

Consultation on Section 75 Equality Impact Assessment of the Proposals on Reform of legal representation provided by way of criminal legal aid at the Crown Court

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1.0 Introduction

1.1 The purpose of this document is to seek views from interested parties on the implications of the proposed reform of legal representation provided by way of criminal legal aid at the Crown Court with regard to the equality of opportunity for all categories specified under Section 75 of the Northern Ireland Act 1998. This document provides an overview of the purpose and content of the proposals.

1.2 The Northern Ireland Courts and Tribunals Service (the NICTS) is required to screen all policies to determine whether a full Equality Impact Assessment (EQIA) is required. In this case, the NICTS has concluded that a full EQIA should be carried out on the proposals and it would welcome any information on the impact of the policy on any of the Section 75 equality categories.

1.3 Essentially, the proposals would amend the circumstances under which a court may certify that a defendant could be represented by two counsel in the Crown Court. The proposed amendments are based on the current provisions in England and Wales, but modified to be more reflective of the needs of the Northern Ireland jurisdiction.

2.0 Background

2.1 The right to free legal aid for defendants being prosecuted in the Crown Court, who are unable to pay for their own defence, is a fundamental principle of the criminal justice system in Northern Ireland. This entitles a defendant to have a solicitor and junior counsel assigned to him to conduct his defence. The legislation that currently applies to certification in Northern Ireland has been in existence since the mid nineteen-sixties. Equivalent legislation in England and Wales has been repealed and new rules have been made setting out different criteria that must be met in a case before the court can certify for two counsel. This has contributed to the position in Northern Ireland where proportionately more defendants at the Crown Court are represented by two counsel than in England and Wales.

2.2 The NICTS believes that a defendant's right to have two counsel must be maintained where the interests of justice and the right to a fair trial require it. However, the NICTS is conscious of the need to ensure that the finite resources allocated to legal aid are used efficiently and to the greatest good of all concerned. It is with these objectives in mind that the NICTS developed the proposals to better regulate the assignment of counsel in Northern Ireland and bring this jurisdiction more into line with England and Wales.

3.0 Legislative position

3.1 The Legal Aid in Criminal Cases: Defence Certificates Rules 1966 (the 1966 Rules) were made in exercise of powers conferred by the Legal Aid and Advice Act (Northern Ireland) 1965. Although enabling powers to make new rules have been replicated in subsequent primary legislation, the 1966 Rules have not been revoked and still remain in effect. Rule 2(4) of the 1966 Rules provides that where a defendant is charged with murder, or the case appears to present exceptional difficulties, the court may certify that the interests of justice require that the defendant shall have the assistance of two counsel. Unlike England and Wales, the certification is not specific as to whether the second counsel is a senior counsel or a further junior counsel.

3.2 In England and Wales, the provisions in respect of the assignment of two counsel are set out in the Criminal Defence Service (General) (No2) Regulations 2001 (the 2001 Regulations) made under the Access to Justice Act 1999. These provisions are much more prescriptive than the provisions in Northern Ireland and before a court can certify for a senior counsel (Queen's Counsel) and one junior counsel the following criteria set out in Regulation 14 must be met:

- (a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact which could not be adequately presented except by a Queen's Counsel assisted by junior counsel; and
- (b) either:
 - (i) the case for the assisted person is exceptional compared with the generality of cases involving similar offences; or
 - (ii) a Queen's Counsel or senior Treasury counsel has been instructed on behalf of the prosecution and one of the conditions (below) is satisfied:
 - (iii) two or more advocates have been instructed on behalf of the prosecution;
 - (iv) the number of prosecution witnesses exceeds 80; or
 - (v) the number of pages of prosecution evidence exceeds 1,000.

3.3 Where the court certifies for two junior counsel, the following criteria must be met:

(a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact which could not be adequately presented by a single advocate (counsel); and

(b) either

(i) two or more advocates have been instructed on behalf of the prosecution;

(ii) the case for the assisted person is exceptional compared with the generality of cases involving similar offences;

(iii) the number of prosecution witnesses exceeds 80; or

(iv) the number of pages of prosecution evidence exceeds 1,000.

4.0 Overview of NICTS's proposal

4.1 It is proposed that new criteria governing the level of representation in Crown Court cases should be introduced in Northern Ireland. At present when a court in Northern Ireland certifies that a defendant should have the assistance of two counsel, in practice this means a senior counsel assisted by a junior counsel. The new provisions would provide for the certification by a court of:

- (i) a senior counsel assisted by a junior counsel; or
- (ii) two junior counsel.

4.2 The provisions in England and Wales contain criteria in respect of the number of prosecution witnesses and the number of pages of prosecution evidence. The NICTS considers that such criteria are not appropriate in this jurisdiction on the basis that they would rarely be met. Accordingly, these criteria have been excluded from NICTS's proposal.

4.3 In respect of certifying for a senior counsel assisted by a junior counsel the following criteria is proposed for Northern Ireland:

- (1) a criminal aid certificate may be granted in respect of a senior counsel with a junior counsel if and only if:
 - (a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact such that it could not be adequately presented except by a senior counsel assisted by a junior counsel; or
 - (b) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact and a senior counsel has been instructed on behalf of the prosecution.

4.4 In respect of certifying for two junior counsel the following criteria is proposed for Northern Ireland:

- (1) a criminal aid certificate may be granted in respect of more than one junior counsel if and only if:
 - (a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact such that it could not be adequately presented by a single counsel; or

(b) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact and two or more counsel have been instructed on behalf of the prosecution.

5.0 Equality Considerations

5.1 As a public authority under Section 75 of the Northern Ireland Act 1998, the NICTS is required to have due regard to the need to promote equality of opportunity:

- Between persons of different religious belief, political opinion racial group, age, martial status or sexual orientation
- Between men and women generally
- Between persons with a disability and persons without
- Between persons with dependants and persons without

5.2 In addition to this obligation, public authorities are required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

5.3 This legislation requires the NICTS to consider whether any policy has a differential impact upon the relevant categories, the nature and extent of that impact and whether such impact is justifiable.

5.4 The NICTS considers that the groups most likely to be affected by the proposals are Crown Court defendants and counsel representing defendants in the Crown Court, both senior and junior.

6.0 Defendants

6.1 Data on defendants on each Section 75 category are not available to the NICTS or other organisations within the criminal justice system. This is because there are sensitivities around providing personal characteristics such as religion, political opinion, sexual orientation etc. within the criminal justice process. The only data held by the NICTS on defendants are age and gender.

6.2 The NICTS has analysed the available Section 75 data on defendants dealt with before the Crown Court during 2009. The following tables show the age bands and gender of the 1556 defendants in the sample.

Age Bands

	Frequency	Percent
under 18	90	5.8
18-19 years	81	5.2
20-24 years	401	25.8
25-29 years	260	16.7
30-34 years	194	12.5
35-39 years	154	9.9
40-49 years	178	11.4
50-59 years	102	6.6
60-69 years	25	1.6

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70-79 years	8	0.5
80-89 years	1	0.1
Total	1494	96.0
Unknown	62	4.0
Total	1556	100.0

Gender

	Frequency	Percent
Company	15	1.0
Female	142	9.1
Male	1398	89.8
Unknown	1	0.1
Total	1556	100.0

6.3 The NICTS would deduce from analysing the available information, as set out in the tables above, that young males who are defendants may be affected more than any other Section 75 category. However, the impact will only be on defendants - not on young males as a category.

6.4 As previously mentioned, no data were available on the other Section 75 categories. However, it would be NICTS's opinion that there is nothing to suggest that any other Section 75 category is over represented in the number of defendants, who would therefore be affected more by the proposal.

7.0 Counsel

7.1 The Bar of Northern Ireland is an association of independent barristers based in the Bar Library in Belfast. As of September 2009 there were almost 600 members in private practice. The Bar is a body of specialist advocates experienced in litigation to which the public have access through solicitors and, in limited circumstances, by direct professional access. As the Bar is not a public body there is no requirement on it to maintain Section 75 data and such information is not collected or held by the Bar. The NICTS, therefore, has no Section 75 data on counsel.

7.2 By providing more objectively the circumstances in which a certificate can be granted for two counsel, there is likely to be a reduction in the number of two counsel cases. This should have a limited impact on junior counsel as the role of a led junior will be replaced by a sole junior and as fee rates for a sole junior are higher than for a led junior the financial impact on the junior bar, if anything, is likely to be a positive one. The greater impact will be in respect of Senior Counsel. The last survey conducted by NICTS indicated that fifty three percent of Crown Court cases are certified for two counsel and if this percentage were to be reduced significantly the reduction in fees will have an impact on senior counsel.

8.0 Consultation questions

8.1 The NICTS welcomes any information you have that suggests that any Section 75 category may be affected disproportionately by this proposal. Your comments are welcome on the equality implications of the draft proposals, particularly with regard to the following questions.

- Is there any evidence of higher or lower participation or uptake by different groups in relation to the scheme within any of the nine categories?
- Is there evidence or indication that different groups have different needs, experiences, issues and priorities in relation to the scheme?
- Is there an opportunity better to promote equality of opportunity or better relations by altering the policy or working with others in Government or the larger community?

9.0 How to respond

9.1 When responding to this document, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where appropriate, how the views of the members were assembled.

9.2 Please submit your response to this consultation by post, fax or email to:

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Closing date

9.3 Responses must be received by 16.00 on Friday 19 November 2010.

Miscellaneous

9.4 Additional copies of this document may be made without seeking permission from NICTS. Printed copies may be obtained by post by contacting the Consultation Co-ordinator at the address above. An electronic version will be available for viewing on NICTS's web-site at www.courtsni.gov.uk.

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