

National Report from NI Legal Services Commission for International Legal Aid Group

Antwerp

6-8 June 2007

The Reform of Civil Legal Aid in Northern Ireland

Gerry Crossan - Chief Executive

Dr. Jeremy Harbison - Commissioner

Dr. Theresa Donaldson - Director of Policy and Service Development

Introduction

It is hard to believe that two years have passed since the last International Legal Aid Group Conference in Killarney in 2005. We all remember the sunshine and the warm hospitality of the host nation. At that time the NI Legal Services Commission was still grappling with the legacy issues inherent in major organisational change such as the practicalities of recruitment and general resourcing as well as the establishment of the reform agenda. A lot has happened since that very memorable conference and even though there is still a lot to be done the Commission has achieved a tremendous amount. This report will provide a flavour of the progress made towards the objective of reforming the legal aid environment in NI.

The Legislative Environment in NI

In order to appreciate the level and depth and complexity of reform required to modernise the provision of legal aid in NI, it must be noted that the main statutory instruments governing legal aid are:-

- The Legal Advice and Assistance (Northern Ireland) Order 1981
- The Legal Advice and Assistance (General Regulation) 1965 (amended but never replaced so many of the regulations are still current law)
- The Legal Aid (Assessment of Resources) Regulations (Northern Ireland) 1981

The legislation facilitates the payment of solicitors and barristers for providing legal advice, assistance and representation through a number of schemes. These are Green Form, ABWOR and Civil Legal Aid. The target environment for legal aid in NI includes a mixed model of service provision in which both private sector providers and those in the voluntary and community sector will provide legal services that can be paid for by legal aid. It is also intended that access to legal aid will be more tightly controlled and targeted through the implementation of a funding code on the merits side and a reformed financial eligibility test on the means side. In addition the Commission wishes to have the option of testing out different ways of working through the establishment of pilots that capitalise on the use of technology.

The reform programme is aimed at developing the legislative and policy structure in which such developments can flourish.

The Northern Ireland Legal Needs Survey

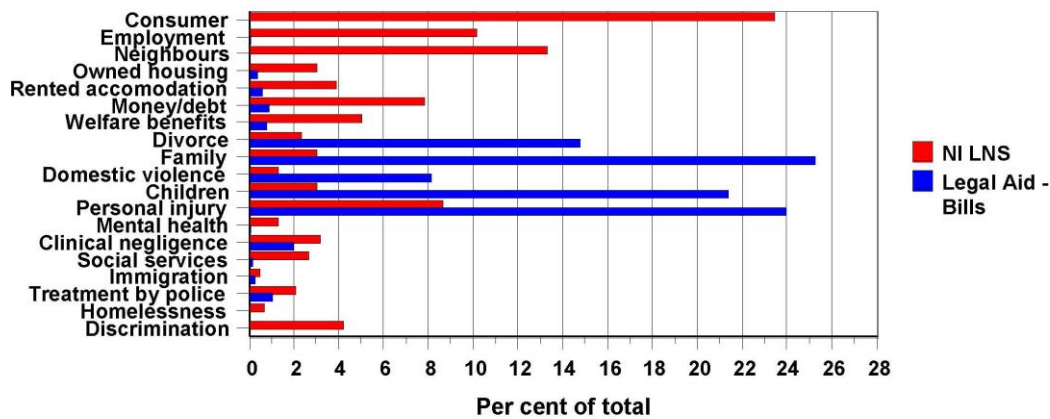
One of the many issues the Commission has had to grapple with since its establishment in November 2003 has been the absence of research and lack of intelligible administrative data to underpin and inform the reform programme as it developed. The completion of the Legal Need Survey in July 2006 has been a major achievement for the Commission. The methodology for the Legal Need Survey comprised two main elements: the development of a modified shortened version of the 2004 English and Welsh Civil and Social Justice Survey to ensure comparability of the survey results so far as this was possible; and the use of an existing survey vehicle for the purposes of data collection - the Northern Ireland Omnibus Survey - which is a random probability sample of individuals living in private households. The main findings of the survey were:-

- 35.5 per cent of survey respondents said they had experienced one or more problems in the preceding three years, on a par with comparable estimates for England and Wales.
- The types of problems reported by respondents to the NI LNS followed much the same patterns as in England and Wales.
- The highest report rates were amongst lone parents (59 per cent), divorced persons (58 per cent), working age persons with a disability (55 per cent), working age persons in receipt of state benefits (50 per cent), those living in

private rented accommodation (48 per cent) and persons with caring responsibilities for a disabled or dependent older person (46 per cent).

In addition, the Legal Needs Survey provided evidence that, from a section 75 equality perspective, different groups have different needs and experiences in relation to justiciable problems, both in terms of the frequency of occurrence and the patterns of problem types that different groups encounter. The survey findings therefore point to the need for Section 75 screening in respect of new policies and programmes for publicly funded legal services, although the NI Legal Needs Survey also provides a resource for equality screening. In Table 1 below, the results of the 2005 Legal Need Survey are mapped against the 19 problems types that formed the basis of the Paths to Justice Studies of England and Wales (Genn 1999) and Scotland(Genn and Patterson, 2001). The table super-imposed on this comprises data on legal aid bills in NI in 2004/05 thus providing an invaluable base-line against which the impact of reforms going forward can be measured.

Problem types in the NI LNS compared to public funding (combined Civil, ABWOR, LAA bills paid)



Notes: Excluding cases not classifiable to NI LNS problem types e.g. PACE, injunctions, miscellaneous other.
Included cases cover 83.5% of bills paid 2002-03 to 2004-05.
Sources: NI Legal Needs Survey 2005; NILSC.

The Northern Ireland Funding Code

One of the most challenging areas of reform being taken forward in order to facilitate the development of the target environment is the NI Funding Code (the Code). This will replace the existing 'merits test' for civil legal aid with a new set of rules to determine which individual cases should receive funding, based on clear priorities and criteria. The Code will allow for more transparent decision making on the award (or not) of legal aid and provide a mechanism for bringing financial control and predictability to the legal aid fund.

The Code is underpinned by findings from the NI Legal Need Survey, current patterns of legal aid coverage, and relevant Government policy. It is designed to address local need drawing on lessons from the approaches taken elsewhere in the UK.

There have already been two consultations on the Code. The first in Spring 2006 when the Commission produced an exposure paper that reflected the Commission's early thoughts on what the Code should look like and the elements it was likely to contain. Thirteen responses were received to this initial consultation that helped in the drafting of the second consultation paper that was issued in November 2006. That second consultation received a further thirteen responses that have helped the Commission to understand in more detail issues and concerns of practitioners, for example, that the Code might well increase bureaucracy. However, it will also improve consistency and increase transparency around the granting of legal aid. In addition to consulting on the Code Criteria a number of areas of supporting guidance have been consulted upon and these can continue to be found on the Commission's web site. An Equality Impact Assessment of the proposed Code informed by the Legal Need Survey was conducted and has been consulted upon. The feedback on this has been helpful and encouraging. The benefits of the Code in terms of facilitating access to justice and targeting social need have been readily acknowledged by the Equality Commission and providers of legal services in the voluntary sector.

The Commission is also taking forward a related issue and that is the development of an alternative scheme for the funding of money damages cases. There will be more details of this reform in the paper entitled:- 'A potential Northern Ireland Additional

Legal Aid Scheme (NIALAS)'. The responses from legal professionals to the Funding Code consultations were dominated by concern about the future of this area of legal aid. The Commission is giving serious consideration to feedback from the consultation on the Code and will be looking again at some of the issues raised by consultees.

Why the Commission is looking at an alternative scheme and not proposing to maintain legal aid in its current form will be discussed in the paper cited above.

Financial Eligibility and Statutory Charge

Decision-making on applications for legal aid can be prolonged because of the time it takes to assess the financial eligibility of the legal aid applicant (currently dealt with by the Legal Aid Assessment Office on behalf of NILSC) ; this is due to the complexity of the current test. Complexity in the procedures for means assessment resides in the Civil Legal Aid scheme.

Largely reflecting the use of standard allowances, complexity is not an issue for LAA or ABWOR - this is dealt with by solicitors. Within the CLA scheme, the sources of complexity include: the lengthy list of disregards, both for income and capital; relatively limited use of standard disregards; the use of discretion; and measuring expected income over a 12-month computation period.

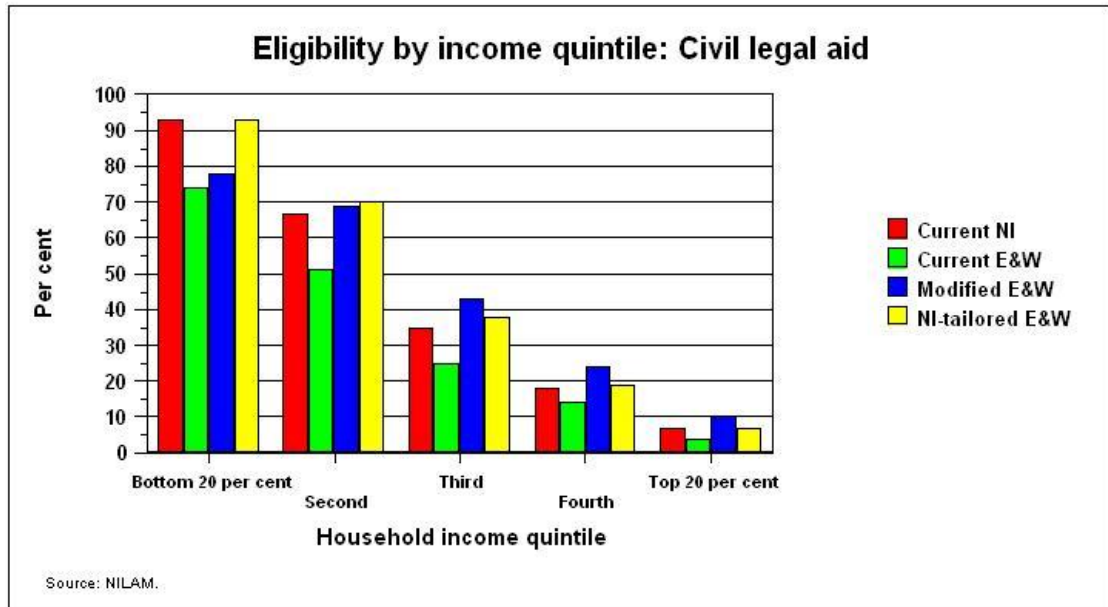
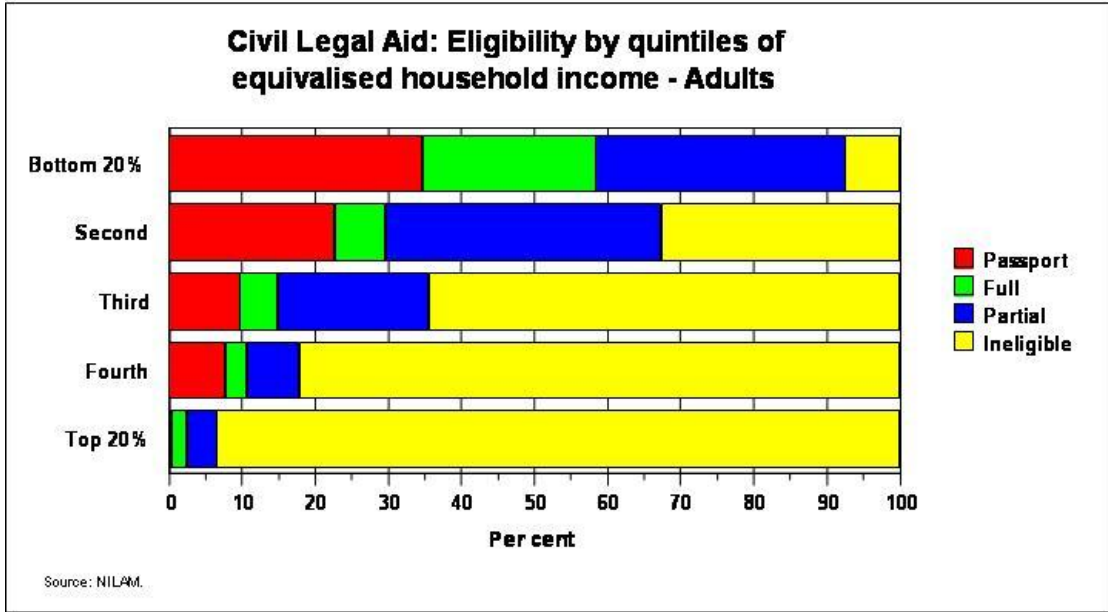
The main benefit from the complexity of the CLA scheme is that it can take account of the diverse circumstances of individuals when assessing whether applicants are in a position to meet their own legal costs. Complexity does, however, have a cost in terms of administrative efficiency. Also, complexity can potentially reduce fairness; some individuals may be deemed eligible where they have high levels of spending on items which are disregarded, regardless of their income levels.

This issue of complexity in means assessment causes problems for practitioners, applicants and for the Commission because in a significant number of cases legal aid is granted on an emergency basis. It is often much later established that applicants are unaware that legal aid is not free and they will have to make contributions or that they are not financially eligible at all. There is a long standing debt recovery

issue within the Commission and it is important that action is taken to address this. The Commission is tackling this in a number of ways.

Firstly the introduction of a simplified financial eligibility test. We have been doing a lot of work on this and believe that we have identified a test that will maintain the current pattern of financial eligibility but will be much simpler to administer. An important starting point for the Commission was using available administrative data to map the existing eligibility and model the impact of any proposed change against those eligible and those who apply. A major challenge was designing a test that maintained existing eligibility as investigation of the current test indicated that it very successfully targeted those most in need in NI.

The table below presents legal aid eligibility by position in the quintiles of household income distribution. It is apparent from this model that only 7% of those in the lowest quintile of household income were deemed ineligible for legal aid, and eligibility declines sharply with increasing levels of household income. This analysis is comforting on one level for the Commission in supporting the current system on a targeting basis but is challenging on another when investigating an alternative. The second table in the models the current NI test, current England and Wales test, modified England and Wales test and a NI tailored alternative for means testing. The NI alternative satisfies the requirement for simplicity and appears to meet the fairness standard of the current system. The options for change provide more detail of how changes to the income limits and housing equity disregard would impact on the current pattern of eligibility in NI. The Commission is preparing to conduct a full consultation on the options for change of means testing in NI.



We are also looking at where eligibility testing is being carried out and will want to be in a position to reassure the Lord Chancellor that the current system is the one

most suitable for the task. An issue that is related to this in terms of the debt owed to the Commission is that of Statutory Charge.

There are various ways in which funding bodies can encourage certain behaviours or approaches to the resolution of problems. One way of encouraging early settlement of cases is to provide direct disincentives to formal dispute resolution, by requiring some applicants to pay towards the costs of their case through the legal aid statutory charge. The operation of the statutory charge provides some incentive for the client to adopt a reasonable approach to the case i.e. to seriously consider offers in settlement and to keep an eye on the costs of the case as it progresses.

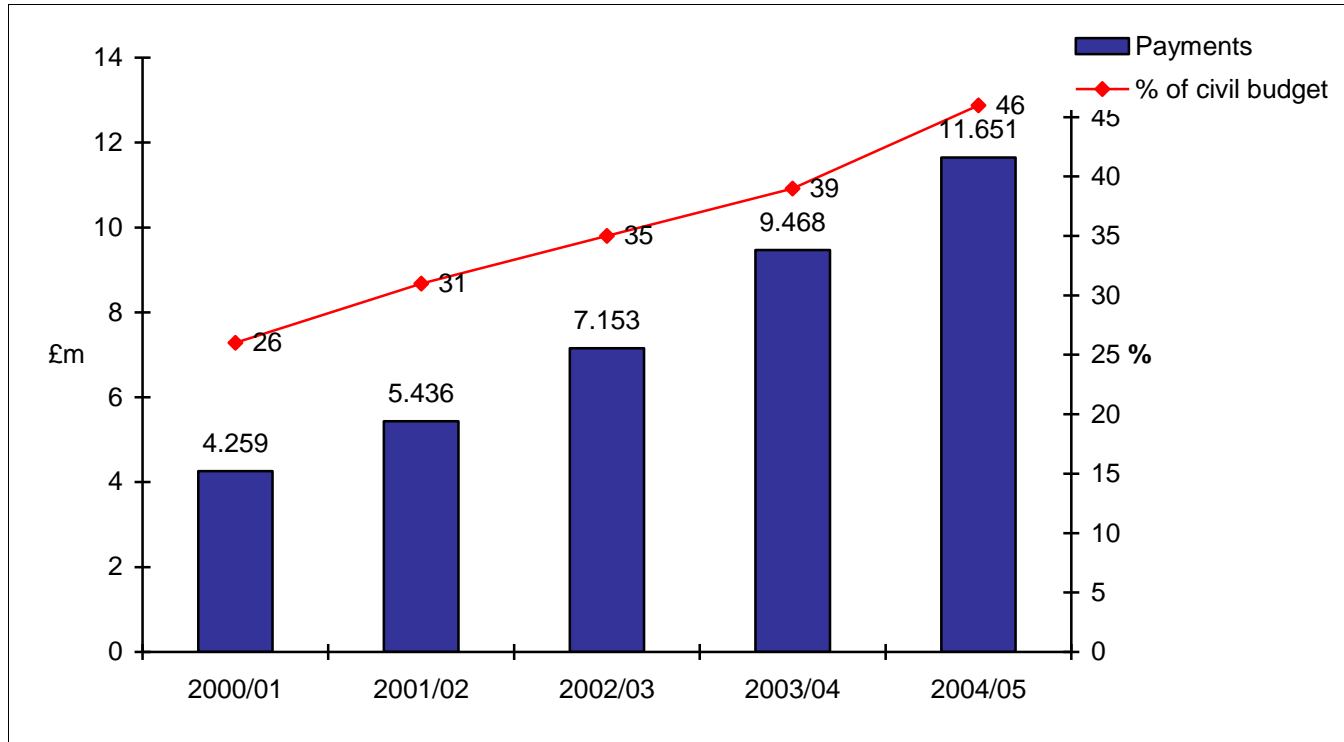
The Commission will be making changes to this area by reviewing the current internal procedures surrounding the operation of the statutory charge and by recommending policy reforms based on a comparison of legal aid policy in Northern Ireland with other jurisdictions

Fees and Quality

Practitioners have been remunerated on the 'fair and reasonable' principle and we are all mindful that under the Access to Justice Order remuneration needs to meet 'value for money' principles. This is a challenging target to meet especially considering that when the Commission was established one of the difficult issues it inherited was a long-standing disagreement with the legal profession about the level of fees in all areas of civil legal aid but particularly in the area of Children and Family proceedings. The Commission has made the reform of fees for Children Order cases a priority because of the disputes that were raging about fees but also because of the proportion of the civil budget dedicated to this area of legal aid spend as is clear from the table below. A remedial settlement was agreed to resolve one area of dispute with the legal profession. This settlement laid the foundation for the introduction of a standard fee regime that is currently being developed. We are continuing to examine Children Order fees and other fees paid through civil legal aid with a view to reforming them where the introduction of a standard fee would bring predictability and control to that area of the budget. We are fortunate that the majority of Children and Family cases are dealt with in the lowest tier of the courts and we are building on advantages such as this. We are also developing important relationships with those in the Health and Social Services Trusts in NI as it is the

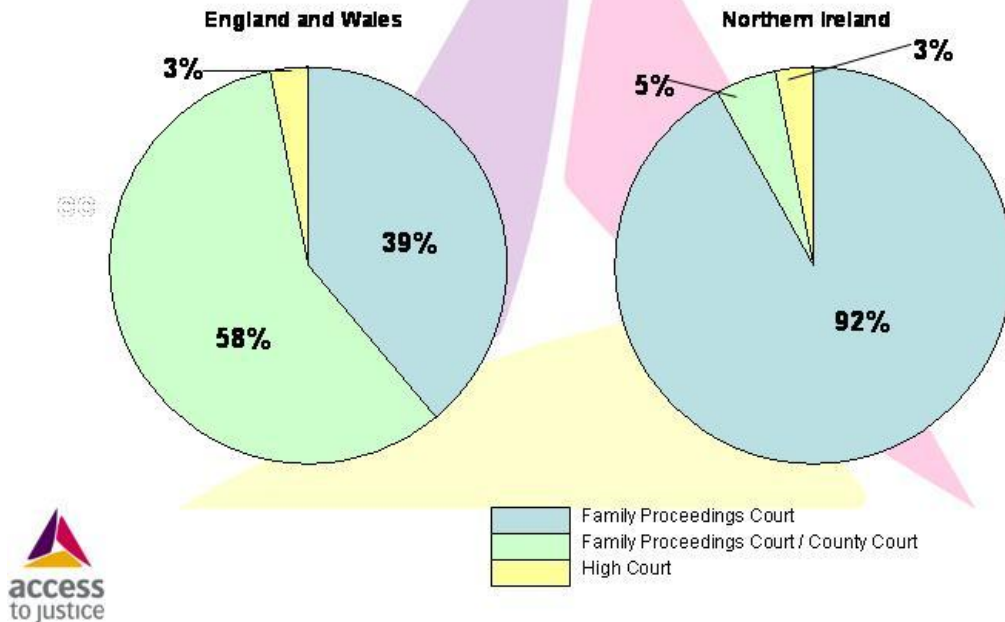
case here, as in E/W, that actions by other bodies both within and outside the legal process have implications for the cost of legal aid.

Children proceedings – related payments 00/01 to 05/06



Children Act / Children Order Disposals 2005

Source - Judicial Statistics



As we introduce standard fees we are conscious that the Commission will require less information about activity in a case before the fee is paid. What we will be moving towards though is developing a system whereby the Commission can still be assured that legal aid work is of a sufficiently high standard. The introduction of the Registration Scheme and of Quality, Compliance and Peer Review are all areas under development. Currently in NI, legal aided work is provided by a network of 2000 solicitors in 500 firms. A Registration Scheme Working Group chaired jointly by two members of the Commission Board who are both solicitors in private practice has been established to take forward this important development. We are also planning to map the provision of legal services by solicitors in private practice. This work will be carried out in partnership with the Department for Social Development and will begin with the issue of a questionnaire to solicitors. Registration will be very much taken forward in partnership with the Law Society.

Community Legal Services

The Commission is committed to the development of a mixed model of legal services provision and that means funding providers in the voluntary sector as well as those in the private sector. It is through this spirit of partnership between the private and

voluntary sector that the Commission hopes that Community Legal Services will create a seamless network of quality, value for money services so that an individual seeking information, advice or help about legal issues will be directed to the most effective source. A consultation paper will be issued before the summer setting out the Commission's early thinking on this issue. We are very clear that the development of Community Legal Services provides an opportunity for practitioners in private practice to consider other ways of working. We intend that Community Legal Services will develop through the establishment of a number of pilot projects funded on a 3-year basis to either continue the provision of existing services or to test out new ways of working. Community Legal Services will be managed on a contractual basis and all contracts will be awarded through the compulsory competitive tendering process which means the award of a contract will be a competitive but transparent process. The first area to be piloted in this way was the provision of Asylum and Immigration Advice and Representation. The Law Centre (NI) was successful in winning the contract although the Commission was encouraged by interest shown from solicitors in private practice to the tender.

Associated with developing a mixed model of service provision is developing alternatives to the legal process. The Commission have been proactive in this regard and have piloted the Collaborative Law Model and are in the process of conducting an evaluation. We are also establishing partnerships with other agencies and organisations in an attempt to develop Family Mediation services, we see such alternatives as playing a vital role in the levels of services that will be offered under civil legal services.

Conclusion

As you can see, since the last meeting of the ILAG group in Killarney the Commission has been busily taking forward the reform of legal aid. We have achieved a lot, but there is still a lot to do and we are well aware that legal aid can only be successfully reformed if we work closely with practitioners and other key stakeholder groups. As noted earlier this article is intended to provide an overview of the reforms we are engaged in. There will be a more detailed paper on the proposal to develop a NIALAS.

The Commission is committed to modernising and improving the legal aid environment of the future for all participants, service providers as well as service users.

