

A Proposal to Revise the Means Test for Criminal Legal Aid in Northern Ireland

A Consultation Response Document

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1.0 Introduction

1.1 This document is a consultation response document in respect of a consultation on a proposal to revise the means test for criminal legal aid in Northern Ireland. The consultation document was issued on 1st March 2010 for a period of 8 weeks consultation. Following representations by stakeholders the consultation period was extended until 28th May 2010. The consultation document invited comments on the proposal to set a fixed financial eligibility limit for criminal legal aid and the principle of introducing a fixed financial eligibility test.

1.2 This document covers:

- Background to the issue
- A summary of responses to the consultation
- The response of the Courts and Tribunals Service to the consultation
- The proposed way forward following this consultation

Further copies of this document and the consultation document can be obtained by contacting:

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A copy of this document and the consultation document are available on the Northern Ireland Courts and Tribunals website at: www.courtsni.gov.uk.
Alternative formats are also available on request.

2.0 Background

2.1 The grant of criminal legal aid in Northern Ireland is currently governed by the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, (the 1981 Order). Articles 28 to 30 of the 1981 Order provide the statutory framework for legal aid for criminal proceedings in the magistrates' court, for onward appeals to the County Court, and for trials before the Crown Court.

2.2 There are 2 tests to be met to receive legal aid in criminal proceedings:

- the means test and
- the interests of justice test.

The legislation does not prescribe a fixed financial limit beyond which an accused is ineligible for legal aid. Article 28(1) of the 1981 Order governs the grant of legal aid in magistrates' court proceedings and states:

“If it appears to a magistrates' court that the means of any person charged before it with any offence, or who appears or is brought before it to be dealt with, are insufficient to enable him to obtain legal aid and that it is desirable in the interests of justice that he should have free legal aid in the preparation and conduct of his defence before it, the court may grant in respect of him a criminal aid certificate, and thereupon he shall be entitled to such aid and to have-

a) a solicitor; and

b) subject to paragraph (2), counsel,

assigned to him for that purpose in such manner as may be prescribed by rules made under Article 36.

(2) Free legal aid given for the purposes of any defence before a magistrates' court shall not include representation by counsel except in the case of an indictable offence where the court is of opinion that, because of circumstances which make the case unusually grave or difficult, representation by both solicitor and counsel would be desirable.”

2.3 There is a similar means test for legal aid for Crown Court trials and onward appeals to the County Court. The criminal legal aid scheme is not a

contributory scheme: accused persons who pass the means test are eligible for free legal aid. This contrasts with the civil legal aid scheme.

2.4 The absence of prescribed financial limits for the means test for criminal legal aid has the consequence that an accused person and his or her legal representative cannot know in advance of the proceedings whether the accused person will pass the means test. This is unproblematic for persons in receipt of passporting benefits such as Jobseekers Allowance, as they will be confident that they will pass the means test. Their application for legal aid will depend on whether or not their application passes the interests of justice test. The situation is different, however, for persons in employment and the self-employed whose financial circumstances are more complex.

2.5 Similarly the process of applying for legal aid is more straightforward for persons in receipt of benefits. At present the usual practice in the magistrates' court is that an accused person applies for criminal legal aid at his or her first appearance, through completion of a statement of means form. The judiciary, when deciding whether to grant legal aid, have confirmation from an independent body regarding a person's receipt of benefits.

2.6 For persons in employment and the self-employed, however, the current means test is less straightforward. They are required to provide evidence of their income by way of recent wage slips or accounts, but will not be able to gauge, prior to the application being made, whether they are likely to pass the means test for criminal legal aid. Similarly, this presents challenges to government in terms of forecasting the legal aid budget.

2.7 The consultation document reported how the Courts and Tribunals Service followed closely the reforms implemented in England and Wales and commissioned its own research on both the means test and the merits test to inform future policy decisions regarding reform of the grant of criminal legal aid in Northern Ireland.

2.8 The research highlighted that there were a number of policy options available for reform in Northern Ireland:

1. No Intervention – do nothing to reform the current grant of criminal legal aid;
2. Replicate the reforms introduced in England and Wales by reforming both the means and merits tests, including decisions regarding who would grant legal aid;
3. Replicate the reforms brought forward in England and Wales in a phased approach by firstly considering reform of the means test only and following this with further work on the interests of justice test and the grant of criminal legal aid.

2.9 The increasing cost of legal aid in Northern Ireland, and criminal legal aid in particular, meant that option 1 was not an attractive option. For the most recent financial year, legal aid expenditure on criminal legal aid equated to approximately £59.9 million while expenditure on civil was approximately £36.8 million. Of the £59.9 million expenditure on criminal legal aid, £28.4 million was paid out in Very High Cost Criminal cases and £31.5 million was spent on all other criminal business.

2.10 Research commissioned by the Courts and Tribunals Service established that the means test may be a higher priority for reform than the merits test. Accordingly, the Courts and Tribunals Service has decided to reform means testing as a priority in the first instance.

2.11 Introducing prescribed financial eligibility limits provides greater clarity regarding who will be eligible for legal aid. This research focused on the means test reform which had been introduced in England and Wales, although the reform in Scotland was also noted.

3.0 Summary of responses

3.1 A total of 12 responses to the consultation paper were received. Two respondents indicated that they had no specific comment to make or that the proposal did not directly impact upon them. Ten responses commented specifically on the proposal. The list of those who responded to the consultation paper is attached at **Annex B**.

3.2 In addition to the formal public consultation, meetings were held with two of the respondents. Representatives from the Courts and Tribunals Service also briefed the Northern Ireland Assembly's Committee for Justice on the proposed reform of means testing at Committee meetings on 1st July 2010.

3.3 Although the consultation document set out a list of consultation questions to assist the consultation process, some respondents tailored their own responses to the proposal to set a fixed financial eligibility limit for criminal legal aid.

3.4 Summary of Responses to specific questions

Q1. Do you agree that the time is right to consider reform of the grant of criminal legal aid in Northern Ireland?

Seven of the ten respondents that commented on the consultation broadly agreed that the time is right to consider the reform of the grant of criminal legal aid and that reforming the means test will help ensure that the resources are targeted at those in greatest need. Three of the ten respondents made no specific comment in relation to this question. One respondent stated that the proposal may bring tighter control over the criminal legal aid expenditure, however, it highlighted that other major cost drivers in the criminal justice system overall need to be identified and also addressed.

Q2. Do you agree with our preferred option of considering reform of the means test in the first instance and review the interests of justice test at a later date?

One respondent agreed with our preferred option of considering reform of the means test in the first instance.

One respondent considered that as both tests are, in its view, closely intertwined it is inappropriate to consider the introduction of a fixed means test without considering the consequences for the interests of justice test.

One respondent specifically stated that it neither, agreed or disagreed with the proposal.

Three respondents highlighted article 6.3(c) of the European Convention on Human Rights: everyone charged with a criminal offence has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

One respondent noted that the reform of the means test will help ensure that the resources are targeted at those in greatest need. Two respondents considered that the interests of justice should have precedence over the means test.

Q3. Do you agree that Northern Ireland should follow the approach taken by England and Wales and Scotland to prescribe financial eligibility limits for criminal legal aid in the magistrates' court?

Whilst many respondents broadly supported the principle of means testing, three of the ten respondents who commented expressed concern that the proposed financial eligibility limits may be set too low, thereby disqualifying too many applicants. One respondent expressed a preference for a test based on disposable income only on the principle that legal aid should be reserved for those without sufficient disposable income or capital to pay for representation. That respondent suggested that if financial limits are to be set in Northern Ireland a guarantee must be given that anyone deemed to be financially ineligible will not be faced with the prospect of representing themselves in court as justice will not be served. One respondent argued that the main cost drivers in the legal system are not actually wealthy defendants receiving legal aid, but the increased volume of offences and changes in legislation leading to more cases and hence budgetary overspend.

Concern was also raised about the potential for increasing administrative costs through the introduction of a fixed means test which might outweigh any savings to the legal aid fund. One respondent cautioned over removing means testing from being a judicial function. One respondent suggested that if means testing is introduced it should be commenced in the magistrates' court first before proceeding to the Crown Court.

The Courts and Tribunal Service intends to address these concerns by conducting research into financial eligibility limits. If a decision is taken to proceed a full equality impact assessment will be carried out and a consultation exercise will be undertaken.

It should be noted that the proposal has been equality-screened in accordance with our obligations under the Northern Ireland Act 1998. The screening indicated that the policy has no adverse effect on any of the section 75 categories.

The proposal has been included as part of the document published by the Department of Justice entitled "Equality Impact Assessment for a Proposed Justice (NI) Bill 2010", which is available at www.dojni.gov.uk/index/public-consultations/current-consultations/justice_bill_eqia.pdf.

Q4. Do you consider there are good reasons not to introduce prescribed financial limits to assess financial eligibility for criminal legal aid? If so, please specify.

None of the respondents provided reasons not to introduce prescribed financial limits.

Five of the ten respondents who commented caveated their response to this question.

One respondent stated that they would not support any proposal to set a prescribed financial eligibility limit for criminal legal aid solely to create savings to the legal aid fund and urged that sufficient funding be made available for the poor and other disadvantaged persons.

Another respondent advised that in principle, limits for eligibility are compatible with human rights, however the respondent also suggested that when assessing financial eligibility consideration needs to be given to the individual's dependents such as extended family members.

One respondent submitted that all defendants under the age of 18 should be passported through the means test. Even if this course was adopted, that particular respondent still had concerns regarding the indirect impact on children if their parents are refused legal aid and have to pay substantial legal fees. In addition, the respondent urged the Court Service to consult directly with children and young people.

One respondent stated that given the nature of domestic violence, means testing or any other screening should not apply in cases involving domestic violence.

The Courts and Tribunal Service believes that the legal aid fund should be targeted at those who need it most and that those who can afford to pay for their own defence should do so.

Q5. To date our research has focused on the reforms which were introduced in England and Wales. Do you agree with this approach? If not, please specify a more suitable comparator jurisdiction.

Three of the ten respondents highlighted concern that the Courts and Tribunals Service should not merely replicate the precise means testing system in England and Wales without careful and detailed evidence being provided with regard to a cost benefit analysis.

Three respondents argued that no decisions should be taken in Northern Ireland until such times as there is clear evidence that the system in England is working and that accurate decisions are being made regarding entitlements to legal aid. One respondent also suggested that Courts and Tribunals Service should conduct further research and consideration should be given to the Scottish means testing system.

Four of the respondents who answered this question agreed that lessons learnt from England and Wales with regard to the introduction of criminal legal aid means testing and the implementation thereof should be reflected in any arrangements put in place for Northern Ireland.

One respondent pointed out that in terms of the running of the courts, it may not be appropriate to entirely replicate the England and Wales system as the magistrates' courts in Northern Ireland deal with more serious offences.

The Courts and Tribunals Service believes that subsequent to a "bedding in" period during which a number of IT issues were resolved the system in England and Wales is functioning well.

Q6. Do you consider that the introduction of a revised means test for criminal legal aid would adversely affect access to justice?

Of the ten respondents who commented three suggested that the proposed reforms might adversely affect access to justice.

One respondent commented that the reform might imperil access to justice as those ruled ineligible for legal aid may be forced to defend themselves leading to potential miscarriages of justice. Not only would this impact negatively on equality of arms, but delays inherent in the justice system combined with an economic downturn might pressurise defendants to plead guilty in order to dispose of the proceedings swiftly and thereby avoid the financial burden of contesting the case.

One respondent urged the Courts and Tribunals Service to ensure that any reform limiting access to legal aid should be accompanied by measures to allow an intervention to appoint representation to an unrepresented person where the interests of justice so require to discourage false pleas.

The Courts and Tribunals Service is committed to ensuring that access to justice is maintained and those who cannot afford to defend themselves will receive free legal aid.

Q7. Do you agree that if a prescribed means test was to be introduced, that an amendment should be made to Article 31 of the 1981 Order to confine the resolution of doubt provision to the interests of justice test only?

One respondent agreed with a proposed amendment to Article 31 of the 1981 Order.

Four respondents urged caution over reform of article 31 (resolution of doubt) of the 1981 Order, arguing that it functions as a safety net for the granting of legal aid when the interests of justice so require or should it be unclear whether the eligibility test has been met.

Another respondent stated a preference to leave Article 31 unchanged so that some discretion remains available.

One respondent wished to reserve its position on this question pending sight of the primary legislation introducing a prescribed means test.

4.0 Response by the Courts and Tribunals Service and Proposed Way Forward

4.1 Courts and Tribunals Service officials have considered the responses in relation to this consultation. As outlined in the consultation document, the underlying principle to which the Courts and Tribunals Service is committed, is that publicly funded representation is made available to those who most need it; that those who can genuinely afford to pay for their own defence do so; and that finite resources are targeted at those defendants who most need assistance.

4.2 It is recognised that some consultees have concerns in relation to the proposed policy, in particular about the potential impact on access to justice.

4.3 A provision has been included in the draft Justice Bill, currently being developed, to provide an enabling power to allow the introduction of a fixed means test for criminal legal aid.

4.4 In light of the concerns expressed in response to this consultation the Courts and Tribunals Service agrees that further research is required before any decision regarding the actual financial level at which any new means test would be set. Accordingly, the Courts and Tribunals Service has commissioned further research by an independent economist, part of the remit of which is to conduct an impact assessment. The Courts and Tribunals Service proposes to brief the Minister, the Assembly and the Justice Committee on the results of this research before any final decision is taken to introduce a fixed eligibility limit. Should a decision be taken to proceed with the proposal to introduce a fixed eligibility limit further public consultation would be required before regulations were made.

4.5 A copy of this report will be sent to all those who have responded to the consultation and it will be placed on the NICTS website at www.courtsni.gov.uk.

Annex A

Criteria for Public Consultation

Criterion 1- When to consult

Formal consultations should take place at a stage where there is scope to influence the policy outcome.

Criterion 2 - Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3 - Clarity of scope and impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4 - Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5 - The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees buy-in to the process is to be obtained.

Criterion 6 - Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7 - Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Annex B

List of Respondents

Northern Ireland Human Rights Commission

Law Society of Northern Ireland

Women's Aid Federation

The Police Service of Northern Ireland

The Committee on the Administration of Justice

The Lord Chief Justice's Office

Sinn Fein

Probation Board of Northern Ireland

The Northern Ireland Association for the Care and Resettlement of Offenders

The Children's Law Centre

Disability Action

Public Prosecution Service

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