

**Response to: 'Consultation Document: Review of the
Legal Aid for Crown Court Proceedings (Costs)
Rules (Northern Ireland) 2005, as amended'**

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1. Introduction

1.1 The Women's Support Network (hereafter, WSN) welcomes the opportunity to respond to the Department of Justice for Northern Ireland's 'Consultation Document: Review of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005, as amended'.

1.2 Established in 1989, WSN is a regional organisation that works across all areas of Northern Ireland. It includes in its membership community-based women's centres, groups and organisations, with a concentration in disadvantaged areas. WSN is a charitable and feminist organisation, which adopts a community development approach. We provide a range of support services to 63 community-based women's centres, projects and infrastructure groups and 26 associate members drawn from across the community and voluntary sector, who support women, families and communities (see Appendix 1).

1.3 Our members provide a wide range of women-centred frontline services across Northern Ireland, including:

- Specialist Advice
- Childcare & Family Support
- Counselling, Support and Advocacy
- Complementary Therapies
- Training & Education
- Health & Wellbeing Programmes
- Personal Development & Employment Support
- Volunteering, Leadership & Empowerment

1.4 WSN aims to achieve social, political and economic justice through the promotion of the autonomous organisation of women. The Network aims to strengthen the collective voice of women's groups and to promote and develop networking opportunities, to enable collective action and to impact upon policy and decision-making processes. WSN provides an accessible, feminist, relevant and high quality support

service and resource for its member groups. The Network is also an important information resource on issues relevant to community-based women's organisations and for other infrastructure groups, nationally and internationally.

1.5 Over the past 30+ years, the community-based women's sector has developed a range of frontline services, such as childcare, support, advice and education/training services, in response to the needs they identified at a grassroots level. Women's groups continue to meet the particular needs of women and their children living in areas considered to be among the most affected by the conflict, and recognised as among the most disadvantaged across Northern Ireland.

1.6 Network members are actively engaged with their local communities, cross-community initiatives and regional structures throughout Northern Ireland.

2. Comments

2.1 WSN recognises that in rationalising the proposed reductions in legal aid remuneration for solicitors and counsel in criminal proceedings, the Department of Justice for Northern Ireland (hereafter, DOJNI) is responding to recession-related financial constraints and drivers. According to the stated rationale, current remuneration levels in Northern Ireland are 'unnecessarily high' and 'no longer represent value for money', as compared to existing levels in England and Wales, and broad fee alignment across the jurisdictions is therefore required.¹ We note with particular interest that in sponsoring the proposals the Minister of Justice has consequently committed to 'bring[ing] legal aid expenditure under control, *whilst ensuring that access to justice is maintained*'.²

¹ DOJNI, Consultation document: Review of the legal aid for crown court proceedings (costs) rules (Northern Ireland) 2005, as amended, DOJNI: Belfast, 2013, p.10.

² *Ibid.*, p.3.

However, WSN remains unconvinced as to the feasibility of this ministerial policy ambition. More specifically, we have serious concerns that the proposed cuts in legal aid remuneration might in fact undermine access to justice for women in criminal proceedings in Northern Ireland, given the evidence-based link between such cuts and increased risk to both the quality *and* supply of legal aid provision.

Options for change

2.2 As things currently stand, legal aid provision in criminal cases plays a fundamental role in securing individuals' rights to access justice in Northern Ireland, including the right to a fair trial and the right to a defence. Broadly, legal aid performs this function by helping to 'provide a voice [for] people facing criminal charges prosecuted with the full resources of the state'.³ Yet research shows that this important function could potentially be jeopardised by the kind of legal aid cuts proposed in the consultation document.

To begin with, quantitative and qualitative evidence indicates a causal association between such cuts and decreases in the *quality* of legal aid representation, which can threaten access to justice. For example, research that examined the impact of legal aid cuts for criminal work in the English case concluded that 'falling legal aid rates [have] undermined incentives [for legal representatives] to provide [a] quality service' to clients, resulting in poor client-representative relations.⁴ Where this happens, access to justice is undermined precisely because 'the relationship between lawyer and client is crucial to the

³ Law Society of Scotland, *Legal aid contracting*, LSC: Edinburgh, 2013, p.24. [Online]. Available at: http://www.lawscot.org.uk/media/645497/contracting_research-final_version.30-07-13.pdf

⁴ D. Bindman, Criminal solicitors "losing moral compass" – and not just because of falling legal aid pay, *Legal Futures*, 10 July 2013. [Online]. Available at: <http://www.legalfutures.co.uk/latest-news/criminal-defence-solicitors-losing-moral-compass-its-just-falling-legal-aid-pay>. See also: D. Newman, More than money, in J. Robins (ed.), *No defence: lawyers and miscarriages of justice*, *Solicitors' Journal Justice Gap Series*, 2013. [Online]. Available at: http://www.solicitorsjournal.com/sites/default/files/SJ%20Justice%20Gap_No%20Defence_0.pdf

effectiveness of the right to a defence'.⁵ The related danger here, of course, is that substandard legal services and poor client-representative relations might negatively affect case proceedings and/or outcomes.

To make matters worse, legal critics have also pointed out the likely long term adverse implications of criminal legal aid cuts for access to justice, which involve decreases in the *supply* of legal aid. A key issue here is the potential impact that the cuts might have on the financial viability of counsel and solicitors' firms, particularly smaller firms whose business models may be heavily reliant on legal aid income. For example, commenting on the English and Welsh cases, the Bar Council has observed that 'savage fee cuts for advocates at crown court level, especially in respect of longer trials, will rapidly destroy the defence bar'.⁶ Moreover, the most senior members of the judiciary in England and Wales have warned of further miscarriages of justice if such cuts dissuade talented lawyers from engaging in criminal and publicly funded cases, thereby reducing the quality of both defence *and* prosecution provision.⁷

Should solicitors and counsel in Northern Ireland crown court cases be financially dissuaded from undertaking legal aid representation in a newly reduced fee environment, then access to justice for women defendants could potentially be placed at risk. Women continue to represent a small minority of crown court defendants: of the 2,215 defendants dealt with during 2012, 9.9% were female.⁸ WSN is

⁵ R. Edwards, Will the new criminal legal aid reforms breach the right to a fair trial? [Online]. Available at: <http://ukhumanrightsblog.com/2013/05/16/will-the-new-criminal-legal-aid-reforms-breach-the-right-to-a-fair-trial/>

⁶ Bar Council, Bar Council response to the transforming legal aid: delivering a more credible and efficient system consultation, Bar Council: London, 2013, p.9. [Online]. Available at: http://www.barcouncil.org.uk/media/213867/the_bar_council_response_to_moj_transforming_legal_aid_consultation.pdf

⁷ O. Boycott, Legal aid cuts will lead to more miscarriages of justice, top judges warn, *The Guardian*, 5 July 2013. [Online]. Available at: <http://www.theguardian.com/law/2013/jul/05/legal-aid-cuts-miscarriages-of-justice>

⁸ DOJNI, Consultation on section 75 equality impact assessment on the legal aid for crown court proceedings (costs) rules (Northern Ireland) 2005, as amended, DOJNI: Belfast, 2013, p.8.

particularly concerned about the potential impact of the proposed cuts on access to justice for vulnerable women in such cases.

Research affirms that vulnerable women in the criminal justice system often have complex and multiple needs related to such issues as mental health, substance abuse, employment, education and accommodation.⁹ Clearly these women require and should receive legal representation that takes due account of their vulnerability and needs. However, if the proposed cuts in criminal work do indeed lead to a reduction in both the quality and supply of legal aid representation, and client-representative relationships consequently suffer, then potentially these women could face new and additional challenges in accessing justice, and their case outcomes could be negatively impacted.

The risk posed to women's well-being by legal aid reform was highlighted most recently in the latest UN report on the UK's record on women's rights: the *Concluding Observations of the Committee on the Elimination of Discrimination Against Women*, which urged government to 'continuously assess the impact of the reforms to legal aid on the protection of women's rights'.¹⁰

There are, of course, wider policy implications to consider here, since case outcomes for female defendants can affect entire families given, for example, women's role as primary care givers. These implications include issues involving children's education, development and well-being. On this view, the potential of the proposed cuts to negatively impact access to justice should be considered a matter of direct concern not only for DOJNI, but cross-departmentally as well.

From this perspective, WSN recommends that, in moving forward with these proposals, the department consider what additional

⁹ K. Edgar, *Lacking conviction: The rise of the women's remand population*, Prison Reform Trust, London, 2004.

¹⁰ UN, *CEDAW: Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN: Geneva, 2013, p.4.

measures/mechanisms might be put in place to monitor and evaluate their potential impact on access to justice for vulnerable women in the criminal justice system.

2.3 As noted, WSN acknowledges that in presenting these proposals, DOJNI is responding to recession-related constraints and drivers. Yet we would question the validity of the stated rationale for the cuts, to recall: the department claims that the proposals will lead to significant and necessary savings in public legal expenditure. This rationale is contradicted by legal commentary.

Legal experts have warned that cuts of this kind *could in fact lead to rising costs in public legal expenditure*, required to mitigate their adverse impact on the quality and supply of legal aid provision. For example, senior judges have commented that such cuts in the English and Welsh cases may increase legal expenditure by resulting in poor advocacy:

[some of these cuts] are likely to transfer rather than save costs [because] it cannot be emphasised too strongly that good advocacy reduces cost ... Poor advocacy is wasteful of resources; cases are less well prepared and they occupy more court time and take longer to come to a conclusion, while simultaneously increasing the risk of mistakes and miscarriages of justice.¹¹

WSN therefore recommends that DOJNI carefully re-evaluates the cost-benefit analysis motivating its proposals in order to take proper account of how the cuts could potentially undermine the administration of justice in Northern Ireland, by leading to poor advocacy, case mistakes and miscarriages of justice.

Future introduction of contracting

2.4 WSN notes with reservation that DOJNI is also consulting on the possible introduction of a system of contracting for criminal legal aid.

¹¹ Boycott, op. cit.

We are concerned about the risks associated with legal aid contracting in terms of its potential adverse impact on access to justice.

The consultation document states that the introduction of contracting should help the Legal Services Commission to ‘demonstrate that it is procuring quality services under the terms of the contract’.¹² However, in some cases where it has been introduced, such contracting has in fact been linked to a ‘dramatic reduction’ in the quality of legal aid provision and consequent interference with access to justice.¹³

The consultation document does not provide any concrete detail as to the precise form such contracting might take. Instead, it simply states that ‘a similar [contracting] approach might be adopted in Northern Ireland’ to the model recently proposed by the Ministry of Justice in England and Wales (hereafter, MOJ).¹⁴ However, that model has been severely criticised by leading legal experts and practitioners for its potential to interfere with access to justice. For instance, the Law Society of England and Wales has warned that the MOJ model is ‘unworkable, and the clear reaction of the [law] firms that we have spoken to is that [it will] lead ... to a collapse of the criminal defence system’.¹⁵

Though different aspects of the MOJ proposals have proven controversial, its plan to introduce price-competitive tendering in contracts has arguably proven most controversial. Under such tendering arrangements, lawyers would in effect compete with each other on price to win legal aid service contracts.¹⁶

¹² DOJNI, Consultation document, op. cit., p.16.

¹³ LSC, Legal aid contracting, op. cit., p.23.

¹⁴ DOJNI, Consultation document, op. cit., p.17.

¹⁵ Law Society, Tendering plans for criminal legal aid: Law Society statement, 2013. [Online]. Available at: <http://www.lawsociety.org.uk/news/stories/tendering-plans-for-criminal-legal-aid-law-society-statement/>

¹⁶ Equality and Human Rights Commission, Human rights review 2012: Right to a fair trial, EHRC, Glasgow, 2012. [Online]. Available at: http://www.equalityhumanrights.com/uploaded_files/humanrights/hrr_article_6.pdf

Evidence suggests that price-competitive tendering of this kind poses risks to the quality of legal aid provision. These risks are associated with factors such as the awarding of contracts to the lowest bidder, unrealistic bids and collusion among bidders.¹⁷ For example, research indicates that contract lawyers can tend to ‘put lower effort into each case with more [recourse to] guilty pleas’.¹⁸ Against this background, the Equality and Human Rights Commission has cautioned that competitive tendering could adversely impact the individual’s right to a fair trial under Article 6(2) of the European Convention on Human Rights.¹⁹

In addition, legal experts have warned that, by concentrating legal aid in fewer practices and undermining the financial viability of smaller practices, such competitive tendering will inevitably lead to a substantial reduction in the number of firms undertaking criminal defence work.²⁰ Research suggests that the availability of legal aid suppliers in rural areas could be particularly diminished since low numbers of rural providers ‘would prevent any meaningful contracting systems’.²¹ Obviously, were this scenario to arise, then the guarantee of access to justice in rural locations would be particularly undermined.

WSN is especially concerned at the potential impact of any future contracting arrangements in Northern Ireland on the guarantee of access to justice for vulnerable women in rural communities. And, from this perspective, we therefore recommend that the Executive give due consideration to this danger. Consideration should also be given to the question of support for smaller rural firms, such as might help ensure an adequate supply of satisfactory rural provision.

¹⁷ LSC, Legal aid contracting, op. cit.

¹⁸ Law Society of Scotland, Legal aid expenditure: growth, causes and alternatives, LSC, Edinburgh: 2002. [Online]. Available at: <http://www.lawscot.org.uk/media/626740/legal%20aid%20expenditure%20-%20growth,%20causes%20and%20alternatives%20-%20contracting%20extract.pdf>

¹⁹ EHRC, op. cit., p.256.

²⁰ Ibid., loc. cit.

²¹ LSC, Legal aid contracting, op. cit., p. 84.

It is particularly noteworthy that since the commencement of this DOJNI consultation exercise, MOJ has announced plans to ditch its proposals on price-competitive tendering in contracts for criminal legal aid in England and Wales.²² For the compelling reasons just outlined in this section, WSN urges DOJNI to do the same in respect of its own proposals for Northern Ireland provision.

3. Conclusion

In sum, research and legal commentary both affirm an evidence-based link between (a) cuts in criminal legal aid remuneration and the introduction of legal aid contracting; and, (b) decreases in the quality and supply of legal aid provision.

As a result, WSN is seriously concerned at the potential of DOJNI's proposals to interfere with access to justice for women in legally aided criminal cases in Northern Ireland. We therefore strongly recommend that the department give due consideration to this risk in progressing these proposals.

²² O. Boycott, Justice secretary scraps plan to award legal aid contracts to lowest bidder, *The Guardian*, 5 September 2013. [Online]. Available at: <http://www.theguardian.com/law/2013/sep/05/justice-secretary-legal-aid-contracts>

Bibliography

Bar Council, Bar Council response to the transforming legal aid: delivering a more credible and efficient system consultation, Bar Council: London, 2013. [Online]. Available at: http://www.barcouncil.org.uk/media/213867/the_bar_council_response_to_moj_transforming_legal_aid_consultation.pdf

Bindman, D. Criminal solicitors 'losing moral compass' – and not just because of falling legal aid pay, 10 July 2013. [Online]. Available at: <http://www.legalfutures.co.uk/latest-news/criminal-defence-solicitors-losing-moral-compass-its-just-falling-legal-aid-pay>

Boycott, O. Justice secretary scraps plan to award legal aid contracts to lowest bidder, *The Guardian*, 5 September 2013. [Online]. Available at: <http://www.theguardian.com/law/2013/sep/05/justice-secretary-legal-aid-contracts>

Boycott, O. Legal aid cuts will lead to more miscarriages of justice, top judges warn, *The Guardian*, 5 July 2013. [Online]. Available at: <http://www.theguardian.com/law/2013/jul/05/legal-aid-cuts-miscarriages-of-justice>

DOJNI, Consultation document: Review of the legal aid for crown court proceedings (costs) rules (Northern Ireland) 2005, as amended, DOJNI: Belfast, 2013

DOJNI, Consultation on section 75 equality impact assessment on the legal aid for crown court proceedings (costs) rules (Northern Ireland) 2005, as amended, DOJNI: Belfast, 2013.

Edgar, K. Lacking conviction: The rise of the women's remand population, Prison Reform Trust, London: 2004.

Edwards, R. Will the new criminal legal aid reforms breach the right to a fair trial? [Online]. Available at: <http://ukhumanrightsblog.com/2013/05/16/will-the-new-criminal-legal-aid-reforms-breach-the-right-to-a-fair-trial/>

Equality and Human Rights Commission, Human rights review 2012: Right to a fair trial, EHRC: Glasgow, 2012. [Online]. Available at: http://www.equalityhumanrights.com/uploaded_files/humanrights/hrr_article_6.pdf

Law Society, Tendering plans for criminal legal aid: Law Society statement, 2013. [Online]. Available at: <http://www.lawsociety.org.uk/news/stories/tendering-plans-for-criminal-legal-aid-law-society-statement/>

Law Society of Scotland, Legal aid contracting, LSC: Edinburgh, 2013. [Online]. Available at: http://www.lawscot.org.uk/media/645497/contracting_research-final_version.30-07-13.pdf

Law Society of Scotland, Legal aid expenditure: growth, causes and alternatives, LSC, Edinburgh: 2002. [Online]. Available at: <http://www.lawscot.org.uk/media/626740/legal%20aid%20expenditure%20-%20growth,%20causes%20and%20alternatives%20-%20contracting%20extract.pdf>

Newman, D. More than money, in J. Robins (ed.), No defence: lawyers and miscarriages of justice, *Solicitors' Journal* Justice Gap Series. [Online]. Available at: http://www.solicitorsjournal.com/sites/default/files/SJ%20Justice%20Gap_No%20Defence_0.pdf

UN, CEDAW: Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, UN: Geneva, 2013.

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MEMBERSHIP 2012

	<u>Member Group</u>
1	All Ireland Mother's Union
2	An Munia Tober (Travellers)
3	Antrim & Ballymena Women's Aid
4	Ardmonagh Women's Group
5	Ardoyne Women's Group
6	ATLAS Women's Centre
7	Al Nisa Women's Group
8	Ballybeen Women's Centre
9	Ballymurphy Women's Group
10	Belfast & Lisburn Women's Aid
11	Belvoir Women's Improvement Group
12	Carrickfergus Women's Forum
13	Carew II
14	Causeway Women's Aid
15	Chrysalis Women's Centre
16	Clan Mor Women's Group (Sure Start)
17	Derry Well Woman
18	Derry Women's Centre
19	Falls Women's Centre
20	First Steps Women's Group
21	Footprints Women's Centre
22	Foyle Women's Aid
23	Foyle Women's Information Network
24	Granaghant District Women's Group
25	Greenway Women's Centre
26	Kilcooley Women's Centre
27	Lesbian Advocacy Services Initiative
28	Lesbian Line
29	Lenadoon Women's Group
30	Ligoneil Family Centre
31	Link Women's Group

32	Manor Women's Group
33	Markets Women's Group
34	NI Women's Aid Federation
35	NI Women's European Platform
36	Fermanagh Women's Network
37	Newry & Mourne Women
38	Newtownabbey Women's Group
39	Older Women's Network NI
40	Omagh Women's Aid
41	Rape Crisis Centre
42	Rasharkin Women's Group
43	Shankill Women's Centre
44	Strabane & Lifford Women's Centre
45	Strathfoyle Women's Centre
46	The Learning Lodge
47	Voices Women's Group
48	Waterside Women's Centre
49	Windsor Women's Centre
50	Women Connect Project
51	Women into Politics
52	Women's Information Group
53	Women's News
54	Women's TEC
55	Women 2 Gather
56	Women's Resource & Development Agency
57	WISPA (Women in Sport & Physical Activity)
58	Ardcarn Women's Group
59	OIYIN Women's Group
60	Mossley Women's Institute
61	Mount Vernon Women's Group
62	Coole New Opportunities
63	North Belfast Women's Initiative & Support Project

	<u>Associate Members</u>
1.	Ballymena Community Forum
2.	CiNI
3.	Community Relations Forum
4.	East Belfast Community Partnership
5.	Employers for Childcare
6.	HIV Centre (Women's Support Group)
7.	Mencap
8.	National Women's Council of Ireland
9.	Playboard
10.	RNIB (Women's Group)
11.	Good Morning Newtownabbey
12.	Monkstown Community Association
13.	WAVE Trauma Centre
14.	WEA
15.	Parents Advice Centre
16.	Templemore Community Action Group
17.	Gingerbread
18.	Larne Community Development Project
19.	Community First Coaching
20.	Changing Faces
21.	Sands NI
22.	Women's Project Ashton Centre
23.	Women on Track
24.	Matt Talbot Women's Group
25.	Ulster People's College
26.	Council for the Homeless NI