account for around two-thirds of the total spent on disbursements (expenses charged by solicitors) which, if translated to Northern Ireland suggests that expert services to the civil courts might cost in the region of £2 to 3 million per annum. There is also the cost of experts in the criminal courts to take into account.

5.147 Comments made to us about experts reflect concerns about cost; unnecessary use of independent experts when sufficient expert opinion is already available to the court; delay to proceedings while authority to fund expert evidence is sought; quality; and limited supply in this jurisdiction. The Law Society, while recognising that expert evidence can play an important role in court proceedings, suggests that clear guidance should be developed to ensure that expert evidence is only deployed when necessary; and there are suggestions about the need to audit the quality of expert evidence to ensure that it provides genuine added value. The Society is currently engaged in further developing its established Expert Witness Service which already includes the provision of a register providing details of experts across the main disciplines; the Bar is also actively engaged in this area.

5.148 In the course of our consultation, we received an interesting suggestion that psychologists and other health professionals employed by the Trusts might have, as part of their terms of employment, a requirement that they should be available to provide independent expert assistance in court proceedings that do not concern their employers. There might be concerns over perceptions about their real independence in a jurisdiction as small as Northern Ireland, but this could be an area where cross border co-operation might yield useful benefits. Indeed, these issues about expert witnesses are applicable in each

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53 At the MHRT a solicitor or counsel (but not both) receives £330 for case preparation and £370 for representation at the tribunal. For a tariff hearing at the Parole Commission, a solicitor receives £100 per hour up to a maximum of £800 and in addition a junior counsel receives £2666 for a hearing (£4000 in the case of senior counsel).
of the jurisdictions on these islands and, given that there is a cross-
jurisdictional market place for experts, there is much to be said for close co-
operation between the legal aid and justice authorities in developing their
responses to the issues.

5.149 In England and Wales initiatives around the quality and supply of medical
experts were largely driven by a report of the then Chief Medical Officer, Sir
Liam Donaldson, in 2006, “Bearing Good Witness”. In line with a proposal in
that report, the Legal Services Commission there has been working with the
Department of Health on a pilot to commission multi-disciplinary teams from
the NHS and other public, private and voluntary sector organisations to
provide jointly instructed expert witness services in public law children cases.
This seems to us to be a development of the idea mentioned in the previous
paragraph and would be worthy of exploration in this jurisdiction, perhaps in
cooperation with others.

5.150 In a research project the, “Analysis of expert witness fees paid in legal aid
work”, being carried out in consultation with bodies representing the interests
of the various disciplines, the Government has confirmed a wide variation in
fees charged by experts for similar work. As part of its programme of reform
of legal aid in England and Wales, it has declared its long term intention to
develop detailed and prescriptive fixed and graduated fees, with some hourly
rates. In the meantime, using data from the research, it has benchmarked
fees currently charged and will codify them, subject to a reduction of 10%.54

5.151 In Northern Ireland, the NI Legal Services Commission carried out some
useful work on experts, before the Courts and Tribunals Service took on
responsibility for the matter in 2009. We recommend that the Department
of Justice allocates a dedicated resource to the development and
implementation of a strategy for securing expert witness evidence for
the courts on a basis that secures value for money, consulting with
stakeholders as appropriate. Building on what has already been done, this
could be taken forward as a matter of priority. Amongst other things, it will
involve addressing:-

- The process by which the need for added value from expert evidence is
  identified and by which experts are appointed - and the circumstances
  where one independent expert appointed by the court would meet the
  requirements of justice (as opposed to experts appointed by each party
  – see paragraph 5.73 above).
- 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.
- The arrangements for remunerating experts in legally aided cases in
timely fashion (treating expert fees as disbursements can result in long
delays before payments are made).
- The development of registers of suitably qualified experts – working with
  the Law Society and other jurisdictions.

54 Proposals for the reform of Legal aid in England and Wales, November 2010, paragraphs 8.7 to 8.18
• The use of video links, IT and written reports to reduce the costs associated with securing expert evidence from outside the jurisdiction.

• Liaising with other jurisdictions in the United Kingdom and with the Republic of Ireland to develop complementary policies and systems on these matters.

• The recoverability of the costs of experts as between the parties and ensuring that the legal aid fund is not unduly exposed.

Financial Eligibility for civil legal aid

5.152 Financial eligibility concerns the income and capital limits above which applicants are ineligible for legal aid, or are required to make contributions towards the cost of advice and assistance or legal representation. There are disregards and allowances that can be ignored or taken into account when calculating income and capital levels, such as housing expenses, travel to work expenses and the costs of providing for dependants. Also in assessing income for the purpose of determining eligibility for civil legal aid, the assessing officer has a discretion to disregard income from any source if, having regard to the circumstances, it is reasonable to do so. In Northern Ireland a complex system is rendered more difficult to follow as there are different rules for financial eligibility depending on whether legal aid is sought for advice and assistance, assistance by way of representation, full legal aid in civil matters or full legal aid in personal injury cases. Perversely, the system acts as a disincentive to early resolution of issues as more people are eligible for full legal aid than for advice and assistance in the early stages.

5.153 It is estimated that for civil matters, 21.5% of adults in Northern Ireland are eligible for full legal aid, either because they are in receipt of benefits that automatically qualify them or because their disposable income is less than the lower income limit; while a further 21.2% are eligible (i.e. with income and capital less than the upper limits), but liable to make contributions. In 2010/11, some £853,177 was collected in contributions from legally aided clients by the Commission.

5.154 In November 2007, the Legal Services Commission issued a consultation document with proposals that would first simplify the civil legal aid financial eligibility rules and then harmonise the different schemes to something closer to the England and Wales model, modified to take account of circumstances in Northern Ireland. The proposals were to be cost neutral. Particular features included the removal of discretionary elements from the assessment of income, the creation of standard disregards and allowances (rather than their being individually assessed) and the introduction of housing equity (over £200,000) to be taken into account in computing capital. Responses to the consultation were mixed but there was strong concern about the housing equity proposal on the grounds that it could impact disproportionately on older people and, at a time of rapidly rising property prices, could significantly reduce eligibility generally.

55 A number of specified public law proceedings are exempt from the financial eligibility rules.
56 Contributions for Green Form and ABWOR are collected by the solicitor.
57 Financial Eligibility for Civil Legal Aid in Northern Ireland; A Consultation Paper on Proposals for Reform.
5.155 The Courts and Tribunals Service and the Legal Services Commission have commissioned research into the options for developing a simplified and harmonised model for assessing financial eligibility. At the request of the review team, the terms of reference of that exercise have been modified to include financial modelling that will allow for assessment of options that will result in cost savings including consideration of the impact of those options on section 75 groups. While seeking to retain the principle of eligibility for legal aid for those who would not otherwise afford access to justice, the current budgetary constraints are such that eligibility limits and contribution levels must be rigorously reviewed to ensure that those who can afford to pay, or make a contribution, do so. We are also conscious that requiring even a small contribution is likely to give a sense of ownership and encourage those in receipt of assistance to approach decisions on whether to seek legal advice or pursue litigation on a similar basis to privately paying clients.

5.156 We have reviewed and taken account of proposals for revising financial eligibility arrangements in England and Wales. While endorsing the objective of simplifying and harmonising the rules on financial eligibility for Northern Ireland, we believe it essential that resulting changes should contribute towards the objective of bringing spend within budget and that this should be a key objective of the financial modelling. We suggest that the following options should be considered:

- **Benchmark the upper income and capital limits** (above which applicants are ineligible for legal aid) **with England and Wales** so that similar outcomes are achieved in terms of the income levels at which people are eligible.

- **Include housing equity in the calculation of capital, subject to a £100,000 disregard** – we appreciate the concerns that have been expressed about this, but if legal aid is to be targeted where need is greatest, it is arguable that it should not include those with significant assets which can be realised or against which loans can be taken out.

- **For people in receipt of passported benefits** (which automatically enable them to pass the income test for eligibility), **reduce the capital limits for eligibility to the same level as for those not in receipt of such benefits** – we cannot see the logic of the argument that someone on income support has a need for the protection of a higher level of capital (if they have it) than someone with a low income but not in receipt of passporting benefits.

- **Where disposable income falls between the upper and lower limits and contributions are required, introduce payment bands whereby the proportion of income over the lower limit to be paid in contributions increases as the upper limit is approached** (currently a third of income above the lower limit is taken in contributions). The English proposals involve an increase in the proportion of disposable income being taken in contributions from 20% to no more than 30%. We suggest that the modelling includes options for a higher level of contributions than England and Wales (this may be necessary to help pay for retaining some areas of law in scope).
• Extend the liability to make monthly contributions to cover a minimum of twelve months or the duration of the case where it lasts for more than twelve months, thus bringing in more in contributions and focusing minds on options for early resolution.

• Remove the contributions requirement from the limited number of advice and assistance applications that can be expected in future (to avoid disproportionate administration costs for suppliers in assessing income and for the Commission in verifying that contributions are properly calculated).

• Provide for a small up front contribution to be paid to the Commission by all applicants (other than those in case types, such as the more serious public law children cases where there is no means test), including those on passported benefits, before legally aided work commences.

• Where feasible, introduce standard allowances and disregards and reduce the need to exercise discretion to meet specific individual circumstances – thus enhancing predictability for all concerned, speeding up decision-making and reducing administration costs (in a way that will be amenable to IT based calculations).

5.157 In examining the options we were particularly interested in the Scottish approach which was substantially to increase the level of income within which applicants qualified for legal aid – but to introduce a system of tapered contributions whereby as income approached the limit, almost all of the cost of the case was borne by the applicants’ contributions. We understand that, while substantially increasing eligibility for legal aid, this has not resulted in a significant increase in spend. There must be some uncertainty about how this would work in the Northern Ireland context, in terms of its impact on take-up, the financial consequences and administration costs. Nevertheless we think it important that the applicability of the Scottish civil legal aid eligibility and contributions arrangements to Northern Ireland is included in the modelling exercise, focusing on the consequences of raising eligibility limits while significantly increasing levels of contributions for those at the higher levels of disposable income.

5.158 Urgent decisions on the way forward, following one round of consultation, will be needed once the modelling is complete. Considerations to be taken into account will include:-

• The proportion of the population qualifying for legal aid.

• Impact on section 75 groups.

• Incentives to encourage people to behave as if they were funding cases privately.

• Those qualifying for legal aid to contribute the maximum they can reasonably afford.
• Transparent, easy to understand rules that are straightforward to administer for suppliers and the Commission and which can be incorporated in IT programmes for processing applications.

• Affordability.

Appeals

5.159 Decisions on the merits of whether to grant legal aid and on certification for senior counsel are subject to appeal to panels of solicitors and barristers in arrangements that go back to pre-2003 days when the administration of legal aid was the responsibility of a department of the Law Society. The panels meet on a regular basis and often hear representations from the legal representative in person. In 2010/11 there were approximately 1,000 appeals; and the administration of the appeals panels cost £128,193, in addition to the cost of 8 staff serving the panels.

5.160 Steps are taken to ensure that no panel member deals with a case where he or she has a personal interest and we are clear that they have carried out their task with objectivity and integrity over the years; indeed a significant proportion of appeals are rejected. Nevertheless, we do think it questionable whether panels consisting entirely of practising private sector lawyers should be taking decisions on these matters. Moreover, there have been concerns about delay while cases await appeal and about the lack of reasons given in decision-making both at first instance and on appeal. We see a need for a more streamlined and efficient system for reviewing decisions and ensuring that a better service is provided to the legal aid applicant through improved timeliness of decision-making and greater transparency. The Commission has been working with panels to speed up the process, for example, by putting appeals through a single panel member to enable those that were clearly going to be allowed to be determined without going through a full panel meeting. There are also moves in the direction of giving reasons for decisions.

5.161 We have looked at the appeal arrangements in other jurisdictions. In Scotland appeals are limited to an internal review of decisions at the request of applicants; if dissatisfied with the outcome of the internal review, they can apply to a sheriff for a decision on whether they should be legally aided to apply for judicial review (an option rarely taken up). In England and Wales appeals against decisions of the Commission are considered, usually on paper, by an independent funding adjudicator (a lawyer, sometimes retired, and often not a legal aid practitioner), while in Dublin appeals are dealt with by a committee of the Board, consisting of legal and lay members.

5.162 We endorse the proposed funding code procedure whereby the solicitor and client will be notified of a refusal of legal aid together with a brief statement of the reasons and the process whereby representations can be made to the Commission to have the decision reviewed\textsuperscript{58}. Such a review would be carried out by a senior member of staff who had not been involved in the original decision. If, following review, the original decision is affirmed (with reasons) there should be the opportunity to mount an appeal to a panel that might consist of a senior member of staff and a

\textsuperscript{58} Northern Ireland Funding Code, Consultation Paper on the Proposed Procedures – June 2009. Section 5 of the procedures.
legally qualified independent member, who could be drawn from the board of the Commission. We envisage such appeals being processed on paper rather than at hearings. In the event that the appeal raises issues of policy or particular difficulty, it could be referred to an appeals panel of the Board. Throughout this process we envisage an approach based on transparency with reasons being given for decisions to better inform applicants and their solicitors (which should in itself reduce the number of appeals) and to ensure that there is feedback to staff who take decisions at first instance. Given the scope for speeding up decision-making and making savings in running costs we do not think that these changes need await implementation of other aspects of the reform programme; they should be pursued as a matter of priority.

Scope of civil legal aid

5.163 As they stand, our proposals involve significant changes to the scope of legal aid only in the following respects:-

- Changes to legal advice and assistance that will shift provision on some welfare and education matters onto a contractual or grant arrangement, remove a number of money damages categories from the scope of advice and subsume legal help on family matters into family help.

- Remove most money damages cases (but not high level clinical negligence) from the scope of civil legal aid, while securing and enhancing access to justice in these cases by other means.

- Limiting the ability to secure legal aid to re-open private family law issues.

5.164 We are aware, however, that the programme for reform in England and Wales involves taking several matters out of the scope of legal aid in order to prioritise and stay within a reduced budget. A list of the main areas coming of scope in that jurisdiction is given below:-

- **Clinical negligence** (but with the ability to fund after the event insurance in respect of the cost of experts).

- **Consumer issues** and **general contract**.

- **Criminal Injuries Compensation Authority cases**.

- **Debt** except where there is an immediate risk to the home.

- **Employment**.

- **Education**, except for Special Educational Needs.

- **Housing** except where there is an immediate risk to the home or housing disrepair where there is a risk to life, or health and anti-social behaviour cases.

- **Immigration** (non detention).
- **Private family law**, except where domestic violence or child abuse is present.
- **Tort and general claims**.
- **Welfare benefits**.
- **Miscellaneous** cases including cash forfeiture under the Proceeds of Crime Act, contentious probate issues, trusteeship, will making.

5.165 Our strategy on budgetary matters is more akin to the approach which has been taken in Scotland than that which has been adopted by England and Wales. It seeks to retain coverage of access to justice, whether by legal aid or other means, and where possible to make improvements, while seeking proportionate savings in as many parts of the system as possible. Chapter 8 will summarise those measures in this review that will help drive costs down. We are trying to avoid suggesting changes that will substantially reduce access to justice. Of the items identified in the previous paragraph we have already explained why in Northern Ireland we believe that the most significant of them in financial terms, private family law and high level clinical negligence cases, should remain in scope (paragraphs 5.80 and 5.111 above). If budgetary pressures mean that some other case types have to be taken out of scope of legal aid, we would take into account considerations such as vulnerability, availability of advice and help from other sources and complexity and have identified the following as candidates:-

- Consumer issues and general contract.
- Criminal injuries compensation.
- Debt, unless the home is at risk.
- Immigration.
- Tort, including nuisance and injunctive relief, (except in the protection from harassment cases where mediation has failed).
- Other miscellaneous matters such as probate.

### Funding Code, Statutory Charge and the Reform Agenda

5.166 The Legal Services Commission has been pursuing a reform agenda for civil legal aid more or less since its establishment in 2003. The work has several limbs, including:-

- The development of a **funding code** establishing the criteria and procedures for determining the merits of legal aid applications.
- **Financial eligibility** (see paragraphs 5.152 to 5.158 above).
- Reform and clarification of the applicability of the **statutory charge** whereby the Legal Services Commission recoups costs from money or property recovered or preserved in legal proceedings.
- A **registration scheme** for providers wishing to supply legally aided services (see next chapter).
- A **Remuneration Order** covering fees for solicitors, barristers and expert witnesses.
In carrying out this review we have sought to benchmark against current provision and systems and concentrate on outcomes being sought, rather than conduct a critique of consultation documents and work so far carried out in the areas listed above. Once decisions are taken on the suggestions and recommendations we have made, it will be for the Minister and his advisers to determine how or if they can be accommodated within the Funding Code. However, we should stress that we see the continuation of the statutory charge and the completion of work on financial eligibility, a registration scheme and remuneration as essential components of the future framework for publicly funded legal services.
6. Service Providers, Quality, Regulation and Value for Money

6.1 Our terms of reference are clear in requiring us to make proposals to achieve value for money and to ensure that our recommendations are cost effective. This means procurement methods that are focused on purchasing legal services for legally aided clients at the best price possible while, on the value side of the equation, having procedures in place to ensure that the services are provided as agreed and to a high standard of quality. On a broader front these objectives are dependant on quality providers being in place and structured to deliver to the best standard and price that a competitive market will permit. While earlier recommendations are consistent with a mixed model of service provision involving lawyers and non lawyers in the voluntary and private sectors, we are clear that the independent legal profession will remain of central importance in sustaining access to justice. We should stress that legal aid constitutes only a proportion of business for the legal profession, although the large majority of criminal defence work would be publicly funded.

6.2 In Northern Ireland there are currently around 2,100 solicitors in private practice operating out of over 500 firms managed by partners or operating on a sole trader basis. There is a strong tradition of small locally based practices, with about 250 firms having a single principal. We do not think that the picture has changed a great deal since the Review of Legal Services carried out by a group led by Professor Sir George Bain in 2006 which described a profession with a markedly different profile from England and Wales working to a general practice model, with most firms providing legal services across a wide range of matters. That report talked of small solicitors' firms situating themselves in “High Street” environments in cities, towns and villages across the country, and, while some specialised in particular areas of law, most would offer initial advice in any area, referring cases outside their expertise to other firms or seeking the advice and assistance of barristers.

6.3 Bain noted that the number of solicitors and firms had nearly doubled over twenty years, while our research suggests that the number of solicitors per head in Northern Ireland is greater than in most regions of England (outside London) and Wales. An examination of legal aid payments by post code in Northern Ireland in 2007/08 and 2008/09 reveals a broad geographical coverage with the majority of two figure post codes being represented, or 74 population centres across Northern Ireland; as would be expected the heaviest concentration of payments to firms is found in the main population centres such as Belfast, Derry, Newry, Lurgan, Enniskillen, Omagh, Ballymena, Armagh and Downpatrick. The Law Society, in its evidence to us, has argued strongly that this network of solicitors across the country provides a comprehensive access to justice service with everyone living within relatively easy reach of a solicitor’s office, an important consideration in rural areas especially for those who have mobility difficulties, are reliant on public transport or have dependants. They note that this model is consistent with the objective of enabling individuals to secure services from a solicitor of choice, a feature that carries particular resonance in Northern Ireland.

6.4 There are over 600 barristers in independent practice here, most of them operating out of the Bar Library; about 10% of these are QCs, appointed as such on their record of performance and able to command higher fees. This represents a substantially higher number of barristers per head of the population than in England and Wales as a whole (in Scotland there are 460
advocates) and Bain noted that their numbers had almost doubled over fifteen years. The Bar Council told us that the Bar Library’s collegiate ethos had served Northern Ireland well, ensuring that barristers had a ready source of advice from colleagues and, importantly, creating a working environment where political differences were set aside and cases taken on without regard to how they were viewed across the community. They argued strongly for the maintenance of an independent Bar receiving work on referral from solicitors, who through their choices of barrister would keep standards at a high level.

6.5 We noted with interest some comments made by the Bar Council in its response to the Review of Legal Services in 2006. After describing the solicitor’s profession very much along the lines outlined above, it went on to say:

Smaller (solicitors’) firms that cannot provide specialised services rely on the independent Bar, not just for litigation but also for advice on a wide range of legal matters. They can instruct any Counsel of its or its clients choice, on a case-by-case basis, thus giving their clients the same service they would receive if they went to a much larger firm, say in Belfast....”.

6.6 We do not believe that access to justice would be well served by calling into question the duality of the profession. However, it is important that the cost of legal services to the public purse (whether through legal aid or other purchases of the services of solicitors or barristers) is not inflated by service delivery arrangements that have not adjusted to a rapidly changing environment or by unjustified restrictions on new types of business model. It is with such considerations in mind that we now address procurement, quality and regulation.

**Procurement**

6.7 In the mixed model of service provision, it is right that the Legal Services Commission should be prepared to utilise the procurement options that have been opened up to it by the Access to Justice (NI) Order 2003, namely payment of fees for work completed by private or voluntary sector lawyers as now, contract, grant and best value tendering. We see contract and grant as of particular value in respect of pilots and specialist services (as is currently the case with a contract for immigration and asylum) and where blocks of advice work can be identified. Tendering for contracts, for example in the field of education or social security law, enables specialist providers in the voluntary and private sectors (private sector companies as well as partnerships of solicitors) to compete for work; while grants can assist in plugging gaps (as in the case of the Scottish grant scheme, paragraph 5.21 above) or in supplementing existing funding from other sources to bolster the legal advice or mediation elements of voluntary sector activity.

6.8 We have considered the procurement options most suited to the purchase of the bulk of criminal and civil legally aided services. In England and Wales contractual arrangements and tendering have been in place for some time and it is the stated objective of the Government there that in the longer term price based competition should “ensure that legal aid services are procured at
a rate which delivers value for money and that the market is able to sustain.\textsuperscript{59}"

In a legal aid market place, driven by price competition and best value tendering, we would expect economic pressures to result in restructuring of the supply base in favour of models delivering maximum efficiency and value for money. The availability of a satisfactory level of service across Northern Ireland and safeguarding standards in such a scenario could be secured through tendering on a geographical basis and including appropriate quality standards in contracts.

6.9 For the immediate future in Northern Ireland, we do not think that a sufficiently strong case has been made out for moving direct to contracting and best value tendering for the generality of civil and criminal services. We note the views expressed by the Law Society, Bar Council and others that the scale of the change and the administrative capacity that would be required within the Legal Services Commission to mount a major tendering exercise across all areas would be too great and potentially disruptive of service provision. However, this option (contracting) should be kept under review in the light of evolving circumstances and the Commission should be alert to the opportunities afforded by contracting to address short term pressures or supply issues that might arise.

6.10 This means that, if our approach is accepted, the primary method of procurement for legally aided services will for the immediate future remain broadly as it is now – with clients able to choose their solicitor (albeit from a list of those registered as legal aid providers in the area of law concerned) who, subject to eligibility and the merits test being met, will be remunerated out of the Legal Aid Fund, along with a barrister where appropriate. We have already covered the principles for setting remuneration in these circumstances (paragraphs 4.39 and 5.144 above) on a basis that accords with the provisions of Article 7 of the Access to Justice (NI) Order 2003, but wish to make some further comments from the value for money perspective.

6.11 The problem with setting fees on this basis is that the Legal Services Commission and Department of Justice are not experts in the business of managing law practices, so are not able to adopt a wholly informed approach in assessing margins, overheads etc. On the other hand, it is natural and reasonable that the representative bodies of the legal profession should wish to maximise remuneration from publicly funded cases, on the basis of securing profitable margins for all of their members, whether in large specialist practices or in single solicitor businesses; and the same goes for those representing the interests of barristers with their variety of specialisms and range of experience. Benchmarking with other jurisdictions is a factor to take into account but cannot be the whole answer, given that they may not always get it right and circumstances vary even when the respective legal systems are very similar. The objective should be to achieve through dialogue and decision what would be secured through the operation of the free market through price competition, with any necessary adjustment to avoid perverse consequences for access to justice (such as the development of monopoly suppliers or leaving large areas without access to a solicitor). That does mean a pricing structure that rewards and encourages the most efficient business models and delivery mechanisms.

\textsuperscript{59} Reform of Legal Aid in England and Wales: Government Response: June 2009, paragraph 305.
6.12 In addressing remuneration issues, the taxpayer cannot be expected to pay a premium to sustain the network of solicitors as is or the existing division of work between specialists, generalists and the Bar simply because that is the status quo. No profession or sector has been immune from structural change over the past decade and the remuneration structure and levels for publicly funded work should be set on a basis that provides reasonable margins for well run businesses that take advantage of efficiencies that can be secured from specialisation, rationalisation, economies of scale and new ways of delivering services. It may be that the changes to legal aid and to the business environment more generally will lead to adjustments to the structures and service delivery mechanisms outlined at paragraphs 6.2 and 6.3 above. If that proves to be the case, the public interest will be best served if government and the professional bodies are able to address the situation through constructive dialogue and with a joint commitment to ensuring that access to justice is improved and safeguarded.

Alternative Business Models (ABMs)

6.13 As noted above, the regulatory framework of the Law Society and the Bar Council in Northern Ireland, supported by legislation, enables the provision of legal services through partnerships of solicitors (or solicitors employed by the voluntary sector where a Law Society waiver is issued) and independent barristers operating out of the Bar Library taking referrals from solicitors. The lack of reliance on external funding from shareholders or private companies with other commercial interests is seen as helping ensure that legal advice and representation continue on an independent objective basis without the risk of external pressures coming to bear. In England and Wales, however, the Clementi Review and ensuing legislation60 have introduced the concept of alternative business models, including:-

- Barristers able to form associations with other barristers for trading purposes.
- Legal Disciplinary Practices where different types of lawyer (for the most part barristers and solicitors) can work together to provide services to third parties.
- Multi-Disciplinary Practices, enabling lawyers to join with other professionals such as accountants in the provision of comprehensive professional services.
- Externally owned law firms – whereby a company such as a commercial retailer can employ lawyers to provide legal services to the public.

Such mechanisms were seen as having the capacity to yield economies of scale, promote competition and enable the provision of integrated professional services. The legislation established a regulatory framework to facilitate the regulation of entities (as opposed to individuals) and to provide safeguards against financial pressures producing potential conflicts of interest.

6.14 The Bain review of legal services carried out in 2006 considered the applicability in Northern Ireland of the alternative business models as recommended by Clementi. It came out against introducing such changes

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60 Legal Services Act 2007
here, largely because of concerns that they might result in a dearth of high
good quality legal help outside the main urban centres and reduce the element of
choice that is necessary to support a competitive market place. There were
also worries about the scope for externally sourced finance to give rise to
conflicts of interest between the lawyer’s duty to the court and client as
opposed to maximising the return for investors. This view reflected concerns
expressed by the legal profession in their responses to the consultation,
although other organisations such as the Office of Fair Trading and Which
argued in favour of change to unlock cost efficiencies and enhance customer
choice. Responses to our review from the Law Society and Bar Council have
argued against re-opening these issues.

6.15 Much has happened since Bain reported in 2006; and Scotland and the
Republic of Ireland have joined England and Wales in moving to relax
restrictions on the way in which lawyers can organise themselves in delivering
legal services. However, we have not had the time or resources to engage
on these complex issues in any depth, especially in relation to the possible
impact on the supply base in a small jurisdiction such as ours; and we would
have some reservations about embarking on a course now which could cause
upheaval and expense in developing the entity based regulatory system that
would accompany the introduction of alternative business models. On the
other hand, it would be foolish to rule out consideration of such changes
indefinitely given the possibility that experience in other jurisdictions might
produce evidence of potential benefits to consumers and the taxpayer in
terms of accessibility, price and competition; and developments here might
make it necessary to consider very different delivery models for publicly
funded services in the future. While we have not addressed alternative
business models in sufficient depth to make firm recommendations
about the issue, Ministers may wish to give it further consideration in
the future. At the very least the experience of other jurisdictions should
be closely watched and the question of ABMs revisited if it becomes
apparent that they could bring advantages in the Northern Ireland
context.

Quality

6.16 An essential part of the “value” side of the VFM equation is that services
should be delivered within an agreed timeline, in a consumer friendly manner
and to high quality standards. In an area such as the law, it is perhaps more
difficult than in most industries for the consumer to judge whether the service
is up to standard, which is why regulation in the public and consumer’s
interest is so important. Defining quality in the context of legal services is not
straightforward but could be taken to include efficiency of service, client care
together with technical skill and knowledge of the relevant law/subject of
advice and applying that skill effectively in the interests of the client.

6.17 Given the amount of taxpayers’ money being spent on legal aid, there is a
clear need to ensure that services that have been paid for are duly supplied
and to the necessary standard. Up to now in Northern Ireland, there has been
a tendency on the part of the Legal Services Commission to rely on the Law

61 The Legal Services Act 2010 in Scotland. In the Republic of Ireland, the Programme of the
Government undertakes to, “establish independent regulation of the legal profession to improve access
and competition, make legal costs more transparent and ensure adequate procedures for addressing
consumer complaints”; this undertaking will be given effect to by the Legal Services Bill.
Society and the Bar Council, as regulators, to ensure regularity and quality in service provision. However, we think that if the commitment to securing value for money is to be met, the Commission will need to be proactive in satisfying itself that its systems and those of the regulators will together provide the necessary assurances. Moreover, in order to comply with Articles 11(5) and 21(4) of the Access to Justice (NI) Order 2003 when those provisions are commenced, the Commission should follow through on its project to put in place systems to assess the quality and value for money of legal aid services funded from the public purse. The key will be to do this in a proportionate risk based way that targets systems on those areas that matter most and does not add disproportionately to costs and the administration of the Commission or the service providers.

6.18 In England and Wales quality standards are secured through conditions attached to the contracts, through which the Commission there procures services. These standard contracts include requirements such as adherence to quality marks, membership of appropriate accreditation schemes run by the Law Society, standards of supervision by accredited partners and commitment to key performance indicators. If, through monitoring, it is apparent that a firm falls short in these areas, its contract can be withdrawn or not renewed. The Law Society in Northern Ireland has expressed concern that the administrative burden and costs of such a scheme outweigh the benefits it secures.

6.19 In Scotland firms registering to provide legal aid services are required to commit to financial and accounting systems that are compatible with those operated by the Legal Aid Board and to agree to ten administrative measures focusing on the way in which cases are managed and work recorded. This is supported by audits of procedures generally carried out every three years in each firm by Board staff. In addition quality assurance is secured through a peer review scheme run by the Law Society of Scotland whereby a panel of solicitors with appropriate experience and qualifications in their specialisms inspects firms’ files to ensure that the work meets the appropriate standard. Such reviews take place on a three yearly basis or can be targeted through a risk based approach if necessary. This scheme, which has a high reputation, provides the Scottish Legal Aid Board with appropriate assurances and a basis for de-registering a firm that does not meet the required standard.

6.20 Peer review in England and Wales is carried out on behalf of the Legal Services Commission by the Institute for Advanced Legal Studies. About 600 reviews are carried out each year, covering specialist areas in firms selected on a random or sometimes targeted basis; each review produces a rating of 1 to 5, with 4 or 5 indicating that corrective action is necessary. Cost has been a factor inhibiting the further development of peer review in that jurisdiction.

6.21 In Northern Ireland the statutory basis for quality assurance will be achieved through commencement and implementation of Article 36 of the Access to Justice (NI) Order 2003 which provides for the registration of persons eligible to provide legally aided services together with a supporting code of practice setting out the conditions of registration. This applies to solicitors and barristers although the type of conditions attached to registration will vary substantially between the two branches of the profession. The Legal Services Commission has been engaged in discussions with the Law Society about a voluntary registration scheme as a precursor to the introduction of statutory arrangements, together with a Code
of Practice; invitations to join the scheme were issued in June 2010. The draft code that is under consideration focuses primarily on quality of customer care, administrative arrangements and the proper recording of work and outcomes – and it provides for the Commission to have access to premises and files and to carry out surveys of customers to ensure that firms are complying with the requirements. It draws on the Law Society’s Solicitor (Client Communication) Practice Regulations, some of the ten administrative requirements of the Scottish scheme and elements of the unified contract in England and Wales. We understand that discussions are also taking place with the Bar Council.

6.22 We endorse the approach outlined in the previous paragraph as a constructive way of introducing a quality control scheme in a measured and proportionate manner. However, we think it important that a clear timeline is fixed for consulting on converting this voluntary scheme to one with statutory backing and that the scheme should be extended, on a proportionate basis, to include standards of service relating to the quality of advice and representation. We suggest that, inter alia, the following are considered:

- Registration to identify those areas of law where practitioners are competent to deliver – evidenced by membership of accreditation schemes or the experience of practitioners in the areas concerned. Particular consideration should be given to standards and accreditation in criminal work, cases where children may be involved and for those practising in areas involving vulnerable clients such as mental health.

- Standards of supervision.

- Lexcel accreditation (this is primarily about efficient management and organisation).

- Requirements to record case progress and outcomes, show where a positive outcome for the client was secured and demonstrate the proportion where early resolution was achieved. This could be the subject of a limited number of key performance indicators – for example the unified family contract in England and Wales sets a percentage of cases where it is expected that issues are resolved through informal negotiation and then through mediation (this could help deal with concerns that cases that could be resolved through straightforward negotiation might be diverted too readily into mediation).

6.23 The Legal Services Commission should develop a cost effective process for conducting file checks and audits on samples of files from selected practices to ensure that standards are being met in accordance with the Code and, in parallel, to verify that payments have been properly made for completed work (thus enhancing assurance on fraud prevention). This might involve all practices being reviewed, perhaps every three years, and also a small number of reviews carried out randomly or because management information or complaints suggest a need for a risk based review. The Law Society has expressed support for peer review along the lines of the Scottish model although it has recognised that there may be issues about how it would work in a small jurisdiction such as ours, given that practitioners cannot reasonably review files of direct competitors. We have
some reservations about the potential cost of a comprehensive peer review scheme in Northern Ireland but suggest that the Law Society engages with the Legal Services Commission on how a scheme might be piloted alongside the audit responsibilities of the Commission.

6.24 Registration should apply in relation to all providers of publicly funded legal services, including the Bar. However, given that barristers do not take carriage of a case directly from the client and that the solicitor operates as a type of quality control mechanism in making an informed choice of counsel, we do not think that registration for the Bar would involve adherence to such an extensive code as in the case of solicitors. Indeed, it may be possible to link registration of barristers to the practising requirements laid down by the Bar Council, provided that the Commission can be satisfied as to the mechanisms for sustaining quality after qualification. There may be issues about quality assurance in relation to advocacy, whether carried out by barristers or solicitor advocates, which we address in paragraphs 6.32 to 6.36 below.

Regulation

6.25 Some have argued that regulation of the legal profession is outside our terms of reference. However, given that the presence of a quality supply base is an essential component of access to justice, whether publicly or privately funded, we feel bound to make reference to the architecture for regulating in the interests of the public and consumer in general and the client in particular.

6.26 In Northern Ireland, the Law Society and the Bar Council are the regulators of solicitors and barristers respectively, as well as their being the professional organisations representing the interests of the two branches of the profession. As regulators, they are concerned with such issues as entry qualifications and routes into the profession, codes of conduct and practice standards, accreditation, post qualification training and development and handling complaints. Until recently similar arrangements applied in relation to the legal profession in the other jurisdictions on these islands. Where professional bodies have a dual role of regulation and representation, this raises the possibility of at least the perception of conflict of interest, for example, if the impression were gained that regulatory powers might be used to safeguard the economic interests of members of the profession. On the other hand members of the professional body would argue that they have the background and expert knowledge to regulate effectively and that their interests coincide with the broader public interest in maintaining the integrity of the profession. The other basic model of regulation and representation of a profession is illustrated by the separation of those roles in General Medical Council and the British Medical Association.

6.27 It was against the background of such considerations that the Clementi Review in England and Wales, recommended the creation of a Legal Services Board there as a regulatory oversight body and the separation of regulatory from representational functions in the professional bodies. A separate Office for Legal Complaints was to be established. These recommendations were enacted in the Legal Services Act of 2007. In Scotland the Legal Services (Scotland) Act 2010 gives Ministers the role of licensing approved regulators – which should exercise their regulatory role

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separately from any other function, avoid conflict of interest, have a sizeable proportion of lay representation on regulatory boards and have governance arrangements that allow for direct communication between the regulatory part of the organisation and other bodies, including government and the Scottish Legal Aid Board. In the Republic of Ireland, as part of the IMF intervention, we understand that consideration is being given to implementing the recommendations of the Competition Authority in 2006 which proposed a Legal Services Commission to oversee the regulation of the legal profession, while retaining a role for the Law Society and Bar Council subject to complete separation of their regulatory functions from their representational role.

6.28 In Northern Ireland these issues (along with alternative business models) were addressed in the review chaired by Sir George Bain in 2006 “Legal Services in Northern Ireland – Complaints, Regulation and Competition”. In short, the report judged that the legal profession in Northern Ireland had discharged its regulatory function in a reasonable manner and, while agreeing the regulatory objectives of Clementi, it concluded that the circumstances here warranted a different response. Bain recommended the establishment of an independent Legal Services Oversight Commissioner with oversight, audit and enforcement powers in relation to complaints, which were still to remain the responsibility of the professional bodies, but with a lay majority dealing with cases. More effective sanctions and compensation would be available for complaints that were upheld. On other aspects of regulation, the report did not identify a need for separation from the representative function but did suggest a greater degree of lay involvement (but not a lay majority) in regulatory affairs and more structured and transparent consultation of interested parties on rule making; it suggested that the Legal Services Oversight Commissioner should have a role in devising the consultation procedures and audit the rule making processes. So far, although we understand that a Bill was prepared, legislation to implement Bain has not been presented to the Assembly.

6.29 In responding to our Discussion Paper, the Law Society and Bar Council have expressed opposition to the re-opening of this debate and have called for full implementation of the recommendations in the Bain review. We should also note in this context that in his annual report for 2010 the Lay Observer for Northern Ireland made positive comments about the Law Society’s commitment to handling complaints effectively and to tackling client care issues. The number of complaints remained low. He did, however, also note the strong feeling amongst many of those who did complain that offending solicitors “got off far too lightly” with “no direct redress, for example by compensation...”.

6.30 The review led by Sir George Bain covered the ground in considerable depth and consulted widely. Given the very limited amount of time and resource we have been able to devote to regulatory issues as part of a much broader review of access to justice, it would be presumptuous of us to try to second guess the conclusions of that exercise. We are particularly conscious of the point that this is a small jurisdiction and that solutions that might be applicable elsewhere (such as a Legal Services Board) would probably carry costs out of

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63 The Lay Observer is appointed by virtue of the Solicitors (Northern Ireland) order 1976 and the Solicitors (Amendment) (Northern Ireland) Order 1989 to oversee the Law Society’s complaints procedure and deal with complaints against the way in which they operate it. He makes an annual report to government, the Lord Chief Justice and the Council of the Law Society.
proportion with likely benefits if implemented here. However, the Bain review took place five years ago and much has happened since then in Northern Ireland and elsewhere. Also, we are conscious that, especially in the current economic situation, difficult challenges lie ahead for the legal profession as for other sectors of the economy; for example, issues will arise over legal aid, the structure of the profession and how to ensure a continuing supply of high quality solicitors and barristers, recruited on merit, into the future. The public and government need to be confident that the regulatory arrangements for the legal profession are well placed to meet such challenges. **We believe it urgent that the government in Northern Ireland comes to a view on whether to implement the recommendations of the Bain Review, with or without modifications to enhance the separation of regulation from representation, and proceeds to legislation.** On the face of it, greater separation between regulation and representation and more lay involvement in regulation should be achievable without disproportionate disruption or cost. We comment in the next chapter on where in government responsibility for regulatory matters might best lie.

**Advocacy and the Legal Market Place**

6.31 We are conscious that an outcome of our recommendations may place greater reliance on solicitors taking carriage of a legally aided case through the lower courts, especially in the criminal and family arenas; although it will be for solicitors to decide whether for case management purposes they wish to brief and pay junior counsel out of their fees. Moreover, we are contemplating reduced use of senior counsel in legally aided cases, especially in the family arena. We believe that such developments are necessary to safeguard access to justice at a time of reduced funding and that it is reasonable to work on the basis that the skill sets of solicitors and junior barristers (including those with considerable experience) should be sufficient to sustain the quality of service in such circumstances. However, we appreciate that this has implications for the Bar, especially when taken alongside the provisions of the Justice Act (Northern Ireland) 2011, giving rights of audience to solicitor advocates in the High Court and Court of Appeal and enabling the Legal Services Commission to pay enhanced fees to accredited solicitor advocates in the Crown Court, magistrates’ courts, county court and certain tribunals.

6.32 Our Discussion paper was published before the provisions of the Justice Act were finalised and we think it right to reflect on the points made to us at that time by the Law Society and the Bar Council. The Law Society referred us to their accreditation arrangements for solicitor advocates. To acquire that status a solicitor must have three years post qualification experience and successfully complete the Society’s advanced advocacy course which is provided by tutors drawn from experienced solicitors, members of the Bar and the judiciary. The course, with input from the National Institute for Trial Advocacy, a US provider of training in advocacy skills, consists of two days of lectures on the law of evidence followed by five days of intensive practical work culminating in a mock trial. We can see that a solicitor, having completed such a course and probably with many years of experience of litigation or of defence work in criminal cases, might be well placed to take on advocacy work in circumstances where, for purposes of legal aid, certification would be granted for counsel.

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64 Justice Act (Northern Ireland) 2011, sections 87 to 90 and Schedule 5.
6.33 The Bar Council pointed out that, having spent twelve months on a post graduate professional course, aspiring barristers engage on a period of six months unpaid pupillage during which time they shadow an experienced barrister, learning the practical skills of advocacy in a variety of courts. During this period they attend an extensive round of seminars, lectures and participative exercises and at the end of it they may not practice independently until signed off as fit to do so by the pupil master. The Bar Council has established an Advocacy Training Board which is developing a programme of training weekends and a scheme for training members of the Bar as instructors and assessors. The Bar suggested to us that, unlike solicitors who carry out many other important functions, a barrister's whole career is focused on advocacy or preparation for court; which is bound to increase the depth of skill and knowledge. They also expressed concern that, with solicitors having a financial interest in taking carriage of their cases as advocates or making reciprocal arrangements with other firms for referrals, clients might not receive disinterested advice on the merits of securing the services of a member of the Bar. They point to experience in England where concern has been expressed by the Public Accounts Committee and others about the increasing use of solicitor advocates in the Crown Court threatening the long term future of the criminal bar and the quality of advocacy at that tier.

6.34 From the perspectives of value for money, competition and client choice we would endorse the recognition of solicitor advocates in terms of enhancing their rights of audience and introducing appropriate remuneration arrangements in legally aided cases. We note that the Justice Act contains explicit safeguards that meet some of the concerns expressed by the Bar, in particular the requirements that:-

- the Law Society makes Regulations on the training, education or experience required of solicitor advocates;

- if a solicitor proposes to represent a client as an advocate in the High Court or Court of Appeal – or if he/she proposes to represent a client where counsel has been certified for legal aid purposes – the solicitor must advise the client in writing (and in terms prescribed by the Regulations) of the advantages and disadvantages of representation by an accredited solicitor or counsel, leaving the choice to the client;

- the Law Society’s Regulations on these matters require the approval of the Department of Justice to be given after consultation with the Attorney General.

The terms of the Law Society’s Regulations on solicitor advocacy required by the Act, and subject to DoJ approval, will be of critical importance in safeguarding client choice and avoiding conflict of interest. From a value for money perspective we would add the following points in the context of legal aid:-

- The payment of enhanced fees for solicitor advocacy services should be limited to cases where, but for these provisions, counsel or separate representation would have been certified.
Where a solicitor takes a case and provides advocacy services, either directly or through his/her firm (rather than briefing counsel or a solicitor advocate from another firm) the degree of enhancement of fees should be reduced as there will be less preparatory work for the advocacy element than if he/she were starting afresh.

6.35 While we endorse the recognition of the role of solicitor advocates, we do have some sympathy with the points made by the Bar at paragraph 6.33 above. One of our guiding principles (paragraph 2.12 above) is about sustaining a high quality independent legal profession now and into the future. In an adversarial setting advocacy, including at the highest levels, and the provision of specialist advice on matters with the potential to go to court, are vital components of the system; and we believe that the independent referral bar has been indispensable in providing that service in Northern Ireland in the criminal and civil contexts over the years. It would be short sighted and damaging to access to justice if concerns over levels of remuneration were to detract from objective consideration of these matters. Our view is that, on the face of it, the training and career path followed by barristers and described at paragraph 6.33 above is likely to be the prime (but not the only) source of the highest level criminal and civil advocates in the future.

6.36 We understand that in England and Wales quality issues around advocacy are being addressed, initially on the criminal side, through the development of an accreditation scheme with staged tiers of qualification relating to the complexity or seriousness of the case in question; this would apply equally to barristers and solicitor advocates (and to legal executives). This seems to us a complex arrangement that in a small jurisdiction such as ours might be disproportionately expensive to administer and involve the judiciary in the assessment process in a way that might appear to compromise the respective roles of judge and advocate. While we doubt that this scheme would be suitable for Northern Ireland, we recommend that consideration is given to how mechanisms might be developed for providing a degree of quality assurance for advocates in this jurisdiction that would be equally applicable to barristers and solicitors. This could usefully take account of work in the Public Prosecution Service to develop quality assurance and an assessment scheme for counsel on their panel65 of external providers.

6.37 Finally, we wish to place on record our concern that a combination of solicitor advocacy and the developments outlined at paragraph 6.31 above might at some point begin to threaten the long term viability of the independent referral Bar, almost by default. It may well be that some contraction is inevitable and we would not advocate any form of restrictive practice or protectionism; but this throws into sharp relief the importance of an appreciation at a strategic level of the impact of economic developments and changes to legal aid on the legal market place and in particular of how to sustain into the future the supply of quality advocacy, especially at the highest levels. To a large extent these are matters for the professional bodies but, given the strong public interest in the integrity of the justice system and in there being an effective independent legal profession, we believe it to be incumbent on government also to take a strategic view of these matters.

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7. Structures for Delivering Legal Aid and developing Policy on Access to Justice

7.1 In this section of the report we consider the administrative structures for delivering legal aid, their relationship with the wider policy making role on justice matters and the place of access to justice within the devolved Department of Justice.

7.2 The present administrative structure for the delivery of publicly funded legal services in Northern Ireland has its origins in a consultation paper “Public Benefit and the Public Purse” (1999) and the ensuing white paper “The Way Ahead” (Cm 4849) published in 2000. These were the precursor to the Access to Justice (NI) Order 2003 which established the Northern Ireland Legal Services Commission (NILSC) as a Non Departmental Public Body (NDPB)\(^6\), taking over responsibility for the administration of criminal and civil legal aid from the Law Society and assuming responsibility for the development of civil legal aid reform centred around a Funding Code. The NILSC was to be accountable to its sponsor body, the Northern Ireland Court Service, which was then a separate department of the Lord Chancellor. These arrangements, brought in when justice remained the responsibility of government at Westminster, broadly mirrored those that were established in England and Wales by the Access to Justice Act 1999.

7.3 The main functions of the NILSC are to:-

- Determine applications for civil legal aid and advice and assess and pay fees for work completed.
- Assess and pay fees for work completed in relation to criminal legal aid (the judiciary decide on applications for criminal legal aid certificates).
- Assess the need for civil legal services and criminal defence services and plan the provision of services to meet those needs.
- Undertake reform of civil legal aid.
- Support the Northern Ireland Courts and Tribunals Service in its reform of criminal legal aid.
- Ensure the propriety and regularity of payments and financial procedures.
- Monitor and forecast expenditure for the purposes of financial planning and budgetary control.

7.4 The Order provided for the Lord Chancellor to appoint a chair and six to ten Commissioners from a range of backgrounds that would give them an understanding of legal practice, the work of the courts, consumer affairs, and such other matters as are necessary to enable the NILSC to perform its functions.

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\(^6\) Executive non departmental public bodies are defined as those that play a role in national government but are not part of any department, deliberately established to operate at arm’s length from Ministers. They are usually overseen by a board, appointed through public appointment procedures, and sponsored by a government department to which they are accountable for performance. They hire their own staff who, unless on secondment, are not civil servants.
social conditions and management. There are currently eight Commissioners, including the chair. The NILSC employs 154 staff (full time equivalents), compared with 101 when it took over the functions of the Legal Aid Department of the Law Society; its annual running costs have increased from £3.8 million in 2003/04 to £7.8 million in 2010/11. An indication of the breakdown in the Commission’s running costs is given in the table at Annex E and the distribution of staff is recorded at Annex F. While we believe that there is scope for making efficiencies and reducing running costs in future, it is important to record that the increase in staff and other costs over the past decade is largely attributable to the need to invest and increase capacity in some areas where there had previously been minimal capability; including:-

- Policy development and reform in civil legal aid.
- Accountancy and finance, in particular to introduce provisions accounting.
- IT.
- Secretariat to support a board, Chief Executive and accountability mechanisms.
- Improving service delivery and addressing backlogs.
- Accommodation.

7.5 In looking at the overall administrative costs of running the legal aid system in Northern Ireland, we must also take account of the sponsor department which, when up to complement, employs 21 staff on work related to publicly funded legal services at an annual cost of about £850k; of these 4 are in the sponsorship role, holding the Commission to account, 2 provide legal support, 6 are in the civil reform section and 7 in criminal reform. The remaining two staff are the head of division and a personal assistant. In addition the Legal Aid Assessment Office, a part of DSD with statutory responsibility for assessing financial eligibility, employs 11.2 staff (FTE) at a cost in 2010/11 of just under £450,000.

7.6 Our terms of reference require us to examine previous reviews and assess the extent to which their recommendations remain relevant. Since its formation in 2003 the Commission has been the subject of a number of internal and external reviews and scrutinies, focusing in particular on financial matters. In 2004 and 2005 there was a Fundamental Legal Aid Review (FLAR), carried out as an extension to a similar exercise in England and Wales. This was sub-divided into 8 projects covering, inter alia, rights of audience, recovery of monies owing to the Commission, social welfare issues, police station advice and financial forecasting. While we have not been able to find evidence that this work was carried out and followed up systematically, we are conscious that it seems to have been driven by considerations relevant to England and Wales and note that many of the issues have been picked up in subsequent exercises or indeed in this current review.

7.7 The Commission underwent a “Landscape Review” in 2007, a process applied to arms length bodies at regular intervals to assess whether they are delivering in accordance with their objectives set by government and whether the governance and sponsorship arrangements are working as they should. This review, carried out for the Court Service by external consultants, made detailed recommendations on a range of governance and management related issues that were the subject of an action plan published by the
Commission along with the report in January 2009. The Landscape Review endorsed the executive NDPB model as being the appropriate design for service delivery, although its terms of reference did not require it to carry out a detailed appraisal of the alternatives. There have been other reviews of financial arrangements and there was an internal three stranded review of the administration of legal aid carried out jointly by the Commission, the Court Service and the Northern Ireland Office in preparation for the devolution of justice matters. Arrangements were put in place to monitor the implementation of the Landscape Review recommendations and those flowing from the pre-devolution exercise; we have not identified significant issues that are outstanding or are not being addressed elsewhere (including through our review).

7.8 Since devolution of justice, the Northern Ireland Courts and Tribunals Service has been an agency of the Department of Justice and has retained responsibility for policy on publicly funded legal services and sponsorship of the Legal Services Commission. The DoJ’s structure is being re-organised (paragraphs 7.28 to 7.31 below) in a way that will bring the NI Courts and Tribunals Service policy responsibilities into the core of the department and this is clearly an opportunity to assess how best policy on, and delivery of, publicly funded legal services should fit into the new structures.

Assessment of the Current Structures

7.9 “Public Benefit and the Public Purse” and “The Way Ahead” identified the following factors as behind the transformation of the Legal Aid Department of the Law Society into an NDPB accountable to the Lord Chancellor:-

- Remove any suggestion of a perceived conflict of interest between the Law Society’s roles as gateway to the legal aid fund and as representative body for solicitors.
- Bring in a multi-disciplinary management structure for the organisation.
- Facilitate reforms to legal aid which the Government might want to implement and which the Law Society might find it difficult to administer.
- Sustain independence from government, especially in relation to decision-making in individual cases.
- Improve financial control.

7.10 The Legal Services Commission, as an entity, has brought many positives to the table over the last eight years, including:-

- Maintenance of a great deal of institutional expertise, identity and commitment amongst staff, all of considerable importance in this complex area - and an ability to engage effectively with the legal profession, the judiciary and other stakeholders.
- A commitment to addressing service delivery and tackling delay which, according to “Public Benefit and the Public Purse”, were issues of considerable concern prior to the establishment of the Commission.
• A Board that has brought a range of skills and experience to the Commission – in particular making a significant contribution to policy development, financial management and ensuring that focus is maintained on day to day service delivery.

• Independence and integrity of decision-making in individual cases.

7.11 However, we believe that there are some significant weaknesses in the current structures. The division of policy responsibility between the Commission and its sponsor results in confusion, duplication, inefficiency and difficulties in getting things done, especially in circumstances where the two organisations may have different priorities. This is not just about the different arrangements for civil and criminal legal aid. In civil reform, while the Commission has responsibility for developing and implementing the programme, it is dependant on the sponsor department for securing the necessary passage of Regulations and for seeking Ministerial approval for detailed proposals. We wish to stress that this is not a criticism of those involved in the reform work. However, along with the failure to appreciate at the outset the importance of rigorous programme management of such a complex interlocking set of projects, we see the structural arrangements and division of responsibilities as having played a significant part in the delays in implementing civil legal aid reform. Moreover, it is unusual for an NDPB (or even an agency) to have responsibility for developing policy. In an area where policy content, including such issues as fee structures, has major implications for large amounts of public expenditure it would seem reasonable for the Minister to want the work to be carried out by staff under the direct control of his department.

7.12 Similar considerations apply in relation to financial control and forecasting which has been the subject of concern expressed in a number of contexts (most recently in the Northern Ireland Audit Office report on Managing Criminal Legal Aid) as spend has risen inexorably over the years. We are not sure how far it is fully appreciated that the Chief Executive is accounting officer for an organisation where levels of spend are to a large extent demand led and heavily influenced by decisions taken outside the Commission, for example, on the granting of criminal legal aid, appeals, taxed costs and the setting of fees for criminal work. As pointed out in paragraph 3.3 above, the practice of setting unrealistically low budgets did in the past detract from the importance attached to financial monitoring and forecasting. However, that will not be the case in the future and we cannot stress too strongly the importance of a common and joined up approach to financial modelling, monitoring and forecasting that has the confidence of the legal aid delivery body, those responsible for sponsorship and the finance function within the Department of Justice. That means a single jointly owned model that takes full account of the operational “bottom up” assessment, based on trends in volume and known cost drivers together with a “top down” input including the impact of policy and operational developments within and outside the justice family as well as socio-economic factors. While all concerned need to appreciate the implications of the demand led aspect of spend, quality forecasting is still achievable, as is corrective action to deal with projected overspends (albeit after a lead in time for it to take effect). While steps were taken by the sponsor to strengthen the finance function in the Commission through secondments and there is now a strong permanent cadre in place, we are not convinced that the NDPB structure has over the years helped
foster the integrated approach to financial management on the part of those responsible for operations and policy that we advocate.

7.13 As for the Commission itself, it is a small, self contained and independent organisation with its own board, staff, finance and HR procedures (although these tend to follow a civil service template). While this does mean that it can work to systems that should be fit for purpose rather than determined by the centre, it can carry disadvantages. The Commission does not have the advantage of economies of scale that would accrue if it were bigger or part of a wider organisation; for example, it has to negotiate and set its own terms and conditions of service for staff, which can be resource intensive and time consuming, while its finance and IT systems are managed separately from those of the department. Other support functions take up proportionately more resource than would be the case in a larger undertaking. The Commission has a strong case-working tradition, dealing with complex and longstanding procedures and regulations. However, as an NDPB there is limited scope for staff to move in and out of the organisation. If it were part of a wider entity it might be better able to access and develop new skill sets, meet short term needs, give its staff the opportunity of broadening their experience (thus enhancing their career prospects) and become exposed to different ideas and ways of doing things – all of which would help at a time of rapid change when adaptability and a commitment to new ways of working will be of critical importance.

Options for Change

7.14 We believe that decisions on structures for the delivery of legal aid policy and administration in Northern Ireland are best made, not by assessing the pros and cons of agency or NDPB status (or complete integration with the sponsor department); and nor do we want to go through a mechanistic or theoretical process of determining which “governance label” best fits legal aid. Rather we want to retain the positive features of the current arrangements while addressing the weaknesses identified in the previous paragraphs. However, there are two key criteria that we believe must be part of the arrangements:-

- Individual decisions on legal aid, within the overall policy set by government, must be made independently of government and of any sectional interest. There may be cases where the grant of legal aid is in the interests of justice but politically unpopular and in such circumstances justice and Ministers are protected if the decision is taken independently and against objective criteria.

- Responsibility for policy development and advice to government on policy matters relating to access to justice, including policy on civil and criminal legal aid, should be brought together in one location with direct access to the Minister. To the extent that this means a separation of the delivery arm from the policy making function, it will however remain important that those with responsibility for delivery work in close concert with the policy makers and use their practical knowledge and experience to feed into the policy-making process.
7.15 In addressing the options for future structures we took account of ideas in an Institute for Government document published in July 2010, “Read before Burning – Arms length government for a new administration”; this was written in the context of a desire to increase knowledge and understanding of arms length bodies at a time when their future was being debated with a particular focus on reducing the numbers of NDPBs. Its proposed new taxonomy for arms length bodies included a range of models of varying degrees of independence from core departments and Ministers, depending on the nature of the functions being carried out – which for example might be a regulatory or independent watchdog type organisation (implying a high degree of independence from government, but with accountability to the legislature) or, at the other end of the spectrum a discrete entity responsible for implementing government policy, staffed by civil servants and constitutionally part of a department (in other words an executive agency). The closest to what we currently have with the Commission was what is described as a “departmental sponsored body” run by a board appointed and appraised by the department.

7.16 We have looked carefully at a solution suggested by the Legal Services Commission. They suggested a “hybrid model” whereby the administrative, executive and policy responsibilities for legal aid currently carried out by the Commission and the NI Courts and Tribunals Service would be brigaded together in an Access to Justice Service within the Department of Justice. This would make the arrangement more akin to a next steps agency than an NDPB. The Service would operate under the control of a board consisting of 6 to 8 non executives, plus the top management team. It would advise the Minister directly on policy matters and be accountable to him for performance, but the Minister would have no role in operational decisions on the grant of legal aid. HR and other common services would be provided by the core department where feasible. We are also mindful of points made by NIPSA about removing uncertainty about the future status of the Commission, concerns for jobs, the need to keep staff informed, the implications of any change for pensions, and the compatibility or otherwise of shared services; and we wish to add how much we welcome the variety of helpful comments made in the NIPSA submission that very much accord with the themes of this review.

7.17 The governance arrangements for legal aid and access to justice in England and Wales were reviewed by Sir Ian Magee who reported in March 2010; in short he identified many of the issues about the relationship between the Legal Services Commission and Ministry of Justice there that we have noted in the Northern Ireland context. The result has been a decision to convert the Commission into an agency of the Ministry so that its operational functions will be carried out by an arms length body within government, rather than outside, while policy is moved to the core of the department. These proposals have been incorporated in the Legal Aid, Sentencing and Punishment of Offenders Bill published in June 2011; the Bill includes provision for the appointment of a Director of Legal Aid Casework and an explicit prohibition preventing the Lord Chancellor from giving directions or guidance about the handling of any individual case, thus safeguarding the independence of decision-making.

7.18 We understand that similar changes were brought into effect in New Zealand through commencement of the Legal Services Act on 1 July 2011 following a review carried out by Dame Margaret Bazley. There, the functions of the
Legal Services Agency have been transferred to the Ministry of Justice while independence of decision making is secured through the appointment of an independent statutory officer, the Legal Services Commissioner, whose role is to grant legal aid to individuals and ensure the independence of lawyers in the public defence service.

**Proposed delivery structures**

7.19 Given the points made at paragraphs 7.11 to 7.13 above we do not think that the Legal Services Commission should continue as an NDPB with its present functions unchanged. We have given careful consideration to the "hybrid" proposal but, for reasons which will become clear later, do not think it ideal to create a structure where policy on legal aid and advice to the Minister are managed through a board; the policy function would be much better fully integrated into the core of the department where it can be progressed on a holistic basis as part of the departmental structure along with other related justice issues. We are quite clear, however, that in the light of the imperative to maintain independence of decision-making it would not be right also to integrate the administration and delivery of legal aid into the core department.

7.20 That leaves the question of the status of the legal aid delivery arm. Removing the policy function from the Commission would reduce its size and role, exacerbating some of the problems outlined in paragraph 7.13, so we do not propose to recommend its continuation as an NDPB. We think that it should move inside the Department of Justice so that its staff would become civil servants and the Chief Executive part of the departmental management structure, while retaining its arms length status along the lines of an executive agency, and with statutory protection for independence of decision-making. We believe that this can be achieved, while taking advantage of some of the elements of the hybrid model suggested by the Commission. As with some other executive agencies, this might include the appointment of a management board responsible for running the organisation, under the chairmanship of the Chief Executive and with a membership to include the top management tier and a non executive director.

7.21 We recommend that all aspects of policy on criminal and civil legal aid should become part of an Access to Justice Directorate or Division within the core of the Department of Justice. Further, the legal aid delivery arm should become an executive agency within the Department and the Chief Executive should be a statutory appointment responsible for decisions on legal aid applications without any involvement on the part of the Minister, any political institution or staff in the core of the department. It would be for the Minister and as appropriate the Assembly to legislate and issue guidance on legal aid matters but not to play any part in decision-making on individual cases. The Agency would be accountable to the department for performance and management purposes in accordance with a framework document. While they would no longer be directly responsible for policy matters, we believe that the closer relationship between the senior management of the Agency and the core department than would be the case with an NDPB will give the Chief Executive and his colleagues the opportunity to contribute to policy formulation from an operational perspective and keep in close touch with other developments in the justice field that might impact on legal aid. In order to support the development of an integrated approach to service delivery and maximise efficiencies we suggest that consideration is given to
legislating to bring the work of the Legal Aid Assessment Office in house within the Agency, together with an appropriate transfer of funds and a secure in house IT link to access benefits data (which we understand works in other jurisdictions) for the purposes of confirming passported benefits.

7.22 Drawing on the Commission’s suggestions, we do suggest that consideration is given to statutory provision for a small advisory board with the following functions:

- Providing assurance on the independence of decision-making in the Agency.
- Acting as an appeals panel for complex or difficult cases.
- A source of independent advice to the Minister on legal aid and access to justice matters.

The board would have a mix of professional and lay membership, possibly with the Chief Executive as an ex officio member. It should not require the same size of membership, activity levels or secretariat support as the Board of the Commission. While we do not envisage this advisory board having oversight of the running of the executive agency, its chair could become the ex officio non executive director on the management board, while another member with suitable expertise could be appointed chair of the agency’s audit committee.

7.23 In order to encourage a unified and coherent approach in such a complex area we suggest that sponsorship of the Agency should be the responsibility of that part of the DoJ’s Access to Justice Directorate that is responsible for legal aid policy. The framework document should ensure that financial monitoring, forecasting and the costing of policy initiatives are carried out on an integrated basis between the Agency and the core department, working to one agreed financial model. It should include provisions that explicitly recognise the inter-relationships between financial management and planning across the different parts of the justice system and, particularly in relation to civil legal aid, outside the justice arena (for example in respect of children in care).

7.24 There will be costs associated with these changes, which will have to be quantified and included in the financial modelling. We have been unable to secure a reliable figure for the one off cost of transferring pensions from NILGOSC into the civil service scheme and there may be some small recurring costs associated with salary assimilation. We also see scope for savings in running costs that will accrue directly from the changes that we are recommending, for example in reducing expenditure on Commissioners, secretariat support and the appeals committees (and associated secretariat support for the committees). Taking advantage of shared services might produce opportunities for savings in areas such as finance, IT and HR, especially the latter as policies, terms and conditions become completely harmonised with the civil service and routine personnel matters are fully delegated to line management. However, we should warn that the scope for shared services in some areas, such as finance and IT, may be tempered by
the need to provide for processes tailored to the specific requirements of legal aid.

7.25 **One area that we should mention where we believe a major one off investment to be essential is IT.** We have seen an effective IT system in operation in the Scottish Legal Aid Board, developed and run by in-house experts rather than through a managed contract, and have identified the following as some of the gains from such an investment:-

- An integrated case and financial management system.
- Reliable and consistent management information to inform performance management, identification of trends, forecasting and risk management.
- Better data management and quality control to support analysis and research, for example of geographical coverage of legal services, applicants and the flow of work carried out by individual firms.
- The use of IT to assist in fraud prevention and the integration of anti-fraud measures in the Commission’s processes.
- Integration with other justice related IT systems.
- Enabling on-line legal aid applications and submission of bills for assessment – allowing substantial reductions in registry and other posts concerned with processing paper and reducing the error rate in forms, while reducing delay and nugatory work in the Commission and on the part of suppliers.
- Supporting more efficient business processes, with the objective of a paperless office.

We are encouraged that senior management in the Commission have been looking at the Scottish system and would raise the question of whether there is scope for co-operative working with that jurisdiction or perhaps purchasing licences covering their software systems.

7.26 **At a time when spend on the legal aid fund is being reduced and further savings need to be identified, we believe that there has to be a rigorous review of potential efficiencies, business processes, posts, structures and staff gradings within the Commission;** such a review would be necessary in any event as part of transforming the Commission into an executive agency within the department and of developing the IT requirements. There will be some additional staff costs, for example to manage quality control as part of the registration scheme, transferring some decision-making from the judiciary to the Commission and bringing the LAAO in house (although in the latter case there should be a transfer of resource from DSD). However, in addition to the opportunities for savings mentioned above, the removal from scope of money damages and the increased trend towards standard fees are examples of changes that should produce further efficiencies. The fact that no comprehensive staffing review has taken place for some years while staffing structures and numbers have of necessity been adjusted piecemeal to accommodate new challenges also gives rise to expectations that such a review is likely to yield savings. We believe that
outside assistance will be needed in this and wish to stress the importance of full communication with, and involvement of, staff in the process.

7.27 The structural changes recommended in this section will require primary legislation and we note the legislative steps taken already in England and Wales to achieve similar changes. We are also conscious of the need to reduce to a minimum any period of uncertainty over governance arrangements and over the future status of staff. We recommend, therefore, that the Department of Justice carries out the necessary planning as a matter of priority and implements the recommended structural changes at an early legislative opportunity.

Policy

7.28 The Department of Justice has already embarked on a change programme that, amongst other things, will see the creation of an Access to Justice Directorate, bringing together existing criminal justice policy and strategy functions with the policy responsibilities of the Courts and Tribunals Service. The operational functions of the Courts and Tribunals Service will remain with that agency. All of this is consistent with the approach we adopted in our Discussion Paper where we made clear that we were minded to recommend the integration of legal aid policy and sponsorship of the delivery agency within a strong access to justice directorate in the Department of Justice and we confirm that recommendation here. We understand that some civil justice responsibilities currently undertaken within DFP, including private family law and implementing European directives on matters such as ADR, will also be brought into this directorate and strongly support that move.

7.29 The new directorate, similar to its counterpart in the Ministry in England and Wales, will amongst other things accommodate the following functions of direct relevance to our terms of reference:-

- Policy on criminal and civil legal aid and sponsorship of the delivery agency.
- Substantive and procedural law on civil and criminal justice.
- Other policy and strategic issues across the civil and criminal justice systems such as ADR and tackling delay.
- Working with stakeholders concerned with the delivery of justice including the judiciary, the legal profession, consumer groups, victims’ groups, the voluntary sector, the insurance industry and other government departments and agencies.
- Horizon scanning and research, for example, to assess and act upon the impact on the justice system and legal aid of increasingly complex legislation, trends in crime, changes to the benefits system etc.

These arrangements will help ensure that the importance of civil as well as criminal justice is firmly embedded in the culture of the Department of Justice and will help foster a holistic approach to policy development, ensuring that full account is taken of the impact on legal aid and access to justice of policy
actions and initiatives elsewhere in the justice system. They will address one of the weaknesses of the pre-devolution arrangements where justice responsibilities were split between the NIO at Stormont and the Court Service reporting to the Lord Chancellor’s Office in London.

7.30 We should stress the inter-relationship between access to justice and the activities of other departments and agencies in Northern Ireland covering a wide range of issues such as children in care, advice centres, benefits, mental health and employment law. For example, we have already drawn attention to the relationship between the care framework set out in the Children Order and the impact on the legal aid costs associated with public law children cases. **The Access to Justice Directorate should as a matter of priority ensure that legal aid impact assessments are drawn up as a matter of routine alongside financial memoranda and regulatory/equality impact assessments whenever new policy or legislation is prepared. Where an increase in legally aided cases is predicted, then the department sponsoring the legislation or policy change should be responsible for making the necessary transfer of resource into the legal aid fund.** Where the impact on legal aid spend is uncertain, this might involve the other department or agency making periodic payments to cover the actual additional spend until a properly assessed long term transfer of resource can be achieved, perhaps as part of a spending review.

7.31 Responsibility for matters concerning the regulation of the legal profession currently lies with DFP. Regulation goes to the heart of public confidence and the quality of service that clients and the taxpayer can expect from solicitors and barristers and, on the face of it, DFP’s role in this appears anomalous. **We suggest that consideration is given to whether responsibility for the legislative framework covering the legal profession and its regulation should pass to the Department of Justice where it would most sensibly be located in the Access to Justice Directorate.**

**The Civil Justice Reform Group and a Civil Justice Council**

7.32 In the course of our discussions with stakeholders, we heard a number of positive comments about the review of the civil justice system in Northern Ireland conducted under the chairmanship of Lord Justice Campbell and reporting in 2000. There were suggestions that, while many of the recommendations had been addressed, there were others that were worthy of being revisited. The review had been initiated by the Lord Chancellor in the wake of the Woolf reforms in England and Wales. Paragraph 8 of Lord Justice Campbell’s final report outlines a set of principles that contain much common ground with our terms of reference, including:- the avoidance of litigation where possible; cheaper, less adversarial and less complex litigation where it occurs; and a system that is responsive to the needs of litigants.

7.33 We are grateful to the Courts and Tribunals Service for providing us with an update on this, demonstrating that all of the recommendations have been the subject of review and well over half have been actioned. Many of the other recommendations concern aspects of judicial case management that are being addressed in a variety of ways and are not strictly matters for this review. We have already referred to the emphasis being placed by the judiciary on pre-action protocols and case management in ways designed to encourage early settlement and facilitate the efficient disposal of cases that do go to court. Other issues raised with us in this context include the
applicability to Northern Ireland or otherwise of the recommendations in Lord Justice Jackson’s Review of Civil Litigation Costs in England and Wales (paragraph 5.99 above), and whether the matters raised in his and Lord Justice Campbell’s review should be examined from the perspective of the county courts given their increased jurisdiction (paragraphs 5.113 and 5.114).

7.34 One recommendation from the Campbell review that we have said we will address is the proposal for a Civil Justice Council mirroring the creation of a similar body in England and Wales. The recommendation was for a body under the chairmanship of the Lord Chief Justice with a remit to consider whether the civil justice system is accessible, fair and efficient and, inter alia, to advise government and the judiciary on the development of the civil justice system and the impact on it of proposed policy or legislative initiatives. Members of the Council would be drawn from different tiers of the judiciary, practising barristers and solicitors, government and nominees with experience of consumer affairs, the advice sector, academia and other interest groups. We understand that a civil justice committee has been established in Northern Ireland, but not with the breadth of remit or representation originally envisaged for the proposed Council.

7.35 We understand that the Council in England and Wales has made a worthwhile contribution, for example in devising and agreeing procedures and protocols for negotiation and litigation following road traffic accidents. However, we also recognise that, particularly in a small jurisdiction, the creation of a plethora of inter-agency groups and committees can result in time consuming commitments, drawing key people away from service delivery with associated opportunity costs; and there is the time and expense associated with servicing them. On balance we do see merit in the establishment of an inter-disciplinary forum through which civil justice matters can be addressed and sub groups established to progress particular issues, not least because it would provide an opportunity for the DoJ and other stakeholders to appreciate and take account of the inter-relationship between policy matters, pre-court processes and case management. We believe that judicial involvement in such a group could add considerable value and suggest that the DoJ engages with the judiciary about how a forum might be constituted in a way that does not create an excessive burden of time or cost, focuses on action rather than becoming a talking shop and respects judicial independence.
8. Living within Budget and the Options for Further Savings

8.1 Our terms of reference ask us to make proposals that are within budget and to identify possible future savings to reduce the budget. We have already noted that, given the lead in time for changes to be introduced and take effect, the realistic approach is to aim to meet the reduced budget for legal aid by 2014/15. Assuming that reforms to criminal legal aid already introduced will produce the expected reductions in spend, that leaves a further £5.1 million of savings to find that will take effect by that year. We do not have sufficiently precise management information or the resources to cost the impact of our proposals with precision, but we start this section of the report by identifying those of our recommendations that will have a financial impact and, where relevant data is available, by giving an indication of the scale of the resources at stake; we then identify what measures might be taken to make further savings, either to reach the figure of £5.1 million if that proves necessary or to meet further budgetary reductions if required.

8.2 We have identified two issues in relation to criminal legal aid in magistrates’ court cases where, taken together, there may be some scope for reduced spend. The recommendations that clear objective criteria are developed for certifying cases for counsel in the magistrates’ courts and that the locus for decision-making on this is shifted to an adjudication function in the Commission (paragraph 4.25) should result in some reduction in certification. In 2010/11 over £3.8 million was spent on counsel fees at this tier of court. Also, we drew attention to the substantial increase in the average cost of magistrates’ court bills, which seems in part to be associated with the introduction of the 2009 Rules for determining remuneration through standard fees. The review of the workings of the new rules will identify the extent to which the increase is the result of the level at which the new fees have been set; but in considering the scope for any corrective action it will need to take account of the broader picture (paragraph 4.29). It may be that, taking these issues together, up to £1 million could be saved on the projected costs of remuneration in the magistrates’ courts, provided that volumes remain as expected.

8.3 We are working on the basis that our proposals for legal advice and assistance will be cost neutral – with the additional cost of contracts for welfare advice being balanced by reductions in spend in other advice areas such as money damages and perhaps through some funding levered in from other government departments with responsibilities in the areas concerned (paragraph 5.32).

8.4 England and Wales have identified ADR as a source of savings of some £10 million per annum in their family budget. However, our motivation in encouraging the spread of ADR is driven by a belief in its value to the justice system and clients rather than a desire solely to save money and in paragraphs 5.49 to 5.53 we warn of the need for further financial modelling in the family arena to assess the financial implications. More generally, however, we are in little doubt that a commitment to early dispute resolution across government and public agencies has the potential to ease pressures on budgets in departments and the legal aid fund (paragraph 5.55).

8.5 We note that £1.4 million was spent on injunctions in 2010/11. Action already being taken by the Legal Services Commission to bear down on fees being
claimed by reference to county court scale costs in these cases and our recommendations for diverting some at least of the neighbour dispute cases to community resolution schemes should help reduce some of this spend, as well as producing better outcomes.

8.6 In *public law children cases* we make some suggestions for tightening up on the number of parties who are able to secure legal aid for separate representation (paragraph 5.68). We also note that representation for children resulted in expenditure of about **£3.6 million** in 2010/11, including **£1.2 million** in counsel fees. We make suggestions for a strategy which should reduce that figure (paragraph 5.72).

8.7 In 2010/11 we understand that some **£1.4 million** was spent on counsel in public and private law cases in the Family Proceedings Courts. We suggest that requests for counsel in FPC cases should be authorised only in the most exceptional circumstances, and that this figure should therefore be reduced (paragraph 5.74). Also, we make a recommendation that senior counsel be authorised in the Family Care Centre only in wholly exceptional circumstances and in family cases in the High Court only where justified against strict criteria (paragraph 5.77); we received some suggestions that seniors should never be authorised in the Family Care Centre. The potential savings here might be quite significant, although the available financial and management information does not allow for easy disaggregation of costs associated with senior counsel. We do know that a sample of files produced evidence of almost 150 cases where senior counsel was authorised in these cases between 2007 and 2010; and that about **£2.9 million** was spent on junior and senior counsel in the Family Care Centre in 2010/11.

8.8 We do not propose taking aspects of *private family law* out of scope, but do suggest a policy which will in many cases prevent legal aid being used to support the prolonging or re-opening of cases; and we recommend changes that will limit the degree of representation that will be funded in uncontested divorces and reduce the scope for legal aid to support contested cases (paragraph 5.85). Divorce and nullity proceedings accounted for a spend of **£4.7 million** in 2010/11 although this will have included spend on areas such as ancillary relief that often accompany divorce proceedings.

8.9 Our recommendations for taking most *money damages* cases out of scope and providing alternatives for accessing justice through conditional fees or insurance based arrangements (paragraphs 5.105 to 5.109) have the potential to save the legal aid fund around **£1 million** per annum as well as significant running costs.

8.10 The *review of fees* in family cases, and introduction of standard rates across the court tiers, should have an explicit objective of reducing the overall bill and contributing to the required savings (paragraph 5.88). Such a review should be conducted in the context of the wider objective of creating a codified standard fee structure for civil remuneration (paragraph 5.143). Given that some **£36.9 million** was spent on fees in civil and family cases in 2010/11 (including VAT but excluding legal advice and assistance), a relatively small percentage reduction in levels would make a substantial contribution to bringing spend within budget; and standard fees enhance predictability and control, effectively enabling costs to be capped. In England and Wales, the legal aid reforms there include a 10% reduction in fee levels (except where price is determined through competition), while in the Republic
of Ireland they have adopted a phased approach to the reduction of fees in criminal legal aid cases: - 10.5% in 2009, 8% in 2010 and 10% in 2011. We make the point in our consideration of remuneration that in Northern Ireland a uniform percentage reduction covering all types of case would not necessarily produce a sensible outcome (paragraph 5.145); but it might be necessary to identify an overall target reduction in fee levels to be achieved through the recommended reviews.

8.11 We cannot say with certainty what proportion of disbursements go on paying for expert witnesses but, extrapolating from England and Wales figures suggest that they might account for £2 - 3 million of spend per annum in civil cases as well as a significant amount on the criminal side. In the family context, we suggest a more proactive approach to the appointment of single experts by the court (paragraph 5.73) and the development of a strategy, focusing on value for money (paragraph 5.151) for expert evidence generally to help exert a downward pressure on costs. The Law Society and the Bar Council have expressed strong views about the need to reduce the costs associated with experts and we agree that this is an area which requires priority attention by the Department of Justice.

8.12 At paragraph 5.156 there are a number of suggestions in relation to financial eligibility for legal aid which, taken together, will make a contribution towards bringing spend within budget. Particular consideration could be given to increasing the level of contributions out of disposable income for those above the lower limit (below which no contributions are payable); in 2010/11 contributions amounted to around £850,000. Also, requiring a small “up front” contribution from those making legal aid applications in certain categories of case might secure a small budgetary easement.

8.13 In 2010/11 running costs of the Commission accounted for about £7.8 million of which staff costs were just over £5 million. Measures identified in paragraphs 7.24 to 7.26, including the recommended efficiency review, should produce savings that will substantially exceed any additional costs accruing from the need for greater quality control, verification of work done and the shift in decision-making on certification of counsel in the magistrates’ courts. The business case for new IT systems should demonstrate the efficiencies that can be secured from the investment.

8.14 While we cannot precisely measure the financial impact of the measures outlined above, our judgement is that concerted action across the areas identified in paragraphs 8.2 to 8.13 above will at least make a major contribution towards – if not achieve - bringing spend within budget by 2014/15, provided that assumptions on projected volumes of cases and the modelling supporting the impact of criminal reforms hold good. We suggest that a group of financial and operational specialists be established to research and refine the impact of these measures with a view to advising on the detail of how far they will go towards achieving the necessary savings. In some of the areas (for example financial eligibility and fee levels) there will be scope for securing different outcomes depending on the extent or scale of change that is introduced.

8.15 If further reductions are needed to stay within budget or meet further cuts in budget, consideration should first be given to whether more could be extracted from the type of measures identified in the paragraphs above. Beyond that, there may be options for leveraging in relatively small amounts of
funding from such sources as interest from private client accounts, contributions from financial institutions and access to funds or interest on funds that are seized or subject to restraint under the Proceeds of Crime legislation. But it is difficult to see how further major inroads in expenditure levels can be achieved without systemic change that would affect scope, remuneration and/or financial eligibility – or that would involve changes to those aspects of the substantive law or the legal system itself that give rise to legal costs. We note some possibilities below, while making it clear that we do not advocate them and that some would involve serious compromises to the principles we outlined in Section 2 of this review.

8.16 On scope, our human rights obligations mean that the coverage of criminal legal aid should remain as now. On the civil side paragraphs 5.164 to 5.165 above outline the reductions in scope that are planned in England and Wales and how, if we had to, we might prioritise reductions here. In going further than our suggested candidates for removal, private family law (except where child abuse or domestic violence are at stake) and all clinical negligence cases could come into the reckoning. Mediation for family cases would remain in scope but with strict cost limits. If such changes were introduced, the savings might be significant, but we do believe that this would be at the expense of potential damage to the running of the courts and would reduce the support available to the vulnerable at a difficult time in their lives. Consideration would have to be given to enhancing other court based advice and support services.

8.17 So far as remuneration in criminal cases is concerned, we have already factored in a review of magistrates’ court fees while Crown Court fees for solicitors and barristers have been the subject of a sharp downwards revision. There remains a question mark about comparability with England and Wales, and with the PPS; but, even as part of a further round of budget cuts, we do not think it would be right to make further cuts in remuneration without at least awaiting the outcome of a review of the workings of the new arrangements.

8.18 On remuneration for civil cases, we are already factoring in projected reductions in overall fee levels. One option might be to consider contracting as a method of procurement associated with a limit on the number of cases to be funded; but that amounts to a form of rationing. Contracting could also be the basis for price competition, provided that it was associated with strict controls on quality standards; but the consequences for supply across Northern Ireland and the danger of services eventually being confined to a limited number of providers could carry serious implications for access to justice and ultimately might threaten the competitiveness of the market. Such options should only be pursued after the most careful consideration of what they would mean for a small jurisdiction such as Northern Ireland. Liberalisation of regulations on alternative business models would be almost inevitable in these circumstances.

8.19 Even as a budgetary control measure it would be difficult to justify restricting financial eligibility to levels lower than England and Wales; Scotland already has higher income limits than the other UK jurisdictions.

8.20 At paragraph 4.54 we identify an offender levy as an option to be considered further if more has to be done to meet budgetary pressures on the legal aid fund. Attachment of the future earnings or benefits of convicted criminals to
pay for some or all of the legal costs of their defence is another possibility that we mentioned in the Discussion Paper.

8.21 Comments made in response to the Discussion Paper do not lead us to believe that significant sums are likely to accrue from other possible sources of funding that we identified, such as interest on client accounts and contributions from the private sector. However, none of these can be ruled out and we do wish to stress that funding, from whatever source (Europe, the lottery), to support community based schemes for advice, family support, restorative interventions etc. can have a positive impact.

8.21 As for cost drivers deriving from the legal system and the substantive law, we have identified family justice (paragraphs 5.89 to 5.92) as a candidate for fundamental review – both from the perspective of quality of outcomes and costs. There may be other areas worthy of examination. For example, from the perspective of lay observers, it does seem that there might be ways of processing the constant churn of reviews and adjournments in the magistrates’ and family proceedings courts that would be less demanding on the time of the courts and of practitioners for whom such a system must make it difficult to manage time efficiently. In general terms, the potential impact on costs for privately and publicly funded cases should be a consideration in identifying areas of law and procedure to be reviewed.

8.22 We are conscious of concerns about the cost of legal services to government departments and public agencies generally and in the Progress Report drew attention to press reports on the subject. The Criminal Justice Inspectorate (NI) report, "Use of Legal Services by the Criminal Justice System" contained a number of strategic recommendations on the procurement and management of legal services. It suggested that the Department of Justice should seek advice from DFP and align its activities on procurement of legal services with other parts of devolved government, as well as determining the scope for greater use of ADR. This is not strictly within our terms of reference but some of the expenditure at issue will concern cases where the other party is legally aided and so decisions on levels of representation and the merits of taking a case to court can impact on two streams of spend – the department’s own legal costs and the legal aid fund. Any concerted action by government to address procurement of legal services and instil commitment to early resolution of issues (see paragraph 5.55 above) is liable to impact on the matters that are the subject of this review. We therefore support the strategic recommendations of the criminal justice inspectorate on the procurement of legal services and raise the question of whether this is a matter that has wider implications for government going beyond the criminal justice system.
Summary of Conclusions and Recommendations

Introduction

1. If the Minister wishes to proceed in line with the thrust of the report that follows, we suggest that the Department of Justice and Legal Services Commission establish a joint task force to manage small teams with policy and project management expertise that will each take ownership of groups of related action points.

Guiding Principles

2. The Department of Justice and any agency with responsibility for delivering legal aid and access to justice should commit to the guiding principles (outlined in Chapter 2) against which policy development and decision-making can be benchmarked.

3. We felt it right to draw the Minister’s attention to continuing concerns about delay in the civil and criminal justice systems.

Financial Resources

4. We believe it important that the Legal Services Commission should enter each financial year with a budget that reflects a reasonable assessment of spend in the light of projected volumes, remuneration levels for providers, contributions from those in receipt of legal aid and running costs.

5. The financial shortfalls in the current year and next year need to be resolved as a matter of urgency.

6. A forecasting model, agreed between the Commission and the DoJ, should be used to support quarterly reviews of spend with in year and longer term forecasts tested and, where necessary, amended in the light of trends and taking account of known or likely future developments liable to impact on volumes and average costs.

7. There should be integration of forecasting on, and budgeting for, criminal legal aid spend with a justice-wide model which recognises the close inter-relationship between spend and performance across the system, including the police, PPS, courts and legal aid.

8. A sensitivity analysis should be carried out to assess the extent of variances from future financial projections that might occur as a result of changes in demand for criminal and civil legal aid that cannot be foreseen.

9. Machinery through which criminal and civil legal aid can be addressed separately for financial management purposes should be considered as part of the organisational restructuring.

Comparison with other jurisdictions

10. The debate relating to spend per head across jurisdictions adds urgency to the need for the development of a reliable mechanism for measuring and
recording average case costs in Northern Ireland, a critical part of the value for money equation and a meaningful means of benchmarking against other jurisdictions.

**Criminal Legal Aid**

11. The Widgery criteria, as replicated in the Access to Justice (NI) Order 2003, continue to provide a sound basis for determining whether the circumstances of a case merit the grant of legal aid to financially eligible defendants.

**Magistrates’ Courts**

12. We do not believe that a case has been made at present for moving responsibility for determining the merits test in criminal legal aid applications from the judiciary to court staff or an executive body. However, we recommend that the DoJ and the Legal Services Commission should research the factors that lie behind the increase in volume of legally aided criminal cases in 2010/11 with particular reference to the case mix.

If such research were to reveal a tendency to grant legal aid in circumstances where it would not previously have been available, then it will be necessary to consider corrective action including the possibility of stricter statutory controls or changing the locus of decision-making.

13. We recommend that the Department of Justice and Legal Services Commission plan to implement a fixed means test in the magistrates’ courts. They should pay particular attention to introducing efficient business processes, maximising the use of IT to keep running costs to a minimum, and ensuring that the business of the courts is not impeded.

14. While the current arrangements for consideration of means continue in place, responsibility for deciding on sufficiency or otherwise of means should remain with the judiciary. When fixed means testing is introduced, responsibility for the decision should pass to the Legal Services Commission or to court based staff acting on behalf of the Commission.

15. We suggest that, as part of the planning for implementation of the fixed means test, the suitability and operation of the provisions in this legislation for defraying the costs of privately funded defendants who are acquitted or where the case is dropped should be researched.

16. We suggest that the Department of Justice consults with the legal profession and the judiciary, (from the case management perspective), about the production of clear objective criteria for identifying those cases in the magistrates’ court which merit certification for counsel by virtue of their unusual gravity or complexity; and about moving the locus for taking decisions on certification to an adjudication function in the Legal Services Commission.

17. We recommend that the review should analyse the cause of the rise in average case costs for magistrates’ courts cases and, to the extent that the increase is attributable to the 2009 Rules, some corrective action is considered.
18. We recommend that the review of the operation of the 2009 Rules should have broad terms of reference, enabling it to take account of the impact of other changes coming out of our review and the model of service delivery in the magistrates’ court.

**Crown Court**

19. We believe that lessons should be learnt from the experience of VHCCs, including the need for legislation and rules concerning fee levels to be drafted with objective and tight criteria to govern decision-making and, where this can be achieved consistently with the interests of justice, for decision-making with financial implications to be located with the spending body.

20. We believe it important that the workings of the 2011 Rules and any implications for access to justice and the provision of quality defence services are reviewed as soon as sufficient numbers and a representative mix of cases have passed through the system to make such a review meaningful.

21. The draft of the regulations relating to certification for two counsel will need to be tight and precise if it is to have the intended consequence of limiting the assignment of two counsel to those exceptional Crown Court cases where they are needed for purposes of effective representation and/or equality of arms with the prosecution.

**Election for Trial at the Crown Court**

22. We support the retention of the option of trial by jury for defendants accused of offences carrying a maximum sentence of more than six months imprisonment.

**Police StationAdvice**

23. We confirm our view, expressed in the Progress Report, that there should be no change to the arrangements whereby legal aid is available to persons held in custody by the police to enable them to be advised in person or over the telephone by a solicitor of choice, provided that the solicitor concerned meets any accreditation requirements.

24. We suggest that, consulting the Law Society, the Commission should conduct a review of PACE payments with a view to setting fixed fees and (if possible) establishing arrangements for verification of claims based on access to police custody records through IT; in circumstances where attendance is not judged to be necessary, the arrangements should encourage the provision of advice over the telephone.

25. The review should be extended to include criminal advice outside police stations given the importance of providing access to those who may not have chosen to seek advice in the police station or who may have been summonsed as opposed to being charged and arrested.

26. We recommend that the Law Society should assist the Legal Services Commission in drawing up duty rota of suitably experienced solicitors across Northern Ireland willing to provide police station advice and that arrangements should be made to ensure availability at all times.
27. We recommend that a demonstrable record of criminal work and commitment to ongoing training and development in that field should be a pre-condition of membership of an official duty solicitor rota.

28. The review of legal aid arrangements for PACE advice should include consideration of whether all public funded work in this area should be subject to accreditation requirements.

**Early Guilty Pleas**

29. We recommend that the case for and against introducing a single fee covering pleas and contests is researched as a matter of urgency.

30. Pending decisions based on the outcome of such research and consultation, Northern Ireland should retain the three levels of fee for guilty plea 1, guilty plea 2 and a contest, provided that the differential between them fairly reflects the amount of work likely to be involved and is not so great as to provide an incentive to prolong cases unnecessarily.

**Contributions towards the cost of criminal legal aid**

31. We recommend that regulations are prepared and made as soon as possible to enable recovery of defence costs orders to be made and to establish procedures for identifying those defendants who have sufficient funds to be made subject to such orders in the event of conviction.

32. We suggest that consideration is given to whether there might be scope for using assets frozen under Proceeds of Crime legislation to defray legal aid costs and for the legal aid fund having the first charge on any assets that have been confiscated.

33. The option of developing an offender levy to contribute to the legal aid fund should be held in reserve for further consideration in the event that additional budgetary pressures arise.

**Alternatives to Prosecution**

34. We recommend that high priority is given to developing guidance for the use of fixed penalty notices and the Code of Practice on conditional cautions as required by the legislation. And we suggest that urgent consideration is given to legislating to enable the introduction of prosecutorial fines in Northern Ireland and to assessing whether other direct measures of the type deployed in Scotland might be applicable in this jurisdiction.

35. Legal aid should enable the provision of advice to financially eligible people who may have been offered fixed penalty notices, conditional cautions or other diversionary interventions, but should only be available to support legal representation at court if it would have been available in the event of the matter being prosecuted in the first place.

36. Northern Ireland is well advanced in the areas of restorative justice and youth conferencing for children and young people, pre and post court, and we would commend the continuing development of these services.
37. We suggest that the Department of Justice reviews the procedures for offering diversionary measures, including restorative youth conferencing, to children and young people to ensure that they have access to appropriate advice and are in a position to give informed consent to such measures. Legal advice to children and young people offered diversionary interventions should be available on the same basis as for adults.

**A Public Defender Service for Northern Ireland**

38. For the present we believe there to be particular benefits for this jurisdiction in relying on criminal defence services provided by the independent private sector legal profession with both real and perceived independence from the state.

39. In the interests of ensuring a supply of quality legal representation it is right that the Department of Justice should undertake contingency planning to fill any gaps in supply.

**Civil legal Aid**

40. We endorse the approach to prioritisation proposed for the draft Funding Code with its classification of special children order proceedings where the child is at risk and of cases where the client’s liberty is at stake as being top priority; while high priority matters would be social welfare, domestic violence proceedings, other cases involving the welfare of children and cases involving allegations of serious wrongdoing, abuse of power or breach of human rights by public authorities.

41. While we do not suggest a further legal needs survey now, we do believe that, once any new initiatives have bedded in following our review, a further survey benchmarking against the 2006 research would be informative in assessing outcomes.

42. The original research into legal needs (which was concerned with adults) should be supplemented now with a researched assessment of the legal needs of children and young people, paying particular attention to accessibility of advice and assistance, the way in which it is delivered and their experience of the justice system as it affects them.

**Advice, the Voluntary Sector and Partnership**

43. We do not recommend that full legal aid be made available to users of tribunals, other than those where liberty is at stake (such as the Mental Health Review Tribunal), but we do propose that advice and assistance in case preparation for, and where appropriate help at, tribunals should be included in the consideration of the mixed model for advice and assistance.

44. We believe that the advice services provided by the Housing Rights Service should be sustained in place and consideration given to whether lessons learnt from its operation might be applicable in other contexts.

45. The Law Society should be proactive in operating its waiver in a way that facilitates voluntary sector bodies in employing solicitors able to give advice to third parties, while ensuring that the necessary client protection arrangements are in place.
46. Subject to the exclusions contained in Schedule 2 of the Access to Justice (NI) Order 2003, it should remain possible for a person, regardless of means, to secure advice and assistance on any point of Northern Ireland law provided that, if the advice is publicly funded, it secures demonstrable benefit for the client who, if in funds, could have been expected to want to pay for it privately.

47. We recognise that if sufficient savings cannot be found elsewhere our ambition will have to be modified and lesser priority areas such as immigration (but not asylum, which is concerned with life and liberty), contract and criminal injuries compensation may have to be excluded from all forms of advice and assistance for the purposes of legal aid.

48. We would expect those giving help and advice on private law family issues to be familiar with, and actively to promote, mediation and other forms of alternative dispute resolution if, and only if, initial attempts to resolve issues informally do not work.

49. The extent to which advice and assistance is available at the early stages of such cases should be considered in the context of the new insurance based and conditional fee arrangements that we will be proposing; we do not believe that money damages cases will be suitable for a generic legal help or green form scheme if our recommendations on money damages are accepted.

50. While it is reasonable that people should be able to approach solicitors for advice on any legal implications of neighbour disputes, our emphasis will be on seeking mediated solutions through community based dispute resolution initiatives; it is important that solicitors, as with other advice providers, are equipped to sign-post clients to appropriate services.

51. In the employment field, it is particularly important that advice takes account of the Department of Employment and Learning and Labour Relations Agency initiatives aimed at encouraging the resolution of issues before the tribunal stage.

52. There is a case for publicly funded advice and assistance on legal issues arising from benefits, debt, housing and education to be provided to financially eligible people by expert suppliers through contracts or grants administered by the Legal Services Commission.

53. We suggest that all recipients of funding for legal advice services, including solicitors and the voluntary or private sector, should commit to providing a limited period of free advice to all who approach them regardless of means.

54. We believe it reasonable to review the structure and rates of payments for legal advice and assistance, or legal help as it may become, to ensure a system that is straightforward to administer and, through standard rates, fairly reflects the level of service in cases that extend beyond the period of free advice.

55. We recommend that the mechanisms whereby solicitors, and in future other sectors, assess financial eligibility for advice and assistance are reviewed in order to ensure that they are manageable and provide sufficient assurance from the accounting officer’s perspective.
56. We suggest that the green form is redesigned in consultation with the Law Society to ensure that it meets the needs of the Commission to verify that work has been properly done and with clear information on outcomes – while at the same time being manageable for the supplier.

57. We believe that the Department of Justice should be a member of the DSD led Government Advice and Information Group. They should prepare guidance on the availability of sources of generalist and specialist advice for use by advice organisations and solicitors in considering whether to refer or signpost clients to other providers appropriate to their needs.

58. The Department of Justice and Legal Services Commission should be open to the possibility of piloting new ideas to assess their impact (the Housing Court Representation initiative is an example of what can be achieved) or identifying local projects to grant aid as in Scotland.

59. We conclude that the availability of a menu of ADR mechanisms for use in differing types of legal dispute enhances access to justice and should be promoted by the department and stakeholders in the justice system.

60. ADR is suited to those cases where there is a reasonable prospect of the parties being able to seek an agreed way forward and where they both consent willingly to going through the process.

61. We believe it important that, subject to certain exceptions, discussions within the confines of an ADR process are treated as privileged by the parties and the mediator and not to be disclosed, except by agreement between the parties before or after the process.

62. We suggest that the current legal position on privilege in these circumstances is confirmed and that, if necessary, legislation is enacted.

63. While we see no reason for the mediator or conciliator being legally qualified, a number of considerations point to the desirability in many cases of the parties having access to legal advice at appropriate points during the ADR process.

64. Before committing to funding family mediation under Family Help or through a bespoke funding regime, the Legal Services Commission and Department of Justice should, in consultation with stakeholders, develop a funding scheme and financial model so that potential costs can be assessed.

As part of this modelling, options for controlling costs should be considered, including cost capping and/or fixed fees and reduced payments in cases that are not resolved.

65. We endorse the view that there should be a coordinating body with membership drawn from the principal suppliers of mediation services, public bodies with a funding role and relevant training providers, with a remit to promote ADR and help ensure that the right infrastructure is in place to support it.
66. We recommend that consideration is given to a number of other initiatives aimed at enhancing the use of ADR:—
- Establishing a pilot family ADR scheme, perhaps associated with a particular court.
- Making it a condition of legal aid in particular categories of case that the options for ADR should have been considered.
- Financial incentives to encourage mediation in publicly funded cases.
- All government departments in Northern Ireland to commit to taking an active role in adopting and promoting ADR mechanisms to resolve disputes with the public and suppliers – this should be incorporated in staff training and covered in annual reports.

67. We recommend the following action to be developed and overseen on a partnership basis as part of the community safety strategy in Northern Ireland:—
- Map the coverage of community based dispute resolution schemes and their funding arrangements, and develop a funded plan to fill gaps.
- Agree proportionate mechanisms to secure quality control, training and accreditation of those providing mediation at the local level.
- Develop referral mechanisms so that appropriate cases of neighbourhood dispute, anti social behaviour or harassment are routed through such schemes for resolution.
- Any grants of legal aid to pursue injunctions in relation to neighbour disputes should be conditional on genuine attempts at mediation having been made and on the case having merit – and, where legal aid goes to the complainant, the objective should be to secure an enforceable court order, as opposed to negotiated settlement thus avoiding repeated court appearances.
- The police and other statutory agencies would issue guidance supportive of this approach and Community Safety Partnerships would actively promote mediation as a means of resolving neighbourhood disputes.

**Family and Children**

68. We endorse family group conferencing as a partnership based means of identifying and resolving issues in suitable cases in the interests of the child outside the court environment.

69. Legal aid should continue to be available to children, parents and anyone exercising parental responsibility, without reference to means or merits, in specified public law children cases.

70. We do not think that anyone apart from those with parental responsibility and the child should be granted legal aid in public law cases other than in circumstances where they can clearly demonstrate that they have a distinct and different (from other parties) interest in relation to the welfare of the child.

71. We support the Guardian Ad Litem Agency’s wish to depart from the existing Children Order Panel of solicitors and establish a smaller specialist group from which to appoint.
72. We recommend that the Legal Services Commission engages with the Guardian ad Litem Agency with a view to finding ways of securing effective representation for children in public law cases, while significantly reducing the level of spend.

73. We support the idea that a lead solicitor, probably representing the interests of the child on behalf of the Guardian ad Litem, should have responsibility for securing the services of any expert witness required by the court. Where it is not possible to identify a suitable expert within this jurisdiction, the presumption should be that evidence will be given by video link.

74. Where a single expert is appointed, we would expect costs to be shared between the parties.

75. We suggest that requests for counsel in the Family Proceedings Court in public and private law cases should be refused other than in the most exceptional circumstances where, for example, there may be related criminal proceedings concerning allegations of serious sexual or physical abuse.

76. If a solicitor, competent in the area of law, wishes to take carriage of a case in the Family Care Centre without briefing counsel, (where counsel would otherwise have been authorised), then remuneration from the legal aid fund should be uplifted by a percentage to be agreed to reflect the additional work and responsibility.

77. We do not believe authorisation should be granted by the Legal Services Commission to fund senior counsel in the Family Care Centre other than in the most exceptional circumstances, to be authorised by a member of staff at director level in consultation with a legally qualified member of the Board. For the High Court, authorisation for senior counsel should be granted only where there are complex matters of law or fact on an issue affecting the applicant, the case is wholly different from the norm at that level of court and it is judged that the issues could not be reasonably presented by junior counsel.

78. The Commission should explore the extent to which, when it proves necessary to brief senior counsel, it would be reasonable for the senior to take the case alone, without the support of a junior. These recommendations, on the use of senior counsel, are also applicable in the generality of civil cases and we suggest that the matter is consulted upon at the earliest opportunity.

79. While we recommend that private family law should remain within scope for the financially eligible, legal aid needs to be structured in a way that facilitates resolution but does not involve the taxpayer in funding parties to use the courts as a means of perpetuating and exacerbating disputes.

80. We suggest a structure for legal aid that incorporates incentives for the parties and their solicitors to secure early agreement on the key issues, while incorporating disincentives against protracted court proceedings and against issues being brought back to court unnecessarily.

81. It will be necessary to research and provide guidance on how to advise clients on the respective merits and availability of mediation and collaborative law.
82. Once agreement is reached or a court order made legal aid would not normally be available to fund further proceedings to reopen the issue, unless directly related to domestic violence or the safety of children.

83. If, exceptionally, legal aid is made available to re-open matters, an option for consideration is a requirement that the court should consider making orders for a contribution towards costs by any party held to be behaving unreasonably. Solicitors would need to warn clients of such a possibility. Where a party is reopening a case with privately funded legal representation and the other party would qualify for legal aid, then it should be open to the court to order the first party to fund the other’s equivalent representation.

84. We do not propose to make recommendations for immediate action with regard to the representation of children in private law proceedings, except to suggest that Court Children’s Officers could play a valuable role in the Family Care Centre if the resources were available to deploy them there; but the arrangements for safeguarding children’s interests and enabling them to be heard in private law cases could be included in matters to be covered in the policy review of family justice that we recommend later (89 below).

85. Fees paid out of the legal aid fund should reflect the nature of the work rather than the tier of court. In particular, we suggest that undefended divorces heard in chambers in the county courts or the High Court would normally require a minimum of legal input and certainly do not warrant the presence of counsel. An appropriately pitched standard fee should suffice. Further, we endorse the view that legal aid should not normally be available to support contested divorce proceedings where a “no fault” ground is available or where it will become available within a reasonable timeframe.

86. We see the Legal Services Commission review as an opportunity to develop a system of standard fees in family and children cases that is coherent and applies consistent principles across the court tiers.

87. We would expect a review of remuneration to work to the “swings and roundabouts” principle in a way that might eliminate the need for Article 3 certification in the Family Care Centre. The remuneration review should consider cost capping for Family Proceedings Court cases or other means of ensuring that costs do not reach excessive levels at the FPC level, especially in cases that could be referred at an earlier stage to the Family Care Centre for resolution.

88. There will have to be some reduction in average payments for particular categories of family work if £5 million is to be saved from the projected budget for civil legal aid by 2014/15.

89. In our view, the time is right for a fundamental review of family justice in Northern Ireland which could be carried out under the auspices of the interested departments and/or the Northern Ireland Law Commission. Therefore, we recommend that the fundamental review commences as soon as the Norgrove review reports and that the review should be time limited with clear terms of reference.

Money Damages
90. We suggest that the Department of Justice should take steps to heighten awareness of the potential role of Legal Expenses Insurance.

91. Most money damages cases, except for the more complex clinical negligence cases, should be removed from the scope of legal aid, provided that an alternative means of securing and improving access to justice in these cases can be implemented.

92. We believe that introduction of conditional fees in Northern Ireland through commencement of Article 38 of the Access to Justice Order (NI) 2003, together with implementation of the relevant recommendations in Lord Justice Jackson’s Review of Civil Litigation Costs, would offer a sound basis for securing and improving access to justice in money damages cases.

93. We are attracted to aspects of the insurance based solution in money damages cases, but think that more details need to be fleshed out on its workings and that full consultation should take place before decisions are taken on whether or not to adopt it.

94. We suggest that the ban on referral fees in Northern Ireland is maintained.

95. While these matters (concerns about a compensation culture and fraud) are not strictly within our terms of reference, it is important that they are taken into account in any development of new approaches to funding money damages cases through appropriate consultation with stakeholders, including relevant public authorities and the insurance industry.

96. We suggest that, at least until new arrangements for funding money damages cases have bedded down, clinical negligence cases involving quantum at a sufficient level to bring them into the High Court jurisdiction in Northern Ireland should remain within the scope of legal aid.

97. We recommend that, if the more serious and complex clinical negligence cases remain within scope, a panel of solicitors should be established, suitably accredited to take carriage of legally aided cases in this area of law.

98. We recommend that DHSSPS establishes the applicability to Northern Ireland of Department of Health work in England and Wales to consider changes to the NHS Redress Act 2006 and to improve the fact finding phase at the early stages of claims to facilitate early resolution where appropriate.

99. We suggest that, in the light of comments made to us, consideration is given to case management tools in the county courts, processes to secure the early exchange of information between parties, appropriate details on civil bills and defence responses and the use of incentives to encourage the early settlement of cases where this is possible.

100. We suggest that the DoJ keeps in touch with the evaluation of the RTA personal injuries scheme being conducted by the Ministry of Justice to assess whether it contains lessons for Northern Ireland.

**Administrative Law**

101. While we remain of the view that it is not feasible, or desirable, to offer publicly funded representation in all social security appeal cases, we do
suggest that the contracts or grants for advice and assistance in welfare matters should include provision for enhanced advice and advocacy services in this area as well as at SENDIST hearings. The relevant government departments should contribute towards such funding, not least because it would give them a stake in seeking to secure early resolution of issues, for example through ADR.

102. If our recommendation about departments committing to ADR is accepted, the commitment should explicitly include the establishment and promotion of mechanisms to secure early dispute resolution in cases that might otherwise go to tribunals.

103. If legislation is introduced concerning mental capacity with implications for the Mental Health Review Tribunal, the responsible department should work with the Department of Justice to carry out a legal aid impact assessment and should be responsible for providing additional funding required to cover any expected increase in spend on legal aid.

104. We recommend that consideration is given to introducing legislation that would prevent apologies or offers of redress made during an attempt to secure a negotiated settlement, a mediation or an Ombudsman investigation from being used in subsequent court proceedings to imply an admission of negligence or wrongdoing.

105. It would be worth exploring whether, if the Prisoner Ombudsman were resourced to deal with time bound issues on a fast track basis, that might reduce the number of prisoner cases going to judicial review.

106. We see access to judicial review as of central importance in maintaining the rule of law and safeguarding the individual against arbitrary or perverse actions by public authorities; as such it is a priority for remaining within the scope of legal aid.

107. The decision on whether to grant legal aid in judicial review cases should take account of whether the opportunity has been taken to resolve the matter by other available means prior to seeking leave to make a full application.

108. The merits test proposed in the Funding Code meets our concern to ensure that public funding for judicial review is concentrated on matters of genuine import.

109. We recommend that the Department of Justice considers whether proposals to restrict the granting of legal aid for judicial review in certain immigration and asylum cases in England and Wales should also apply in Northern Ireland.

110. We suggest that the Legal Services Commission (or the Courts and Tribunals Service in respect of all judicial reviews, whether publicly funded or not) should develop case codes and recording systems that enable them to report annually on the numbers of judicial reviews taken out against each public agency or department and the nature of the issue.

**Exceptional Grants and inquests**

111. There should be an exceptional funding scheme for excluded cases where, in the particular circumstance of the case, failure to do so would be likely to
result in a breach of the individual’s right to legal aid under the Human Rights Act 1998 or European Union law.

112. We suggest that the Department of Justice consults the authorities in England and Wales and gives further consideration to how the exceptional grant provision might be framed in such a way as to retain criteria that are tight and objective while protecting the individual who is the subject of proceedings initiated by an economically more powerful plaintiff on a matter that is out of scope but is of fundamental importance to that individual.

113. We recommend that decisions on exceptional grant should be the responsibility of the statutory appointee at the head of the legal aid delivery organisation without reference to the Minister or any political body.

114. We agree that there should be explicit recognition of a presumption that where Article 2 issues are at stake, the immediate family of the deceased would receive legal aid to support legal representation at the Coroner’s Court.

115. Decisions on legal aid for inquests should be entirely for the legal aid authority without Ministerial involvement; transparent guidelines should be drawn up defining what is meant by “immediate family” and to ensure that speedy and fair decisions are taken on financial eligibility.

Remuneration in non-family civil cases

116. As with family cases, we believe that if there is to be control and accountability in relation to expenditure, the Commission's objective should be to develop a codified standard fee structure for solicitors and barristers to be formalised in a Remuneration Order, covering all civil cases at the different tiers of court.

117. In the short term, while the necessary research and preparations are taking place, we recommend that the Commission should determine an hourly rate which it is prepared to pay in publicly funded taxed cases and require that full records are kept of the work undertaken by solicitors and barristers.

118. If it proves necessary (as we think likely if the current scope of access to justice is to be retained) to aim for a quantified reduction in remuneration levels in civil payments, we think that the exercise should be carried out by examining each area of work on the merits, rather than by seeking a blanket across the board percentage reduction.

Expert Witnesses

119. We recommend that the Department of Justice allocates a dedicated resource to the development and implementation of a strategy for securing expert witness evidence for the courts on a basis that secures value for money, consulting with stakeholders as appropriate.

Financial Eligibility for civil legal aid

120. While endorsing the objective of simplifying and harmonising the rules on financial eligibility for Northern Ireland, we believe it essential that resulting changes should contribute towards the objective of bringing spend within
budget and that this should be a key objective of the financial modelling. We suggest that the following options should be considered:-

- Benchmark the upper income and capital limits with England and Wales.
- Include housing equity in the calculation of capital, subject to a £100,000 disregard.
- For people in receipt of passported benefits (which automatically enable them to pass the income test for eligibility), reduce the capital limits for eligibility to the same level as for those not in receipt of such benefits.
- Where disposable income falls between the upper and lower limits and contributions are required, introduce payment bands whereby the proportion of income over the lower limit to be paid in contributions increases as the upper limit is approached.
- Extend the liability to make monthly contributions to cover a minimum of twelve months or the duration of the case where it lasts for more than twelve months.
- Remove the contributions requirement from the limited number of advice and assistance applications that can be expected in future.
- Provide for a small up front contribution to be paid to the Commission by all applicants (other than those in case types, such as the more serious public law children cases, where there is no means test), including those on passported benefits, before legally aided work commences.
- Where feasible, introduce standard allowances and disregards and reduce the need to exercise discretion to meet specific individual circumstances.

121. We think it important that the applicability of the Scottish civil legal aid eligibility and contributions arrangements to Northern Ireland is included in the modelling exercise, focusing on the consequences of raising eligibility limits while significantly increasing levels of contributions for those at the higher levels of disposable income.

**Appeals**

122. We endorse the proposed funding code procedure whereby the solicitor and client will be notified of a refusal of legal aid together with a brief statement of the reasons and the process whereby representations can be made to the Commission to have the decision reviewed.

123. If, following review, the original decision is affirmed (with reasons) there should be the opportunity to mount an appeal to a panel that might consist of a senior member of staff and a legally qualified independent member, who could be drawn from the board of the Commission. We envisage such appeals being processed on paper rather than at hearings. In the event that the appeal raises issues of policy or particular difficulty, it could be referred to an appeals panel of the Board.

124. Given the scope for speeding up decision-making and making savings in running costs we do not think that these changes need await implementation of other aspects of the reform programme; they should be pursued as a matter of priority.
Scope of civil legal aid

125. If budgetary pressures mean that some other case types have to be taken out of scope of legal aid, we would take into account considerations such as vulnerability, availability of advice and help from other sources and complexity and have identified the following as candidates:-

- Consumer issues and general contract.
- Criminal injuries compensation.
- Debt, unless the home is at risk.
- Immigration.
- Tort, including nuisance and injunctive relief, (except in the protection from harassment cases where mediation has failed).
- Other miscellaneous matters such as probate.

Funding Code, Statutory Charge and the Reform Agenda

126. We see the continuation of the statutory charge and the completion of work on financial eligibility, a registration scheme and remuneration as essential components of the future framework for publicly funded legal services.

Service Providers, Quality, Regulation and Value for Money

Procurement

127. In the mixed model of service provision, it is right that the Legal Services Commission should be prepared to utilise the procurement options that have been opened up to it by the Access to Justice (NI) Order 2003, namely payment of fees for work completed by private or voluntary sector lawyers as now, contract, grant and best value tendering.

129. We do not think that a sufficiently strong case has been made out for moving direct to contracting and best value tendering for the generality of civil and criminal services. However, this option (contracting) should be kept under review in the light of evolving circumstances and the Commission should be alert to the opportunities afforded by contracting to address short term pressures or supply issues that might arise.

130. The remuneration structure and levels for publicly funded work should be set on a basis that provides reasonable margins for well run businesses that take advantage of efficiencies that can be secured from specialisation, rationalisation, economies of scale and new ways of delivering services.

Alternative Business Models (ABMs)

131. While we have not addressed alternative business models in sufficient depth to make firm recommendations about the issue, Ministers may wish to give it further consideration in the future. At the very least the experience of other jurisdictions should be closely watched and the question of ABMs revisited if it becomes apparent that they could bring advantages in the Northern Ireland context.
Quality

132. In order to comply with Articles 11(5) and 21(4) of the Access to Justice (NI) Order 2003 when those provisions are commenced, the Commission should follow through on its project to put in place systems to assess the quality and value for money of legal aid services funded from the public purse.

133. In Northern Ireland the statutory basis for quality assurance will be achieved through commencement and implementation of Article 36 of the Access to Justice (NI) Order 2003 which provides for the registration of persons eligible to provide legally aided services together with a supporting code of practice setting out the conditions of registration.

134. We think it important that a clear timeline is fixed for consulting on converting this voluntary scheme for registration to one with statutory backing and that the scheme should be extended, on a proportionate basis, to include standards of service relating to the quality of advice and representation.

135. The Legal Services Commission should develop a cost effective process for conducting file checks and audits on samples of files from selected practices to ensure that standards are being met in accordance with the Code and, in parallel, to verify that payments have been properly made for completed work.

136. We have some reservations about the potential cost of a comprehensive peer review scheme in Northern Ireland but suggest that the Law Society engages with the Legal Services Commission on how a scheme might be piloted alongside the audit responsibilities of the Commission.

137. Registration should apply in relation to all providers of publicly funded legal services, including the Bar.

138. It may be possible to link registration of barristers to the practising requirements laid down by the Bar Council, provided that the Commission can be satisfied as to the mechanisms for sustaining quality after qualification.

Regulation

139. We believe it urgent that the government in Northern Ireland comes to a view on whether to implement the recommendations of the Bain Review, with or without modifications to enhance the separation of regulation from representation, and proceeds to legislation.

Advocacy and the Legal Market Place

140. From the perspectives of value for money, competition and client choice we would endorse the recognition of solicitor advocates in terms of enhancing their rights of audience and introducing appropriate remuneration arrangements in legally aided cases.

141. The terms of the Law Society’s Regulations on solicitor advocacy required by the Act, and subject to DoJ approval, will be of critical importance in safeguarding client choice and avoiding conflict of interest. From a value for money perspective we would add the following points in the context of legal aid:-
• The payment of enhanced fees for solicitor advocacy services should be limited to cases where, but for these provisions, counsel or separate representation would have been certified.
• Where a solicitor takes a case and provides advocacy services, either directly or through his/her firm (rather than briefing counsel or a solicitor advocate from another firm) the degree of enhancement of fees should be reduced as there will be less preparatory work for the advocacy element than if he/she were starting afresh.

142. We recommend that consideration is given to how mechanisms might be developed for providing a degree of quality assurance for advocates in this jurisdiction that would be equally applicable to barristers and solicitors. This throws into sharp relief the importance of an appreciation at a strategic level of the impact of economic developments and changes to legal aid on the legal market place and in particular of how to sustain into the future the supply of quality advocacy, especially at the highest levels.

Structures for Delivering Legal Aid and developing Policy on Access to Justice

143. Arrangements were put in place to monitor the implementation of the Landscape Review recommendations and those flowing from the pre-devolution exercise; we have not identified significant issues that are outstanding or are not being addressed elsewhere (including through our review).

Options for Change

144. There are two key criteria that we believe must be part of the arrangements for delivering legal aid and developing policy on access to justice:-
• Individual decisions on legal aid, within the overall policy set by government, must be made independently of government and of any sectional interest.
• Responsibility for policy development and advice to government on policy matters relating to access to justice, including policy on civil and criminal legal aid, should be brought together in one location with direct access to the Minister.

Proposed delivery structures

145. We recommend that all aspects of policy on criminal and civil legal aid should become part of an Access to Justice Directorate or Division within the core of the Department of Justice. Further, the legal aid delivery arm should become an executive agency within the Department and the Chief Executive should be a statutory appointment responsible for decisions on legal aid applications without any involvement on the part of the Minister, any political institution or staff in the core of the department. It would be for the Minister and as appropriate the Assembly to legislate and issue guidance on legal aid matters but not to play any part in decision-making on individual cases.

146. We suggest that consideration is given to legislating to bring the work of the Legal Aid Assessment Office in house within the Agency, together with an appropriate transfer of funds and a secure in house IT link to access benefits data.
147. We do suggest that consideration is given to statutory provision for a small advisory board with the following functions:-
   - Providing assurance on the independence of decision-making in the Agency.
   - Acting as an appeals panel for complex or difficult cases.
   - A source of independent advice to the Minister on legal aid and access to justice matters.

148. We suggest that sponsorship of the Agency should be the responsibility of that part of the DoJ’s Access to Justice Directorate that is responsible for legal aid policy. The framework document should ensure that financial monitoring, forecasting and the costing of policy initiatives are carried out on an integrated basis between the Agency and the core department, working to one agreed financial model.

149. One area that we should mention where we believe a major one-off investment to be essential is IT.

150. There has to be a rigorous review of potential efficiencies, business processes, posts, structures and staff gradings within the Commission.

151. We recommend that the Department of Justice carries out the necessary planning for structural change as a matter of priority and implements the recommended changes at an early legislative opportunity.

Policy

152. We have recommended the integration of legal aid policy and sponsorship of the delivery agency within a strong access to justice directorate in the Department of Justice. We understand that some civil justice responsibilities currently undertaken within DFP, including private family law and implementing European directives on matters such as ADR, will also be brought into this directorate and strongly support that move.

153. The Access to Justice Directorate should as a matter of priority ensure that legal aid impact assessments are drawn up as a matter of routine alongside financial memoranda and regulatory/equality impact assessments whenever new policy or legislation is prepared. Where an increase in legally aided cases is predicted, then the department sponsoring the legislation or policy change should be responsible for making the necessary transfer of resource into the legal aid fund.

154. We suggest that consideration is given to whether responsibility for the legislative framework covering the legal profession and its regulation should pass to the Department of Justice where it would most sensibly be located in the Access to Justice Directorate.

The Civil Justice Reform Group and a Civil Justice Council

155. We do see merit in the establishment of an inter-disciplinary forum through which civil justice matters can be addressed and sub groups established to progress particular issues.
We suggest that the DoJ engages with the judiciary about how a forum might be constituted in a way that does not create an excessive burden of time or cost, focuses on action rather than becoming a talking shop and respects judicial independence.

Living within Budget and the Options for Further Savings

Our judgement is that concerted action as recommended in this report will at least make a major contribution towards – if not achieve - bringing spend within budget by 2014/15, provided that assumptions on projected volumes of cases and the modelling supporting the impact of criminal reforms hold good. We suggest that a group of financial and operational specialists be established to research and refine the impact of these measures with a view to advising on the detail of how far they will go towards achieving the necessary savings.

The potential impact on costs for privately and publicly funded cases should be a consideration in identifying areas of law and procedure to be subject to policy reviews.

We support the strategic recommendations of the criminal justice inspectorate on the procurement of legal services and raise the question of whether this is a matter that has wider implications for government going beyond the criminal justice system.
ORAL STATEMENT ON ACCESS TO JUSTICE: 13 SEPTEMBER

Mr Deputy Speaker,

The devolution of justice powers offers Northern Ireland many benefits and opportunities. Among these are the opportunities to identify local solutions to local needs, to look afresh and adopt different approaches that will serve our community better. Ultimately, it gives us the opportunity to reshape our justice system to fit the needs of Northern Ireland.

With that in mind, and as Members of this Assembly will know, I indicated on 7 June my intention to commission a fundamental review to help develop our thinking on how best to ensure access to justice for the least well off in our society. At that time I undertook to set out my plans for that review to the Assembly, and this statement is intended to fulfil that commitment.

I want to build a system of justice in Northern Ireland that will meet the needs of everyone. In criminal cases we need, and deserve, a system that works for all – victims, witnesses and defendants, and which gives everyone confidence that the system works. I welcome the announcement by the Lord Chief Justice last week that he wants to hear what people think about sentencing for certain types of crimes, and I support his initiative. We also need and deserve a civil justice system that provides an effective and accessible way of resolving many different kinds of legal disputes - and of course both criminal and civil cases need to proceed without delay.

Members will be aware that work is already underway to address the urgent need to align legal aid expenditure with the available budget, and in the coming weeks I intend to commence public consultation on proposals to achieve that. I am grateful to both the Bar Council and the Law Society for the degree of engagement that they have entered into on that issue, engagement which has helped us to develop proposals that are “home grown” and provide a best fit for Northern Ireland. I hope that that consultation exercise will provide an opportunity to achieve the best possible degree of agreement on how to secure the reduction in expenditure that is required. I also welcome the Bar Council’s initiative to encourage its members to undertake cases under the existing arrangements, thereby avoiding any disruption in the Courts.

But the review that I am announcing today is more fundamental than an exercise in cost control. Rather, it is an exercise to examine how we can best help people secure access to justice.

Fair and effective access to justice is an essential element of getting justice right, critical to building confidence and an important part of our vision for a future justice system. Our present system is built around providing financial assistance to those who could not otherwise find the money to pay for legal representation. But there may be other approaches, and there may be better ways of using the funds available.

Deputy Speaker, the Terms of Reference that I have set for the Review are as follows:

To review legal aid provision in Northern Ireland and to develop proposals to improve access to justice which will:
• ensure that defendants have adequate representation to secure the right to a fair trial in criminal cases;

• in civil cases provide adequate, appropriate, efficient and cost-effective mechanisms for resolving legal disputes, whether by action in the courts or otherwise;

• examine previous review work to determine what recommendations and proposals remain relevant;

• examine what scope there is for alternative approaches and structures, as set out in my 7 June speech;

• make proposals for an efficient and cost-effective system of administration to develop policy and support access to justice;

• make proposals to achieve value for money in the use of public funds within the available budget, including identification of possible future savings to reduce the legal aid budget.

I am pleased to inform the Assembly that the review will commence today, and that it will be carried out by Mr Jim Daniell, who is standing down from the position of Chairman of the Legal Services Commission to lead the review. As members of the Assembly will be aware, Mr Daniell previously chaired the Review of Criminal Justice in Northern Ireland which flowed from the Good Friday Agreement. That, and his more recent experience of chairing the Northern Ireland Legal Services Commission, makes him the ideal person to carry out this review. While I have set the terms of reference for the review, his review will be independent.

I have asked for a preliminary report by the end of February 2011, with a final report by the end of May 2011.

I particularly want the review to consider new ideas; new ways of doing things, thinking that is radical and innovative. I want to look at how we help people solve problems and disputes without necessarily bringing those disputes into the courts, and how we can support people through the justice process. While we must ensure that access to legal representation will always be available to those who need it, I believe that we should try to find ways of avoiding the costly, adversarial and often stressful experience of a court hearing, in favour of alternative methods of resolving disputes.

I want the review to consider ideas and proposals – and constructive criticism – from as many people, groups and organisations as possible. I know that the voluntary sector will have an important contribution to make to this review, as will the legal profession and the statutory agencies involved in the justice system. But I want everyone to have their say, because everyone should have a voice in how the justice system works.

Deputy Speaker, the Review of Access to Justice will play an important part in developing our vision for justice in Northern Ireland, and in securing justice for all. I look forward to bringing its conclusions to the Assembly in due course.
Justice for all – access to justice

And “Justice for All” means more. It means making justice accessible for all, and ensuring that we remove any barriers that prevent that. Much attention has been paid to the very necessary efforts that are being made to bring the costs of our legal aid system under control, and if that was necessary last year it is all the more necessary in the current financial climate.

The legal aid system in Northern Ireland has operated in essentially the same way since the 1960s. What has changed over the years, however, is just how expensive this system has become. Last year, more than £100m was spent on the legal aid system. Far too much of the budget is now being spent on comparatively few cases.

The recent phenomenon of Very High Cost Criminal Cases – in which less than 1% of the cases consume almost 30% of the total legal aid budget – is unsustainable and I am determined to bring it to an end. I will ensure that that will be the case, using scarce resources wisely.

This is why I have already indicated that I will bring forward a range of reforms to the legal aid system, with the objective of aligning legal aid expenditure with the available budget.

But simply reducing the cost of the current legal aid system would be a missed opportunity. For many years the operation of the legal aid system in Northern Ireland has developed in tandem with the system in England and Wales. But devolution provides the opportunity – for the first time in a political generation – to decide how best to help people secure access to justice in Northern Ireland, and I am determined to make the most of this opportunity. So, today, I want to go further than the reforms I have already indicated, and announce my intention to undertake a Fundamental Review of Public Legal Services in Northern Ireland, and will set out my plans in detail to the Assembly in due course.

The objective of the review will be to go back to first principles, and to decide how best to help people secure access to justice. My vision for public legal services in Northern Ireland is:

- One which helps more people solve their legal problems;
- Which puts much greater emphasis on finding solutions to problems outside court, and less emphasis on fighting cases inside court – with all the expense and stress that gives rise to;
- And which provides a much wider choice in the sources of legal help available to those in need. Instead of simply paying people to go to law, it should also be possible to “bring the law to the people” through advice centres and legal clinics. You only have to look at the excellent work being done by Citizens Advice, Advice NI and the Law Centre to see what I have in mind.

I am determined that the report of the Fundamental Review will set out a road map to make that vision a reality, and provide Justice for All.
ORGANISATIONS AND INDIVIDUALS WHO MADE SUBMISSIONS OR WHOM WE MET DURING THE REVIEW

- A4E
- Academics (Queens University Belfast and University of Ulster)
- Advice NI
- Ards Borough Council
- Association of British Insurers
- Association of Collaborative Lawyers NI
- Association of Northern Ireland Collaborative Family Lawyers
- Association of Personal Injury Lawyers
- Belfast Education and Library Board
- Belfast Solicitors Association
- British Irish Rights Watch
- Children’s Law Centre
- Committee on the Administration of Justice
- Citizens Advice Bureau
- Condico (Solicitors for Children)
- Criminal Justice Inspectorate for Northern Ireland
- Department of Education and Learning
- Department of Enterprise, Trade and Investment
- Department of Finance and Personnel
- Department of Health, Social Services and Personal Services
- Department of Justice
- Department of Social Development
- Departmental Solicitors Office
- Directorate of Legal Services
- EAGA
- Employment Lawyers Group NI
- Family Mediation Northern Ireland
- Friary Law
- Housing Rights Service
- Judiciary
- Law Centre NI
- Marsh Insurance
- Mediation Northern Ireland
- Northern Ireland Audit Office
- Northern Ireland Commissioner for Children and Young People
- Northern Ireland Courts and Tribunals Service
- Northern Ireland Guardian Ad Litem Agency
- Northern Ireland Housing Executive
- Northern Ireland Human Rights Commission
- Northern Ireland Legal Services Commission
We also met a range of individuals and organisations during jurisdictional visits to England and Wales, Scotland and the Republic of Ireland.
## Annex C

### Breakdown of Legal Aid Expenditure 2005/06 – 2010/11 and forecast for 2011/12 – 2014/15

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<td>48.1</td>
<td>39.6</td>
<td>34.2</td>
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<tr>
<td><strong>Grant in Aid - inc Cap Adds</strong></td>
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<td>7.3</td>
<td>7.8</td>
<td>8.2</td>
<td>7.8</td>
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<td><strong>Total</strong></td>
<td><strong>89.8</strong></td>
<td><strong>104.2</strong></td>
<td><strong>101.1</strong></td>
<td><strong>104.2</strong></td>
<td><strong>86.7</strong></td>
<td><strong>80.3</strong></td>
<td><strong>80.1</strong></td>
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</table>
LEGAL AID TRENDS

The pages that follow show trends in the various components of the civil and criminal legal aid schemes. The information detailed in the following graphs has been compiled from Management Information which has not been reconciled with the Commission’s accounting system. However, we are confident that the trend information shown is broadly valid. Average costs are calculated by dividing the total cost of bills paid with the number of payments.

For purposes of civil legal aid the graphs provide information on the three levels of assistance, which are defined below.

**Legal Advice and Assistance (LAA)** provides for a solicitor to give oral or written advice on matters of Northern Ireland law, whether civil or criminal. The solicitor can provide a wide range of tasks, including preparing applications for civil or criminal legal aid, writing letters, drafting documents, getting a legal opinion from a barrister or helping an applicant prepare a tribunal case. The bulk of spend under this category covers advice given to clients held in police stations under PACE provisions.

**Assistance by Way of Representation (ABWOR)** enables a solicitor to initiate certain proceedings and represent an assisted person in civil matters before a magistrate’s court, a Family Proceedings Court, the Mental Health Review Tribunal and some hearings held in respect of prisoners.

**Civil Legal Aid** covers advice, preparation and representation in civil matters at the county court tier and at the higher courts.
**Legal Advice and Assistance**

Volume, cost and average cost of Legal Advice and Assistance based on bills paid. The information has been split into 3 categories: criminal, family and other. The figures are based on full bills, additional fees and interim payments. Recoupments and corrections are not included.

![Figure 1: LAA Volume of Bills Paid](image1.png)

![Figure 2: LAA Total Payments](image2.png)

![Figure 3: LAA Average Cost per Bill Paid](image3.png)
**Assistance by Way of Representation**

Volume, cost and average cost of Assistance by Way of Representation based on bills paid. Children Order figures are shown separately. The figures are based on full bills and additional fees. Recoupments, interim payments and corrections are not included.

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**Figure 4: ABWOR Volume of Bills Paid**

**Figure 5: ABWOR Total Payments**

**Figure 6: ABWOR Average Cost per Bill Paid**
Civil Legal Aid

Volume, cost and average cost of Civil Legal Aid based on bills paid, broken down by family and non-family. The total paid amount is based on the value of full bills and additional fees. Interim payments, recoupments and corrections are not included.
Criminal Legal Aid – Overview

Figure 10 details payments made for cases heard at the Magistrates’ courts and the Crown Court. This represents the payments made to Solicitors’ firms and to Counsel and includes their professional fees, VAT and disbursements, such as travel expenses and expert witnesses. It does not include interim payments, recoupments and corrections or criminal business in other courts.

Figure 11 shows a breakdown of total expenditure in the Crown Court, split by VHCC and other standard fee cases. This details all transactions including interim payments, recoupments and corrections.
Criminal Legal Aid – Magistrates’ Court

Volume, total cost and average cost of Criminal Legal Aid in the Magistrates' Courts. This represents the bills paid and is split by Counsel and Solicitor. The total paid, which includes fees and VAT, is based on the value of full bills, additional and appeal fees. Interim payments, recoupments and corrections are not included.

Figure 12: Criminal Legal Aid Volume of Bills Paid for Magistrates’ Court

Figure 13: Criminal Legal Aid Total Payments for Magistrates’ Court

Figure 14: Criminal Legal Aid Average Cost per Bill Paid for Magistrates’ Court
Criminal Legal Aid – Crown Court

Volume, total cost and average cost of Criminal Legal Aid in the Crown Court. This is based on bills paid and is split by Counsel and Solicitor. The total paid which includes fees and VAT is based on the value of full bills, additional and appeal fees. Interim payments, recoupments and corrections are not included.

Figure 15: Criminal Legal Aid Volume of Bills Paid for Crown Court

Figure 16: Criminal Legal Aid Total Payments for Crown Court

Figure 17: Criminal Legal Aid Average Cost per Bill Paid for Crown Court
NILSC – Running Costs

This chart shows trends in the Commission's Grant in Aid (running costs). The figures for 2010/11 are broken down in Annex E.
Annex E

Grant in Aid Expenditure for 2010/11

<table>
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<tr>
<th>Expenditure (£ 000)</th>
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<tr>
<td>Salaries</td>
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<tr>
<td>Other Staff Costs</td>
<td>147</td>
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<tr>
<td>Commissioner &amp; Committee Costs</td>
<td>323</td>
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<tr>
<td>IT Costs</td>
<td>354</td>
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<tr>
<td>Accommodation Costs</td>
<td>528</td>
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<tr>
<td>Utilities</td>
<td>312</td>
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<tr>
<td>Consultancy</td>
<td>72</td>
</tr>
<tr>
<td>Judicial Review &amp; Legal Costs</td>
<td>131</td>
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<tr>
<td>Other Admin</td>
<td>416</td>
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<tr>
<td>**TOTAL NET ADMIN EXPENDITURE</td>
<td>7,172</td>
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<tr>
<td>Total Non Cash Expenditure</td>
<td>699</td>
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<td><strong>TOTAL EXPENDITURE</strong></td>
<td>7,871</td>
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The above details a breakdown of GiA expenditure over the last 4 years.

Staff and Commissioner/Committee Costs have been highlighted as areas of particular interest. Other Expenditure includes items such as IT, Accommodation, Utilities, Legal and Consultancy costs.
### NILSC Staffing Level

<table>
<thead>
<tr>
<th>Department</th>
<th>Section</th>
<th>Full Time Equivalents</th>
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<td></td>
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<td><strong>Overall Total</strong></td>
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<td><strong>153.51</strong></td>
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</table>

The above details a breakdown of staffing levels within the Commission by Department for July 2011. The figures are based on full time equivalents and include staff on secondment to the Commission and temporary staff through a recruitment agency.