Submission to the
Access to Justice Review

Executive Summary

The Northern Ireland Human Rights Commission (NIHRC) pursuant to Section 69(1) of the Northern Ireland Act 1998 reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights. In accordance with this function the following statutory advice is submitted to the Northern Ireland Courts and Tribunals Service on the Access to Justice Review Northern Ireland.

The Commission welcomes the opportunity afforded by the Review to consider whether the current arrangements for ensuring access to justice could be developed or improved in the years ahead, notwithstanding budgetary constraints. The Commission advises that a human rights based approach to ‘access to justice’ decision-making be instituted. The following advice is given in the submission:

- If money damages cases are removed from the scope of civil legal aid, appropriate measures should be taken to ensure that less well off litigants are not denied access to justice at the initial stages.
- The exceptional grant mechanism for civil legal aid should be retained with the adoption of a non-political statutory appointee who is responsible for the grant.
- A concrete guarantee should be given that inquests raising Article 2 ECHR right to life issues will receive legal aid. This could be achieved by placing such inquests within the scope of mainstream legal aid.
- Judicial review should remain a priority area for legal aid.
• If consideration is given to amending the scope of legal aid by removing certain immigration and asylum cases or any of the areas mentioned in paragraph 5.165 of the Review then further advice should be sought from the Commission.

• The use of mediation is harmonious with the right to respect for private and family life. However, its use should also comply with the best interests of the child and the proportionality principles.

• Children should be given appropriate legal advice in order that they may give informed consent to diversionary measures to prosecution.

Response to the consultation

1. The Northern Ireland Human Rights Commission ("the Commission") pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights.1 In accordance with this function, the following statutory advice is submitted to the NI Courts and Tribunals Service on the Access to Justice Review ("the Review").2

General comments: Access to justice and human rights

2. As stated in our initial response to the Review, submitted in January 2011,3 access to justice is a fundamental human right, forming an essential element of the right to a fair hearing and the right to an effective remedy. As such, it is enshrined in Articles 2(3) and 14 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 6 and 13 of the European Convention on Human Rights (ECHR). Legal aid and access to justice are matters also dealt with in Principles 1 and 3 of the United Nations Basic Principles on the Role of Lawyers.4 The right to both a fair hearing and an

1 Northern Ireland Act 1998, s.69 (1).
effective remedy require practical arrangements to be put in place to provide legal advice and, where appropriate, representation to those of limited means to ensure that access to justice is secured in a manner that is effective in practice, not just in theory.\(^5\)

3. Where an individual’s human rights are at stake, the right to an effective remedy may require the provision of legal advice and assistance free of charge to enable an individual of limited means to protect his or her human rights, outside the context of judicial proceedings. In addition, the right to a fair hearing requires equality of arms for all parties to proceedings in the preparation and presentation of their case\(^6\) and effective access to the courts.\(^7\)

4. Principle 3 of the UN Basic Principles recommends that “governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources”.\(^8\)

5. Thus, the Commission advises that the Minister adopts a human rights based approach to ‘access to justice’ decision-making. This approach should ensure that all decisions comply with international human rights treaty obligations and the Human Rights Act 1998. Particular attention should be paid to the impact on vulnerable persons when measures are introduced solely to reduce costs. This language is more emphatic than the Review’s analogous guiding principle to ‘take account of human rights instruments’.\(^9\) In light of the above human rights standards and principles, the Commission provides comment on specific aspects of the Review.

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5. Airey v Ireland, European Court of Human Rights, Application No 6289/73 (9 October 1979).
8. See footnote 4, above.
9. The Review, see footnote 2, para 2.3.
Civil legal aid: Money damages

6. The Review recommends removing from the scope of civil legal aid most money damages cases, with the exception of complex clinical negligence cases. This includes the intention that money damages cases will not be included in the generic legal aid provision of advice and assistance on any point of Northern Ireland law. In place of legal aid, the Review recommends introducing conditional fee arrangements through the commencement of article 38 of the Access to Justice (NI) Order 2003 together with the implementation of the relevant recommendations in Lord Justice Jackson’s Review of Civil Litigation Costs.

7. The Commission does not advise on the precise form of funding arrangement best suited to fund civil actions for money damages but is concerned that conditional fee arrangements do not provide for litigants at the initial stages. This concern arises from the fact that the proposal will be particularly prohibitive to indigent litigants as they run the risk that a solicitor might decide not to progress with the case but expect to be paid for initial consultation and research.

8. Both Article 14 ICCPR and Article 6 ECHR attest to the right to a fair trial by an independent and impartial tribunal established by law. The Human Rights Committee in its General Comment on Article 14 emphasises the concept of ‘equality’ before the courts and tribunals encouraging state parties to report on how ‘equal access’ is ensured. The Commission does not suggest full legal aid in money damages cases, only that appropriate measures, which are reasonable and proportionate, be put in place to mitigate the risk of denying equal access to less well off litigants who could be deterred by the initial cost of the legal advice required to get to the stage of first instance.

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10 Above, paras 5.104 and 5.106.
11 Above, para 5.28.
13 Human Rights Committee, General Comment 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (art 14) 13 April 1984, para 1.
14 Above, para 3.
Civil legal aid: Exceptional grants and inquests

9. The Commission advises that the Minister implement the Review’s recommendation that an exceptional funding scheme should continue to be part of the legal aid architecture and that this will focus in the particular on whether or not a failure to provide legal aid is likely to result in a breach of the Human Rights Act 1998 or European Union law. In *Steel and Morris v the United Kingdom*, the European Court of Human Rights held that a refusal to grant legal aid to two defendants in defamation proceedings was a violation of their right to a fair hearing, noting in particular, (a) the importance of what was at stake for the applicants in the proceedings, (b) the complexity of the legal issues raised in the litigation, (c) the volume of material forming part of the proceedings and (d) the capacity of the individuals to represent themselves in the proceedings, bearing in mind the nature of the proceedings and their educational and professional background. Retaining the exceptional grant framework allows Government to mitigate against similar violations of Article 6 ECHR.

10. However, the Review opts not to bring inquests raising issues with regard to Article 2 of the ECHR, the right to life, within the scope of the mainstream legal aid system. Instead, the Review proposes to retain the current exceptional grant regime whereby the Minister of Justice can authorise legal aid in proceedings that would not otherwise qualify. In addition the Review states that “there should be explicit recognition of a presumption that where Article 2 ECHR issues are at stake, the immediate family of the deceased would receive legal aid to support legal representation at the Coroner’s Court”.

11. The Commission advises that given the importance of the right to life, a concrete guarantee is required that legal aid will be provided for inquests raising Article 2 ECHR concerns when the financial eligibility criteria is met. It should not be necessary for families unable to afford advice and representation in proceedings as complex and important as

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15 The Review, see footnote 2, para 5.138.
17 The Review, see footnote 2, para 5.140 (and further paras 5.134 and 5.135).
18 The current arrangements for the exceptional grant of legal aid in Northern Ireland are governed by the Access to Justice (NI) Order 2003, art 8 and the Legal Aid, Advice and Assistance (NI) Order 1981, art 10A.
19 The Review, see footnote 2, para 5.140.
these to have recourse to an exceptional, discretionary power. Furthermore, placing Article 2 ECHR inquests into the mainstream legal aid system would eradicate the incongruity proposed, which is having an exceptional power with a presumptuous category.

12. The right to life enshrined in Article 2 ECHR has been regarded by the European Court of Human Rights as one of the most fundamental provisions of the Convention, so much so that in addition to the substantive right, there exists a procedural requirement on the part of the state to conduct an effective investigation following an alleged breach of the substantive limb. In *Jordan v the United Kingdom*, the Court stated:

> Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which in peacetime no derogation is permitted under Article 15. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe... The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective. ...

> The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.

More recently, the case of *Šilih v Slovenia* demonstrated the breadth of both the substantive and procedural components of Article 2 when addressing a medical context. It stated:

> [T]he procedural obligation under Article 2 [imposes] an obligation on the State to set up an effective judicial system for establishing both the cause of death of an individual under the care and responsibility of health professionals and any responsibility on the part of the latter.

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21 Above, paras 102 and 104.
22 *Šilih v Slovenia*, European Court of Human Rights, Application No 71463/01 (9 April 2009).
23 Above, para 155.
[...] [T]he procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent “interference”... In this sense it can be considered to be a detachable obligation arising out of Article 2...

13. It is further noted that the substantive aspect of Article 2 ECHR includes a duty to ‘protect by law’ the right to life. Repeated failure by a state to properly investigate and deal with certain types of Article 2 deaths would not only breach the procedural aspect of Article 2 but also the substantive limb because the law could no longer be said to ‘protect’ the right to life in such situations.

14. In addition to Article 2 ECHR, the Commission advises that the Minister adopt the Review’s recommendation that decisions to grant exceptional legal aid will not be referred to the Minister or any political body but will be the responsibility of a statutory appointee. Under Article 14 ICCPR and Article 6 ECHR, the right to a fair trial requires an independent and impartial tribunal. Since the grant of legal aid is at times a component of ensuring this right is met, it follows that the body responsible for granting the legal aid should also be independent and impartial.

**Civil legal aid: Administrative law**

15. The Commission agrees that judicial review should remain a priority area for legal aid. Given the rights that are at play in public authority decision-making and the importance of ensuring confidence in the system of civil and administrative justice, the retention of legal aid for judicial review permits indigent persons to hold public authorities to account for human rights breaches and ensure equality of arms under Article 6 ECHR. For example, the European Court of Human Rights has recognised a right to access information held by public authorities in a number of specific contexts as an aspect of Article 8 ECHR the right to respect for private and family life, where there has been a failure to provide safety and environmental information, a failure to provide

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24 Above, para 159.
25 The Review, see footnote 2, paras 5.139 and 7.21.
26 Above, para 5.127.
27 *Guerra and Others v Italy*, European Court of Human Rights, 26 EHRR 357 (19 February 1998).
information integral to an individual’s sense of personal identity, and a failure to provide information about governmental programmes posing a risk to health. Furthermore, Article 41 of the European Charter of Fundamental Rights speaks of a right to good administration which includes in paragraph 2 an obligation on the administration to give reasons for its decision.

16. The Commission notes the Review’s suggestion that the Minister of Justice give consideration to restricting legal aid for judicial review in some immigration and asylum cases in the same manner as England and Wales. In making this decision, the Commission advises that due cognisance is given to the vulnerability of immigrants and asylum seekers. Immigration cases often involve the Article 17 ICCPR and Article 8 ECHR right to a family life and the Article 14 ECHR prohibition on discrimination. It is worth noting that many adults claiming immigration status have arrived in the UK as children. Given the importance of this issue and the lack of clarity on the reforms to be made in this area, the Commission requests to be consulted further should movement occur on the Review’s recommendation.

Civil legal aid: Future scope

17. The Review has stipulated that if budgetary pressures require it to do so, the following types of case may be removed from the scope of legal aid: consumer issues and general contract; criminal injuries compensation; debt (unless home is at risk); immigration; tort, including nuisance and injunctive relief (excepting protection from harassment cases where mediation has failed); and probate. This includes removing contract, criminal injuries compensation and immigration from all forms of advice and assistance. Given the length of this list, each suggested area would need to be individually scrutinised in terms of human rights compliance. For this reason, the Commission wishes to be consulted further should action be taken to remove any of the aforementioned areas from the scope of legal aid.

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28 Gaskin v the United Kingdom, European Court of Human Rights, Application No 10454/83 (7 July 1989).
29 McGinley and Egan v the United Kingdom, European Court of Human Rights, 27 EHRR 1 (9 June 1998).
30 The Review, see footnote 2, para 5.131.
31 Above, para 5.165.
32 Above, para 5.26.
Family and children

18. The Commission advises the Minister to support the Review in its efforts to incentivise mediation in the family law context. The right to respect for private and family life is enshrined in Article 17 ICCPR and Article 8 ECHR. The essence of Article 8 ECHR is that family life should be firmly located in the private sphere free from arbitrary state interference. Furthermore, Article 3 of the UN Convention on the Rights of the Child ("CRC") requires that private or public social welfare institutions, courts of law, administrative authorities or legislative bodies, must give primary consideration to the best interests of the child in all actions. Mediation is contractual and occurs outside the court system thereby affording the parties an opportunity to resolve their dispute without court interference and because it is non-adversarial, it is less likely to impact negatively on the health of the child.

19. In addition, taking family matters outside the judicial process where it is likely to be beneficial is in keeping with the human rights principle of proportionality in decision-making. The proportionality concept requires that decision-makers conduct a value comparison between competing interests. This has been demonstrated in the Review through the promotion of mediation, a form of Alternative Dispute Resolution (ADR), but with the realisation that situations concerning child protection, domestic violence or implacable hostility are better placed in the courts.33

Alternatives to prosecution

20. Youth conferencing has the potential to promote respect for the human rights of children in conflict with the law in Northern Ireland. However, any system of restorative justice must include procedural safeguards and be appropriate to the child’s “well-being and proportionate both to their circumstances and the alleged offence” (Article 40 (3) (b) CRC). The UN Committee on the Rights of the Child has stated in the General Comment on Article 12 CRC that:

In case of diversion, including mediation, a child must have the opportunity to give free and voluntary consent and must be given the opportunity to obtain legal and other advice and

33 Above, para 5.43.
assistance in determining the appropriateness and desirability of the diversion proposed.\textsuperscript{34}

The Commission therefore advises that the Minister adopt the Review’s determination that appropriate legal advice should be given to children so as to place them in a position were they can give informed consent to any proposed diversionary measure.\textsuperscript{35}

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\textsuperscript{34} Committee on the Rights of the Child, General Comment No 12: The right of the child to be heard, UN Doc CRC/C/GC/12 (20 July 2009) para 59.

\textsuperscript{35} The Review, see footnote 2, para 4.62.