EXPLANATORY MEMORANDUM TO

The Legal Aid (General) (Amendment) Regulations (Northern Ireland) 2014

SR 2014 No. 64

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department of Justice ("the Department") to accompany the above Statutory Rule, which is laid before the Northern Ireland Assembly.

1.2 The Statutory Rule is made under Articles 22 and 27 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and is subject to the negative resolution procedure.

1.3 The Rule makes amendments to the Legal Aid (General) Regulations (Northern Ireland) 1965.

2. Purpose

2.1 The Rule relates to the exercise of function by the Northern Ireland Legal Services Commission ("the Commission") in authorising solicitors to instruct counsel in proceedings funded by way of civil legal aid.

2.2 The Rule provides that authorisation must be obtained from the Commission prior to instructing counsel (junior and / or senior) in such proceedings.

2.3 In conjunction with this Rule, the Department has issued guidance to the Commission under Article 8 of the Access to Justice (Northern Ireland) 2003 as to the manner in which it considers the Commission should grant such authorisation. That guidance, together with the corresponding guidance issued by the Commission to the legal profession, is published on the Commission's website at www.nilsc.org.uk

3. Background

3.1 In September 2010 the Department commissioned the "Access to Justice Review" to review legal aid in Northern Ireland and develop proposals to improve access to justice.

3.2 One of the findings of the Access to Justice Review, which reported in September 2011, was that in civil and family

proceedings the levels of representation funded by the Commission were not always proportionate to the expertise required. The report recommended that this disparity be addressed.

4. Consultation

4.1 In November 2012 the Department published a consultation document on the Reform of Publicly Funded Legal Representation in the Civil and Family Courts outlining the proposed amendment to the 1965 Regulations. In addition to that consultation exercise, the Department consulted the Committee for Justice in the Northern Ireland Assembly.

5. Equality Impact

5.1 An initial screening exercise indicated that a full equality impact assessment ("EQIA") of the proposed amendment was not necessary. However, the Department chose not to screen the options out at that stage. Instead, the Department issued an EQIA consultation document in an effort to obtain additional information to supplement that already available.

5.2 A further equality screening exercise was carried out at the end of the consultation and the policy was screened out. A full EQIA was therefore considered unnecessary.

6. Regulatory Impact Assessment

6.1 A final Regulatory Impact Assessment was carried out in June 2013. A copy of the Assessment can be found in the Annex to this Explanatory Memorandum.

7. Financial Implications

7.1 The Rule, which provides that prior authority must be obtained from the Commission in advance of instructing counsel (junior and / or senior) is part of a programme of legal aid reforms designed to deliver value for money and reduce legal aid expenditure. In conjunction with the guidance issued by the Department, the Rule is expected to contribute to significant savings of approximately £3.4m per annum to the legal aid fund, once all bills paid relate to certificates granted after the reforms have been implemented.

8. Section 24 of the Northern Ireland Act 1998

8.1 The Department considers the Rule to be compatible with section 24 of the Northern Ireland Act 1998.

9. EU Implications

9.1 Not applicable

10. Parity or Replicatory Measure

10.1 Not applicable

11. Additional Information

11.1 Not applicable



Department of Justice

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Regulatory Impact Assessment

Reform of Publicly Funded Legal Representation in the Civil and Family Courts

Published March 2014

Contents

1. Introduction

2. Background

3. Options

4. Costs

5. Benefits

6. Impact

Annex A: Reform Proposals - Overview

Annex B: Post Implementation Review

1. Introduction

Proposal

1.1 Proposals for Reform of Publicly Funded Legal Representation in the Civil and Family Courts.

Objective

1.2 The purpose of this project is to regulate the circumstances in which publicly funded Junior Counsel in Family Proceedings Courts and more than one, or Senior Counsel in the higher courts are assigned, to ensure appropriate, but cost-effective, levels of representation at all levels. The project seeks to introduce new and revised requirements for applicants and solicitors seeking to engage Counsel on behalf of legally assisted persons, and will go some way to meeting the Minister's strategic objective of bringing legal aid within budget.

1.3 This will be of interest to Counsel, solicitors and their clients, the public generally and to other providers in the legal services market whose policies, practices and procedures are affected, or influenced by, legal aid.

1.4 On 29 November 2012 the Minister of Justice published proposals for consultation along with a Partial Draft Regulatory Impact Assessment (RIA). The consultation period closed on the 8 March 2013.

1.5 This full and final RIA builds upon the analysis in the partial RIA with information from the Consultation, updated data collection and analysis.

2. Background

2.1 The legal aid budget for 2013/14 is set at £75million. The latest estimates from the Northern Ireland Legal Services Commission (the Commission) show an anticipated total spend of £102million for 2013/14. The Minister is committed to improving access to justice while bringing legal aid spend within budget.

2.2 In September 2010 the Minister of Justice announced a review of legal aid provisions in Northern Ireland with a view to developing proposals on how best to help people secure access to justice while achieving value for money in the use of public funds. The final report of the Access to Justice Review (the Review) which contained 159 conclusions and recommendations was published in September 2011 and was subject to public consultation thereafter.

2.3 On 2 July 2012 the Minister of Justice announced his response to the Review and published a Departmental Action Plan (the Plan) setting out 38 projects, specifically addressing 138 of the recommendations. The projects in the Plan were grouped into three strategic priorities:

i. Improving Access to Justice;
ii. Bringing Legal Aid Expenditure Within Budget: and
iii. Improving Governance and Accountability of Legal Aid.

The Plan allocated workloads across the 2012-2015 period with various milestones attached to each project.

2.4 **Project 25: Reform of Publicly Funded Legal Representation in the Civil and Family Courts -** Project 25, which falls within strategic objective two, seeks to address six of the Review recommendations (71, 72, 75, 76, 77 and 78) specifically considering the levels of representation in civil and family proceedings at the magistrates' court, County Court and the High Court.

2.5 The Review recommended that the levels of representation, particularly in the higher courts, be urgently reviewed; that solicitors should take carriage

of proceedings in the magistrates' courts, including Family Proceedings, and in the Family Care Centre where their experience allows (and be adequately remunerated where they act without Counsel); and that Senior Counsel should not be requested for proceedings in the Family Care Centre, County Court or High Court (other than in exceptional circumstances). The review further recommended that where Senior Counsel was granted, the circumstances where they could act alone, without the support of Junior Counsel, should be explored.

2.6 For those measures which require regulatory change, following consideration of responses to the consultation, amendments may be made to the following:

- the Legal Aid (General) Regulations (NI) 1965;
- the Legal Aid, Advice and Assistance (NI) Order 1981
- the Legal Advice and Assistance Regulations (NI) 1981; and
- the Access to Justice (NI) Order 2003

2.7 It is estimated that the proposals within this project, when fully implemented, could realise approximately £3.4million in annual savings while retaining appropriate levels of representation and without reducing access to justice for those who need it most.

Risk Assessment

2.8 Civil legal aid expenditure in Northern Ireland has been increasing in recent years. Civil legal aid expenditure in 2009/10, the year before devolution, was £36.9million. This rose to £41.9million in 2010/11 and again to £48.7million in 2011/12. Approximately one third of annual civil legal aid expenditure in 2011/12 related to Counsel fees.

2.9 The Review found that level of representation for any party to proceedings may not always relate to the expertise required of the legal issues in dispute. The Review concluded that the same level of advocacy should not necessarily apply to all the parties in the proceedings unless their own

specific issue requires that level of specialism and expertise. For example, where parties are not in dispute or are impacted to the same extent by the same legal issues, it may not be appropriate for each assisted party in the case to be represented separately or to the same level.

2.10 If the scope of legally aided access to civil justice is to be retained for those who need it most, particularly in matters impacting the welfare of children, it is necessary to consider alternative methods of reducing the spend while minimising the impact to the number of people who require higher levels of legal representation in Court.

3. Options

Do Nothing

3.1 This is not a viable option as it is imperative that civil legal aid is brought within budget and one key element is to limit, to a level which is appropriate and sustainable, the occasions which Counsel can be authorised for a legally assisted party in a civil matter in the Courts in Northern Ireland. The Access to Justice Review Report clearly articulated the rationale for change which was accepted by the Minister in his response.

3.2 Two options were contained within the Consultation document.

Option 1

3.3 This option proposed:

- prior authority for funding against revised criteria must be sought before the engagement of Senior or Junior Counsel in civil or family proceedings at any court tier regardless of circumstances.

- where authorisation to fund Senior Counsel is granted in any civil matter at any court tier, the application on behalf of the assisted person must set out the reasons why the support of Junior Counsel is required and to what extent, before continued authorisation covering funding for both Senior and Junior Counsel may continue;

- authorisation to fund Senior Counsel must be confirmed by a member of staff at Director level within the Legal Services Commission;

The consultation document estimated that Option 1 would save approximately £4.2million

Option 2

3.4 The option proposed:

- requests to fund any Counsel in **Family Proceedings Courts** should be refused other than where related criminal court proceedings concerning allegations of serious sexual or physical abuse have been brought;

- authorisation should not be granted to fund Senior Counsel in the **Family Care Centre** other than where related criminal court proceedings concerning allegations for serious sexual or physical abuse have been brought;

- authorisation should not be granted to fund Senior Counsel in the other civil matters in the **County Court**;

- authorisation to fund Senior Counsel in **High Court Children Order** proceedings 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 reasonably be presented by Junior Counsel;

The consultation document estimated that Option 2 would save approximately £2.8million.

Revised Policy Post Consultation

3.5 In consideration of the responses to the Consultation, and further analysis of data and engagement with key stakeholders, the Department has revised the proposed policy which will introduce the following general principles:

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- Legally aided representation will generally be **limited** to:

    - solicitors in the magistrates' courts;
    - one Junior Counsel in the County courts;
    - one Counsel (normally Junior) in the higher courts;

- while each application will be considered on its merits, where opposing parties are both legally aided, representation will normally be limited to that which is generally considered appropriate for the type of proceedings and court tier involved;

- where costs may potentially be recovered from the assisted person by way of the statutory charge, the solicitor must have advised them of the cost implications and the assisted person must have confirmed in writing that they are content to bear any additional costs associated with engaging Counsel;

- save in exceptional circumstances, representation should not be authorised at a level higher than those engaged by the opposing party in the case (or child in Children Order proceedings);

- where authorisation to fund **more than one Counsel** is sought in any civil or family matter at the County or higher court tiers (including appeals), the application on behalf of the assisted person must set out the reasons why the support of Senior or more than one Counsel is required and to what extent, before continued authorisation covering funding for both Senior and Junior (or two Junior) Counsel may be authorised;

- where the solicitor feels that Counsel is required for undefended divorce proceedings, or exceptional cases in the magistrates' court, the **solicitor** must set out the specific reasons why the legal issues are outwith their competence, the level of support required, the demonstrable benefit that Counsel will bring, and to what extent their involvement is required.

3.6 Criteria for suggested levels of representation across all court tiers are detailed in Guidance from the Department of Justice, and supported by the Northern Ireland Legal Services Commission's Guidance on relevant factors to be taken into consideration, both of which will be published on www.nilsc.org.uk.

4. Costs

4.1 The Minister of Justice in his speech to Department of Justice stakeholders and partner organisations made reference to "the exponentially increasing legal aid budget". In referring to civil legal aid he said "we now need to make improvements to the controls over civil legal aid, here the costs have more than tripled in a ten year period and it has continued to grow, this must stop. I have already published proposals for changes to ensure that legal aid for Counsel is only provided where the individual circumstances in each case genuinely require this".

Do Nothing

4.2 This is not a viable option as the Minister has made clear it is imperative that civil legal aid is brought within budget and one key element is to limit, to a level which is appropriate and sustainable, the occasions which Counsel can be authorised for a legally assisted party in a civil matter in the Courts in Northern Ireland. The Access to Justice Review Report clearly articulated the rationale for change.

Options 1 and 2

4.3 The Consultation sought information on the impact of each of these options as outlined in the Draft Partial RIA published on 29 November 2012. No responses were received to allow further elaboration on the assumptions detailed in that document.

Revised Policy Proposal

4.4 In consideration of the responses to the Consultation, and further analysis of data and engagement with key stakeholders, the Department has revised the proposed policy as summarised at Section 3 and **Annex A** to this document and in full in the Department's Response to the Consultation.

Solicitors

4.5 The impact on solicitors has been mitigated from the original options as a result of the Consultation responses.

4.6 Solicitors are currently required to seek prior authority for junior counsel under Assistance by Way of Representation (ABWOR), and for Senior Counsel under Civil Legal Aid (CLA). The revised policy will require solicitors requesting Junior Counsel in the magistrates' courts to specify how their application meets the revised criteria and satisfy the Commission's adjudicators that the issues are outwith their competence. While Junior Counsel will still be authorised for the higher Courts, the solicitor will now be able to 'opt in' where they wish to take carriage of the proceedings themselves (where they have rights of audience). They will also be required to confirm that they have advised their client of any financial implications of engaging counsel and ensure that the client confirms they are content to accept those implications.

4.7 The only business area to be affected by a new requirement for prior authority for Counsel where this would have been 'inherent' previously will be for Undefended Matrimonial Proceedings where the solicitor will be expected to undertake work without instructing Counsel.

4.8 Previously, some solicitors have submitted the opinion of Junior Counsel to set out the details of their application, which will no longer be accepted under the revised policy for requests made under ABWOR. Junior Counsel's opinion for Senior Counsel will still be required for applications for more than one Counsel under CLA.

4.9 The new application process will be supported by revised forms and guidance and may initially impact solicitors when submitting applications. However, as the criteria to be used for adjudication have been developed to reduce a higher level of representation than is the 'norm' for the court tier, it is expected that the number of requests for Counsel will decrease and that any initial costs (in

terms of solicitor time in making applications) will be reduced in the longer term as the policy becomes established.

4.10 A downturn in the grant of Counsel particularly in the lower tiers of court may mean solicitors spending more time preparing for and attending in court, than they may have done previously if Counsel had been engaged. Limited data is available to determine the frequency of solicitors attending court hearings or consultations in support of Counsel, although in the County Court and higher court tiers this is accepted practice.

4.11 There is also potential for solicitor's costs to increase as they undertake some work previously carried out by Counsel instructed by them. However, our estimates indicate that if Children Order cases in the Family Proceedings Courts were undertaken by solicitors acting without Counsel, this would reduce the annual solicitor's profit costs by approximately £0.5million once all bills paid relate to certificates granted post-reform.

4.12 It is not possible to quantify the cost impact for individuals solicitor firms given that these could vary greatly depending on the business model operated within and solicitors firm and the proportion/nature of civil business they may undertake. It is possible that some solicitors may reduce the amount of legal aid work they supply, or refocus their legal aid work into the most profitable categories. The matter of choice of solicitor will remain with the client and the Commission has no influence whatsoever in this respect.

Counsel

4.13 These proposals will directly affect the engagement, and therefore earning potential, of Counsel carrying out legally aided work in the civil courts in Northern Ireland. The level and extent of the impact will depend on the type of business and court tier in which each barrister may be engaged, though it should be noted that the Commission does not have any involvement in the selection of any individual barrister, as this is the choice decision of the legally assisted person, with the advice of their chosen solicitor.

4.14 It is not envisaged that individual Counsel will be impacted by additional implementation costs as the main impact of the revised policy will limit authorisations for a higher level of representation. They will be largely unaffected by the new application process, but will be required to submit Opinion as to how requests for more than one Counsel meet the revised criteria and guidance.

4.15 The earnings each individual barrister attributes to civil legal aid payments as a proportion of their overall income is not quantifiable, and no further information was received as a result of the Consultation.

4.16 Collectively as a result of this policy the potential loss of civil legal aid counsel income is estimated up to £3 million per annum once all bills paid relate to certificates granted post-reform.

Northern Ireland Legal Services Commission

4.17 The introduction of a new application process, procedures and criteria for the grant of Counsel will incur initial costs in time-terms of staff training and compliance monitoring, and for the design and publication of revised forms and guidance. It is however expected that, in the longer term, the volume of requests for Counsel will reduce and enable resources to focus on the more qualitative aspects of adjudication in particular to ensure policy compliance, and improve governance and accountability. It is likely this will be most evident following the first six months/year of implementation.

The Courts

4.18 The revised policy is expected to have minimal impact on the work of the Courts with the main change being a reduction in the number of Counsel engaged. All assisted persons will continue to receive appropriate legal representation, and this policy will not increase the number of personal litigants appearing before the Court.

4.19 The new application process and adjudication criteria are not expected to cause any undue delay in considering properly detailed applications by the Commission, and the Courts will have no role in determining the level of representation. Some of the responses to the Consultation asserted that lesser involvement of Counsel in Family Proceedings may in fact reduce delay and number of court appearances.

Other Government Departments

4.20 It is envisaged that this policy change should positively impact other public bodies, for example the Health Trusts who may engage Senior Counsel having considered the level of representation engaged on behalf of an assisted party. To support the policy, the Commission will seek to agree Protocols with the Directorate of Legal Services (DLS) who are instructed by the Health Trusts in Public Law cases, NI Guardian Ad Litem Agency (NIGALA), and other appropriate bodies.

4.21 While many and varied factors are taken into account in engaging Counsel it is expected that similar policies will be considered in reaching these decisions which should produce further cost savings to the public purse. It is not possible to quantify the cost impact which could vary within any Department depending on the nature and volume of court business and whether the opposing parties are legally aided.

Court users

4.22 The revised criteria seeks to restrict the level of legal representation funded from legal aid to a limit which is both sustainable and appropriate, and a higher level may be authorised for an assisted person where the merits of the application justify Counsel engagement, and where the assisted person has accepted any financial implications of their engagement.

4.23 Previously the authority to engage Senior Counsel, particularly for high value money damage cases in the High Court, and Junior Counsel in undefended matrimonial proceedings, was considered an almost automatic right. The new process will not do so, therefore, unless such authorisation is justified and

financial implications accepted, the expected reduction in these levels of legal representation could reduce the financial impact for legal aid clients in such cases.

4.24 Where privately funded opponents may have engaged a higher level of representation in order to match that authorised for a legally aided opponent, or where they felt disadvantaged by being unable to fund representation to that level, those not eligible for legal aid should also see some financial benefits.

Business and other Sectors

4.25 It is not thought the policy change will impact other areas of business, charities, social economy enterprises or the voluntary sector as an appropriate level of legal representation will continue to be funded where merited. Where private sector opponents have engaged a higher level of representation in order to match that authorised for a legally aided client, they may see some benefits from no longer feeling the need to do so.

4.26 It is estimated that the policy will result in legal aid savings in the region of **£3.4million** per annum once all bills paid relate to certificates issued post-reform.

5. Benefits

5.1 The Minister of Justice in his speech to Department of Justice stakeholders and partner organisations made reference to "the exponentially increasing legal aid budget". In referring to civil legal aid he said "we now need to make improvements to the controls over civil legal aid, here the costs have more than tripled in a ten year period and it has continued to grow, this must stop. I have already published proposals for changes to ensure that legal aid for Counsel is only provided where the individual circumstances in each case genuinely require this".

Do Nothing

5.2 This is not a viable option as the Minister has made clear it is imperative that civil legal aid is brought within budget and one key element is to limit, to a level which is appropriate and sustainable, the occasions which Counsel can be authorised for a legally assisted party in a civil matter in the Courts in Northern Ireland. The Access to Justice Review Report clearly articulated the rationale for change.

Options 1 and 2

5.3 The Consultation sought information on the impact of each of these options as outlined in the Draft Partial RIA published on 29 November 2012. No responses were received to allow further elaboration on the assumptions detailed in that document.

Revised Policy Proposal

5.4 Revised procedures and processes will ensure transparency in the Commission's determination of whether and to what extent Counsel is merited in a case while fulfilling the Commission's duty to apply sufficient scrutiny to legal aid applications requiring Counsel and, where Counsel is retained, to ensure that the Commission is fulfilling its obligation to fund an appropriate level of advocacy at each court tier.

5.5 It will help to ensure that funding for an adequate level of representation, normally solicitor in the magistrates' court and Junior Counsel in the higher courts, is available to those of limited means enabling the enforcement of their rights in the same manner as those who can afford to litigate privately from their own resources.

5.6 It seeks to minimise the instances were those falling outside the eligibility criteria for support, but who still have limited means to take or defend an action privately, may incur any avoidable legal fees or be at a disadvantage to a party who is legally assisted.

5.7 It provides additional safeguards for assisted persons. Where the assisted person is liable for additional costs which may be recovered under the statutory charge, the solicitor must have advised them of the potential cost implications and the assisted person must have confirmed they are content to bear any additional costs associated with engaging Counsel.

5.8 It re-enforces the duty of all members of the legal profession to safeguard the legal aid fund and advise the Commission at the earliest opportunity where the merits, prospects of success or likelihood of any financial benefit outweighing anticipated legal costs as originally granted, no longer apply.

5.9 Each individual application will be considered on its own facts and merits taking into account the role and the involvement of each party within the proceedings. Where it is considered that a level of Counsel is appropriate and proportionate for one assisted person, it does not follow that all other parties should be similarly represented. Similarly, where a higher level of Counsel has been authorised for one application, it does not follow that all other related applications should require similar representation. The case for or against each party and / or on each application may be different and other parties joined to the case may not be so directly impacted by the issues of their particular application.

Legal Aid Fund

5.10 These policy proposals are subject to economic appraisal and will be monitored and evaluated to ensure they contribute to reducing the cost of legal aid in the civil and family courts which has to date been significantly over budget year-on-year.

Economic Benefits

5.11 A reduction in government spending associated with the reduction in legal aid would contribute to achieving the government's macroeconomic objectives, in particular reducing the size of the government's fiscal deficit.

Wider Benefits

5.12 It is expected there will be an increase in public confidence in the legal aid system with implementation of the proposals, a first step in the overall programme of civil legal aid reform, tackling legal aid expenditure while ensuring access to justice with the appropriate levels of representation.

6. Impact

Main affected groups

6.1 The main groups affected by the reforms will be:

- Legal firms (undertaking legally aided civil and family work);
- Advocates conducting legal representation for clients who are legally aided; and
- The Northern Ireland Legal Services Commission.

Implementation

6.2 The Department of Justice's Guidance and legislative change will be applied by the Commission's adjudicators from April 2014. New forms, and guidance will be published by the Commission and issued to all practitioners in advance.

Equality Impact Assessment

6.3 The Equality Impact Assessment (EQIA) screening document details the equality impacts.

Human Rights

6.4 We have reviewed these proposals in view of the impact on representation and the right to a fair trial and it is the Department's view that human rights are not adversely impacted by this policy. Each case will continue to be adjudicated upon in accordance with the statutory criteria supported where appropriate in legislation and published guidance, and legal representation funded to an appropriate level.

Competition Assessment

6.5 The proposed reforms changing the adjudication criteria for the grant of Counsel across the court tiers may affect the number of civil and family legal aid providers.

Environment

6.6 We do not anticipate any impact on the environment as a consequence of these proposals.

Rural Impact

6.7 We have considered the rural impact of the proposals and we have not identified any adverse rural impact on applicants for legal aid who are entitled to select any service provider whether solicitor or Counsel of their own choice in any location in Northern Ireland. We have considered the extensive solicitor provider network and its access to the Bar, which is organised on a jurisdiction wide-basis and administered from the Bar Library, but with an extensive outreach to all court circuits and constituencies throughout the jurisdiction.

Justice Impact Test

6.8 The overall impact on the Justice System is outlined in the evidence base of this impact assessment.

Sustainable Development

6.9 The proposed reforms set out in this Impact Assessment are consistent with the principles of sustainable development, contributing to a sustainable economy and a just society.

Annex A

Reform Proposals – Overview

1. The Reform Proposals and associated criteria have been structured following careful consideration of the consultation responses, discussion with key stakeholders and further analysis. The proposals recognise the issues raised by respondents, further evidence given to the Justice Committee, and further data research and analysis.

2. Prior authority for civil legal aid funding will be required for all applications for:
    - Counsel in the magistrates' court (including Family Proceedings Court)
    - Counsel in undefended divorce proceedings at any tier; and
    - Senior, or more than one Counsel in the County, High or higher courts.

3. The Commission will consider each individual application in line with the statutory criteria and on the financial and legal merits, in consideration of the Guidance issued by the Department of Justice.

4. It is envisaged most of the measures can be introduced without prescriptive legislation, avoiding lengthy and costly delays to implementation.

5. Legally aided representation will generally be **limited** to:
    - solicitors in the magistrates' court
    - one Junior Counsel in the county courts
    - one Counsel (normally Junior) in the higher courts

6. **<u>Children Order</u>**
The Department considers that Solicitor is the appropriate level of legal representation for the majority of Children Order cases dealt with in the Family Proceedings Court or magistrates' court.

- **Only those specific issues presenting as significantly more difficult than the 'norm' in terms of gravity, seriousness or public importance for the court tier and case type, in the opinion of the Commission, should merit consideration for Counsel;**

    - where the **solicitor** has clearly demonstrated that the application is outwith the competence of a practitioner providing representation in this court tier and case type and merits such authorisation; and

    - having considered justification by the solicitor as to whether Junior Counsel is merited, authority may be limited in time or steps required to bring about resolution.

The Department considers that Junior Counsel is the appropriate level of legal representation for the majority of Children Order cases dealt with in the Family Care Centre.

- Requests to fund Senior, or more than one Counsel in the **County Court tier** will be considered **in only the most exceptional circumstances where the specific issues of the case are more difficult in terms of gravity, seriousness or public importance for the case type and merit the higher level of representation having considered the 'norm' of cases determined in the High Court tier,** in the opinion of the Commission.

- Where the **solicitor or Junior Counsel engaged** has clearly demonstrated that the proceedings are exceptional for the court tier**;** AND it has been demonstrated in the opinion of the Commission that the additional exceptionality criteria for additional representation of the High Court merits consideration, Senior or more than one Counsel may be authorised when deemed appropriate for continued proceedings at the Family Care Centre;

- having considered justification by the solicitor as to whether Junior Counsel is merited, authority may be limited in time or steps required to bring about resolution.

The Department considers that Junior Counsel is the appropriate level for the majority of Children Order cases dealt with in the High Court.

- Requests to fund Senior or more than one Counsel in the **High Court** will be considered **in only exceptional circumstances where the specific issues presented in the case are more difficult than the 'norm' in terms of gravity, seriousness or public importance for this court tier and the**

case type in question, and they merit the higher level of representation; and

- where the **solicitor / Junior Counsel** has clearly demonstrated that the application is outwith the competence of a practitioner providing representation in this court tier and merits such authorisation;

- having considered justification as to whether Senior, or more than one Counsel, is merited, authority may be limited in time or steps required to bring about resolution.

7. **Matrimonial Proceedings**

Undefended Matrimonial Proceedings

The Department considers that solicitor only is the appropriate level of legal representation for undefended matrimonial proceedings in either the County Court or High Court.

- A request for Junior Counsel may be authorised in extremely unusual cases where the Commission are satisfied:

  - as to whether the other party is privately funded, has confirmed Counsel have been instructed, and the civil legal aid certificate covers disputed ancillary relief matters which the solicitor has demonstrated are outwith their competence and merit representation by Counsel;

- Where the adjudicator has assessed that this is merited, funding of Junior Counsel may be limited to steps required to achieve early resolution and only where the expected benefit to the assisted person continues to reasonably outweigh the additional costs to the legal aid fund.

Defended Matrimonial proceedings

- Where a "no fault" ground is available or where it will become available within a reasonable timeframe, and the Commission grants civil legal aid on this basis, the proceedings will progress as Undefended and funding for representation will be limited as defined above;

- Where dissolution proceedings are defended, one Counsel at an appropriate level will be authorised where the statutory means and merits tests have been met, to bring the matter to the quickest possible resolution, having considered justification by the solicitor as to whether Senior or Junior Counsel is merited;

- A request for Senior or more than one Counsel may **exceptionally** be considered where:

    - the specific issues presented in the case are more difficult than the 'norm' in terms of gravity, seriousness or public importance for the court tier and the case type in question, and they merit the higher level of representation; and

    - the solicitor has clearly demonstrated that the issues cannot be resolved without this additional level of representation;

    - authority may be limited to steps required to bring about resolution, and only where the expected benefit to the client continues to reasonably outweigh the costs to the legal aid fund.

8. **All Other Civil and Family Proceedings**

Magistrates' Court
The Department considers that Solicitor is the appropriate level of legal representation for the vast majority of cases dealt with in the magistrates' court, and it should be extremely unusual for the Commission to authorise Counsel for other cases falling within this category

County Court
The Department considers that representation by a solicitor together with Junior Counsel is the appropriate level of legal representation for all other civil and family proceedings in the County Court, **and it should be extremely unusual for the Commission to authorise Senior, or more than one, Counsel for other cases falling within this category.**

High Court
The Department considers that representation by a solicitor together with Junior Counsel is the appropriate level of legal representation for the majority of other civil and family proceedings in the High Court, **and it should be unusual for the Commission to authorise Senior, or more than one, Counsel for other cases falling within this category.**

9. **Estimate of Savings**

The proposals with revised criteria have been applied across the tiers of court and proceedings using the 2011/12 baseline data provided by the Commission for case volumes for Junior and Senior Counsel.

The revised estimates of annual savings against 2011-12 costs, total approximately £3.0million in respect of Counsel and £0.5million for

solicitors' costs (net of VAT and disbursements). Given the length of time to progress cases already authorised, and this level of savings will not be achieved for at least 4 years when all bills paid relate to certificates granted post-reform.

Annex B

Post Implementation Review Plan

Basis of the Review: It is intended to review the policy within 4 years following the implementation date. The review will form part of the wider review of those policies implemented following the Access to Justice Review.
Review Objective: The project seeks to introduce proposals to limit, to a level which is appropriate and sustainable, the occasions which Counsel can be authorised for a legally assisted person in a civil matter in the courts in Northern Ireland.
Review approach and Rationale: The intention is to monitor and review the impact of the proposals across the tiers of court against data collated by the Legal Services Commission for grant of Counsel and subsequent expenditure. We will in the analysis consider the impact of the proposals on solicitors and barristers as outlined in the Impact Assessment and the Equality Impact Assessment.
Baseline: The proposals will be assessed against the 2011/12 baseline for expenditure and volumes data, as detailed in approved economic appraisals.
Success Criteria: Whether the policies proposed have the impact outlined in Economic Appraisals.