

A Potential Northern Ireland Additional Legal Aid Scheme

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Introduction

The Northern Ireland Legal Services Commission (NILSC) is the organisation responsible for promoting fair and equal access to justice in Northern Ireland through the provision of publicly funded legal services, often referred to as "Legal Aid". The Commission operates within the regulations, directions and guidance of the Department of Constitutional Affairs, which provides resources from Parliament. The NILSC was established as a non-departmental public body sponsored by the Northern Ireland Court Service in November 2003 through the Access to Justice (Northern Ireland) Order 2003, (AJO 2003). The mission of the NILSC is to promote fair and equal access to justice in Northern Ireland in its provision of publicly-funded legal services. The Commission aims to provide **"high quality, customer focused services that target those in greatest need, promote social inclusion and demonstrate value for money"** through the provision of Civil Legal Services.

As part of the reform of publicly funded legal services, the issue of how the Commission should deal with money damage cases to meet its objectives of promoting access to justice, maintaining and developing a mixed model for the provision of legal services, and ensuring value for money within a tightening financial position, rapidly surfaced. This paper summarises current developments in the reform of legal services in Northern Ireland and considers the implications for the funding of money damages cases. It then describes the present position on funding money damages through legal aid and examines possible alternatives to that position. One option is then developed in greater detail.

Reform of Civil Legal Aid in Northern Ireland

In the provision of Civil Legal Services as required under the legislation, the Commission is seeking to manage three interrelated strands, namely:

- Targeting social need and promoting social inclusion through the provision of publicly funded legal services;
- Bringing control and predictability to the expenditure on Civil Legal Services, and
- Ensuring that any such Services represent value for money.

The legislative drive for the reform within the civil legal aid system of Northern Ireland has its foundations in the Access to Justice (Northern Ireland) Order 2003 (AJO 2003). The timetable for the enactment of this legislation sees its implementation in late 2008 and involves the following (see Crossan et al, 2007):

Establishment of a Funding Code

The establishment of Civil Legal Services will be supported by the introduction of a new testing methodology to meet social need, whilst recognising the importance of cost control and predictability. In order to receive funding under the Civil Legal Services a person must not only establish that their income and capital levels are within qualifying limits, but that the

proposed case has sufficient merit to justify funding that is appropriate given the assessed outcome, cost and benefit.

Alternatives to Court

The Commission will be seeking to promote early intervention to limit the need to resort to court based remedies through the development of a range of service providers, and exploring the provision of alternative forms of dispute resolution, such as mediation and collaborative law, to resolve issues currently being brought to court.

Value for Money

The Commission is required to ensure that the services it funds demonstrate value for money. This is defined as

“the provision of legal services at the quality required and at the lowest economic cost consistent with the maintenance of an effective provider network¹”

As part of this work the Commission is also working to introduce a system of standardised fees to bring control and predictability to the civil legal aid budget.

Northern Ireland Funding Code

The AJO 2003 requires the Commission to secure, within the resources available and priorities set, that individuals have access to civil legal services that effectively meet their needs. It also requires the NILSC to prepare a Funding Code setting out the criteria by which decisions on legal aid will be taken.

The Code, once implemented and set against a capped budget for Civil Legal Services, is intended to equip the Commission to target the available funds to the most important cases. The main difference with the current Merits Test is

that funding priorities will be set out in the Code, thereby allowing different funding criteria to be applied to different case types. For example, more stringent criteria may be attached to lower priority cases which may be required to show higher probability of success.

The Commission has recently concluded its consultation on the Funding Code and will shortly submit its recommendations to the Lord Chancellor.

The priorities for case type to be included in the Code are likely to include:

- Proceedings relating to major issues in children’s lives, and
- Civil proceedings where the client is at real and immediate risk of loss of life or liberty.

Other areas where the Code will generally be required to give the following categories higher priority are:

- Assistance with social welfare issues – such as housing proceedings and advice relating to debt, employment and entitlement to social security benefits
- Domestic violence proceedings
- Proceedings involving the welfare of children, and
- Proceedings against public authorities alleging serious wrong doing, abuse of position of power or significant breach of human rights.

The selection criteria the Commission will establish aim to ensure that funding is directed to those cases where the need is greatest. Priority areas will have their own selection criteria. In respect of money damages cases, the Commission's consultation paper noted that "*strict cost benefit ratios and prospects of success be applied to money damages cases ...to enable weaker claims to be excluded and for tougher and more transparent decision-making than under the present merits test.*"

It is envisaged that the Code will provide a range of levels of help or service. The Code sets strict conditions in terms of percentage prospects of success and thresholds for costs and damages, whenever feasible to do so. The Code seeks to assess cases as having very good prospects (80% or more chance of success), good prospects (60% – 80% chance of success) and fair chance of success (50 – 60% chance of success). The higher the chance of success, the less stringent the requirement that damages should outweigh legal costs.

Implications of Funding Code for money damages cases

Under the Commission's current approach the NI Funding Code will prioritise issues relating to children and families, social welfare and civil liberty cases. Responses to the consultation document showed general support for the proposed priorities as noted above. The legal profession's comments were however deeply concerned by the implications of the Funding Code and its priorities on money damages cases, as these are not prioritised. This will mean a reduced access to justice for those with limited means seeking justice relating to money damages cases. Furthermore, due to budgetary restraints the NILSC will be limited in the number and range of schemes which it can implement to provide an alternative to litigation, such as mediation services, in the short term.

Money Damages: current position

The volume of present and potential money damages cases in NI is hard to estimate as there has been no comprehensive record kept of such cases in recent years. Some were submitted to NILSC for assistance, others supported by trade unions or by lawyers on a speculative basis, and still others privately funded. A recent estimate (Peysner 2007) puts the market at around 16,000 cases per annum in the province.

Of applicants for Legal Aid around 65% were issued with certificates. Table 1 shows the main categories for which applications were made. Data for 2001/2, the last year for which full information on completed cases is available, indicates the duration before completion ranged from 19 months for criminal injury to 30 months for employers' liability.

Table 1 : Applications for Legal Aid in Money Damages cases

	Applications	Certificates
Assault	536	317
Criminal injury	2,096	1,657
Employer liability	914	507
Negligence general	1,656	1,108
Tripping	1,090	692
RTA	1,364	805
Appeal	270	198
Other	681	415
TOTAL	8,607	5,699

Money Damages: Current Population Coverage of Legal Aid

Recent research commissioned by the Commission (Dignan, 2007) models eligibility for Legal Aid based on the financial circumstances of benefit units in the Family Resources Survey completed in Northern Ireland. (A *benefit unit* comprises a single adult or a couple living as married and any dependent children.) In practical terms, a benefit unit generally corresponds to a family unit. The allocation of individuals to benefit units is equivalent to the process of aggregation for means assessment in the legal aid schemes.

Three levels of eligibility are distinguished:

- **Passport.** The benefit unit is in receipt of a passport benefit. In a couple, this could be one or other of the partners.
- **Full.** The aggregated financial means of the benefit unit fall below the lower limits on both income and capital. The unit is fully eligible in the sense that no contribution is payable towards legal costs.
- **Partial.** The aggregated financial means of the benefit unit are *below* the upper limits on both income and capital, but fall in *between* the lower and upper limits for *either* income *or* capital. The unit is eligible, but would have to pay a contribution towards legal costs.

While the modelling of financial eligibility needs to be conducted at benefit unit level, to permit aggregation of means, it is individuals who actually make applications for Civil Legal Aid. For that reason, it is useful to consider eligibility at the level of *individuals* in the population. The estimates for the adult population regarding financial eligibility (whether passport, full or partial) for money damages is shown in Table 2. Also shown for each scheme is the percentage of children living in benefit units which are financially eligible for Legal Aid.

Table 2 Civil Legal Aid: Per cent of benefit units and individuals

	Eligible			Ineligible	
	Passport	Full	Partial	All	
	%	%	%	%	%
Benefit unit level	17.3	9.7	23.6	50.6	49.4
Individual level					
All				42.8	57.2
Adults				43.8	56.2
Dependent children				39.9	60.1

The figures show that a little over one in two benefit units are eligible for civil legal aid (and three percentage points higher for Personal Injury cases as slightly more generous income limits apply for these). As with the analysis by benefit unit, the variations by legal aid scheme in levels of eligibility are again apparent for individuals. More strikingly, eligibility rates are lower at the level of individuals than at benefit unit level. For example, the 50.6 per cent of benefit units which are money damages-eligible contain 43.8 per cent of the adult population and 39.9 per cent of the child population.

A lower percentage of individuals than benefit units are eligible because eligibility rates are higher in single-person benefit units and those headed by a lone parent, as compared to benefit units comprised of couples, with or without children. For example, whereas 82 per cent of single pensioner benefit units are eligible, this is the case for only one in four couples with children.

Current Legal Aid: Eligibility and Take-up

The research noted above (Dignan, 2007) also examined the take-up and targeting of legal aid in the Northern Ireland population. Results showed that legal aid is well-targeted on adults in the bottom 20 per cent of the household income distribution; 59 per cent are passported or fully eligible while a further 34 per cent are partially eligible. Only seven per cent of those in the bottom 20 per cent were found to be financially ineligible.

The current pattern eligibility was well-aligned with the modelled pattern in legal needs amongst the eligible population, based on the NI Legal Needs Survey (Dignan, 2006). In particular, the eligible population is estimated to account for a higher share of legal needs (53 per cent) relative to its population share (44 per cent). This in turn reflects the fact that eligibility tends to be higher amongst those population groups with a higher degree of vulnerability to justiciable/legal problems (married but separated, lone parents, in receipt of a benefit and those with a disability).

Current Legal Aid Costs of money damages cases

The annual cost of funding money damages through Legal Aid was in the region of £1.77m in 2004/05 (excluding the significant administration costs for the NILSC involved) and covered numerous case types under seven categories:

- Assault / battery / trespass
- Criminal injury
- Employers' liability
- Negligence – general
- Negligence – medical
- Negligence – tripping, and
- Road traffic accidents.

The Northern Ireland Legal Needs Survey (Dignan 2006) noted that 35.2% of the population experience problems or disputes within the previous 3 years, of which employment accounts for 10.1%, personal injury accounts for 8.7% and medical negligence 3.2%. In population terms this equates to 193,000 employment problems, 76,000 personal injury and 28,000 medical negligence cases.

Alternatives for funding money damages cases

The Funding Code consultation emphasised the importance of continuing the support for money damages and personal injury cases to ensure access to justice for those members of society of limited means to enable them to enforce their rights in the same manner as those who can afford to litigate privately. The aim of current Commission's work is to balance the cost of providing Civil Legal Services in respect of money damages cases with the need to ensure that only merited cases are proceeded with in the most cost effective manner, whilst meeting the priorities set for the Commission by government.

The Commission has therefore been considering what if any alternatives exist to support the funding of money damages cases in Northern Ireland following the full commencement of the Access To Justice Order in late 2007. The objectives agreed by the Commission for its actions in this area are:

- to implement a system of Legal Aid that does not preclude any individual who has a merited case from progressing with their legal proceedings by 2008.
- to implement a system of Legal Aid which acknowledges best practice and research available from other jurisdictions.
- to implement a suitable mechanism for the administration of money damages cases by 2008/2009.
- to ensure that any system of Legal Aid for money damages cases has the minimum negative impact on the Court Service, solicitors and barristers within the NI legal sector.
- to implement a system that, if required, has the operational support of the Insurance Sector in Northern Ireland.

In its work the Commission has identified a number of alternatives, and these have been considered in detail through a series of "Big Tent" consultations with stakeholders to assess which approach best creates a system to suit Northern Ireland conditions (Peysner, 2006). The main options and their implications are now considered.

Option 1: Status Quo

The NILSC would continue to maintain and operate existing processes and systems without any amendment to current arrangements. This option would involve the provision of publicly-funded legal services in relation to money damages cases under The General Funding Code. On the assumption that the level of cases for which legal aid is sought and the number of associated certificates granted is similar in quantum to current levels, the likely implication is that the spend on legal aid for money damages cases would fall as many of the cases would not be prioritised under the new Funding Code. The merits test would likely reduce the volume of cases which are certified and in the absence of financial means of paying privately, cases which although not priority or were highly likely to succeed would not be brought forward. This would fundamentally impede the access to justice enjoyed by lower and nil income individuals.

Option 2: Introduction of Conditional Fee Arrangements

Under this option the NILSC would implement Conditional Fee Arrangements (CFA) (also known as no win, no fee), for the funding of money damages cases. This would replicate the system implemented in the English system and would include:

- Individuals having to pay for their solicitors if their case is lost
- The ability to limit the above risk by purchasing After the Event Insurance (ATEI)
- Not all costs being recovered even if cases are won

CFA models require After the Event Insurance (ATEI). Currently there are no ATEI providers in Northern Ireland. No provider in England and Wales will offer a commitment to enter into Northern Ireland at this stage. Furthermore, the ATEI market is not healthy due to historic profitability issues with a number of Insurers making significant losses on ATEI. Therefore under a CFA model in Northern Ireland individuals may easily find a solicitor to represent them but could potentially be unable to acquire ATEI to insure them against the risk of adverse cost. This would deter most of those who are currently eligible for legal aid and would effectively remove money damages claims from the legal aid system. Premiums could be so high as to exclude a large proportion of the population, leaving a large number of people without access to justice.

A further implication of this alternative relates to the current network of law firms in NI. Northern Ireland remains a largely rural society of small towns with a diverse network of small legal firms to service them. Evidence from England suggests that the introduction of CFA's would significantly alter such a pattern of service delivery with the concentration of

money damages provision into a smaller number of firms often at a distance from their clients. The Commission believes that the nature of current provision has much to commend it in the current NI context and would be concerned at such a development.

Option 3: Introduction of Additional Legal Aid System model (Northern Ireland Additional Legal Aid Scheme)

The final option is to develop within the Commission a ring fenced fund to support money damage claims. Such an approach would operate as follows:

- The fund invites claimants to apply for support for money damage cases.
- Claimants and their lawyers pay a registration fee.
- If the case is lost the fund pays the losing lawyers disbursements **and a** percentage (somewhere between 50% and 75%) of the profit costs of the losing lawyers and some or all of the winner's costs
- If the case is won the loser pays the claimants' lawyers costs in the normal way and a percentage of damages recovered is paid into the fund to support future cases.
- Case selection will be more merit based than is currently the situation.
- Access to legal assistance could be widened.

The advantage of such an approach is that, by introducing such a scheme while initially retaining Legal Aid within the Funding Code, access to justice could be maintained and ultimately widened and that in due course Legal Aid for money damages could be taken fully out of scope of the Funding Code and processed completely through the NIALAS.

Current Position

The additional Legal Aid scheme attracted the most support at the "Big Tent" consultations (Moorhead, 2006). The NILSC therefore commissioned additional work to assess the economic, financial and social implications of the model.

Unfortunately there is little available information about a large proportion of money damages cases but the following **assumptions** were made about a potential Northern Ireland Additional Legal Aid System (NIALAS):

- 75% of the population would be eligible if the income threshold is raised to allow up to 1.5 times the average NI salary;
- 1% of those who are eligible will make use of the new system;
- NILSC will require solicitors to be contractually obliged to put all eligible cases through the new system, however due to moral hazard (cherry picking) it is more likely that around 90% of eligible cases will be put through;
- The funding will introduce a tighter merits based regime which should result in 80% of cases being successful;
- All current cases behave in a similar way to legally aided cases in terms of length of time and damages awarded.

The **income assumptions** for the NIALAS model, that is the benefits of the options that can be valued in money terms, (revenue streams), were based on:

- All 514 solicitors firms in NI will pay at least a £600 registration to use the new system
- Barristers also would be obliged to register in order to be able to receive instructions under the scheme proposed
- Individuals wishing to use the system will pay a £50 application fee
- Successful plaintiffs who settle before court will pay 6% of their damages into the fund

- Successful plaintiffs who go to court will pay 15% of their damages into the fund.

The assumptions made in relation to **costs** associated with running the preferred option were that:

- NILSC will still be liable for damages and costs relating to lost cases
- The costs and damages are bulked up based on current legal aid cases
- Administration costs will be around the level that they currently are
- NILSC will procure Stop Loss and Fund insurance, the premium for which will be no more than £50,000 per annum.

Quantitative Analysis of monetary out turn

The performance of the NIALAS on a quantitative basis was modelled over a 10 year period. The base case Net Present Cost ("NPC") of the option i.e. the best estimate of option costs and benefits after adjustment for optimism bias is compared with the status quo position. The analysis was based on the adjusted costs and benefits over a period of 10 years at a discount rate of 3.5% real. Set out below is a summary of the discounted net benefits for NIALAS against the current position.

Option	Net discounted Benefit £
Option Status Quo	(27,473,446)
Option NIALAS	12,074,661

The analysis based on the above assumptions indicates that over a 10 year period the NIALAS would not only break even but would generate positive benefits to the Commission of over £12 million in this time. The positive benefits ie a surplus of income generated over costs, occur at an early stage of the ten year period.

Assessment of non-monetary costs and benefits

The different approaches to funding money damage cases have other costs and benefits to which it is difficult to allocate a monetary value. These non-monetary costs and benefits can however be equally as important as the monetary values and are significant in the decision making process. To evaluate these non-monetary factors a "weighted" scoring approach was applied. The benefit criteria are closely related to specific objectives and policies of the NILSC. The criteria and the weighting awarded to each objective which were applied in the detailed analysis were:

1	Ability to mitigate against risks identified in the VFM policy	20
2	Ability to meet government targeting social needs objectives	20
3	Ability to maintain and extend access to justice	30
4	Ability to monitor quality of service	20
5	Ease of implementation	10

Each benefit criterion was weighted to give a total score of 100 for all five criteria, with the most important receiving the greatest weighting. NIALAS was then scored out of 20 against each benefit criterion and this score is then multiplied by the allocated weighting to produce a "weighted score". The total weighted score for NIALAS was compared with the current

position to give a qualitative ranking. A summary of the qualitative weighting and scoring indicates:

Option	Raw Score	Weighted score	Rank
Option : Status Quo	23	380	2
Option : NIALAS	41	870	1

Thus the NIALAS met the Commission’s qualitative policy objectives significantly better than did the current approach, especially in meeting Targeting Social Need and maintaining and extending access to justice.

Sensitivity analysis

Whilst risk is measurable, the HMT Green Book recognises that uncertainty is more vague and of unknown probability. The proposed model was then subjected to detailed sensitivity analysis to test its robustness in respect of the following costs and benefits:

Sensitivity	Description
Sensitivity 1	Amendment to the success rates of cases taken
Sensitivity 2	Amendment to the level of uptake of the fund
Sensitivity 3	Amendment to the Fund Administration Costs
Sensitivity 4	Amendment to the level of applicant and registration fees
Sensitivity 5	Amendment to the level of damages won put back into the fund

The results of the detailed sensitivity analysis demonstrated that the NIALAS model was particularly sensitive to the level of successful cases taken. If this is not closely monitored the fund could move into deficit. The model was also sensitive to the level of damages paid back into the fund and if this is too low it could also have serious implications on the success of the fund. Other factors, such as the registration fee charged to solicitors’ firms and the number of cases being taken also had an impact over a 10 year period though not as significant.

Conclusions

The implementation of the Northern Ireland legislation to develop Civil Legal Services through the introduction of a Funding Code and the requirement to demonstrate value for money within a capped budget will impact significantly on Legal Aid funding of money damages cases. Access to Legal Aid is currently available to almost 50% of the Northern Ireland population and evidence demonstrates that uptake is well targeted at those most in social need. Reduction in current Legal Aid funding will clearly have an adverse affect on those members of society of limited means to enable them to enforce their rights.

The NILSC has explored various alternatives to the funding of money damages cases within an NI context. A NIALAS appears not only to be the most appropriate and effective option in meeting the Commission’s objectives of ensuring access to justice, maintaining the geographical network of legal provision but potentially offering the opportunity to extend

further access to justice through its positive contribution of funding to the Commission. Such an approach also appears to command the support of key stakeholders in the province.

Current legislation precludes the Commission from establishing a NIALAS. The next stage for the NILSC following completion of the current exercise will be to make an evidence based case to the Lord Chancellor for a change to the present legislation. The early devolution of justice to the new Northern Ireland Assembly may hopefully assist this process.

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