



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Response to the Department of Justice
Engagement Paper on Pro Bono Costs Orders**

September 2021

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Summary of Recommendations

The NIHRC recommends:

- **The NIHRC recommends that the Department of Justice proceeds with the introduction of pro bono costs orders as a mechanism for helping to improve access to justice and maintain equality of arms in the NI legal system. It should do so in consultation with relevant stakeholders such as the Law Society NI, the Bar Council and other relevant organisations.**
- **The NIHRC recommends that funds raised from pro bono costs orders should be channelled to an existing voluntary organisation or public body that has expertise in providing assistance with pro bono legal representation.**
- **NIHRC recommends that the development of pro bono legal assistance from the private and voluntary sectors should complement rather than replace or supplant a comprehensive and effective legal aid system.**

1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). In accordance with this function, the following advice is submitted to the Department of Justice (DoJ) in respect of its engagement paper on the introduction of Pro Bono Costs Orders of July 2021.

The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:

- European Convention on Human Rights (ECHR);¹
- UN International Covenant on Civil and Political Rights (UN ICCPR);²

1.2 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but are intended to provide further guidance.³

1.3 The NIHRC welcomes the opportunity to respond to the DoJ engagement paper on the proposed introduction of pro bono costs orders in Northern Ireland. The NIHRC seeks to highlight the effect such an introduction may have on domestic and international human rights law.

1.4 The NIHRC acknowledges the questions set out in the consultation document, however due to the practical nature of the questions the Commission will not provide specific comment on each. Instead, this submission will highlight relevant human rights standards and principles where they may be of relevance to the Department's consideration of this matter.

2.0 International Human Rights Standards

2.1 Pro bono legal advice and representation, which the proposed pro bono costs orders may support, can form part of the State's obligation to provide equal access to law and allow people, regardless of financial means, to take action and defend themselves in civil proceedings before the courts.

¹ Ratified by the UK in 1951.

² UK ratification 1976

³ This includes resolutions and recommendations of international bodies such as the UN General Assembly or the Council of Europe.

- 2.2 The international right to equality before the law is derived from Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR):

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal.

- 2.3 This has been expanded upon by the UN Human Rights Committee, General Comment 32 on Article 14.⁴ Here the Human Rights Committee underlined that:

The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.

- 2.4 General Comment 32 expands on this principle further and goes on to state that:

The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant.⁵

- 2.5 From Article 14 of the ICCPR and the General Comment of the Human Rights Committee, we can discern that whilst there is a more obvious and urgent need to ensure that appropriate legal advice and representation is provided to those facing criminal proceedings, it is clear that the State's obligation to equality before the courts does not end there. There is an international obligation on states to secure provision of legal assistance in civil matters. As noted above, the introduction of pro bono costs orders could have an effect on that provision.

⁴ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007)

⁵ Communications No. 377/1989, Currie v. Jamaica, para. 13.4; No. 704/1996, Shaw v. Jamaica, para. 7.6; No. 707/1996, Taylor v. Jamaica, para. 8.2; No. 752/1997, Henry v. Trinidad and Tobago, para. 7.6; No. 845/1998, Kennedy v. Trinidad and Tobago, para. 7.10.

European Convention on Human Rights

- 2.6 The Human Rights Act 1998 (HRA) incorporates the rights set out in the European Convention on Human Rights (ECHR) into UK domestic law. As Policing and Justice is a devolved matter within the competency of the NI Assembly and Executive, the ECHR and associated jurisprudence is directly applicable in NI. Established public authorities such as the Courts and Tribunals Service are also bound by these rules.
- 2.7 Of particular relevance to the introduction of pro bono costs orders is Article 6 ECHR, the right to a fair trial and access to justice, which reads as follows:
1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
 2. Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.
 3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and the facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
- 2.8 It has been held that Article 6(1) does not obligate the State to provide free legal representation for every dispute,⁶ and there appears to be a distinction between Article 6(3)(c), which guarantees the right to free legal aid in criminal proceedings subject to certain conditions, and Article 6(1), which makes no reference to legal aid.⁷ However, the Convention is intended to

⁶ Airey v. Ireland (no. 6289/73), para 26

⁷ Essaadi v. France (no. 49384/99), para 30

safeguard rights so that their enjoyment is practical and effective, in particular the right of access to a court. It has been held that Article 6(1) may compel the State to provide for the assistance of a lawyer in civil proceedings when such assistance proves indispensable for an effective access to court.⁸

- 2.9 There is therefore an obligation on the State to ensure reasonable access to legal representation, even in civil cases in certain circumstances. How the balance is struck between access to justice, the financial cost involved and the effective operation of a legal system falls within the margin of appreciation that the ECHR allows States. It will arguably not be met if shortcomings in the legal aid system deprive individuals of the “practical and effective” access to a court to which they are entitled.⁹
- 2.10 The principle of equality of arms is inherent in the broader right to fair trial and the adversarial nature of legal proceedings, particularly in the UK Common Law system. The requirement of equality of arms provides a balance between the parties and applies in principle to civil as well as to criminal cases. Equality of arms implies that each party is afforded an opportunity to present their case under conditions that do not place them at a substantial disadvantage in relation to the other party. Therefore, when one party has the ability to employ experienced legal representatives to present their arguments and the other party does not, it not only puts that other party at a significant disadvantage, it also increases the potential for a miscarriage of justice.
- 2.11 Failure to observe the equality of arms principle in, for example, the denial of legal aid to one of the parties in proceedings could arguably deprive them of the opportunity to present their case effectively before the court against a wealthier opponent.
- 2.12 Whilst not strictly part of the legal aid system, it is arguable that the provision of funds for pro bono litigation could help form part of the State’s obligation on the provision of legal assistance and the promotion of the wider principle of equality of arms. However, it is crucial that in introducing pro bono cost orders, these do not gradually replace or reduce legal aid, and that the two are seen clearly as distinct.

3.0 Substantive response to Pro-Bono Costs Engagement Paper

- 3.1 The NIHRC welcomes the proposed reform of costs for pro bono litigation and suggests that this should form part of increasing coverage for those seeking assistance with the cost of legal representation. This is particularly pertinent as the scope of legal aid coverage has declined over time. The

⁸ Airey v. Ireland (no. 6289/73), para 26

⁹ Staroszczyk v. Poland (no. 59519/00), para 135; Siałkowska v. Poland (no. 8932/05), para 114

proposals are unlikely to interfere with or limit international and Convention rights, but they will engage them.

- 3.2 The concept of 'pro bono publico' (for the public good) legal work is well established. Solicitors, barristers and other legal representatives have been known to take time out of their working schedules to assist people unable to access help elsewhere, including through the legal aid system. Sometimes support can also come from law clinics, such as that in place at the University of Ulster, staffed with law students, who can play an advisory or representative role alongside their studies. Pro bono support can allow for cases to proceed where barriers exist to applicants both in cost and procedure.
- 3.3 Under the current system, where a party is represented by pro bono lawyers, they can usually avail of a 'Protective Costs Order' (PCO). A PCO can take a variety of forms, including:
 - a) An order that the respondent only can recover no costs.
 - b) An order that the respondent can recover only a maximum amount in costs.
 - c) An order that neither party can recover costs.
- 3.4 Whilst this provides some assurance to potential applicants that they will not be liable to pay the costs of the other parties, it does not provide financial incentive for legal representatives to pursue a case as they will not be able to claim a fee for their work. It can also mean a better resourced party having an unfair advantage of litigating without the normal costs risk involved, and it may also give less encouragement to such parties to mediate or reach a settlement.
- 3.5 The proposed introduction of pro bono costs orders follows on from similar reforms made in England and Wales. There, before 2008, legal costs could not be awarded in cases where the winning party was represented for free. Section 194 of the Legal Services Act 2007 changed this. Pro bono costs are awarded like ordinary legal costs but are applicable where a party received free legal representation. In England & Wales, if a civil case is won with pro bono help, pro bono costs can be ordered by the court or included in settlements. The costs cover any period when free representation was provided and the amount is based on what a paying client would recover. The costs are then paid to the prescribed charity, in the case of England and Wales the Access to Justice Foundation, which distributes the money to agencies and projects that give free legal help to those in need.
- 3.6 Legal aid originated in the 1940s with the foundations of the post-war welfare state and the recommendations of the Rushcliffe Committee.¹⁰ From modest beginnings this grew over time until, at its height in 1979, the

¹⁰ Rushcliffe Committee Report on Legal Aid and Legal Advice in England and Wales, 1945

proportion of the population eligible for legal aid had increased to 79%.¹¹ From then, decisions taken by government to reduce spending on legal aid led to a steady decline in coverage and by 2016 the estimated percentage of the population eligible for civil legal aid was 25%.¹² There exists therefore a significant gap in coverage for those seeking legal redress, who do not meet the financial threshold for legal aid but who would see the costs of pursuing a legal challenge as beyond their means.

- 3.7 Pro bono costs orders and the funds raised from them may assist, even in a modest way, towards an equality of arms and a fair balance between the parties in the opportunities given to them to present their case in a manner that does not disadvantage them with respect to the other side. In practice, ensuring equality of arms can be challenging. Without any other options many are forced to proceed without any legal representation and act as 'litigants in person'. The Commission, in conjunction with others, published a report into the experience of litigants in person in NI.¹³ It has been shown that this is very often not an equitable or effective way of ensuring justice through the courts. Very often the outcomes for litigants and the effect it can have on the running of the courts is not ideal when compared to those who are legally represented.¹⁴
- 3.8 Widening access to experienced legal representation can assist with ensuring equality of arms and pro bono costs orders may go at least some way in helping to achieve this. This will work best when done in consultation with and in agreement with relevant stakeholders such as the Law Society NI, the Bar Council NI and other relevant organisations. It will also be important to ensure the wider legal sector is engaged with and has knowledge of the proposed costs orders in order to maximise their effect.
- 3.9 **The NIHRC recommends that the Department of Justice proceeds with the introduction of pro bono costs orders as a mechanism for helping to improve access to justice and maintain equality of arms in the NI legal system. It should do so in consultation with relevant stakeholders such as the Law Society NI, the Bar Council and other relevant organisations.**
- 3.10 The effectiveness of the introduction of pro bono costs orders will depend on the level of funds available and what can or should be done with any proceeds raised from these orders will depend a great deal on how much they will raise. Looking at the projections provided in the engagement paper, which are based on an assessment of how the system has operated in England & Wales, it is likely that any funds raised will be modest, with projections of less than £5,000 expected to be raised annually.

¹¹ Bach Commission on Access to Justice: Appendix 6, Sir Henry Brooke, September 2017, page 8

¹² House of Commons Library - DEBATE PACK -Number CDP 2020/0115, 21 October 2020 -Spending of the Ministry of Justice on legal aid; Doug Pyper, Georgina Sturge, Sally Lipscombe, Sue Holland

¹³ Litigants in person in Northern Ireland: barriers to legal participation. Gráinne McKeever, Lucy Royal-Dawson, Eleanor Kirk and John McCord, Ulster University: Belfast, 2018

¹⁴ Ibid, page 18

- 3.11 However, this does not mean that it cannot have a meaningful benefit on access to justice. An example where even modest funds may be of great assistance to the public would be with the initial cost of an opinion from counsel or the cost of an application for leave to appeal in a judicial review. Many applicants can fall foul of the three-month time limit to begin a judicial review and even those who pass the 'means test' for legal aid can fail the stringent merits test. Even a small fund, made available to an organisation that can properly assess potential cases of strategic interest would be able to cover the initial leave application costs to the court. If leave is then granted by the court, the applicant might find it easier to pass the 'merits test' and achieve an award for legal aid for full hearing. In addition to this, simply having the option to begin proceedings before the court means that a respondent would have to seriously consider whether to negotiate a settlement in the case.
- 3.12 Decisions on how best to utilise funds from pro bono costs are therefore important. The DoJ engagement paper identifies one option being to pay the legal representatives who have acted pro bono in that case but goes on to say that this would limit the potential for wider public good from the scheme. In this, the Commission is in agreement with the DoJ and further agrees with the assessment that funds would be most effectively used if they are channelled to a charity or public body that meets the cost of legal representation and promotes pro bono work.
- 3.13 In England & Wales the Access to Justice Foundation is the central recipient of funds from Pro-Bono Costs Orders. The Foundation then distributes the money received to front line agencies and projects that provide free legal help to those in need. The Department may wish to follow this example and investigate the viability of setting up a local Access to Justice Foundation in NI that distributes funds generated from these orders. However, it should bear in mind the costs of setting up and administering such a body as against the relatively modest funds projected in the engagement paper.
- 3.14 Alternatively, it may be more financially and administratively prudent and efficient to make such funds that are recovered available to an organisation that already exists and which is already operating in expanding and developing access to justice. A possible option would be the Public Interest Litigation Support project (PILS).
- 3.15 It is foreseeable that this may then have an accumulative effect, with increased pro bono litigation undertaken by an organisation like PILS, with its associated pro bono register, potentially generating more funds for further pro bono work in the future.
- 3.16 **The NIHRC recommends that funds raised from pro bono costs orders should be channelled to an existing voluntary organisation or public body that has expertise in providing assistance with pro bono legal representation.**

- 3.17 There may be potential dangers to this reform in costs. There is a risk that pro bono legal provision will be seen as or become an alternative to a comprehensive and properly resourced system of legal aid. The Commission advises strongly against such a shift. Over many decades there has been a shift away from state provision of legal representation through legal aid. It has meant a reduction in funding but also an ideological turn away from the state directly providing assistance, to a reliance on market orientated provision of services. This was exemplified when, in England & Wales in 2000,¹⁵ the Government removed the right to legal aid from personal injury cases and replaced it with the “no win, no fee” mechanism to help potential litigants claim compensation and/or other types of loss, including damages.
- 3.18 Arrangements like ‘no win, no fee’ can have an advantage over provision like legal aid as there is no means test eligibility. However, whilst this may assist in extending coverage for those able to avail of such an arrangement, may result in legal service providers being less likely to take on potentially risky cases. A case might be viewed as ‘risky’ simply because the potential client does not speak English, is a child, is a person with a disability (particularly a learning disability) etc. It is likely to be those who are most vulnerable who will be screened out of such agreements. A reliance on pro bono assistance at the expense of a comprehensive legal aid scheme could undermine or remove many individuals’ access to the courts.
- 3.19 Similar discussions around pro bono provision have been had in the legal system in Ireland. The Irish legal aid scheme has been considered by some to be inadequate to meet the needs of many clients.¹⁶ Coupled with this, some critics have gone so far as to hold that a formal pro bono scheme would only be a stop-gap solution that would further obscure the failings of a troubled legal aid regime, encouraging the government to continue to underfund the existing programs.¹⁷ Nevertheless, the benefits of supporting pro bono work in the UK and Ireland are becoming more obvious, particularly if such pro bono work complements a commitment to a robust legal aid system.
- 3.20 **NIHRC recommends that the development of pro bono legal assistance from the private and voluntary sectors should complement rather than replace or supplant a comprehensive and effective legal aid system.**

¹⁵ The Conditional Fee Agreements Regulations 2000

¹⁶ “And Justice for some”, Gerry Whyte, published in “The Closed Door, a Report on Civil Legal Aid Services in Ireland,” page 19

¹⁷ Law Society of Ireland, Report of Law Society Council Meeting (held on Jul. 6, 2001), Law Society Gazette, 39 (Aug./Sep. 2001) (citing a report showing that in countries where an institutionalised pro-bono scheme had developed, governments had used such schemes as excuses for refusing to subsidise legal aid).

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