

Written evidence submitted by The Law Society of Northern Ireland and The Bar of Northern Ireland, relating to the funding of public services in Northern Ireland (FPC0020)

Public funding of legal services - Joint submission

Introduction

The Law Society of Northern Ireland (“the Society”) and The Bar of Northern Ireland (“The Bar”) jointly make this submission to the Northern Ireland Affairs Committee Inquiry into the funding of public services in Northern Ireland. The roles and responsibilities of both organisations mean that this paper focuses on the first two of the four subjects the Committee has invited information on: the financial situation facing Northern Ireland’s public services; and the impact of a lack of an Executive on budgetary management and strategic decision-making across NI departments.

This submission highlights the unique position of the legal profession in Northern Ireland and their role in enabling access to justice as a vital service to the public. The predominance of small solicitor practices and self-employed barristers, coupled with the already scarce access to legal representation in rural communities is of serious concern as we face into a precarious funding environment that would threaten jobs and leave communities stranded in “Legal Aid deserts”.

A core problem in how Northern Ireland manages Legal Aid spend is not only that it is under-funded, but it is structurally flawed, setting a fixed budget for a demand-led service. This effectively leaves the Legal Services Agency NI with only one budget-management tool – delaying payments. This has led us to the scenario where, in the most recent financial year, in spite of in-year top ups to the budget, Legal Aid payments continue to be delayed by months. Starving small businesses and the self-employed of cashflow – by withholding payment for work that has been legitimately carried out – is not acceptable. This is set against the NI Civil Service Departments’ own target of paying their suppliers within 10 working days.

From an already sub-standard position, further cuts, leading to further delays in payments represent a deeply concerning prospect for the justice sector. In 2022, the Department of Justice estimated that a cut of just 2% to the Legal Aid budget would lead to delays of up to a year for payments to be made in the most straightforward legally-aided cases. In the current context, with a Northern Ireland Budget yet to be

set and speculation that unprotected Departments (all except the Department of Health) face cuts of around 10%, we fear a looming catastrophe for access to justice in Northern Ireland. Many solicitor firms and barristers would be forced to withdraw from publicly-funded work in their community or close their doors altogether, leaving vulnerable people in our communities without access to the legal assistance they are entitled to, when they need it.

Northern Ireland's public service funding is dominated by its health system. Few would argue, more than six years following the Bengoa report, that reform and the investment required to achieve the required transformation is necessary. What must be recognised however is that improving health outcomes requires effort across all public services – including the justice system – and cutting funding to other public services undermines the intended improvements in health. The reverse is also true – with a body of evidence demonstrating that investing in Access to Justice can help reduce the strain on other public services, including health.

Further, many of the issues apparent in the health service are also seen in the justice system – long delays and backlogs, a dedicated but stretched, pressured workforce, historic underinvestment in the system and the need for structural reform. The health and justice systems also overlap greatly in terms of the people served who are often the most vulnerable in our society. It is also these people who will bear the brunt of cuts in services when they face a legal issue and cannot access representation. The clear implication is that our justice system requires reform before it reaches crisis point. This paper provides a short summary of some of the core reforms that are required for our justice system but which cannot be progressed in the absence of an Executive.

The Society and the Bar trust that this paper will be helpful in the Committee's work on this inquiry and would be happy to provide further information or clarification as required.

About the Law Society of Northern Ireland

The Law Society of Northern Ireland is the professional body for the solicitor profession in Northern Ireland. As a member organisation the Society represents and supports its nearly 6,000 members, including solicitors working in the public, private and third sectors. The solicitor profession is a vital component of Northern Ireland's economy,

creating close to half a billion pounds of economic value every year, directly employing over 6,000 people and supporting many thousands more.

The Society regulates c.3,000 practising solicitors, exercising its statutory functions under the Solicitors (Northern Ireland) Order 1976 by upholding professional standards and working in the public interest to ensure confidence in the solicitor profession in Northern Ireland. It is responsible for admitting newly qualified solicitors to the profession and for the continuing professional development of all solicitors.

The Society acts as the voice of the profession, representing the profession's interest, engaging with government and other stakeholders as well as working in the public interest to uphold the rule of law, to influence law reform and to promote access to justice.

About the Bar of Northern Ireland

The Bar of Northern Ireland is a profession of barristers in independent practice with a unique specialism and expertise in legal advocacy. Members of the Bar champion the rule of law, serving the administration of justice, and the public interest. In exercising their duties to their clients and the courts, barristers play a vital role in safeguarding the legal rights afforded to all citizens right across Northern Ireland.

The Bar of Northern Ireland encompasses around 600 self – employed barristers working from the Bar Library building in Belfast. The Bar Library provides access to training, professional development opportunities, research technology and modern facilities which enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court.

All barristers operating independently from the Bar Library building practice under the “cab rank” rule. This requires barristers to accept instructions from a solicitor in any field in which they are competent, regardless of their views of the client or the circumstances of the case.

The independence of barristers is of paramount importance and a vital virtue. As independent professionals, their entire purpose is to selflessly serve, fearlessly and rigorously, their clients' interests and to achieve the best practice result, whilst fulfilling their duty to court.

The financial situation facing publicly-funded legal services

Fixed budget for a demand-led service

Legal Aid is an indispensable part of our justice system, protecting the most vulnerable and ensuring access to justice for those who could not otherwise afford legal representation. It is a demand-led service - those who meet the set eligibility criteria to avail of Legal Aid have a statutory right to this assistance. This is borne out in the published statistics - in the year ending March 2022 there were almost 68,000 cases granted financial help through Legal Aid in Northern Ireland, up from around 63,000 in the previous year. Despite this, the budget for Legal Aid is fixed, funded through the Department of Justice (DoJ) Resource DEL.

This mismatch – a fixed budget versus highly variable demand for services – leaves the Legal Services Agency (LSANI) in an unenviable position when demand for Legal Aid exceeds the available budget. With no other budget management tools available LSANI will delay payment of legitimate Legal Aid claims. This method has persisted for many years, for instance, in 2020-21 the LSANI had set a target of making 95% of criminal Legal Aid payments within eight weeks. This target was increased in 2021-22 to 95% of payments being made within 12 weeks due to the lack of sufficient funds. In other areas outside of criminal Legal Aid, the payment time target is as long as 24 weeks. Payment is also typically only possible following the conclusion of a case which may have taken years to complete.

Payment target times are set unilaterally by the LSANI and are not agreed by the professional bodies as representing appropriate payment times for the work done. In other UK jurisdictions, solicitors and barristers are typically and reliably paid approximately two weeks after having submitted their bill.

Delaying payment for work already completed is unacceptable in any scenario. In this area it is particularly damaging as the suppliers are typically self-employed barristers or small solicitor practices where prompt payment and cashflow are essential to staying afloat. The approach is causing legal professionals to withdraw from providing Legal Aid services across the province. For example, a 2022 report¹ from Criminal

¹ <https://www.cjini.org/TheInspections/Inspection-Reports/2022/April-June/Criminal-Legal-Aid-Processing>

Justice Inspection Northern Ireland (CJINI), described slowing down payments as having, “resulted in suppliers not having the cash flow necessary to provide Legal Aid services, potentially impacting access to justice for individuals.”

Structural under-funding

A fixed budget is only ever appropriate for a demand-led service if it is set at the correct amount. This unfortunately has never been the case for publicly-funded legal services in Northern Ireland as structural under-funding of the system has become the norm. In every year since the devolution of policing and justice to Stormont, the opening budget for Legal Aid has been insufficient and has required in-year allocations. In both the most recent financial year and in 2021-22 the opening budget was clearly insufficient at c.£75m. Additional funding of c.£15m and c.£27m were required respectively in each year to allow LSANI to meet even their 12-week targets for standard fee cases.

The Society and the Bar are grateful for the work of the LSANI and DoJ officials who acted to secure the in-year allocations to stave off a collapse in Legal Aid provision. However, the uncertainty created by such an approach is problematic leading to, for example, uneven payment profiles over the year with slower payments early in the year based on the lower opening budget, followed by an end-year rush to disperse the additional monies.

Structural underfunding also creates a situation whereby the LSANI is forced to carry a growing volume and value of unassessed bills on their books. The sole reason these bills are unassessed is not because they are novel or complex or because the LSANI do not have the processing capability to do so but rather because they do not have an adequate budget with which to meet their obligations. These unassessed bills represent the quantum of the gap between demand and available budget and have been at historically high levels since May 2022, not dropping below £20million and peaking at £26 million. Even during what would be considered a well-funded year, the quantum of unassessed bills still equates to approximately 20-25% of in year demand.

Any organisation that cannot keep on top of its current liabilities would, in accounting terms, be considered to no longer be a going concern and would face closure.

The disconnect between the budget and the demand-led nature of publicly funded legal services is further demonstrated by the failure to provide a funding response required to meet the heightened levels of activity that are being deployed to address the backlog of cases caused by Covid. The backlog exists across the Crown Court and Magistrates Court and requires practitioners to work at an increased scale (c.115% of normal capacity) and pace to deal with the backlog and yet, despite the obvious collective benefit and necessity in doing so, there has not been any matching funding applied to the LSANI budget.

The Society and the Bar are advocating for a more sustainable approach with the budget set at a credible budget at the outset, allowing the LSANI to profile and plan their work more effectively which in turn would provide a stable basis for legal professionals to manage their businesses.

Forward look

At the time of writing, in the absence of the Executive and without a budget having been set by the Secretary of State, we are unaware of what level the Legal Aid budget for 2023-24 will be set at. We understand that LSANI are conducting their operations based on a hypothecated £90m Legal Aid budget to which an assumed reduction will be applied, until such time as the Secretary of State or a newly formed Executive confirms otherwise.

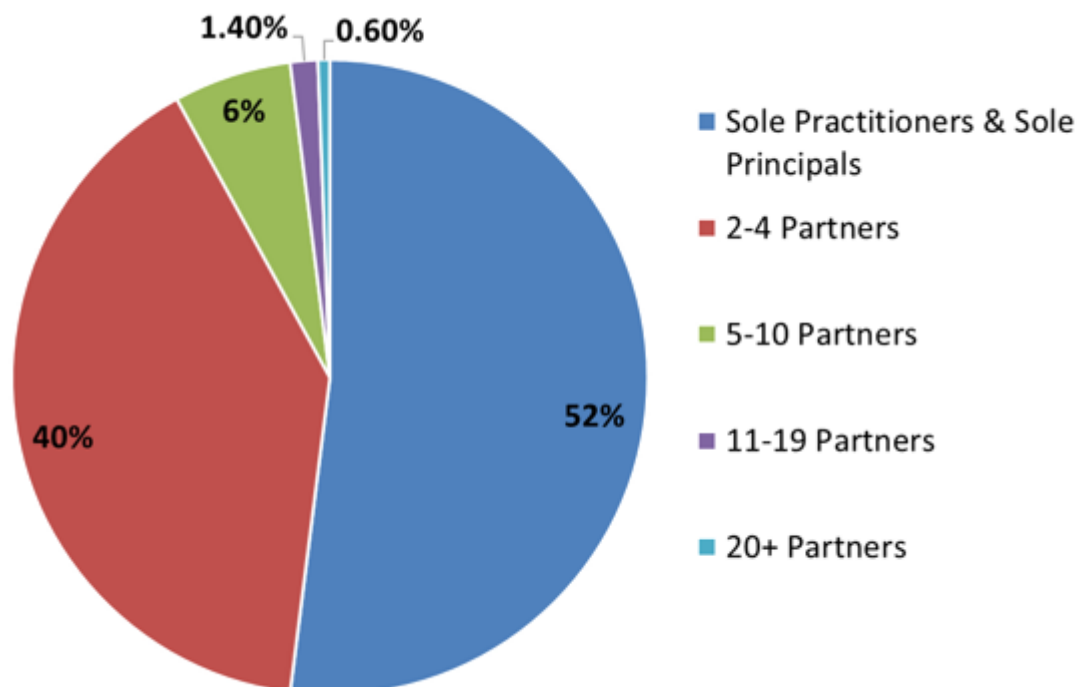
This is a reasonable approach by LSANI and is welcomed by both the Society and the Bar. However, there is uncertainty around this position with the NI Fiscal Council's assessment that real departmental spending is set to fall by 6.4% next year. If a confirmed budget once again protects the Department of Health, this would in reality translate into a cut of c.10% for unprotected Departments. Such a cut to the Legal Aid budget would be catastrophic for Access to Justice in Northern Ireland.

In 2022 the DoJ modelled a 2% reduction across its expenditure, equating to a Legal Aid budget of £74m for the 2022-25 Budget period. The consequence of such a reduction was a minimum 47 week wait for payment by 2025 for the most straightforward of cases. We are unaware of any modelling predicated on a 10% cut but it would likely lead to payment delays of more than a year before the end of the current financial year. No small businesses could survive when starved of cashflow in

this manner. For legal aid providers, whether they are a small solicitor practice or a self-employed barrister, it would simply not be viable to provide Legal Aid services to communities any longer. The next section of this paper explores the impact of increasing payment delays on the barrister and solicitor professions and the consequent impacts for the communities they serve.

Impact of cuts on the solicitor profession

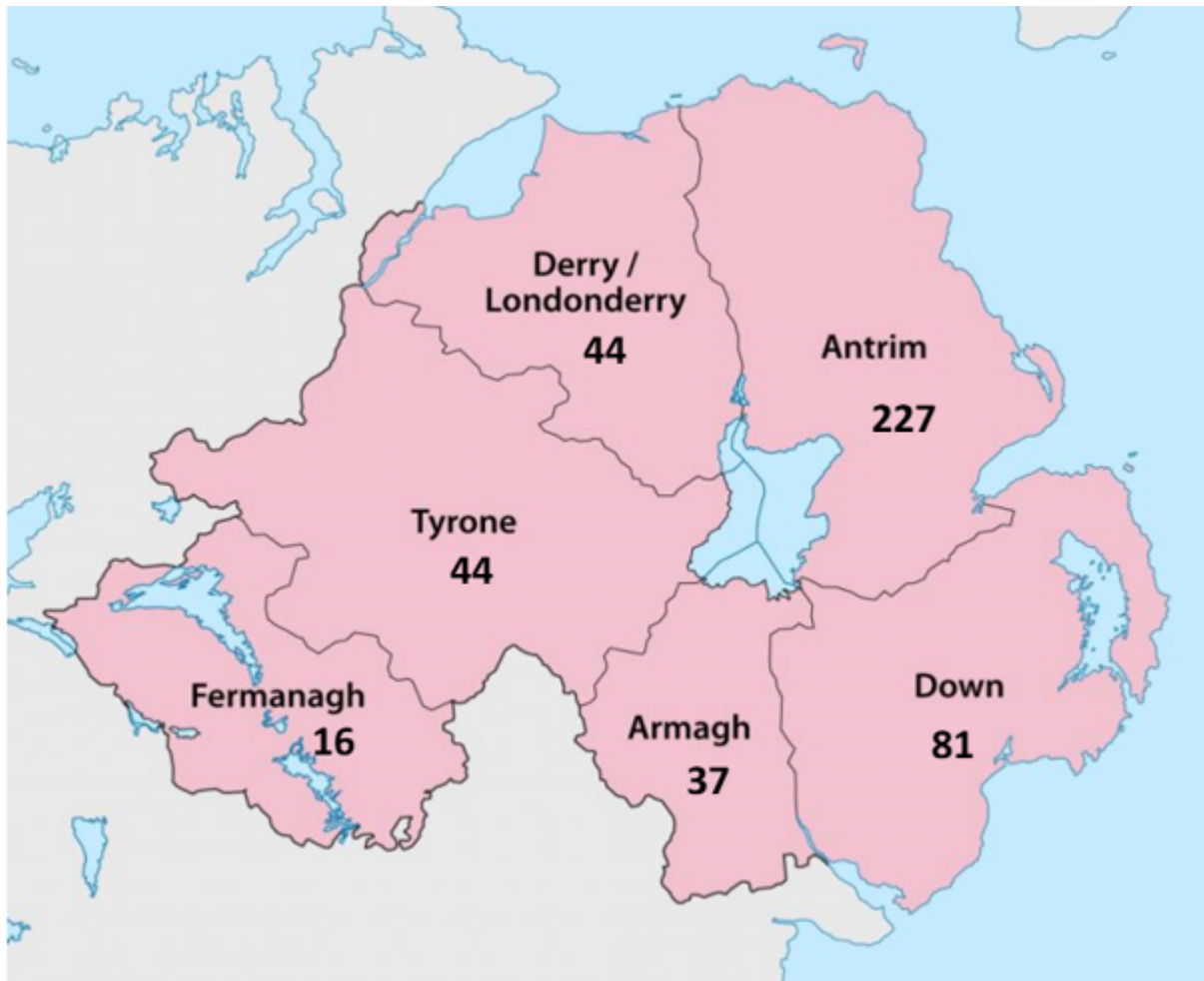
There are around 450 solicitor firms in Northern Ireland, employing close to 3,000 solicitors and a further 3,000 support staff. As can be seen below, solicitor firms in Northern Ireland tend to be relatively small; over 90% of our firms have 4 or fewer practising solicitors while more than half are sole practitioners.



Source: LSNI data

Research conducted by the Society last year found that smaller firms and those outside of the Belfast Metropolitan area are highly dependent on the prompt payment of Legal Aid fees and would therefore be disproportionately affected by any delay in payments.

The map below shows the geographical distribution of solicitor firms. Outside of the Greater Belfast area, access to legal representation is already scarce in rural areas particularly in the South and West of the province.



Local solicitor firms supply a vital service to members of the public and are an essential part of the local community, delivering services that no other organisations can offer. Taking County Fermanagh as an example, there are currently only 16 solicitor firms for the whole county. Those practices directly employ over 100 people and their contribution to the local economy is further enhanced by the support provided to other businesses. Cuts to the Legal Aid budget would have a profound impact on Co. Fermanagh. Of the 16 firms currently practising there, three have already ceased to provide Legal Aid services in recent years. Cuts to the budget which lead to long delays in payments would exacerbate this trend, reducing the number of firms and the proportion of them that carry out Legal Aid work. Fermanagh, along with other rural communities, risks becoming an Access to Justice desert.

Impact of cuts on the barrister profession

It is estimated that approximately two thirds of all barristers practicing in this jurisdiction will have a practice that will mainly or exclusively entail the provision of legal services funded by Legal Aid.

Barristers are not responsible for setting or administering the Legal Aid budget. They are also not responsible for the Legal Aid rates that they are in receipt of. Furthermore, they cannot insert themselves into legally aided cases of their own accord. Their involvement only comes about after the case itself has been granted certification by either Judge or the LSA and the instructing solicitor has chosen a particular barrister to best represent their clients' needs.

Access to Legal Aid has become increasingly restricted in recent years. Without specialist advocates to navigate complex legal issues, cases involving personal litigants inevitably experience delays, additional cost and are more likely to risk injustice.

Meanwhile many highly motivated, talented, and qualified young barristers who have entered the profession to serve justice and help others are struggling to sustain viable practices at the Bar. Given the levels of socio-economic deprivation in parts of our society, it is not surprising that many seek to apply their professional skills and gain early experience in legally aided cases, yet they are being denied the opportunities afforded to their predecessors as they embark on their legal careers. This has the potential to create serious long-term problems for our justice system.

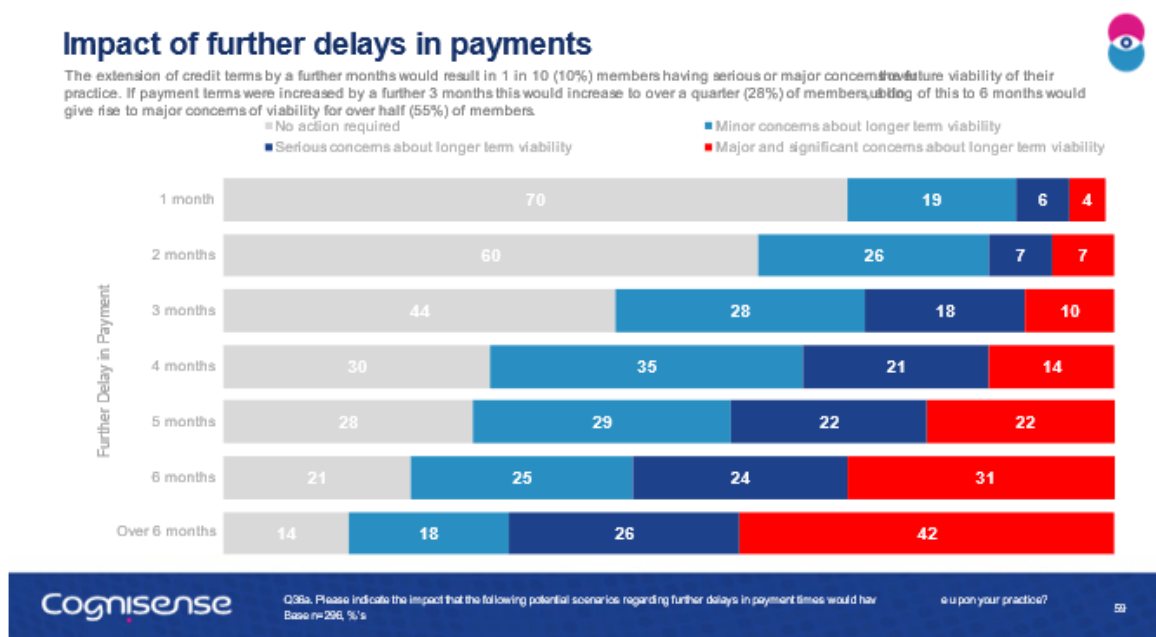
Payment Delays Causing Younger, Female Practitioners to Cease Practice

If the LSANI faces a reduction in its budget and seeks to address this by delaying paying bills it will mean that the only barristers who might possibly withstand the resultant cashflow pressures will be the older, typically male barristers based in Belfast who have accumulated sufficient reserves from previous years.

The Bar Council recently conducted a survey to assess the impact of proposed payment delays upon practitioners. 296 were received (approximately 45% of the relevant population of independent practicing barristers).

The results of the survey demonstrate that:

- Practices begin to cease being viable even after 1 month delay with the impact being felt most acutely by those under 30 or with less than five years practice.
- The pace at which practices become non-viable more than doubles every 2 months.
- Ceasing practice is something that 1 in 13 (7%) of those aged under 30 would anticipate if fees were delayed for even 1 month. A delay of 5 months would force 1 in 5 (18%) of young practitioners out of business.
- The most significant impact of payment delays is also seen with female barristers and barristers who practice outside of Greater Belfast.



LSANI's own metrics demonstrate that payment delays for Family Legal Aid practitioners are more pronounced than in any other area of Legal Aid work. Family practitioners are predominately female, creating an in-built gender imbalance in the Legal Aid payments system with female practitioners waiting longer, on average, for bills to be paid. Further payment delays will make the gender imbalance more pronounced.

Reduction in Access to Justice

If the projections indicated in this survey were to be realised it will mean that the services offered by members of the Bar will reduce. Younger, female and rural practitioners will not be able to withstand the cashflow delays.

Significant and irreversible gaps and imbalances will emerge in the ability of clients to gain access to justice. In addition to the existing delays in the criminal justice system and backlog of cases caused by Covid, the budget will pose a further direct threat.

Not only will the budget damage the availability of instructing solicitors but clients will also no longer be able to have the same choice of counsel to represent them in court.

The Bar will be less representative of society and face a generational crisis to replenish the pool of Legal Aid barristers. Barristers who might potentially retain a viable practice will be under huge financial and workload pressure. Ultimately this places the client's ability to have sustainable, reliable and meaningful access to justice in grave danger.

Impacts on Access to Justice and communities

Legal Aid is about helping people - quite often the most vulnerable people facing the most challenging circumstances. Whether it is a parent seeking access to their child in a matrimonial dispute or someone defending a criminal charge, everyone deserves access to effective legal advice and representation.

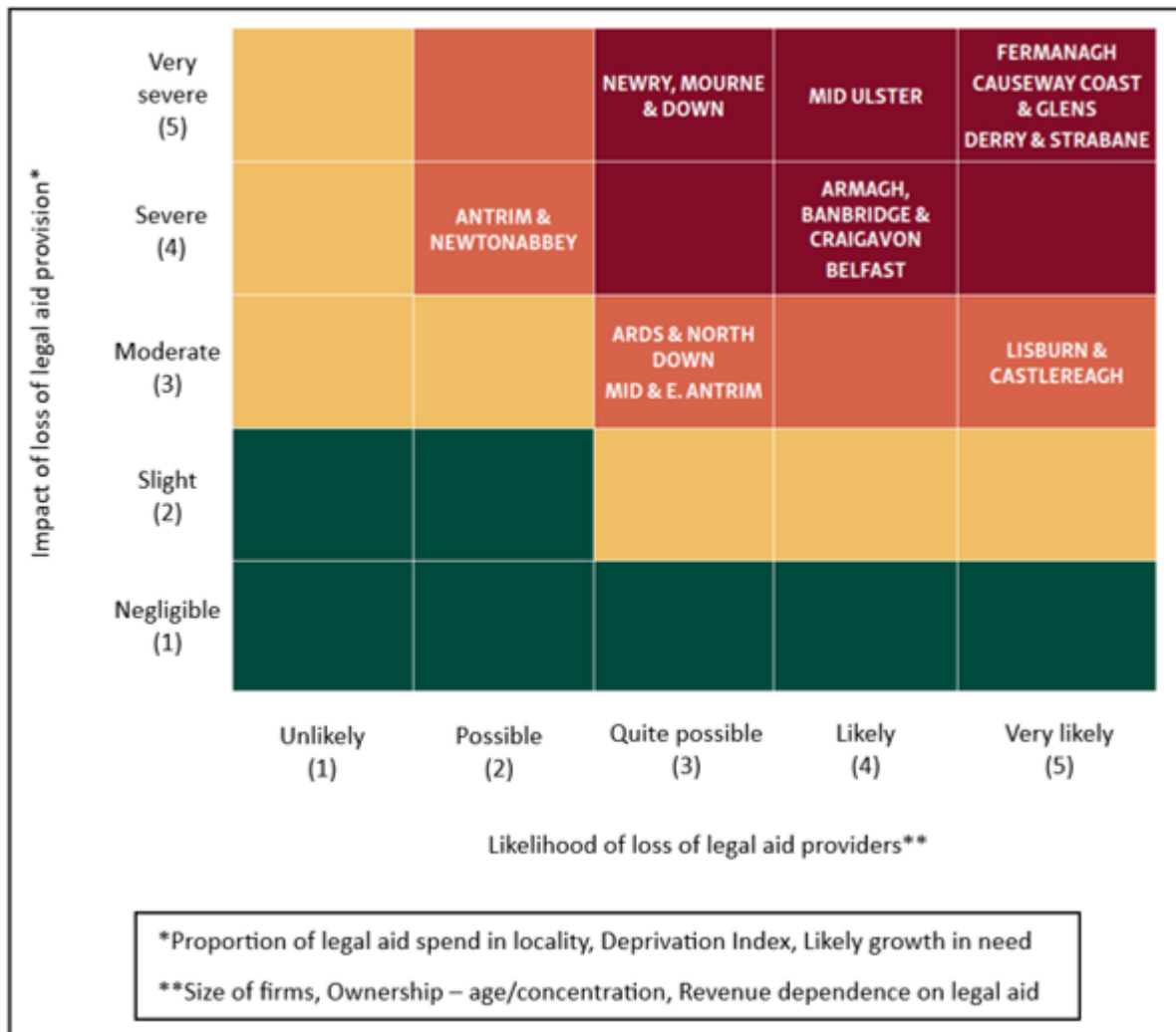
The DoJ Equality Impact Assessment on the draft Budget 2022-25² identified that the contraction of the network of providers, could mean that individuals seeking advice, assistance and representation may not have access to legal advisors. If smaller firms are forced to close, the choice of representatives will be more limited, and potentially less representative of society. Further, the document highlighted that the draft Budget 2022-25 would *“have a direct impact on vulnerable groups and victims, with further implications from failure to deliver against statutory responsibilities and increased ‘downstream’ costs for the justice system, the health service and the wider public sector...”*. These estimates were based on predicted 2% budget cuts – a reduction in the region of 6 – 10% to the budget would be much more destructive and lead to an irrecoverable position.

The most recently available statistics³ on poverty in Northern Ireland estimate that 18% of children, 14% of working age adults and 16% of pensioners in NI are in relative

² <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/esf-budget-17-02.pdf>

³ [https://www.northernireland.gov.uk/news/northern-ireland-poverty-and-income-inequality-report-2021-22-released#:~:text=Working%20age%20adults%20%E2%80%93%20Poverty%20\(,12%25%20in%202021%2F22.](https://www.northernireland.gov.uk/news/northern-ireland-poverty-and-income-inequality-report-2021-22-released#:~:text=Working%20age%20adults%20%E2%80%93%20Poverty%20(,12%25%20in%202021%2F22.)

poverty. These figures have almost certainly increased with the cost-of-living crisis over the past year. At a time when demand for Legal Aid is increasing, a limited supplier base of Legal Aid providers would lead to added pressures on an already overburdened court system, creating further backlogs, delays, and inefficiencies.



This diagram shows the clear overlap between areas of deprivation in Northern Ireland and those areas where Legal Aid coverage is endangered. The continued existence of a local network of solicitor firms, and the ability of citizens to access Legal Aid services through them, is under threat.

Impact of the lack of an Executive

There is a clear need for reform of the justice system in Northern Ireland which is being frustrated by the lack of a functioning Executive. Justice is not unique across the public sector in this regard – the need for reform of NI’s Health and Social Care is already well documented. The issues in justice are in some respects very similar to those facing the health service – a stretched workforce, long delays, historic under-investment and the need for modernisation are all apparent. The justice system can often be overlooked however and the concern of the Society and the Bar is that Northern Ireland is sleepwalking towards a crisis point.

A brief consideration of some key statistics is illuminating. In 2021-22 in Northern Ireland’s Crown Court, the median time taken for a charge case to be dealt with at Crown Court was 535 days, an increase of 13.8% from 2020-21 (470 days) and the highest in the last 5 years⁴. These court delays have serious impacts – for both victims and the accused. For sexual offence cases, the median time to complete is a startling 742 days, with reports that these unacceptable delays are leading victims to withdraw cases. A recent CJINI report found that almost 40% of NI’s prison population are there without having stood trial or receiving a conviction. This snapshot demonstrates the dire state of the criminal justice system currently in NI – further issues are clear in the civil and family courts with the last Justice Minister having previously stated that it may take until 2028 to deal with the backlog in NI court cases.

Last year, the Law Society published the Justice Agenda⁵ which set out a range of proposals for Government to take forward which would start to address the issues in our justice system. The Society continues to work with stakeholders to progress these matters and will build on previous proposals with further plans to be published later this year. It is clear however that without Ministers in post, real reform will not be achieved and it cannot be left to the Civil Service to preside over further decline. Some of the key reforms we are calling for are:

- **Properly and sustainably fund Legal Aid** - as covered in the previous section of this paper, the Legal Aid budget requires setting at an appropriate level. Beyond this, an incoming Executive should follow commission an urgent,

⁴ <https://researchbriefings.files.parliament.uk/documents/CBP-8372/CBP-8372.pdf>

⁵ https://www.lawsoc-ni.org/DatabaseDocs/new_6240530_law_soc_justice_agenda_2022assemblyfinal.pdf

independent review of Legal Aid in Northern, taking the lead from the Review of Civil Legal Aid in England and Wales recently commissioned by the Ministry of Justice which rightly recognises the need for Legal Aid to “offer a financially viable business option for legal aid providers” – this clearly must consider fees payable which have been moribund for decades in Northern Ireland.

- **Establish a task force to address court backlogs and delays** – a dedicated multi-agency task force could break the cycle of decline in our system. This has to recognise the need for collaboration across the public sector, where better justice outcomes help provide better outcomes in other areas such as health, education and more. As a priority it should look at implementing the remaining recommendations of the Gillen Review, consider the introduction of statutory time limits for cases and progress bail reform in NI.
- **Invest in modernising our Courts** – our court estate is in need of significant modernisation to provide a suitable working environment for court staff, legal professionals and the judiciary and to maximise courts’ efficiency. This must include adoption of new technology and new ways of working. For too long the answer to our issues has been to increase capacity – but “more of the same” misses the opportunities that digital justice could bring.
- **Prioritise mediation** – the best way to tackle the court backlog is to keep cases out of the courtroom, where it is appropriate to do so. Mediation is now well established as a cost effective means of resolving disputes, recognising that while litigation through the courts is sometimes unavoidable, it is not the only means to achieve justice. Mediation has a high success rate, is faster and is usually less expensive than taking a case through the court process and should be prioritised in our system.

There is a clear need for reform of Justice in NI, requiring not just a Justice Minister in post but a full Executive working together. The aim must be to deliver a package of reform as a core part of a new Programme for Government with the ultimate aim of providing the people of Northern Ireland with the services they deserve.

The Bar of NI published its priorities for an incoming Executive and Assembly through the 2022, Raising the Bar⁶ policy paper. In it, the Bar urged policy and decision makers

⁶ [Appeal for a Strategic View of the Role of the Legal and Justice System | The Bar of Northern Ireland \(barofni.com\)](https://www.barofni.com)

to recognise the value and meaning of justice to our society given the important matters of public interest at stake. The Bar called for a strategic direction and stability in Northern Ireland's legal aid policy to ensure that it is properly recognised as an indispensable part of our legal system and indeed welfare system. The absence of an Executive means that these priorities have yet to be addressed by our locally elected politicians and therefore the needs of their constituents remain at risk of going unmet.

Legal Aid addresses fundamental matters of real human concern that have far-reaching societal and economic impact for Northern Ireland if not properly addressed. It matters what happens to children when parents separate or divorce; it matters that those who appear in the Crown Court have proper representation to ensure fair trials; it matters that those who are guilty of crimes are properly prosecuted; and it matters that those who suffer personal injuries or financial loss have effective remedies in our Courts. Decision makers must not view such issues as costly or abstract luxuries.

Technology has improved the efficient disposal of straightforward matters. This should assist in delivering efficiencies. However, its use must be balanced alongside the interests of justice and the rights of the participants, including the protection of their Article 6 rights. Studies have shown that technology can prove ill-suited to complex cases where sensitive issues are at stake. It must not be a distant, compromised or remote experience for those involved in complex cases.

The Bar has called for a ringfenced legal aid budget as a critical means of enabling people to secure access to justice and ensuring that our most vulnerable citizens are protected today and into the future.

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Conclusion

The Law Society and the Bar are united in our belief that Access to Justice is a fundamentally important component of any fair society and is uniquely vital to Northern Ireland when considering our history. However, the Justice system in the jurisdiction is not currently delivering the service that our citizens deserve and without adequate funding and the required reforms we may soon face a crisis point. Any cuts to publicly-funded legal services would cause generational harm to the Justice System to the detriment of some of society's most vulnerable. It has the potential to put many legal professionals out of business and force many others to withdraw vitally needed services from communities. The impact would not fall evenly and there is the potential to very significantly disadvantage rural communities.

We trust that this submission is helpful to the Committee's work on this inquiry and would be very pleased to provide further information or clarification on any of the points raised.

April 2023