

A scoping study into the use of Contracting for the provision of Legal Aid
in Northern Ireland

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Report

1. Preface - about the author

Hugh Barrett retired after 15 years as a UK senior civil servant in 2016; following an earlier career with global blue-chip companies in commercial and general management roles both in the UK and Europe.

In 2001 he joined HM Treasury to help set up the Office of Government Commerce – charged with improving UK Government's commercial and project delivery performance. He ended his time in the Treasury as chief executive of the purchasing agency for central civil government with a spend of circa £4 billion p.a. After two years in a Commercial Director role in the Department of Communities and Local Government in 2008 he was appointed as an Executive Director at the Legal Services Commission with responsibility for commissioning £2.5 billion p.a. of legal aid and managing the contractual relationships with the 3000 or so legal aid providers in England and Wales. He also had responsibility for the Legal Services Research Centre, the sizable Public Defender Service, management of Very High Cost Cases, and leading the operational policy and strategy development for the Commission. More recently he led, as Senior Responsible Owner, the two major Legal Aid Reform Programmes for the Lord Chancellor and Secretary of State for Justice.

He has presented at many international conferences on Legal Aid and been an expert witness to several House of Common's and House of Lord's Select Committees. He has been a non-executive director of agencies in the Home Office and Department for Environment, Food and Rural Affairs.

He is currently an independent business adviser and a member of the Court of the University of Essex. He is an alumnus of Imperial College, and the Universities of Wales and Oxford.

2. Introduction

I have been asked to consider the role that a contracting approach might play in future delivery of publicly funded legal services in Northern Ireland and to identify the potential implications of such an approach to inform future policy decisions. In this report I start by providing some background information on three service delivery models (Contracting, Panels and Registration Schemes) which are used in other jurisdictions to manage the delivery of Legal Aid.

I then briefly review how quality is measured in legal services, before looking at Legal Aid delivery in Northern Ireland. In that section I explain who provides the services, where they are located and what quality assurance mechanisms are in place.

In the next section I look at how Legal Aid is delivered in four other jurisdictions (England and Wales, Scotland, Republic of Ireland and New Zealand).

I then examine the statutory obligations of the Department of Justice (the Department) regarding Legal Aid and assess how well these can be discharged under current arrangements, before examining in more detail the implications of introducing various forms of contracting for Legal Aid. I look at the implications for a range of stakeholders: the wider justice system; solicitors' firms; barristers; clients; and the Legal Services Agency (LSA).

I then consider whether the introduction of Contracting will be cost effective. I have endeavoured to quantify costs and benefits, but I acknowledge that the figures I have used are broad brush estimates, based typically on experience in other jurisdictions.

I conclude my report with some recommendations for the future. It will be for Ministers to determine what, if any, further steps they want to take in changing the way Legal Aid is delivered in Northern Ireland, but I hope my study will allow those decisions in principle to be taken expeditiously without much further analysis.

I would like to thank all those who provided input to my review – listed in Annex 1 – and to Alan Weir and Adele Watters from the Department who gave me much valued support and to Rob Freel and Donna Hollywood of the LSA who assisted with the statistical analysis.

3. Executive summary

Legal Aid delivery in Northern Ireland is effectively a remunerated voluntary service carried out by almost all solicitors' firms and barristers. There are more solicitors' firms carrying out Legal Aid work in Northern Ireland than are required if one considers the needs of Legal Aid clients only, this is particularly evident in large urban areas but also applies in rural parts of the country. Current supply of barristers appears more closely aligned to demand.

There is no consistency of approach to managing provision of Legal Aid across the five jurisdictions studied.

After considering the pros and cons of various alternative approaches, I conclude that the introduction of a general contracting regime will not be cost-effective since the benefits that might be realised will almost certainly be less than the costs of delivering this approach. In addition, there would be significant risks in moving to this approach and there are probably lower risk ways of the Department meeting its goals, although there may be merit in looking at contracting in niche areas of legal aid delivery (particularly if any new services were introduced). I found that in common with the other jurisdictions I studied that the theoretical attractions of price-based competitive contracting for Legal Aid are not in practise deliverable – particularly in such a small jurisdiction as Northern Ireland.

When one looks at the National Audit Office's definition of Value for Money, which in essence is delivering agreed outcomes for the least expenditure; I find that the fact that at present there are no agreed outcomes for legal aid provision, particularly in terms of numbers of providers needed and the quality standards to which they need to operate, means that the Department cannot demonstrate that it is getting value for money under current arrangements. That is not to say that it does or does not achieve value for money but rather that the current scheme cannot demonstrate this one way or the other. I recommend that Ministers determine what outcomes for Legal Aid provision are desired and these are then monitored to ensure they are met. I suggest that the proposed Statutory Registration Scheme and other elements of the current Legal Aid strategy could be used to guarantee quality, preserve client choice and ensure clients have reasonable access to local solicitors' firms whilst reducing the real cost, in the medium term, of Legal Aid.

4. Terms of reference

My terms of reference were:

To consider the role that a contracting approach might play in future delivery of publicly funded legal services and to identify the potential implications of such an approach to inform future policy decisions. In undertaking this review consideration should be given to:

- *Experience of contracting in other jurisdictions, in particular, but not exclusively, in England and Wales.*
- *The range of services which are currently provided in Northern Ireland and how they are provided.*

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- *The distribution of the population in Northern Ireland and specific needs of diverse communities.*
- *The market readiness for the introduction of sustainable contracting. Any issues identified regarding the under or over supply of services*
- *The different approaches to contracting (including segmentation) and which, if any, would be best suited to Northern Ireland.*
- *How the small number of Not-For-Profit (NfP) providers entitled to provide Legal Aid could interact with any contracting regime.*
- *Existing and planned measures for quality and cost control in Northern Ireland.*
- *The current structure and organisation of the legal profession in Northern Ireland and the potential implications of any form – or any particular form – of contracting for solicitors and barristers' practice.*
- *The nature and availability of the skill sets necessary to establish, maintain, monitor and refresh a contracting approach and how those skill sets would be obtained and maintained.*
- *The longer-term opportunities, challenges and risks associated with introducing any form – or any particular form – of contracting to Legal Aid provision in Northern Ireland.*
- *The overall short- and long-term economic impact of any suggested approach to contracting and specifically costs associated with the contracting and bidding processes, the impact on the cost of Legal Aid, the legal profession and urban and rural communities.*
- *The potential for parties to seek to use the Public Contracts Regulations on this review – noting that the Part 4 does not extend to Northern Ireland*

The Review will bring forward advice and recommendations as to the advantages which contracting could deliver and the associated impact of the introduction of contracting, including costs for the development and administration of contracting.

The Review will also identify the disadvantages which the introduction of contracting could have on the citizen, the legal profession, the LSA and the longer-term sustainability of local access to justice.

Finally, the Review will advise on what principles should guide further development and what steps are required.

5. Legal services delivery mechanisms

There are three different mechanisms commonly used to secure legal services - Contracting, Panels and Registration Schemes and I have described each below.

5.1. Contracting

Contracting is the system of service delivery through formal, legally binding contracts between the contracting authority (in this case the LSA) and legal services providers. The contracting authority decides how many contracts are awarded and defines how the service provider must deliver the required services. Usually quality standards and other requirements are specified along with a range of contractual terms that the provider must meet. Contracts can be non-competitive – meaning that any provider who meets the published requirements is awarded a contract, or competitive – meaning that contracts are only awarded to a limited number of providers. Selection of the “winning” providers in the latter case is done via a competitive bidding process where bids are evaluated by the contracting authority against pre-published criteria. Those providers who score highest are awarded contracts up to the number specified at the time the procurement was initiated. Providers’ contracts in Legal Aid are typically for three to five years duration. The selection criteria can but do not have to include price but normally includes quality and capacity measures.

Contracting for Legal Aid covers a wide range of possible models. At its simplest it sets a minimum standard that a provider must meet and formalises the obligations of the service provider and the contracting authority. So as an example, it might specify that the provider offers services during normal office hours and that the contracting authority is obliged to pay for services within a defined period. In many ways this is like a basic statutory registration scheme (see section [4.3](#)).

At the most complex end of the spectrum it can reshape the services provided, rationalise the provider base and use competition to set prices. As an example, in England and Wales the national first-line telephone civil legal advice service is delivered by a single provider only following a competition (based on prices tendered, capacity and quality).

As the Contracting approach is a form of public procurement the Public Procurement Regulations 2015 apply in part (at least in England and Wales) which means there are restrictions and constraints on the public body as to how they conduct the procurement. For example, they must normally allow 35 working days between the publication of a tender for services and the closing date for bids. The situation in Northern Ireland is not clear and further investigations would be needed to ascertain whether the Regulations applied in the same way.

Providers can be exposed to contract sanctions if they breach the terms of the contract, which ultimately can result in contract termination.

Decisions to award and to terminate contracts by a public body are challengeable and it is not uncommon in other jurisdictions for this to happen either via Judicial Review (JR) or under the Procurement Regulations where they apply to this sort of arrangement.

Contracts for Legal Aid work can be lengthy and complex – for example the standard civil contract for Legal Aid in England and Wales runs to 93 pages of text, with the New Zealand version being 26 pages long.

Some forms of contracting can give Legal Aid providers a level of certainty of volume – a provider who is for example one of three with an exclusive contract in an area might be certain that they would get something close to a third of the volume of relevant cases over a period.

5.2. Panels

A Panel is an arrangement where either barristers, individual solicitors or solicitors' firms apply to become a panel member who is then awarded work. The criteria for joining the panel can be based on any or all of experience; competences demonstrated; interview performance; third party references; and written submissions. Panel membership can be unlimited in number – in that all who meet the standard will be appointed - or number limited so that only the highest scoring applicants are appointed. Panels normally have a fixed duration of between three and five years – during this period new members cannot be appointed but at the end of the period an exercise to refresh the panel can be undertaken, at which time new entrants are permitted to apply. Panel membership gives a member the right to do work for that public body or for its clients, in most (but not all) cases without a guarantee of a volume of business. There are more sophisticated schemes (in Northern Ireland and elsewhere) which ensure that the available work is shared equitably between the panel members. Panels aim to ensure that only providers who meet defined quality and service standards (or proxies thereof) are appointed, typically providers then carry out the work based on fees specified in regulations or otherwise promulgated prior to the panel membership being advertised. If panel members are found to not meet the ongoing requirements for membership they can be removed from the panel, effectively meaning they cannot carry out further work for that public body. Both decisions to appoint to the Panel and remove members are challengeable, ultimately via JR and this is a not uncommon occurrence in several jurisdictions.

5.3. Registration schemes

Registration schemes (statutory or otherwise) are used to by purchasers of legal services to ensure that providers meet standards over and above those of the general regulated profession. They typically ask for more specific commitments from the provider (either the firm or individual) related to the type of work planned to be undertaken and for indicators of quality relevant to the work planned. So, for example the proposed Statutory Registration Scheme for Northern Ireland Legal Aid providers requires that barristers and solicitors have undertaken at least one or three hours respectively of training in the year of application (pre-accredited by the LSA) in publicly funded civil or criminal legal services. Inevitably these and many other stipulations are proxies for quality – they don't in themselves give assurance that quality as delivered for clients is better than that delivered by those who have not registered. Registration schemes typically have an associated audit regime and sanctions can be

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applied to providers who are shown on audit not to be meeting the standard. The schemes are normally run on a rolling basis which means new providers can join at any time as long as they can show they meet the required standards.

To summarise:

	Contract	Panels	Registration Schemes
Able to select based on			
Price	Yes	No	No
Quality	Yes	Yes	Yes
Rank versus others	Yes	No	No
Sanctions versus Providers	Yes	Yes	Yes
Able to add Providers at any time	No	No	Yes
Volume certainty for providers	Possible	Possible	No

6. Quality assurance in legal services

The question of how to measure and ensure quality in legal services is extremely wide and complex. In this report I can do no more than summarise the main mechanisms currently in use. Quality is conventionally defined as fitness for purpose but in professional services this is very difficult to define.

6.1. Outcomes

Arguably, for the client this is the paramount measure of quality – the outcome that the lawyer delivers. However, the outcome of any legal dispute is only partially impacted by how a lawyer applies his or her expertise, knowledge and skills. More important are the facts. So, clients in a criminal case might value lawyers who have a high acquittal rates but as an objective measure of quality this would not be an appropriate measure. Only in very limited circumstances (for example clinical negligence case success rates) have outcomes been used as a measure of legal services quality.

6.2. Accreditation

Accreditation schemes are prevalent in many areas of law (such as Family, Criminal and Conveyancing) in some jurisdictions, they are typically but not exclusively run by the national Law Society. They accredit individuals based on applications which document experience and qualifications and often include case studies and normally insist on a minimum level of ongoing Continuous Professional Development (CPD). In England and Wales, accreditation costs between £200 and £300 per year and typically accreditation lasts for three to five years. Generally, Accreditation schemes are a “badge of excellence” but public bodies often use them as a threshold qualification – in other words they will not use lawyers who don’t hold the appropriate accreditation. In Northern Ireland there are accreditation schemes for solicitors – examples include the Children Order Panel¹ being used by Northern Ireland Guardian ad Litem Agency (NIGALA) as an entry criterion to their Panel and another (the Dispute Resolution Service) being effectively a “badge of excellence” for those wanting to use mediation as a way of resolving disputes.

6.3. Practice standards

These specify how a solicitor or barrister should operate their business – they don’t look at the quality of the work done per se. Typically, they require self-assessment followed by an audit by an independent entity. ISO9000, Investors in People (IiP) and Lexcel (run by the Law Society of England and Wales) are examples. Practice

¹ Application to join this panel costs £230.

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standards are sometimes used as “capability” threshold criteria in contracting schemes.

6.4. Supervisor ratios

In England and Wales, the Legal Aid Agency’s contracts mandate that solicitors’ firms must employ an appropriate number of “supervisors” dependent on the volume of Legal Aid cases undertaken. These supervisors must have a level of accreditation higher than that of the basic practitioner. The experience of the Legal Aid Agency in this jurisdiction is that effective supervision helps improve quality.

6.5. Peer Review

Peer review is a process where independent experienced lawyers audit a solicitors’ firms’ case files and look at whether the advice given and the way the case was conducted are of a satisfactory level. The result of the peer review is normally a score of between 1 and 5; levels 1, 2 and 3 being acceptable. It is, however, a costly process, on average costing circa £1000 per peer review². Peer Review is well established in the rest of the UK and is at various levels of development in a small number of other jurisdictions (Chile, South Africa, the Netherlands, Ontario, Finland, Moldova, New Zealand, China and Georgia).

6.6. Compulsory Continuous Professional Development (CPD)

In addition to a generic requirement to undertake CPD (for example as mandated by the Bar Council and Law Society of Northern Ireland) regulatory bodies can make CPD in a relevant area of law mandatory. For example, in Northern Ireland, solicitors who wish to practise conveyancing must undertake at least three-hours of relevant CPD per annum. In practise this probably costs circa £200 plus the solicitor’s time per annum. Attendance at CPD events is typically self-certified with “light touch” regulatory body oversight but courses etc. are normally accredited by the Regulatory body to ensure they are relevant to the matter at hand.

6.7. Observation schemes for advocacy

Peer Review does not look at performance in court, but schemes have been developed to do this. In England and Wales, the Crown Prosecution Service used experienced advocates to observe and assess the performance of their in-house advocates in criminal trials and there is also a scheme (Quality Assurance for Advocates) where judges in Crown Court criminal trials assess the performance of advocates who appear before them. This scheme has not yet been rolled out.

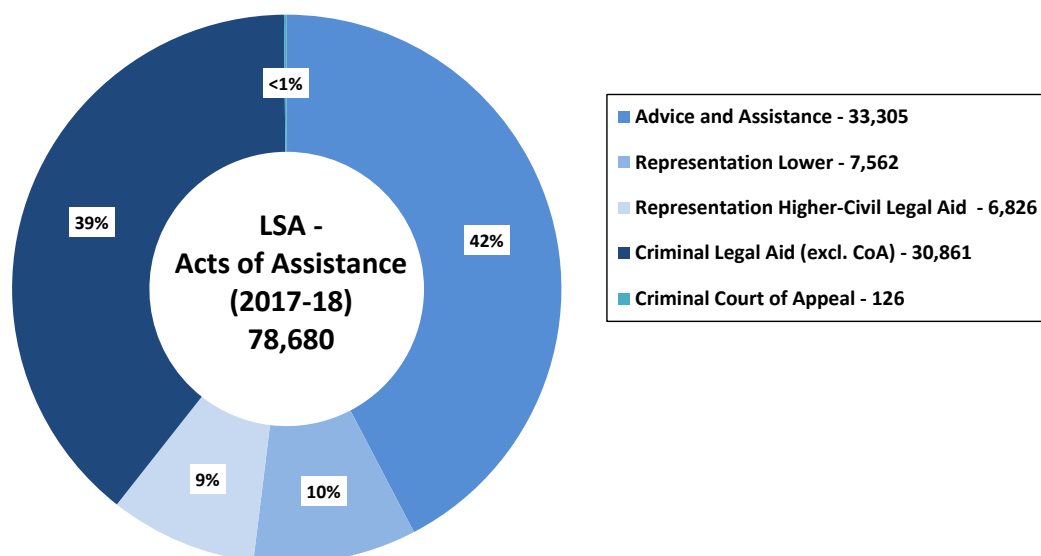
² Figure for England and Wales

7. Legal Aid delivery in Northern Ireland

Legal Aid provision and remuneration has grown organically in Northern Ireland and is subject to a complex matrix of arrangements set out in a range of statutes and subordinate legislation. Advice and assistance, (including police station advice) is widely available on any point of Northern Ireland law, subject to a few restrictions. In civil matters, representation is available at all court tiers and some tribunals, subject to the issue being within the scope of Legal Aid; meeting a merits test; and the applicants meeting a financial eligibility test. For criminal cases, Legal Aid is available at the magistrates' courts and the Crown Court subject to financial means considerations and the 'interests of justice' test being met. Legal Aid is also available for criminal cases at the Court of Appeal. Finally, Statutory Exceptional Grant Provisions are available in certain circumstances for proceedings which are outside the scope of ordinary civil Legal Aid.

Legal Aid is demand led and is measured by "acts of assistance". The volume of acts of assistance varies from year to year. Recent years have seen a decline with 78,860 acts of assistance in 2017/18 down from a high of 97,200 in 2015/16. The most significant reduction was in respect of advice and assistance which saw a decrease of 14,700 acts of assistance.

Table 1 Acts of Assistance 2017-18



Services which are funded by Legal Aid are delivered through a network of private solicitor's practices, the independent bar, and by voluntary organisations which have a waiver from the Law Society. The client has complete freedom of choice, subject to their preferred supplier being regulated by the Law Society of Northern Ireland ("Law Society") or the General Council of the Bar of Northern Ireland ("the Bar Council") and the supplier being willing to carry out Legal Aid work. The Law Society regulates the solicitor profession in Northern Ireland and represents solicitors' interests. It represents and regulates over 2,600 solicitors working in some 530 firms, based in over 74 geographical locations (as well as solicitors working in the public sector). The

vast majority of firms undertake some Legal Aided work. Approximately 200 firms receive about 80% of the money spent with solicitors on Legal Aid.

The Bar Council regulates the barrister profession in Northern Ireland and represents barristers' interests. The Bar Council currently has approximately 640 members carrying out both privately funded and Legal Aided work. Some barristers tend to specialise in Legal Aid work, with further specialisation between criminal and civil work. The vast majority of barristers undertake some work paid for by Legal Aid. Typically, 85% of the Legal Aid barrister spend is taken by 200 barristers. Barristers in private practice work as independent sole practitioners within a Library system in which they receive their instructions from a solicitor. Barristers are specialists in both a focused range of practice areas and have specialist skills in relation to courtroom advocacy and legal opinion. Operating from the Bar Library in Belfast affords instructing solicitors some choice and competition within any given area of law. There is no chambers system in Northern Ireland and the absence of a clerk as an intermediary³ means that direct relationships have been established between solicitors and instructed barristers.

The following two tables summarise payments to the two branches of the profession.

Table 2 Payments to solicitors authorised in 2017/18 by case type rounded to nearest £1000

Case Type	Profit Costs	Profit Costs VAT	Disbursements	Total Payment
Civil ⁴	£4,899,000	£963,000	£1,908,000	£7,770,000
Criminal	£19,402,000	£3,833,000	£2,607,000	£25,842,000
Family	£13,020,000	£2,583,000	£3,544,000	£19,147,000
Grand Total	£37,321,000	£7,380,000	£8,059,000	£52,760,000

Table 3 Payments to barristers authorised in 2017/18 by case type rounded to nearest £1000

Case Type	Counsel Fees	Counsel VAT	Total Payment
Civil	£3,748,000	£635,000	£4,383,000
Criminal	£13,121,000	£2,357,000	£15,478,000
Family	£5,478,000	£847,000	£6,325,000
Grand Total	£22,348,000	£3,838,000	£26,186,000

Disbursements are payment passed on to third parties by solicitors' firms – the largest element of which would be Expert fees. It is worth noting that there is growing concern about the increase in Expert fees in recent years, however, I understand the Department is considering several proposals to control these.

³ As happens elsewhere in the UK.

⁴ The gross expenditure on Civil cases is higher than reported here because in many cases which are won the costs are reimbursed by the losing side.

As explained above, the professional activities of solicitors and barristers are regulated by the Law Society and Bar Council respectively. However, a Statutory Registration Scheme is currently being developed by the Department. Once the Registration Scheme is in place, solicitors and barristers wishing to provide publicly funded services will be required to register with the Department and comply with a statutory code of conduct, monitored by way of routine compliance audits. Implementation of this scheme will not happen until the Executive is re-established in Northern Ireland.

Remuneration for publicly funded work is currently delivered through a complex matrix of standard fees, time and line assessment by the LSA, and assessment of bills submitted to the Taxing Master. For barristers, bills submitted to the Taxing Master are still based on a 'brief' fee. The Department has a strategy to introduce standard fees with escape clauses for all Legal Aided work. This has been achieved for most criminal work, and proposals for family cases at all court tiers are being finalised. The intention is to complete the standardisation of fees creating clarity in respect of remuneration, reducing the level of administration required and allowing greater control to be exercised over the high costs of complex cases which escape the standard fee.

Clients need to have a choice of solicitors' firm if they wish to avail themselves of legal advice and representation. This is for two key reasons. The first (shared with other common law jurisdictions) is that lawyers (individuals or firms) cannot represent clients on opposite sides of a legal dispute due to potential conflicts of interest. Hence for a multi-party dispute (such as a family case with parents, children and grandparents involved) a number of firms will be needed. In a similar way in criminal cases it is often necessary for individual defendants to have separate representation. The second key reason is particular to Northern Ireland and is, that despite significant political and cultural change over the past decades, there are thought to be significant sections of the two communities who would not feel confident in using a lawyer perceived to be from the other community. This means that solicitors from both communities will need to be available for clients to choose.

7.1. Where the services are provided

Solicitors' firms are located in 64 different settlements in Northern Ireland. There is no comprehensive analysis of their overall revenue or size, so in this report I have only been able to look at Legal Aid funding – many, possibly all, firms, will also have private paying clients.

Barristers in private practice work as independent sole practitioners operating from the Bar Library in Belfast. Like solicitors there is no information on the overall earnings of barristers (only payments from Legal Aid) and from a geographical perspective all the payments are made to individuals based at the Bar Library in Belfast.

As mentioned earlier solicitors' firms are widely spread across Northern Ireland. If one looks at the 40 largest settlements by population in the country (the 40th has a population of 6000), there are only four settlements (the 33rd, 34th, 36th and 40th ranked) with no firms providing Legal Aid; and each of these settlements is within three

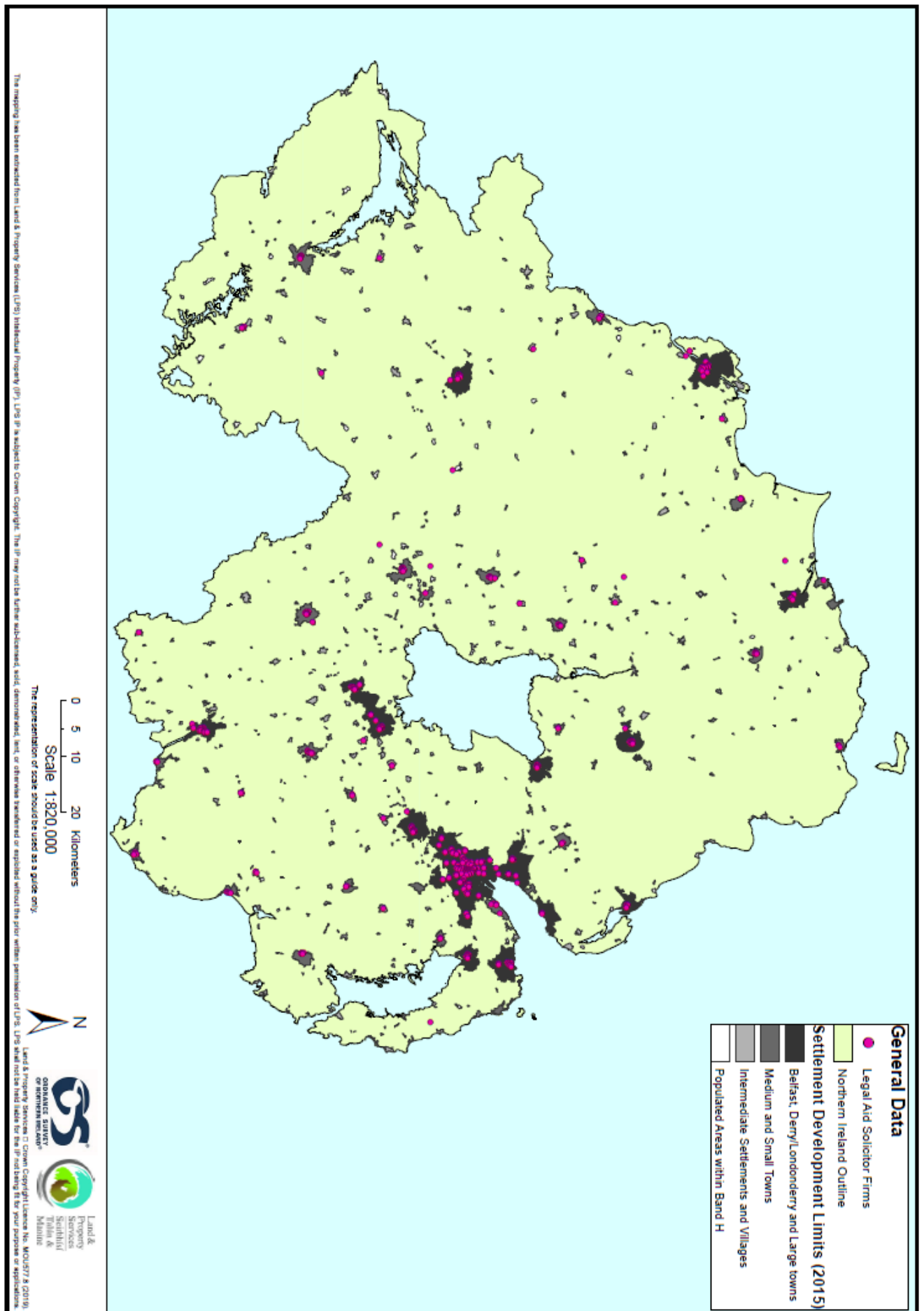
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to seven miles of a town which does have Legal Aid firms operating. Maps 1 to 4 shows the location of all solicitors who deliver Legal Aid across Northern Ireland.

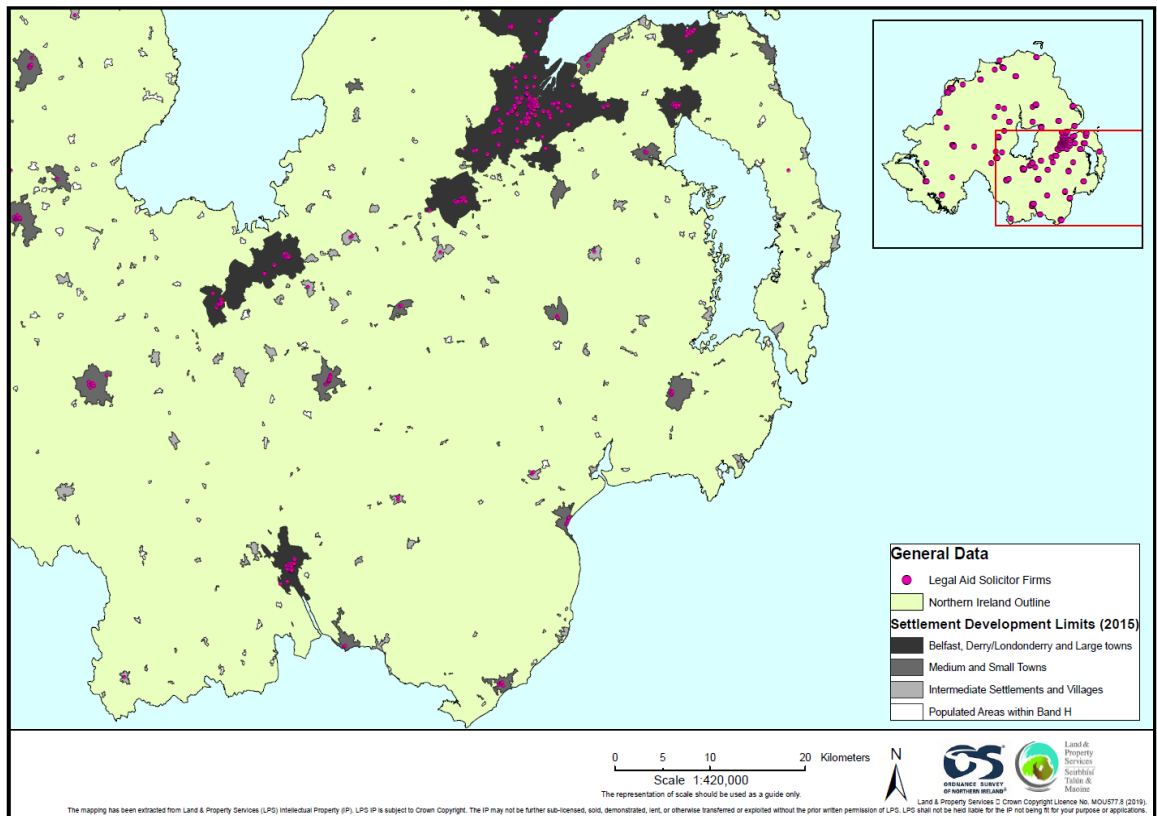
Figure 1 show a ranked distribution of payments to solicitors' firms for the whole country and Figure 2 looks at those firms who receive less than £20,000 p.a. Figures 3 and 4 show two typical⁵ towns - Coleraine (population 24,000) and Kilkeel (population 6,500) and analyses the Legal Aid work done by firms in these towns. The reason some firms are shown as receiving negative payments in a year is that for successful civil cases, costs are recovered from the unsuccessful party and legal aid costs are then reimbursed to the LSA.

⁵ From the perspective of their legal aid provision

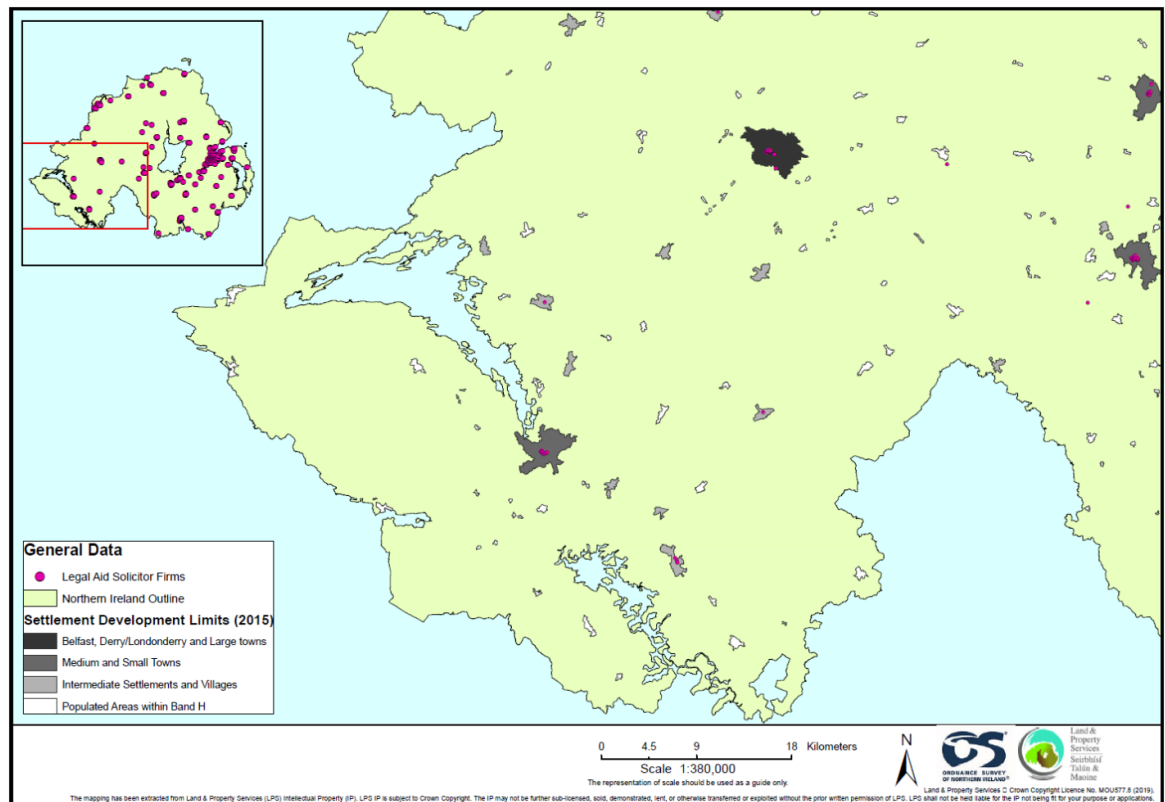
Map1



Map 2



Map 3



Map 4

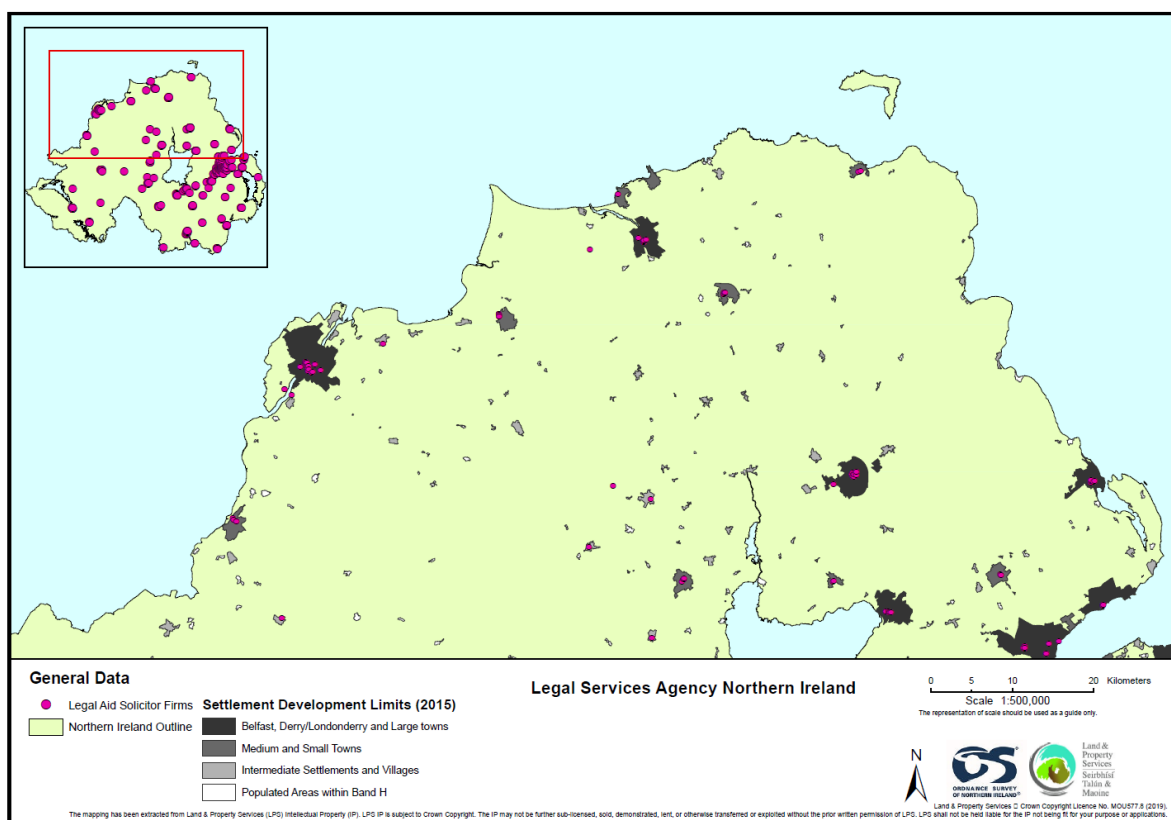


Table 1

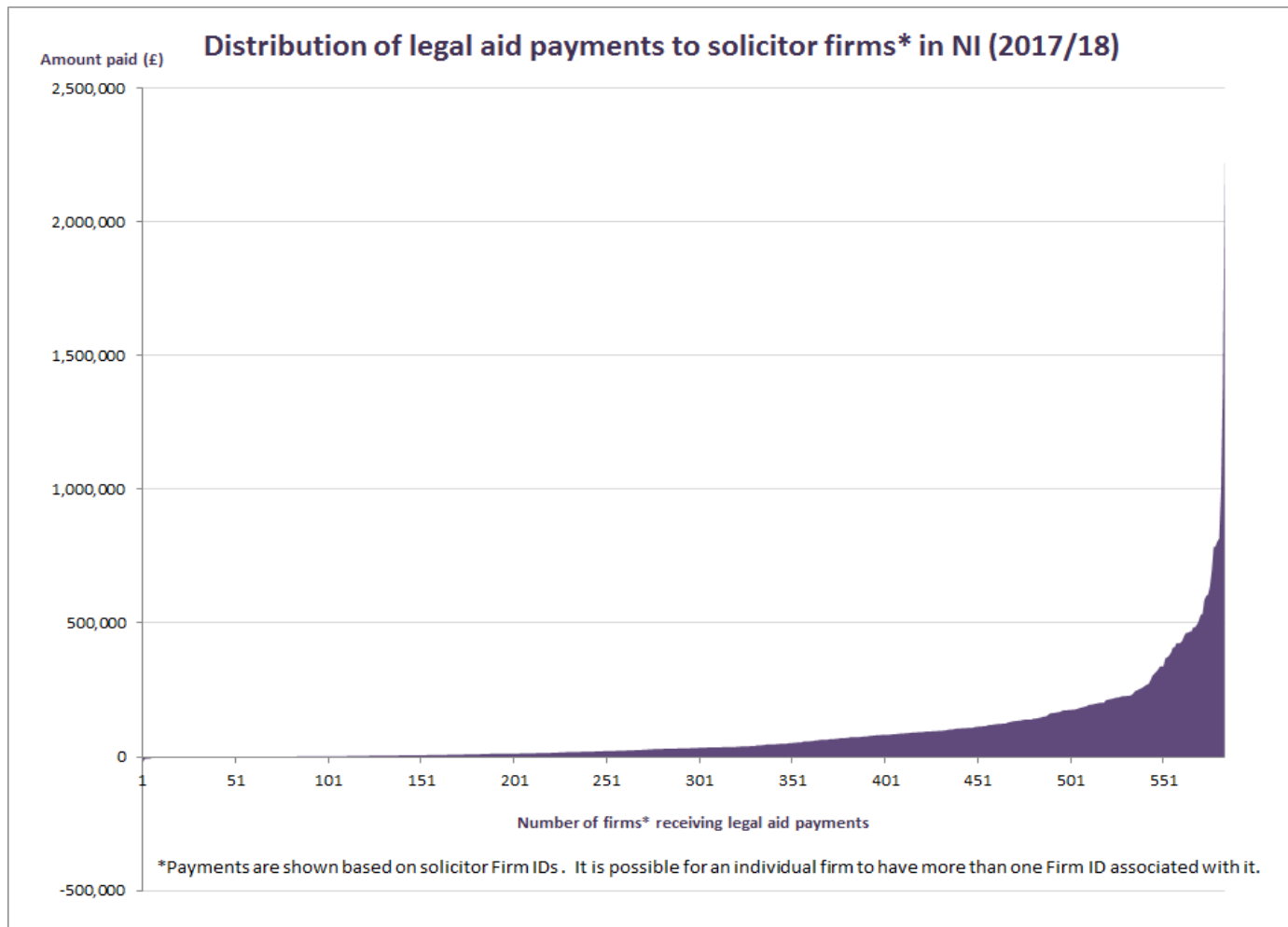
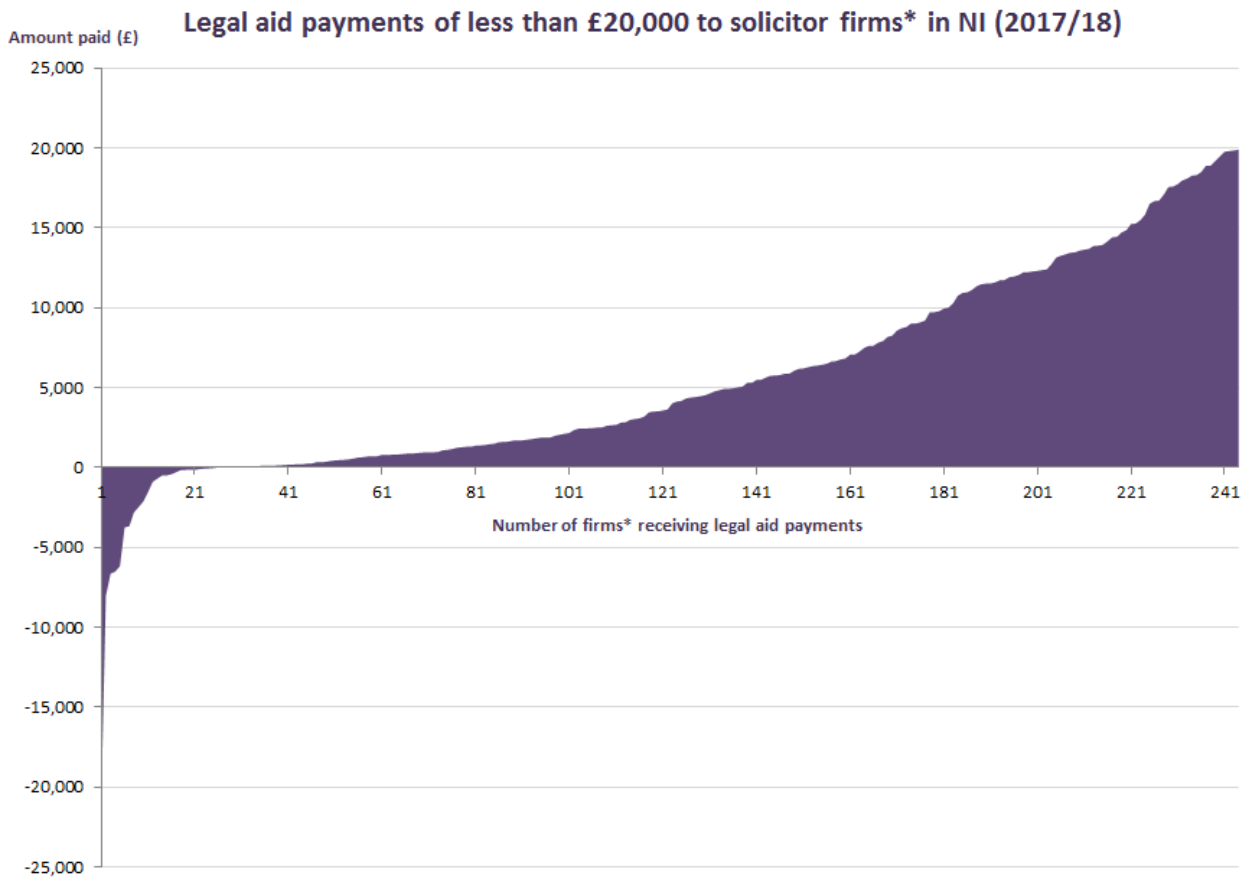
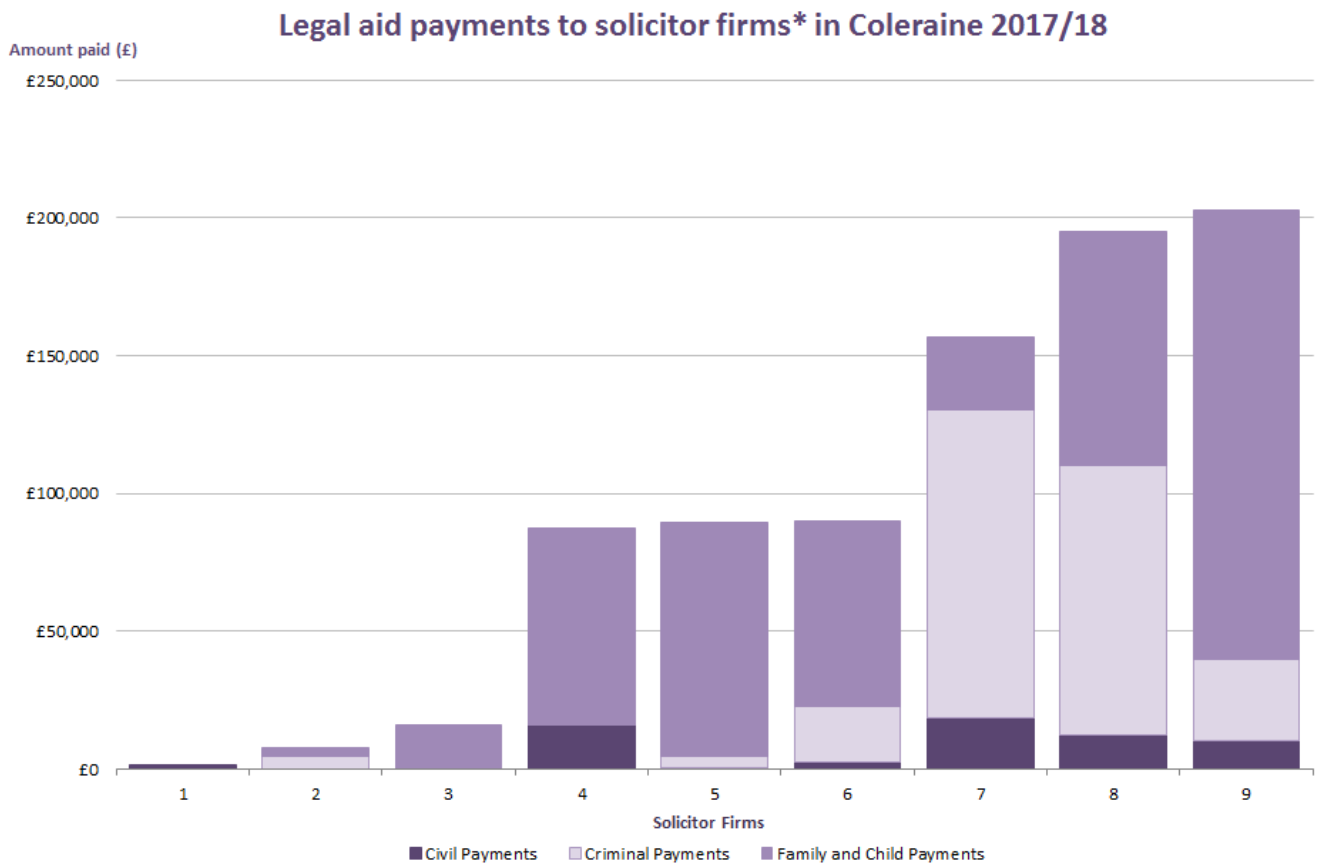


Table 2



*Payments are shown based on solicitor Firm IDs . It is possible for an individual firm to have more than one Firm ID associated with it.

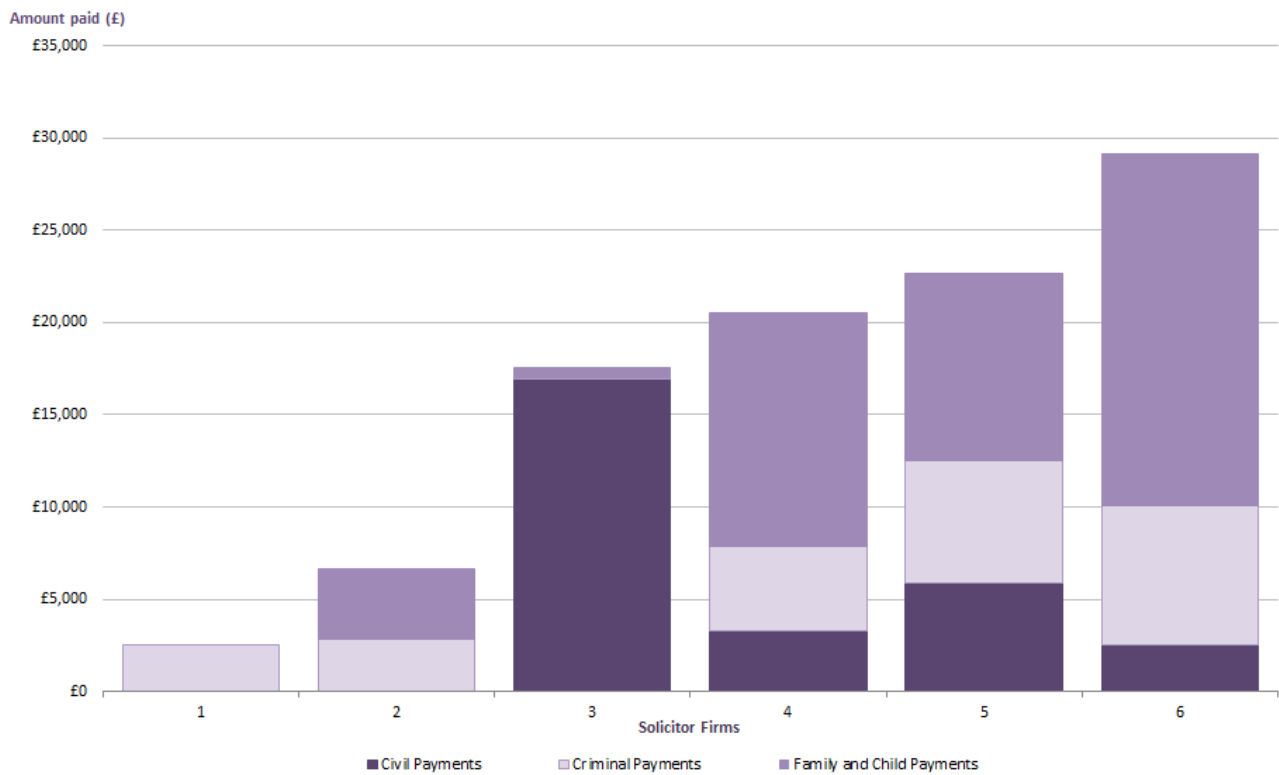
Table 3



*payments are based on solicitor Firm IDs and it is possible for an individual firm to have more than one Firm ID associated with it.

Table 4

Legal aid payments to solicitor firms* in Kilkeel 2017/18



7.2. Quality assurance of legal advice, representation and advocacy

The Law Society believes that solicitors in Northern Ireland typically provide “high quality services through a well-trained set of professionals adhering to the high professional standards.”

They state “Solicitorsare highly trained and highly skilled, being subjected to a rigorous application and assessment process when applying to become a member of the profession. On qualification a solicitor must continue to develop his/her skills annually through completing continuing professional development courses⁶”.

I was told that the Society’s Compliance and Monitoring Officers inspect all firms on a regular rotational basis and will investigate concerns identified to the Law Society.

This quality assurance system relies largely on the professional principle that solicitors are accountable to all clients (whether publicly funded or otherwise) for the adequacy of the service that they provide. I will explore later whether Legal Aid clients are in a good position to judge the quality of work done by solicitors.

Except for the practise of conveyancing there are no formal mechanisms post-qualification to ensure that solicitors have the required expertise in an area of law and the only formal monitoring mechanism is via client complaints. The latest available figures on volume of client complaints puts the rate of complaints against solicitors at approximately one-half of the rate in England and Wales⁷. These complaints cover all areas of law and both legally aided and privately paying clients. It is therefore difficult to reach firm conclusions about the quality of solicitors’ work experienced by legally aided clients. I heard evidence that in small communities poorly performing lawyers will lose their reputation very quickly if they deliver a poor service. I can see this having some validity, but it has not prevented poor quality of advice and advocacy in other jurisdictions (all of which have some small communities) needing further intervention over and above the minimum standard required to practise.

There is no evidence that small firms deliver worse quality than larger firms, indeed my experience is that there is no correlation between size of firm and quality of service.

I turn now to the barrister’s profession.

After they are qualified, barristers must comply with a code of conduct which stipulates “A barrister should decline to act in any case which is beyond his competence”. In addition, they are required to complete a minimum of 12 hours of CPD per annum. The first of these requirements is a matter for individual professional judgement, the second is monitored and audited by the Bar Council.

⁶ Solicitors must complete 15 hours of CPD per annum but apart from conveyancing this does not need to be in any particular area of the law – it can be in general topics such as client care and risk management.

⁷ Although comparisons are not straightforward given the differing regulatory structures in the two jurisdictions.

The Bar Council argued that there was “*no evidence of there being a pre-existing problem with the quality of service it (the Bar) produces. This seems to be reinforced in the statistics associated with service complaints received and processed by the Professional Conduct Committee (PCC) of the Bar...figures for the year ended 2017 show that the PCC dealt with some forty-five complaints over that period, and of these approximately fifteen to twenty matters merited the attention of the PCC and required investigation. The overwhelming majority of those complaints and issues were capable of being dealt with by the PCC. Of the complaints that the PCC dealt with itself, some 75% concerned professional conduct issues and the remainder related to professional services provided by counsel to their professional and lay clients. Those complaints, following investigation were found to be without foundation and were dismissed. These complaints statistics reflect a stable trend and consistent pattern observed over recent years*”.

It might be useful to compare these statistics with England and Wales where in a similar period there were 475 complaints for a population of 16,000 barristers. With the caveat that the culture and systems are somewhat different, a crude calculation shows that there are roughly twice as many complaints per barrister in Northern Ireland as in England and Wales. However, as with the figures for solicitors I am not sure this really tells us much about the quality of legally aided work.

7.3. Observations

As can be seen from Figures 1 and 2, there are large numbers of firms who do relatively low volumes of Legal Aid. There are approximately 244 firms (40%) who are paid less than £20,000 per annum and 136 (23%) less than £5000 p.a. Figures 3 and 4 illustrate that in typical small/medium sized town many solicitors' firms do very low volumes of legally aided cases (although they may do much higher volumes of privately funded cases) and many who carry out high volumes of Legal Aid work in one category of law (like family) do a handful of cases in other areas (like criminal)⁸.

By international standards there is easy access for members of the public to Legal Aid services in Northern Ireland from a physical proximity perspective (although in contrast to some other jurisdictions there are no state-funded Legal Aid telephone advice lines). Compared to many other jurisdictions Legal Aid clients in Northern Ireland also have more choice of solicitors' firm within easy travelling distance of their homes.

Looking at the distribution of firms and where potential clients are located leads me to the conclusion that there are more solicitors' firms carrying out Legal Aid work in Northern Ireland than are needed if one considers the needs of Legal Aid clients only. If there were fewer firms offering the service, provided they were in the right locations, then the service would still meet the needs of clients.

There are also a significant number of firms who carry out very low volumes of legally aided work which leads me to the conclusion that these firms are not critically dependent on Legal Aid funding in order to survive (although I recognise that for small firms in particular every extra pound of revenue is important).

⁸ For example, Firm 5 in Coleraine

The distribution of work in locations outside Belfast indicates that there are unlikely to be enough volumes of work that could be reallocated to other firms in order to deliver economies of scale in the event of a market consolidation. In Belfast with many more firms in a much more concentrated geography there is enough volume available that there might be economies of scale following consolidation. I explore the implications of this section [9.5.3](#) on the introduction of a Contracting model.

My experience and feedback from discussions with stakeholders indicates that there is a risk to quality with the current distribution of work described in the previous section. A client should expect that a firm will deploy a solicitor with appropriate expertise in the relevant area of law. However, there are probably firms carrying out Legal Aid cases in areas of law where they have little experience and therefore their solicitors lack the expected expertise. As the law becomes more complex this is becoming a bigger problem. By way of example, I was told that the telephone helpline set up to help members of the public with housing legal problems receives a number of calls from solicitors' firms where the solicitor has agreed to advise the client but needs to phone the public helpline to gain the necessary advice.

There is a counter argument to the above, that by offering advice in all areas of law a solicitors' firm can offer a better service to the client, rather than referring elsewhere. There is evidence from international studies⁹ that many clients experience clusters of legal problems which arguably are better resolved by a holistic service provider rather than being advised by multiple specialists, not least because of the phenomenon of referral fatigue.

On balance I would conclude that it is better for a client to be sure of getting advice from a solicitor with expertise than not and it must be right that public money should only be spent on services that are demonstrably of an appropriate quality.

One area worth mentioning is Police and Criminal Evidence Act (PACE) advice at the Police Station – in Northern Ireland only solicitors (as opposed to paralegals elsewhere in UK) can attend to give legal advice to detainees. I am of the view that this is a better system than using paralegals, in that if *expert*¹⁰ advice is given at the earliest stage of the process this is likely to produce a better result for all concerned – including the client; and reduce costs in other parts of the justice system. I will return to this area in a later section.

In my discussions with solicitors and barristers I reached the conclusion that, in general, the direct contact between an instructing solicitor and a barrister gives the Legal Aid client reasonable assurance that he or she is getting access to a barrister with the expected expertise in their case. However, I have seen no evidence on the quality of advocacy in the Courts, although this was not an issue of concern raised by any of the stakeholders I consulted.

⁹ For example: Multiple Justiciable Problems: Common Clusters and Their Social and Demographic Indicators, 2004 authors Pascoe Pleasence, Nigel J. Balmer, Alexy Buck, Aoife O'Grady, Hazel Genn

¹⁰ See section [9.1.2](#) for further discussion

8. International comparisons of Legal Aid delivery

8.1. England and Wales

Almost all Legal Aid delivered by solicitors' firms and NfPs is contracted in England and Wales. In total approximately £1.6 billion out of a total expenditure of £1.75 billion is delivered under contracts. Very little work done by barristers is contracted (only Very High Cost Criminal cases), other than this any practising barrister may be instructed by a Legal Aid solicitor. Of the work contracted only circa £10 m p.a. (0.6%) is price-competed – this is for telephone advice work only.

Contracts are awarded based on quality and capacity and are awarded in a specified geographical region in the following areas of law: Family; Housing, Debt and Welfare Benefits; Immigration and Asylum; Mental Health; Community Care; Claims against Public Authorities; Clinical Negligence; Public Law; Criminal; and Family Mediation.

Quality is usually assessed in the tendering process by measuring the number of solicitors in the firm with area of law specific accreditation and appropriately qualified supervisors being employed by the firm.

In most cases an unlimited number of contracts are awarded (non-competitive contracts) but in some areas of law providers bidding for contracts that allow them to be able to deliver higher volumes of work must meet additional requirements, compared to providers wishing to do lower volumes of work (such as employing more supervisory standard lawyers).

Firms may hold contracts in one or more areas of law; some firms will only have contracts in one area of law – like Family and others who will have contracts across a number (and possibly all) areas of law.

There is a Peer Review process run by the Legal Aid Agency (LAA). It audits the work of a small proportion of Legal Aid providers each year and is a scheme similar to that run in Scotland. Since its introduction in 2005 approximately 4500 solicitors' firms have been audited.

Attempts (latterly led by the legal service regulators) to introduce quality measures for barristers and solicitor-advocates to improve the standard of criminal advocacy have stalled despite being ruled lawful and proportionate by the Supreme Court.

There have been several attempts to introduce price-based competition into contracting for criminal Legal Aid in England and Wales, but none have been implemented. These have foundered for two prime reasons – firstly Ministers decided that they could simply reduce fees paid by legislative changes rather than by a somewhat uncertain competitive tendering approach; and secondly because the proxies for capacity and quality have turned out to be so complex that in practise it proved impossible to design and run an industrial scale (several hundred bidders for several hundred contracts) contracting process error free.

There is small (relative to the total market) Public Defender Service (PDS) that operates in some parts of the jurisdiction which employs both solicitors and barristers (including QCs).

In terms of coverage and access currently there are 3300 firms of solicitors providing Legal Aid services across the jurisdiction. This is approximately 20% of the total solicitor's firms in England and Wales. This number has reduced over the years – in the main due to reductions in the scope of Legal Aid and in part due to the contracting process. On average a Legal Aid firm will receive £0.5m per annum in Legal Aid funding – although the largest will be paid approximately £20m.

The number of firms carrying out Legal Aid work has stabilised at a level where in general there is just enough supply across the geography, although for Housing and Family there are rural areas where provision is below a level that the Ministry of Justice would deem acceptable (although how much of this is due to the Contracting approach is moot – lack of Housing experts was identified as long ago as 2004¹¹). The distance from a Legal Aid provider for clients will vary dependent on an area of law. For areas of law with high volumes of work, such as Family, there are typically at least five providers per Local Authority area. At the other extreme an area of law such as “Actions against Public Authorities” has only one provider per Region – such as the South West of England. There are, however, a range of Legal Aid telephone advice lines available for the public

Historically there were a few areas of the country where bundled service delivery was required from providers funded jointly by the LAA's predecessor and the local Authority. However, these were ceased at the time of the Financial Crisis of 2010.

8.2. Scotland

The Scottish Government have decided not to pursue contracting as a strategy for the provision of Legal Aid services. Their reasoning is summarised below:

“In its paper, A Sustainable Future for Legal Aid (Scottish Government, 2011), the Scottish Government set out its intention to move towards a contractual relationship with criminal legal assistance suppliers rather than the case-by-case arrangements currently in place. The focus on criminal legal assistance reflected the powers available in the Legal Aid (Scotland) Act 1986 which does not allow contracting for civil legal assistance.

The Scottish Legal Aid Board was charged with undertaking a scoping exercise to develop options and advise Scottish Ministers. The Board undertook an engagement exercise with the legal profession to gather information that would inform advice to Scottish Ministers. The advice subsequently submitted set out a number of challenges in moving forward with contracting for the provision of criminal legal assistance. Contracting in itself would not achieve significant savings; it would need to be accompanied by some form of fee control, either through new regulations or by competitive price tendering.

There were challenges in undertaking a procurement exercise for what is essentially a demand-led service. The indirect relationship between the supplier of legal services (the solicitor), the recipient of those services (the client) and the funder produced additional complexities. The Board would need to enter a procurement process without a clear sense of how many full-time equivalent solicitors would be required to deliver

¹¹ Evidence of former LSC Chief Executive to Constitutional Affairs Select Committee

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the full range of criminal legal assistance services in each court location. It would therefore prove difficult to assess how many contracts would be required or the overall capacity required. Developing a tender document could be challenging, particularly given the diverse nature of business models in the criminal legal assistance landscape. There was limited experience of procurement within the firms specialising in criminal work. There was therefore a high risk that tenders would not be acceptable, making it impossible to award the necessary number of contracts. As a result, Ministers took the decision not to proceed with the contracting proposals¹²."

I understand that the original justification for a contracting approach in criminal litigation was postulated savings of £3m p.a. However, the review concluded that there would be no direct savings from contracting – any significant saving would only be a result of price-competition leading to lower prices. The view was taken that if price reductions were viable then simply reducing the rates, via a legislative route, was lower risk than attempting to introduce price competition into a market with no direct experience of such and without the internal capability to undertake the contracting process.

There is a registration scheme for solicitor providers who must comply with a Code of Practise. There are different codes for different areas of law although they have many elements in common. There were recent proposals to make the code more onerous, but introduction of the revised code has been delayed. There is no restriction on advocates (barristers), who may be instructed in Legal Aid cases without restriction.

In Scotland there is a well-established Peer Review scheme for both Civil and Criminal solicitors' providers. This ensures that each provider is peer reviewed on the quality of their litigation files on either a five- or six-year cycle. Any provider who fails to pass a peer review is liable to be excluded from carrying out Legal Aid work.

The total cost of Legal Aid in Scotland is circa £136m p.a. of which approximately £100m is paid to solicitors and £16m to advocates. This is delivered by 580 civil solicitors' firms, 500 criminal solicitors' firms (a number that has halved since 2010) and 380 children's solicitors' firms. An average firm takes approximately £0.75 M. There is a relatively large Public Defender Service in Scotland.

8.3. Republic of Ireland

The service delivery model here is somewhat different for Civil Legal Aid from jurisdictions in the United Kingdom. Client are first serviced via a network of 30 state-run Law Centres employing approximately 150 solicitors. After initial advice and possible representation by the Law Centre solicitors, where needed eligible clients are then able to instruct local private practice solicitors selected from a Panel. Individual solicitors are members of the Panel not the firm for whom they work. There is no guarantee that Panel members will get any work as a result of being on the Panel.

There are five Panels for civil solicitors: Family (excluding divorce) ~400 solicitors; Divorce ~120 solicitors; Asylum and International ~30 solicitors; Public Family Law (pilot only); Housing Repossession (time limited schemes).

¹² Rethinking Legal Aid – An Independent Review 2018

Criteria for admission to a panel include having minimum experience levels and meeting on-going training requirements – relevant to the area of law. Applications for admission can be made at any time. Barristers can be instructed by Law Centres from a single Panel.

In criminal cases solicitors are chosen from a single Panel by the client – admission to the Panel is open to any solicitor practising in the Republic who wishes to carry out publicly funded criminal defence work.

Fees payable in all cases are set by Regulations. Total Legal Aid expenditure in the Republic is approximately Euro 105m (£95m).

8.4. New Zealand

In New Zealand, the Ministry of Justice operates a contractual method to deliver Legal Aid. However, the system has many of the characteristics of a panel scheme and is with individual lawyers rather than organisations. There are just under 2000 lawyers under contract with the Ministry in four main categories of law: Criminal; Civil; Family; and Waitangi. The merged legal profession in New Zealand has approximately 13,000 lawyers – the 6% who carry out Legal Aid work all do a mixture of publicly and privately funded work. There is also a significant Public Defender Service – introduced about ten years ago to help improve quality. Individual lawyers apply for contracts with the Ministry and their applications are initially assessed by civil servants before being passed to a selection committee consisting of experienced Legal Aid lawyers. Applicants must describe their experience and qualifications against standards published in regulations. Approximately 50% of applications are passed first time, 35% after further information is received and 15% either rejected or agreed with restrictions. Fees are set by regulation and payments are made direct to the individual lawyers' nominated account (which might be that of their legal firm). Contracts are for a three-year period and once awarded the individual lawyer is free to do as much or as little Legal Aid work as they chose within the specified area of law. There is a Peer Review audit function that audits approximately 100 individuals a year – selected by a risk-based assessment. One of the perceived weaknesses with this system is that there are no limits on the number of applicants who can be awarded contracts, so although it is an effective process for ensuring quality there is no mechanism to match supply and demand. This has led to a view that there are too many Legal Aid lawyers in urban areas and too few in more rural areas. With the current scheme there is nothing that can be done over and above letting market forces work through to address this imbalance.

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The following table summarises the approaches taken in these jurisdictions:

Country	Contracts	Registration Schemes	Panels	State-employed, Defence or Civil advice lawyers
Northern Ireland	No	Planned	No	No
England and Wales	Yes	No	No	Yes
Scotland	No	Yes	No	Yes
Republic of Ireland	No	No	Yes	Yes
New Zealand	Yes	No	No	Yes

9. The Department of Justice's obligations regarding Legal Aid

The relevant legislation (*Access to Justice (Northern Ireland) Order 2003*) lays out that the Department should secure (within the resources made available, and priorities set) that individuals have access to civil legal services that effectively meet their needs, and that individuals involved in criminal investigations or relevant proceedings have access to such criminal defence services as the interests of justice require.

In section 6 we looked in detail how Legal Aid is provided; at present the provision of Legal Aid is effectively a remunerated voluntary service provided almost exclusively by solicitors in the first instance.

Lawyers can choose whether to carry out Legal Aid work – although as we have seen at present almost all solicitor's firms do so, as do the vast majority of barristers. There is no guarantee that this will continue and indeed there have been occasions when "strikes" have occurred and Legal Aid has not been available when needed. Less dramatically the Department does not have a way of ensuring that local provision remains at a level to meet need. I recognise that in practice with the relatively small geography of Northern Ireland the emergence of so-called "advice deserts" would be unlikely to go unnoticed. Nevertheless, under the current voluntary arrangements the Department cannot be sure it is securing the services it is obliged to under the legislation.

The Order also stipulates that the Department shall aim to obtain the best possible value for money but what does value for money mean in practice? The UK National Audit Office defines "Value for Money" as

"The relationship between resources and outcomes determines value for money: the optimal use of resources to achieve the intended outcomes."

In the current Legal Aid context resources can be regarded as money. Outcomes, however, are more complex and as far as I can determine no statement of the intended outcomes for Legal Aid provision has ever been set or agreed for Northern Ireland. The outcomes would need to cover several dimensions:

How should providers be distributed geographically (in other words how far should clients have to travel)?

How many providers should there be in each area (in other words how much choice should be available to clients)?

How will quality be ensured?

What sort of advocacy services should clients have access to?

Should providers be obliged to offer services in the full range of Legal Aid cases or is it acceptable for services offered to be restricted to one area of law?

Are there economic reasons for providers to be of a minimum size? (This could be to allow economies of scale to be delivered or to reduce the costs of administration for the LSA)

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Is there a role for a Public Defender Service¹³ or on the civil side an employed Law Centre network (as in the Republic of Ireland)?

Ultimately, it is for Ministers to set this vision but in its absence, it is axiomatic that the Department cannot be sure it is delivering value for money.

In the final section of this report I propose a draft desired outcome vision which could form the basis of further discussion.

¹³ Not ruled in or out in Access to Justice 2 Report

10. Implications of introducing a Contracting approach

If the Department introduces some form of Contracting regime there will be costs and benefits. For **purely illustrative** purposes only, the three Contracting models I consider below are firstly a price, capacity and quality-based competition with a limited number of contracts awarded in each area of law. As mentioned earlier in the report clients need to have a choice of provider within reasonable traveling distance and therefore, I have assumed that in rural areas approximately four criminal, five family and two civil contracts would be awarded in each locality (where possible) to ensure that client choice and adequate provision to cope with conflicts is maintained whilst not increasing travelling times materially. In larger conurbations (Belfast in particular) there will be significantly more contracts awarded. I have assumed that this type of contract is limited to work carried out by solicitors, since work done by barristers is, under the current market structure, delivered by individuals with no real potential for economies of scale. If the Northern Irish legal market moved in the same direction as that of England and Wales, following the Clementi Review, this assumption could be revisited but there appears, for understandable reasons, to be no appetite for this sort of change as reflected in Sir George Bain's report in 2006¹⁴.

For the second model I have assumed no price competition and contracts awarded based on quality and capacity thresholds, but with an unlimited number of contracts awarded. Thirdly a competitive quality and capacity-based competition with the same number of contracts awarded as in the first model; both models could be extended to barristers' work.

I have assumed that the quality selection criteria use Peer Review, although another criterion like Accreditation is possible. Peer Review is generally regarded as the "Gold Standard" for quality assuring Legal Aid services and in their submission to me, the Law Society said it "*considers that if mechanisms to ensure the quality of legal services are under consideration, the first scheme for consideration should be the peer review scheme.*" There are however questions of affordability and deliverability¹⁵. The selection criteria for capacity would be relatively straight-forward and it would be unlikely that firms would have difficulty meeting these.

I have examined the implications from a variety of stakeholder perspectives.

10.1. The wider justice system

I saw evidence that improvements to the performance of the wider justice system might require changes to the way Legal Aid is provided which could in part be achieved by the introduction of a contracting approach. I also heard reasons why a contracting approach might be detrimental to the wider justice system.

¹⁴ <https://www.finance-ni.gov.uk/articles/review-legal-services-northern-ireland>

¹⁵ See section [9.5.1](#)

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10.1.1. Clinical Negligence

I understand part of Lord Justice Gillen's recommendations on Clinical negligence were based on the lack of experience of lawyers in effectively progressing these cases through the courts system. His report¹⁶ says

"I consider that the introduction of a system of accreditation for solicitors and junior counsel who wish to practise in the area of clinical negligence is crucial in the interests of the public at large. No longer can we tolerate such highly complex and high-value cases being left in the hands of those who have not demonstrated an expertise in this specialised field."

This sort of requirement could be introduced via any of the three contracting approaches (assuming a suitable Accreditation scheme has been developed).

10.1.2. Police station duty rotas

I mentioned in passing Police Station advice in section [6.3](#). In Colin Stutt's Access to Justice 2 Report he says *"Advice and assistance at the police station is a vital part of the criminal justice system. The Law Society are developing duty solicitor rotas covering all Northern Ireland. Guidance on the operation of this scheme should be transparent and allow for new entrants. Quality criteria for solicitors providing this service should be developed with the Law Society and introduced as part of the new Registration Scheme."*

Dr Vicky Kemp's international comparative study on Police Station Advice 2018 says

"It is only in Belfast that a duty solicitor rota operates and, the report of the independent Access to Justice Review commissioned by the Department of Justice was critical of arrangements because it meant that the police were effectively assisting suspects in their choice of a solicitor. Accordingly, the Law Society agreed with the Department that duty solicitor arrangements needed to be formalised across Northern Ireland to ensure a fair distribution of work amongst criminal Legal Aid solicitors, but there have been delays in setting up such schemes. In 2015, the Law Society reported that such delays were due to changes to police divisions, the closure of a number of police stations and the relocation of the Serious Crime Unit, which would have an impact on the rotas. As time moves on, however, the policy officers said that no progress was being made on setting up new duty solicitor rotas."¹⁷

A contracting regime would be able to set the quality criteria for those carrying out Police Station advice and would be able to formalise the running of the duty rotas. I look again at this issue in section 11.1.

¹⁶ Lord Justice Gillen Civil Justice Review 2018

¹⁷ Effective Police Station Advice, Country Report 5: Northern Ireland, Dr Vicky Kemp, University of Nottingham 2018

10.1.3. *Electronic working*

There was a consensus that larger firms are more likely to be able to work electronically and although this might be a short-term phenomenon, some felt that a move to fewer larger providers would make moving to wholly electronic working easier and quicker to implement, assuming it becomes adopted policy. A move to a competitive contracting model (fewer providers) might also make this slightly easier to deliver and electronic working could be required as part of any contract.

10.1.4. *Serious sexual offences*

In his preliminary report into the law and procedures in serious sexual offences in Northern Ireland Sir John Gillen says “*Training on the prevalence and changing character of serious sexual offences should be undertaken on a regular basis, regularly refreshed and include an assessment of those identified as most vulnerable (for example, people with disabilities, older people, ethnic minorities and those with insecure immigration status). Thus, all publicly funded advocates should have to undergo specialist training on working with vulnerable victims and witnesses before being allowed to take on serious sexual offences. It is noteworthy that legally aided family practitioners are on an approved list.*”

This possibly could be enforced under a contract although there are other mechanisms for doing this.

10.1.5. *Unrepresented clients and potential conflicts*

It was suggested that reduced numbers of criminal solicitors’ firms (which could mean longer and more costly travel for defendants to meet their legal representative) will increase the number of defendants who choose to be unrepresented – leading to less efficient and effective trials. If this is true, then one might expect levels of unrepresented defendants to be higher currently in rural areas as compared to urban areas. However, I can find no data available on this issue either in Northern Ireland or elsewhere. It should therefore be a risk – but provided access to enough providers within a reasonable travelling distance is maintained, should not be a material concern. It was also suggested that if there were reduced numbers of Family providers this would make it more likely that parties on opposite sides of a case would have to travel on the same public transport to see their solicitor, thereby causing stress and the risk of possible intimidation. To some extent this must happen already but given that for it to occur the parties would have to have similarly timed appointments with separate closely co-located solicitors the frequency of this occurring must be low. I don’t consider this a significant risk factor.

There can be no doubt that if there were fewer solicitors’ firms offering civil Legal Aid services then individual clients will have to travel further on average to see a solicitor. This might have an impact on the number who seek advice but once again the level of risk depends on the number remaining within each local area and a well-designed

scheme would minimise the impact of this, as might the introduction of a civil legal aid telephone advice line¹⁸.

10.1.6. Confidence in the Justice System

It was strongly argued by a number of solicitors whom I met collectively under the auspices of the Law Society (and indeed by the Law Society itself¹⁹) that one of their main objections to the introduction of contracting was, that by restricting the number of firms who could carry out Legal Aid work there would be a loss of confidence in the legal system because clients would no longer trust the independence of Legal Aid funded solicitors. This was argued on two main grounds: that solicitors in Northern Ireland are (worldwide) uniquely independent of government (it was said that solicitors in many other jurisdictions were not truly independent because the state is in various ways involved in regulation of the legal profession); and that if clients became aware that the government was dictating which subset of all firms they as clients could use (as would be the case in some contracting scenarios) that this would make clients believe that these hitherto fearless, independent lawyers were now in some way agents of the state. To be fair this was argued as a change in perception and not reality. I find the first arm of the argument highly implausible for two reasons. Firstly, my experience of lawyers in other jurisdictions is that a level of state involvement in regulation does not affect their independence, and secondly the assertion that there is a complete absence of State involvement in regulation of the Northern Irish legal professions is erroneous²⁰. I find the second arm of the argument difficult to accept. The principle that the state will have some role in restricting which firms can carry out Legal Aid work is already government policy (this is what the proposed Legal Aid Statutory Registration Scheme will do). What I do know is that in other countries (some of which have minorities who feel alienated from their Government) government limitations on choice of Legal Aid lawyers does not cause an issue.

I would accept that the result of a contracting process must be seen to be fair and non-discriminatory – indeed if it was otherwise, (successful) legal challenges would no doubt follow.

10.2. Solicitors firms

I was told by several “country solicitors”²¹ that any steps to restrict the ability of all firms in rural areas to offer a full range of Legal Aid services would jeopardise their business model and probably lead to firm closures. Although for many firms Legal Aid is only a small part of their total revenue, it was highlighted to me that many firms work on the

¹⁸ The Department might want to look at this issue as part of future work on a desired outcome statement for Legal Aid provision

¹⁹ *“To have to choose a lawyer from a limited range of State selected lawyers would compromise confidence in the legal system in Northern Ireland. The Society believes that our present model puts the client rather than the State at the centre of the legal aid process to the benefit of both. This is a principle which must be preserved and one that contracting would significantly damage.”*

²⁰ The Legal Services Oversight Commissioner is appointed by the Minister of Finance for example

²¹ Their terminology

basis that they offer a complete service to their client base – in other words they are a one-stop shop. It was argued that if services could not be provided across all areas of law by a firm then that firm would be likely to lose the client (and potentially his or her circle of family and friends) with a much more significant loss of revenue from non-legally aided work like conveyancing, probate and private family work. I also heard this from solicitors' firms in more urban areas.

They felt that if this happened there would be a threat to the established culture of rural communities, with respected and valued solicitors at their hearts. It is important to recognise that any contracting or similar model should have no impact on the volumes of work undertaken (and a minor impact on the number of lawyers needed) – all that will change is the number of entities who carry out the work. Crudely there will be firms that are winners and losers. The winners will have demonstrated that they offer the best combination of (price,) quality and capacity. The losers will not have done so.

Looking at the question of the place of solicitors in local rural communities –would the redistribution of work be such that local solicitors' firms would cease to be important pillars of the community? Given the need to preserve choice and access, my conclusion is that rationalisation of the market following the introduction of any of the contracting models I have considered would still retain a good number of solicitors' firms in small and medium sized towns. There might be firms that might have to close or merge, and the remaining firms would on average be somewhat larger, but I don't think this change would be an existential threat to "country solicitors" or to their place in rural communities.

10.3. Barristers

Barristers and the Bar Council largely argued for the preservation of the status quo on the basis that *"they consider that the marketplace in Northern Ireland works well in the context of the needs of our jurisdiction"*

However, for barristers any likely contracting regime is unlikely to have significant impact on them as a profession. The volume of advocacy is not going to change, and models used elsewhere do not extend contracting to self-employed barristers – mainly because the economics of single operators are very different to those of firms. In addition, given the role of instructing solicitors in choosing suitably expert barristers to work on a client's case²², there is no strong case for contracting for barristers to be introduced on quality grounds. If contracting for solicitors' work was introduced there would possibly be changes to their instructing solicitors – some barristers would lose existing relationships and have to forge new ones, but this, in itself, is not a big change.

In general, barristers were much more supportive of moves to increase the levels of area of law specific expertise by those doing Legal Aid work. In principle they supported moves to introduce Compulsory CPD in several areas of law. This could be done in any of the contracting models.

²² See section [6.3](#)

10.4. Not for Profits (NfPs)

NfPs were less concerned about the potential introduction of a contracting regime than solicitors' firms. They saw risks and opportunities if this were to happen. I believe that any contracting scheme could (and should) be designed in a way that would allow NfPs to compete on a level playing field with solicitor's firms.

10.5. Clients

If a contracting regime was introduced which reduces the number of firms carrying out Legal Aid, then clients would have less choice of solicitors' firm and there might be small increases to travelling time²³.

Clients would be less likely to be able to get all their legal issues dealt with by one solicitor's firm – not all firms would be offering Legal Aid and those that did would be likely to specialise in fewer areas of law than hitherto²⁴. This might make it somewhat less likely that they would seek advice since they would have to deal with two or more separate firms of solicitors.

On the other hand, if area of law specific expertise was mandatory in order to gain a Legal Aid contract or a system of Peer Review introduced, then in general clients would see improved levels of expertise applied to their case and therefore improved quality.

10.6. The Legal Services Agency

As described in an earlier section, the LSA and the Department have no surety that Legal Aid will be provided to the residents of Northern Ireland. Current arrangements are effectively a remunerated voluntary service provided by lawyers.

Formal contracts would increase surety of provision. The Department would be more certain that Legal Aid would be available when required by clients and lawyers would be committed to providing the service by contract. Withdrawal from provision of the service would normally only be possible with appropriate notice. Failure to provide the contracted service would probably be a breach of contract. In addition, if a comprehensive contracting regime was implemented then it would be relatively straightforward to identify any areas where provision was sub-optimal and to act to increase provision.

Sanctions for non-compliance are a feature of any type of arrangement (Panel, Registration Schemes or Contracts). Contracts in practise can have more serious and nuanced sanctions²⁵ than Panels and Registration Schemes and in theory protect

²³ But assuming the scheme met the desired policy outcomes this would not result in unreasonable travelling time

²⁴ Although a model where legal aid firms have to offer a holistic service covering all areas of law is theoretically possible.

²⁵ Such as Damages

against mass breach of contract. Although in practise if, for example, all criminal providers stopped work it would be impractical to terminate all their contracts. I was told that in Northern Ireland that the use of Panels by the Public Prosecution Service enabled them to continue with a prosecution service when barristers doing defence work decided to withdraw their labour. In England and Wales payment were withheld from Legal Aid providers who were in breach of contract during periods of protest about the introduction of price-competition.

10.6.1. Price, quality and capacity-based competition

Using prices as a selection criterion in Legal Aid contracts might yield more competitive prices. However, it is worth keeping in mind that apart from 0.6% of Legal Aid expenditure in England and Wales, nowhere else in the world (as far as the author is aware) is price competition used to select Legal Aid lawyers (although it is common in private-sector commercial transactions).

Economic theory and practical experience in other areas of procurement indicates that the best way to set prices and ensure value-for-money is to use competitive bidding as the mechanism. It ensures that in the long run prices match those that can be offered by the most efficient providers. As with all public sector procurements this needs to be based on a combination of price and quality, with due regard to the indirect costs of service provision. In Northern Ireland, Legal Aid services have no established quality measures and there is a poor understanding of the indirect costs associated with the service. In order to develop robust quality measures to allow more than price to be considered in the bidding process will inevitably take a long period and be costly to develop. For example, developing a robust Peer Review process for the areas of law being tendered and then auditing all the firms who want to bid for the work will cost (based on experience in England, Wales and Scotland) in the region of £2m and take a minimum of 5 years to introduce. Not having any quality measures runs a high risk that there will be a “race to the bottom” and bidders win contracts and then use the lack of robust quality measures to deliver unacceptable levels of service.

10.6.2. Market readiness

Given the number of firms potentially bidding for Legal Aid contracts in Northern Ireland and their lack of readiness for competing based on quality and price I consider it likely that a number of the winning bids would be unprofitable and therefore the firms would fail in the short to medium term. Firms that had bid at more realistic prices would by then have exited the market and the result could be a widescale failure of the service. This would be a significant risk if the first (price, quality, capacity) model was introduced but should not be a significant factor in the other models, although there would have to be a programme of education by the LSA for potential bidders in all the models to ensure that they understand the way the bidding process would work.

10.6.3. Economies of Scale

If there are significant economies of scale and the market structure could support consolidation, then prices should fall. From section 6.3 above I conclude that in areas outside Belfast there is insufficient work to be reallocated to deliver significant²⁶ increases in volume to other firms. In Belfast there probably is enough work to make a material difference. So what economies of scale might be achieved? Studies in England and Wales in 2013²⁷ indicated that circa 6% as economies of scale might be achievable from the nearest conceptually similar contracting process (criminal defence work in England and Wales). However, it is difficult to transfer this analysis to Northern Ireland – the market (price) levels and cost drivers are different, for example one relatively large economy of scale in England and Wales is insurance costs for solicitors' firms – which is not a factor here because the Law Society's insurance scheme means that larger firms pay exactly the same per capita as smaller firms.

10.6.4. Long term market sustainability

There is a risk that a move to price-based competition might concentrate market power in the hands of a few providers and therefore in the longer term make the market less than ideally competitive. Given the current market situation and any realistic medium-term consolidation, I consider the chances of that to be small in the first round of competition but potentially of more significance in future rounds. The design of further rounds of competition would have to be sensitive to this risk and strategies to mitigate it would need to be employed.

10.6.5. Cost savings from fewer providers for the LSA

The LSA told me that providers who are inexperienced or inexperienced in Legal Aid administration cost the LSA more to service. However, with the planned roll out of digital working at the LSA, standard ways of working for Legal Aid firms will become mandatory and hence any cost savings from reducing the number of Legal Aid providers (and thereby concentrating work with providers with more experience) will be negligible. Volumes of cases and payments will drive administrative costs not volume of providers.

I had discussions on fraud. I heard a tentative argument that having fewer providers might reduce the risk of fraud by providers. However, given the very low volume of reported provider fraud and the risk that if providers became bigger on average any potential "rotten apple" might be bigger than hitherto, I cannot see how one can assume any reduction in fraud level from a contracting approach that results in fewer providers, although a robust contract management and audit function might be better able to detect this.

²⁶ Significant meaning enough to deliver improved economies of scale

²⁷ <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/otterburn-legal-consulting-a-report-for-the-law-society-and-moj.pdf> and <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/kpmg-report.pdf>

10.6.6. *Costs of implementation*

In order to introduce a contracting regime, the relevant legislation will have to be modified by the Northern Ireland Assembly. This will not be a complex or costly process provided the political support for such a move exists. I have already looked at the cost (and time) needed to develop a robust set of quality measures for a Legal Aid procurement. To estimate the cost of running the procurement, I propose to base these on figures available for England and Wales. These need to be adjusted for the Northern Ireland context – there are reasons why running a set of schemes in that jurisdiction will be more expensive (e.g. greater number of providers) and reasons why it will be less expensive (e.g. economies of scale). For the purposes of this scoping study I have assumed that these two factors balance themselves out. Hence a figure of circa £0.6m p.a. of procurement costs is assumed. In other jurisdictions (England and Wales most notably) there have also been costs incurred by the contracting authority in defending and in cases that were lost paying compensation to successful legal challengers. I have not recognised any explicit number in my calculations but there is clearly a risk that these sorts of costs (which could be £ hundreds of thousands) might also be incurred in Northern Ireland.

Turning to the on-going management of the contract, rather than using figures from England and Wales, I have looked at the estimated costs of monitoring the proposed Statutory Registration Scheme here in Northern Ireland. When I review the scope of what is proposed therein and what might be required in a full-blown contract management approach, I have estimated that twice as much effort would be needed. Hence, I would suggest increasing this by 100% to reflect the more rigorous and comprehensive monitoring and compliance checking that would be required, in particular to ensure that providers did not “cherry-pick” the most profitable cases. This gives an on-going cost of circa £0.7m p.a.

There is also the question of developing the expertise within the LSA to run these complex procurements but for the purposes of this study I am assuming that this could be done during the time it will take to develop the needed quality measures. However, the Department should not underestimate the difficulty of recruiting and ***retaining***²⁸ staff with the right skills and experience.

Finally, on the feasibility of delivering the price competition, there must be a significant risk that the complexity of the procurement and the number of bidders (although lower than in England and Wales) will make the scheme impossible to deliver without successful legal challenge (as there). This is only a risk and by making the scheme less complex might be significantly mitigated, although my experience is that solicitors' firms who are unsuccessful in winning Legal Aid contracts can be very successful in winning claims against the Government.

10.7. Conclusions on cost effectiveness

²⁸ My emphasis

These are costs and benefits of moving to a Contracting model. In this section I will focus on the direct financial implications.

I will first deal with the price, quality and capacity-based model. From the evidence in section 6 I concluded that economies of scale will only **allow** price reductions in Belfast. I have made the judgement that prices in the rest of the country will not change in any significant way based on there being no significant economies of scale available. There is obviously a possibility that this assumption is incorrect. Competition might drive prices down (e.g. existing levels of profit might be excessive in more rural areas) or conversely prices might rise (e.g. due to a lack of competition).

We then need to look at the potential price reductions and whether in practise they will exceed the costs of implementing the scheme. If the one-off £2m for introducing Peer Reviews is amortized over five years this gives a total running cost of a contracting regime for the LSA of approximately £1.7m per annum. Total Legal Aid spend with solicitors' firms in Belfast (in 2017-18) is approximately £16.2m p.a. Therefore, to achieve a positive payback would require prices to fall by something over 10%.

To summarise:

Costs	Annual Figures
Quality Assurance ²⁹	£0.4m
Procurement	£0.6m
Contract Management	£0.7m
Total³⁰	£1.7m
As a percentage of annual spend with solicitors in Belfast	10.5%

I don't believe this is probable³¹ and hence leads me to the conclusion that it is unlikely that moving to a price, quality and capacity competition will deliver price reductions that will offset the costs of developing and running the procurements and managing the contracts. Even if there was a closely run cost-benefit argument for proceeding, the risks of non-delivery (and abortive costs) or localised market failure would be significant. One would, however, be forgoing the non-financial benefits identified above, the most significant of which would be improved assurance of quality for clients.

Turning to the two alternative models (competitive and non-competitive contracting regimes based on quality and capacity). The costs of developing these two schemes could be slightly lower than the first model and the non-competitive model would be less risky and contentious to implement but, on the benefits side, there would be no direct cost savings from either (there being no price reductions). If the scheme was extended to work done by barristers, my expectation would be that this would increase the cost and be more contentious to implement. Hence it would be unlikely that any of these alternative arrangements would be cost effective either.

²⁹ Peer Review costs amortised over 5 years

³⁰ Plus, the possible cost of defending legal challenges

³¹ A Discounted Cash Flow analysis, reflecting the timings of costs and benefits would require an even greater level of price reductions to ensure a positive payback

It is important for me to make clear that this conclusion only applies to existing face-to-face services. If it was proposed to introduce new services (e.g. telephone or on-line advice) there might well be a case for these to be delivered via a Contracting regime.

There are also two niche areas of legal aid provision (police station duty advice and Very High Cost Criminal Cases (VHCCs)) where for differing reasons there might be merit in further exploration of a contracting approach. I have discussed the issues with police station advice in section 10.1.2, for VHCCs the arguments for introducing a contracting regime are more to do with ensuring better case management and thereby effectively reducing the amount of unnecessary work done in these rare very costly cases. Much more work will need to be done to determine if this approach would improve value for money, not least in determining what additional contract management capability the LSA would need to make this an effective approach.

11. The way forward and recommendations

Since introducing a general contracting regime will not be cost effective, what are the possible ways forward? The first is to keep the status-quo, with all the issues discussed above – particularly around quality assurance; the second approach is to build on the proposed Statutory Registration Scheme and use the agreement of a “desired outcome” statement for the provision of Legal Aid as a route to ensuring that providers of Legal Aid meet the required standards of quality and their physical distribution meets the needs of clients throughout Northern Ireland.

It is worth noting that the Bar Council suggested this as a possible way forward in their submission to me.

“The mechanism by which to achieve such a filter of potential suppliers [to ensure high quality] and to bind them to comply with its terms may take a form very similar to the proposed Statutory Registration Scheme that the Department of Justice and professional bodies have already invested significant time and effort in scoping over recent years. Although not quite at a point of being ready to implement, it is a mature concept and the remaining areas of work to be addressed have already been identified. This might therefore legitimately be considered as a form of contracting that would require minimal investment and has the potential to reap benefits such as quality assurance, quality control and jeopardy for any non-compliant provider of services”.

In order to do this the following actions would be needed.

Develop and get the Ministerial agreement to a Desired Outcome Statement for Legal Aid provision in Northern Ireland, specifying maximum travel times for clients, choice levels (how many solicitors’ firms need to be within that travel time) and what quality assurance measures should be used. Other issues such as the possible use of a PDS etc. could be looked at as well.

The planned Statutory Registration Scheme would be augmented to require quality measures to be met by individuals or organisations doing Legal Aid work (either mandatory accreditation, Compulsory CPD or Peer Review). The active involvement of the Bar Council and Law Society would be important in this process.

Earlier in the report I found that there are more solicitors’ firms carrying out Legal Aid work in Northern Ireland than are needed if one considers the needs of Legal Aid clients only. There is therefore scope to allow these numbers to fall provided enough remained in the right places. This might happen if fees in real terms fell over time. I suggest that in parallel with the introduction of the quality assurance mechanisms referred to above, any changes in fee levels are considered carefully with the above in mind (whilst continuing with the planned move to more fixed fees). Firms will decide based on their own circumstances whether and when they wish to withdraw from the market. This could mean that in the medium-term market forces will ensure that only the most efficient providers continue to provide Legal Aid.

The LSA must monitor the levels of provision in each location (by category of law) and should publish them, to ensure that levels of provision remain above those in the “desired outcome” statement. If provision looks like falling below the minimum level,

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then steps will need to be taken (probably by increasing prices paid) to increase levels of provision.

This approach will have some cost (introduction of a quality assurance regime) but should ensure that the desired outcome for Legal Aid provision is delivered at the lowest cost – in other words it will deliver Value for Money. It will not give much greater surety to the Department that Legal Aid provision is secure³² but the regular monitoring of supply levels against an agreed minimum will at least give good visibility of the need to take corrective actions if supply looks insecure. It should improve quality, preserve client choice and ensure clients have reasonable access to local solicitors' firms. It will mean change for the legal professions and some solicitors' firms will no doubt stop carrying out Legal Aid work and a few might have to close or merge. Both barristers and solicitors will have to spend more time (and money) than hitherto on quality improvement activities if they are to continue to carry out Legal Aid work. Some barristers will have to develop new relationships with new instructing solicitors.

11.1. Recommendations

- Develop and get Ministerial agreement to a Desired Outcome Statement for Legal Aid provision in Northern Ireland. This should at a minimum address the following questions
 - How should providers be distributed geographically (in other words how far should clients have to travel)?
 - How many providers should there be in each area (in other words how much choice should be available to clients)?
 - How will quality be ensured?
 - What sort of advocacy services should clients have access to?
 - Should providers be obliged to offer services in the full range of Legal Aid cases or is it acceptable for services offered to be restricted to one area of law?
 - Are there economic reasons for providers to be of a minimum size?
 - Is there a role for a PDS or, on the civil side, an employed Law Centre network (as in the Republic of Ireland)?

It may well be that the answers to the above questions vary dependent on the area of law. For example, the quality assurance mechanism appropriate for criminal work might be different to that for civil.

- once the quality measures are agreed, these should be piloted as part of the Statutory Registration Scheme in one or two areas of law – perhaps Police Station work and Clinical Negligence (addressing specific issues from the Access to Justice Report and the Gillen Report on Civil Justice).
- Any changes to fee levels should be made with the level of supply in mind.
- Once the pilots have concluded, widen the scope of the required quality measures to all significant areas of law.

³² As discussed in Section [8](#)

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- monitor provision against the Desired Outcome Statement standard and report on regular basis to the Minister.
- if the Law Society are unable to meet their earlier commitments on management of police station rotas, the LSA to take over management of the rotas. Alternatively, a simple non-price based contractual approach might be a reasonable way forward to ensure both 24/7 coverage of all police stations in Northern Ireland and that suitably skilled solicitors are deployed for these important initial interviews.

12. A possible Desired Outcome Statement for Legal Aid provision in Northern Ireland

This might be, at a high level:

Clients will have an acceptable level of choice of advice and representation, offered by solicitors' firms or Not for Profit organisations with expertise in the relevant area of law who are within reasonable travelling time of the client's home, who are in turn supported by a network of expert barristers.

As stated in the previous section there will have to be levels of detail below this top-level statement.

On the question of quality assurance mechanisms my personal view is that a combination of mandatory Accreditation schemes in Criminal and Family law together with appropriate levels of Compulsory CPD in other areas (including Clinical Negligence) would be the best way forward. As mentioned earlier the Law Society would favour Peer Review as the mechanism but I believe the costs of running such a system would be disproportionate, whilst the Bar Council are in favour of Compulsory CPD across the board. Resolution of these different views will require strong leadership.

Annex 1 List of stakeholders consulted

Law Society of Northern Ireland
Representatives of solicitors' firms carrying out Legal Aid work
Limavady Solicitors' Association
Lisburn Solicitors Association
Ards North Down and Downpatrick Solicitors' Association
Newry & Banbridge Solicitors' Association
Lurgan Portadown & Craigavon Solicitors' Association
Bar Council of Northern Ireland
Barristers carrying out Legal Aid work
Lord Chief Justice and other members of the judiciary
Northern Ireland Guardian ad Litem Agency
Attorney General
Legal Services Agency
Northern Ireland Audit Office
Departmental Solicitors Office
Public Prosecution Service
Scottish Legal Aid Board
Legal Aid Board (Ireland)
New Zealand Ministry of Justice
Ministry of Justice (UK)
Law Society of England and Wales
Housing Rights
Children's Law Centre
Law Centre Northern Ireland
Dr Vicky Kemp, University of Nottingham
Department of Justice