THE BAR of NORTHERN IRELAND

Review of Civil and Family Justice: Draft Report on Civil Justice

Bar Council – Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

2. The Bar Council welcomes the opportunity to contribute to the consultation on the draft civil justice report emanating from the Review of Civil and Family Justice. We appreciate the engagement to date through the Review Group under the chairmanship of Lord Justice Gillen as this has enabled the Bar to contribute from an early stage to the recommendations for the future shape of civil justice in Northern Ireland. In addition, the fifteen sub-committees have provided an invaluable forum for the legal professions to provide assistance in examining the key issues across the various court divisions and tiers within the civil justice system.

3. The Bar is supportive of the broad aims of the review in terms of improving access to justice, achieving better outcomes for court users, creating a more responsive and proportionate system and making better use of available resources.

4. We note the acknowledgement that the report is "*beset by a lack of statistical underpinning and the absence of raw data*" which is not yet available in Northern Ireland. A number of the suggested reforms also emanate from recent pilot projects or exploratory initiatives in other jurisdictions, the outcome and impact of which have yet to be known. One example of this relates to developments of online dispute resolution with projects, such as the Rechtwijzer system in the Netherlands, still very much in infancy. Consequently, associated recommendations such as a pilot scheme of voluntary ODR to be set up throughout Northern Ireland for money damages cases under £5,000 must be approached with caution.

5. In addition, there are other policy areas in the report which would be enhanced by the provision of further evidence. One example referenced in response to recommendation CJ136 around the increase in the jurisdiction of the County Court to £75,000 is the need for the undertaking of a detailed analysis in relation to the way in which the County Court is functioning under its current workload.

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This is vital in order to assist in determining the additional pressure which an increase in jurisdiction would place on the system.

6. The Bar is also concerned by the financial cost and the ability to secure funding for many of the reforms, whether in relation to services for personal litigants or court modernisation and technological improvements. The Report provides no detail of the cost implications of the various proposals or recommendations. It states in paragraph 17 that "*our role has not been to calculate the costs or savings which our recommendations will engender*" with the report instead intended to provide a "*strategic blueprint*" for the future and the Department to consider funding. However, the viability of these reforms is in jeopardy without an early indication from the Department of Justice in relation to the budget available to support the various recommendations.

7. There is also a question around the legislative changes required for some of the reforms, particularly in relation to any shift towards allowing conditional fee agreements, the suggested introduction of scale costs in the High Court or the reconstitution of the NI Courts and Tribunals Service as a non-ministerial department. Such changes would require significant legislative amendment requiring approval from the Northern Ireland Executive. Therefore it is unclear whether these recommendations will gain any traction in terms of Government Departments or statutory work programmes and whether they are achievable in the short to longer term.

8. In addition, the Department of Justice must clarify how this report should be viewed in the context of other reform programmes for the justice system in Northern Ireland in particular with regard to the outworkings of the Access to Justice Review 2 from 2015. It is vitally important that the DOJ provides coherent prioritisation and alignment of the various reform programmes in an effort to bring some strategic direction and stability to this policy area for the years ahead.

9. The Bar's response to the report is structured according to our comments on each of the substantive proposals outlined in the chapters contained in the document.

Chapter 3: Paperless Courts

- Consideration to be given in the next Programme for Government to include a commitment to the digitalisation and modernisation of the courts process during the next Assembly mandate. [CJ1]

10. The Bar has no difficulty with the inclusion of a commitment in the Programme for Government around the digitalisation and modernisation of the courts

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process during this Assembly mandate. However, it is worth highlighting that the approach adopted by the draft Programme for Government 2016-2021 employs a new outcomes-based approach focused on societal wellbeing across a range of social and economic issues. This represents a significant shift from previous years which saw a range of overarching priorities identified alongside key commitments and associated targets for achievement.

11. The new PfG document was published by the Executive on 28 October for consultation and contains an outcome entitled "*we have a safe community where we respect the law, and each other*". Under this strand the Executive challenges itself to consider "*new approaches through testing of pilots and roll out of evidence based programmes to improve public services*" with the development of digital justice mentioned. It is worth noting that there is no further mention of this included in any of the delivery plans linked to the draft PfG at present although these may still be developed further. Therefore it would be necessary for the Executive to explicitly commit to the recommendation for court digitalisation.

12. In addition, questions around funding for the strategic direction of travel outlined in the draft PfG remain. The document highlights that the Executive is working towards the development of a one-year resource budget and a multi-year capital budget which will support PfG priorities. Consequently, it remains to be seen whether any funding can be found for digitalisation and modernisation of the courts process given current budgetary constraints.

- A business case to be developed for digital courts which would capture all of the anticipated monetary and non-monetary benefits, based on experience in with other comparable jurisdictions and in the local criminal justice sector. [CJ2]

13. The Bar accepts that there is a role for the increased use of technology across the court system. The development of any business case would undoubtedly have to consider the potential cost of any move towards digitisation of the courts. We note the reference at paragraph 3.29 to the £748 million which the Government in England has committed to investment in the courts and tribunals system and has "*primed the pump for digitisation*". This plan will also see £160 million invested in IT systems, software and Wi-Fi access. The move towards digitalisation in England is on a larger scale than required in Northern Ireland. However, we would query the level of funding which could be made available by

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the NI Executive for any new investment in technology and innovation across the courts.

14. In England the Ministry of Justice published '*Transforming Our Justice System*' in September 2016 which outlines a vision for modernising and upgrading the justice system in the years ahead[1]. Significant challenges will be inherent in these developments as they take shape with the judiciary, legal professionals and ordinary citizens needing to adapt to new and innovative processes. These changes may take years to properly embed into the English system and there is no guarantee that the allocated funding will be sufficient, as the report acknowledges in paragraph 3.39.

15. The Bar would urge caution given that further evidence based research is required on the outcomes and financial implications of reforms in England and elsewhere before any business case is developed in Northern Ireland. We would also query whether there will be a commitment to no further increases in court fees in the foreseeable future if a business case for investment in digital courts is to be developed. A staged increase in court fees is already planned following a NICTS consultation in June 2016 with yearly uplifts of 10%, 7.5% and 5% representing a total of 22.5% by April 2019. In the longer term any further increases to court fees should be resisted given the risk this will ultimately undermine any future investment in digitisation infrastructure across the court estate with prohibitive fees likely to result in a reduction in the throughput of cases.

16. This issue has been very much to the fore in England and Wales with substantial increases in fees for civil proceedings implemented in 2014 and 2015. The House of Commons Justice Select Committee conducted an inquiry into the impact of fees and charging in courts and tribunals with senior members of the judiciary highlighting that the enhanced fees mean "*ordinary people on modest incomes… will inevitably be deterred from litigating*[2]". We would caution that any significant increases in court fees across civil business will have an adverse impact on

[1] Ministry of Justice, Lord Chief Justice of England and Wales & Senior President of Tribunals, *'Transforming Our Justice System'* (September 2016) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf (last accessed 01 November 2016)

[2] House of Commons Justice Select Committee, *'Inquiry into Courts and Tribunals Fees & Charges'*, (20 June 2016) at http://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/167/167.pdf (last accessed 01 December 2016)

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access to justice with negative consequences for the viability of any digitisation reforms in the NI courts.

- The ultimate aspiration to be the creation of paperless courts. [CJ3]

17. The Bar notes the various references throughout chapter 3 to e-files, e-bundles, electronic applications and the virtual reality court. We would query the ability of the NICTS to plan for the implementation of many of the technologies mentioned in the longer term given the budgetary pressures being experienced across the court estate. There are a range of specific financial issues which the Bar believes will require attention before paperless courts could be considered for NI. This includes investment in data security alongside the potential expense of access to licensed software for solicitors and counsel. We also take the view that funding and detailed planning would be required for digitalisation training and education programmes aimed at judges, NICTS staff, the professions and court users.

18. We also note the timescales detailed at paragraph 3.86 for England and Wales. There is doubt as to whether similar ones would be achievable in Northern Ireland, given the number of outstanding funding issues that would have to be resolved. Consequently, the Bar would request more information on any timescales which might be envisioned for the achievement of the ultimate aspiration of paperless courts in NI.

19. The Bar also queries the statement at paragraph 3.87 that "*we need to commence moving on it as soon as possible. Its symbolism for a new era in civil justice is woven into the texture of its realism*". Any moves towards digitalisation and online courts must be supported by a clear evidence base. Paragraph 3.66 outlines visits to the Rolls Building in London and the UK Supreme Court to observe the paperless concepts in operation, including a demonstration of the Microsoft Dynamics software package. Whilst these visits were undoubtedly useful, we believe that a wider assessment of the impacts associated with the rollout of paperless reform is required before any action is taken.

- In the short to medium term, a move to "paper light" courts. [CJ4]

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20. The Bar has no difficulty with this recommendation as it appears reasonable that an interim stage would be implemented before any transition to paperless courts. We welcome the recognition at paragraph 3.85 that both paper and electronic files may be necessary in some trials with the potential for judges and counsel to operate with a hard copy core bundle of critical documents. It would also undoubtedly be beneficial for any initial financial outlay to be considered further by the Department before action is taken in relation to developing a timetable for staged introduction in the short to medium term.

- The change programme to include a sequenced and co-ordinated roll-out plan, supported by a programme of education, training and advisory services. This work should be taken forward in consultation with the judiciary, professional bodies and court users. [CJ5]

21. The Bar has no difficulty with this recommendation. However, it would undoubtedly be beneficial for the financial investment in any roll-out plan to be considered in depth by the Department before any action is taken in relation to the outworkings of this. A programme of education and training will be vital in ensuring that stakeholders are confident in navigating any new system. Our specialist Bar Associations deliver a range of training to practitioners and could develop a programme of work relevant to any digitisation developments in due course.

22. Furthermore, the Bar agrees that taking this work forward in consultation with the judiciary, professional bodies and court users will be essential. The Bar Council and the respective Bar Associations would request to be involved in contributing to the development of any roll-out plan.

- The establishment of Judicial Engagement Groups (JEGs) to ensure every level of judge takes part in the change programme on a jurisdiction by jurisdiction basis. [CJ6]

23. This recommendation is not applicable to the Bar.

- The setting up of a Litigant in Person Focus Group to give thought to the organisation and funding of this element of the reforms. [CJ7]

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24. The Bar has no difficulty with this recommendation as the establishment of a focus group to address the needs of personal litigants may prove to be a useful exercise, alongside the Judicial Engagement Groups. However, we would point out that it might be more worthwhile setting up an engagement group for the legal professions. Practitioners should have the opportunity to input into the design of any reform programme for paperless courts given the expertise within this sector. It should be noted that the Bar of Northern Ireland is an independent referral Bar and as such does not accept direct access work. We do not contemplate any divergence from this in the short or longer term.

25. We note that this recommendation does not appear in the pdf version of the preliminary report but assume that this is merely an oversight.

- The setting up of a e-discovery to give thought to the organisation and funding of this element of the reforms [CJ7]

26. This recommendation appears in the Word version of the preliminary report but not in the pdf version; however we assume this is an oversight.

- Wi-Fi access to be set up in the Royal Courts of Justice (RCJ) and in Laganside Courthouse as a matter of urgency. [CJ8]

27. This recommendation is a matter for the NICTS to prioritise based on any potential costs associated with securing Wi-Fi access across the Royal Courts of Justice and Laganside Courthouse. However, the Bar would strongly support this recommendation as the access to Wi-Fi is a severe limiting factor at present. We would also urge that this is extended across the court estate in due course.

28. In addition, the Bar takes the view that the current NICTS website is not fit for purpose and we believe that there is an urgent need for time and money to be invested in making significant improvements to this in order to make it accessible for court users and practitioners.

- A designated courtroom in the RCJ to be forthwith equipped with the necessary technology to allow parties, by agreement, to run actions electronically. [CJ9]

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29. The Bar has no difficulty with this proposal. However, the investment required in securing the technology for a designated courtroom in the Royal Courts of Justice would be an operational matter for the NICTS.

Chapter 4: Online Dispute Resolution

- A pilot scheme of voluntary ODR to be set up throughout Northern Ireland for money damages cases of under £5,000, excluding personal injuries over the value of £1,000. Legislation will be required to introduce such a step. [CJ10]

30. The Bar notes that the section of the report relating to online dispute resolution borrows heavily from developments in other jurisdictions, particularly the three stage online court structure espoused by Lord Justice Briggs in the Civil Courts Structure Review.[3] The finalised report was only published in July 2016 and the outworking of this will require further careful scrutiny and planning before any Online Court will be feasible in this jurisdiction. Consequently, Northern Ireland must proceed with a "*measure of caution*" as noted at paragraph 4.76 in relation to developments in this area.

31. The report also claims at paragraph 4.75 that ODR is "*gathering momentum worldwide*" with references to developments in British Colombia, the Netherlands, New Zealand, Australia and the USA. However, most of these projects are still in their infancy and may even require significant adjustments before they are fit for purpose, for example the Civil Resolution Tribunal in British Colombia only opened for business in July 2016. The report makes no reference to any evidence based research focused on ascertaining the effectiveness of ODR in any other jurisdictions post implementation. The Bar believes it would be sensible to consider this further before any legislative change allowing for a pilot scheme would be contemplated in Northern Ireland.

32. Meanwhile there is a clear question around the potential financial investment associated with the rollout of any scheme across the court system given the security and confidentiality issues that would need to be fully addressed. The report notes in chapter 3 at paragraph 3.29 that £748 million has been committed by the Government in England to the courts and tribunals system which will prepare "*the pump for digitisation*", including the online court

[3] Judiciary of England and Wales, *'Civil Courts Structure Review: Final Report by Lord Justice Briggs'*, (July 2016) at https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf (last accessed 07 November 2016)

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concept. However, there is no suggestion anywhere in the Civil Justice Report that any investment would be forthcoming to support the development of a "*province wide*" pilot in Northern Ireland, as envisaged at paragraph 4.87.

33. It is worth noting that the IT Adviser to the Lord Chief Justice and Chair of the Civil Justice Council's Online Dispute Resolution Advisory Group, Professor Richard Susskind, recently highlighted in a speech to the Society for Computers and Law that there is a need for restraint around ODR as this must be thoroughly "*piloted and researched*" before implementation.[4] He also reflected that these changes represent a fundamental change to the system and must be refined before being built upon incrementally. Any progress in this area must be pursued at a measured and modest pace allowing for a coherent public debate around the long term impact of this technology. Consequently, questions still exist as to whether online courts will be a panacea for the difficulties being experienced by ordinary citizens in accessing justice across England.

34. The Bar's greatest concern around the impact of online dispute resolution relates to the fairness of such a system for the public in pursuing access to justice through the courts. Whilst we accept that the report presently only proposes a pilot scheme for money damages cases under the value of £5,000, we believe that ODR will have wider ramifications which must be fully considered. We are very concerned that such a scheme will enshrine a two-tier justice arrangement by building it into the civil justice system. Ultimately those who can afford to will still engage lawyers to deal with their litigation whilst those who are unable to obtain funding for advice or representation will be precluded from obtaining assistance. There is a real danger that this has the potential to damage the standing of Northern Ireland's legal system in the eyes of the general public and beyond.

35. We would also argue that such a change could result in an increase in the unregulated, uninsured and often untrained providers of advice through McKenzie Friends thereby jeopardising the report's further recommendations in this area contained in chapter 13. People typically require lawyers and assistance with representation when facing legal action. They are facing uncertain outcomes and engaging in unknown and often daunting processes. This desire for support will not change simply because cases will be determined by a new type of online dispute resolution. The Bar is concerned that for

[4] Susskind, R, *'Society for Computers and Law 25th Annual Lecture'*, (06 October 2016) at http://www.scl.org/files/6_oct_2016/Professor_Richard_Susskind_-_SCL_25th_Annual_Lecture_-_6th_October_2016.mp3 (podcast last accessed 02 November 2016)

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significant numbers of litigants, technology will remain a barrier to, rather than an enhancement of, access to justice.

36. We would query whether the issue of accessibility has been fully addressed in scrutinising this area. Further consideration should be given to the needs of older litigants who are not accustomed to the digital era and may be less able to use IT systems. Sight-impaired and hearing-impaired litigants will not have access to online documents or video and telephone conferences, without assistance. We would also question whether any ODR scheme would provide for the increasing diversity of Northern Ireland's population and the need to accommodate a range of languages. We are also concerned about those litigants who are illiterate given that there is a danger these individuals simply will not be able to properly access the court system in order to enforce their legal rights, as they should be entitled to do.

37. We would point to figures contained in the consultation document linked to the Government's '*Transforming Our Justice System'* paper which highlight a major issue around digital exclusion. Paragraph 7.1 quotes figures from the Government's Digital Strategy showing that there is a range of ability in using technology across the UK with 30 per cent described as "*digital self-servers*", 52 per cent as "*digital with assistance"* and 18 per cent as "*digitally excluded"*. These figures showing that one fifth of the population "*cannot or choose not to engage digitally at all*" are striking.[5]

38. Another report by the House of Commons Science and Technology Committee published in June 2016 also focused on the *'Digital Skills Crisis'*.[6] It reported worse figures than those used in '*Transforming Our Justice System'* and showed digital exclusion remaining "*stubbornly high with an estimated 23 per cent of the UK population lacking in basic digital skills*".[7] Of these, 49 per cent are disabled, 63 per cent are over 75 and 60 per cent have no formal education qualifications. Meanwhile a higher percentage of men have digital skills (80 per cent) than women (74 per cent). It is evident that age, gender and socio-economic status

[5] Ministry of Justice, Lord Chief Justice of England and Wales & Senior President of Tribunals, 'Transforming Our Justice System: Summary of Reforms and Consultation', (September 2016) at https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf (last accessed 22 November 2016)

[6] House of Commons Science and Technology Committee, 'Digital Skills Crisis: Second Report of Session 2016-17', (June 2016) at http://publications.parliament.uk/pa/cm201617/cmselect/cmsctech/270/270.pdf (last accessed 22 November 2016)

[7] Ibid at paragraph 9

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are all factors that contribute to digital exclusion; there is a clear need for skills rather than extrapolating a capacity to use the internet simply from access to it. The figures suggest that any move towards a mandatory ODR system is premature given that it would disproportionately impact on the older people, women and those on low incomes.

39. Furthermore, we are concerned that chapter 4 does not contain a fuller consideration of the types of cases which are unsuitable for resolution by way of an online court. One example of this is a case in which cross-examination is necessary or where there are contested factual issues. There is a clear risk that ODR could increase the potential for miscommunication in certain disputes given that the lack of face-to-face interaction would jeopardise opportunities for counsel to fully scrutinise the credibility of parties. The Bar believes that the potential for full court hearings with legal representatives in attendance must always be retained and employed when appropriate. We would query whether it is envisaged that the new Civil Justice Council or another body will consider more fully the types of claims which should be excluded from ODR.

40. Finally, the implementation of any ODR proposals would mark a fundamental departure from the way in which access to justice has until now been secured. They are not just organisational reforms and must be subject to rigorous testing and evaluation of their impact before the risks inherent in the dismantling of the existing court structures are realised.

Chapter 5: Single Entry System for Civil Cases?

- No introduction of a unified system or a single point of entry in the civil courts in this jurisdiction. [CJ11]

41. The Bar welcomes this recommendation given that the present system works efficiently across the various court tiers. We highlighted in response to the Access to Justice 2 Review that the introduction of a single point of entry in the civil courts would only risk a potential added layer of cost, bureaucracy and delay which is not currently being experienced.

Chapter 6: Costs

- Scale costs to be introduced in the High Court with four levels depending on complexity of claim, with scope for exceptionality. This requires legislative change. [CJ12]

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42. The Bar believes that the introduction of scale costs in the High Court must be approached with caution, particularly given the acknowledgement in the report that no research or evidence base exists to suggest that such reform is pressing. The report highlights at paragraph 6.39 that there is no real data to illustrate that there is any professional or public appetite for changing the status quo.

43. There is also reference to the English system at paragraph 6.30 complete with quotes from Lord Dyson around fixed fees in the context of clinical negligence fees. Whilst the Government's timetable to introduce these from October 2016 has not been met, we would point out that costs in civil cases in England typically tend to be significantly higher than in Northern Ireland. We believe it is worth highlighting that the cost of litigation in our High Court civil cases are already predictable and proportionate in the vast majority of cases.

44. The Bar also notes the idea suggested at paragraph 6.32 of four bands of fixed fees with the argument put forward in favour of this being the need for "*increased transparency*". We would question the basis for four bands depending on the value or complexity of case and how it is envisaged that such a system might operate in practice. We are also concerned at the prospect of the judge being put in a position to *"determine the relevant band"* at the end of a case unless this is agreed. It is unlikely that this proposal will meet the aims of predictability and transparency in relation to legal costs and the avoidance of satellite litigation. Consequently, we would propose a variation on the idea of a banding system as it is advanced in paragraph 6.32.

45. The Bar notes that it is established practice in the High Court to apply the Taxing Master's Advisory Guidance in personal injury cases. Consequently, we would propose that there is some scope to consider codifying this guidance under statute. We take the view that if this recommendation is to be taken forward then there could be two tiers in operation reflecting both standard and non-standard cases in personal injury alongside provision for exceptionality in both instances. In standard money damages cases, the current advisory guidance could be implemented with provision for increases in line with inflation as appropriate. In addition, an uplift could be made at the discretion of the Judge or Taxing Master in respect of those cases falling into the standard tier which are deemed to be of exceptionality complexity or where the system does not adequately reflect the work carried out by a legal representative.

46. Meanwhile non-standard cases could be dealt with through the use of the currently accepted 50 per cent uplift for counsel on the Taxing Master's Advisory Guidance in the High Court for personal injury cases. This would relate

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to clinical negligence, stress at work, respiratory disease and in cases against the security forces (other than road traffic, occupiers or employer liability). This list is not exhaustive in terms of personal injury cases and we expect it would be subject to consultation if this recommendation is taken forward. The uplift could be subject to discretion only in limited circumstances with the Judge or Taxing Master able to award an increased uplift for exceptional complexity or exclude an uplift.

47. The Bar expects that this recommendation would be subject to a wider detailed discussion and negotiation with the professions before the Department would seek to legislate in this area. We would point to the Department's 2013 consultation on civil legal aid remuneration which aimed to introduce standard fees for civil legal aid for cases heard in the Magistrates' Court, County Court and High Court tiers. This was subsequently withdrawn and highlights the need for caution in approaching the design of a standard fee scheme that aims to cater for a complex range of case profiles across the court tiers.

- Increased use to be made of immediately measured and payable costs for interlocutory proceedings, such costs to be determined by the judge or Master hearing the interlocutory application. [CJ13]

48. The Bar welcomes the suggestion for the greater use of the summary assessment of costs in interlocutory matters. Civil cases involving interlocutory proceedings tend to run on for longer periods of time, resulting in payment delays for practitioners. This move towards making interlocutory costs orders immediately enforceable will help to secure a means of partial payment for counsel involved in these cases without awaiting taxation and will also assist in reducing the burden on the Taxing Master.

49. We also note the reference at paragraph 6.22 that counsel's fees for dealing with interlocutory matters are currently catered for in a practice direction issued by the Taxing Master. The Bar is content in principle that these fees be legislated for by way of amendments to the Rules of the Court of Judicature as outlined in recommendation 15.

- If scales and bands are not implemented, courts to consider the parties' costs estimates as part of case management. [CJ14]

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50. The Bar would query the degree to which decision making by a court should be influenced by cost considerations. We are also concerned that it is difficult to assess costs unless the proceedings have reached a conclusion. We would caution that the implementation of this recommendation could result in a potential risk to the appropriate administration of justice if the provision of detailed costs estimates by parties becomes a defining factor in progressing a case at the case management stage.

- Amendments to the Rules of the Court of Judicature to be made to give effect to the first two of the above recommendations. [CJ15]

51. Amendments to the Rules of the Court of Judicature to give effect to these two recommendations would require legislative change to be taken forward by the Department. This will necessitate consultation with the professions and other stakeholders. Whilst opposed to legislative changes to give effect to scale fees in the High Court as outlined in recommendation 12, we are content with the suggestion for amendments to allow for the summary assessment of costs in interlocutory matters from recommendation 13.

- An amendment to the Rules may assist with the implementation of the proposed third recommendation, though such a practice could be introduced under the court's existing powers of case management. [CJ16]

52. Any amendment of the Rules to assist with the implementation of recommendation of 14 would need to be incorporated into the Department's legislative timetable during this Assembly mandate.

- The Civil Justice Council, if introduced, or the Lord Chief Justice, in the next twelve months to commission a group led by a High Court Judge to explore the possibilities for conditional fees, cost shifting and after the event insurance in light of experience elsewhere. [CJ17]

53. There are references throughout this section of the report to the Bar's opposition to conditional fee agreements. We believe it is useful to restate our position in relation to CFAs as outlined in the report of the Access to Justice 2 Review and the subsequent DOJ consultation on an alternative method for funding money damages claims in early 2016. The Bar contends that the system developed in England and Wales of CFAs and success fees recoverable from a

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plaintiff is entirely inappropriate for Northern Ireland. The system developed in England and Wales has been driven by the wholly disproportionate costs being charged by lawyers in the jurisdiction.

54. The changes introduced under the Access to Justice Act 1999 and the subsequent Jackson reforms under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 were designed specifically to rectify an English problem. This simply is not a feature of the system in Northern Ireland and there is no evidence to suggest that the legal fees being charged here act as a disincentive to litigate or an impediment to accessing justice.

55. The Bar has no difficulty with the proposed Civil Justice Council or a group commissioned by the Lord Chief Justice and led by a High Court Judge exploring CFAs further. Qualified One Way Cost Shifting as outlined at paragraph 6.36 is worth particular consideration for NI as legal aid expenditure continues to reduce given the protection that this could offer to unsuccessful claimants who will not be exposed to the costs of the victorious defendant in certain civil claims. We also agree with the report's conclusion at paragraph 6.43 that "*we should hasten cautiously and scrutinise the outworking and experience of other jurisdictions*" given the need for evidence-based considerations. However, evidence from other jurisdictions should already concern justice policy makers in Northern Ireland.

56. The Bar Council of England and Wales produced a report in September 2014 entitled '*The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On*' which surveyed barristers on the impact of the changes with 716 respondents. This highlighted that in privately funded work where CFAs may have once been attractive due to the right to recover success fees and any ATE insurance premiums, they have now become much riskier to accept. Over a quarter (27%) of respondents indicated that they now require a higher prospect of success before accepting a case, while 27.86% of respondents suggested that the Jackson reforms had forced them to require a higher prospect of success as well as a higher quantum than they would have required prior to LASPO[8].

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[8] The Bar Council of England and Wales, *'The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On'* at paragraph 65, (September 2014) at http://www.barcouncil.org.uk/media/303419/laspo_one_year_on_-_final_report_september_2014_.pdf (last accessed 10 November 2016)

57. As we have highlighted elsewhere, any future work must recognise that CFAs place lawyers in an untenable position of a potential conflict of interest with their clients by giving lawyers a significant financial interest in the outcome of the case. They impede access to justice as lawyers are likely to see difficult and complex cases involving high early investigation costs, disputed liability or emerging points of law as an unreasonable commercial risk. Any payment of success fees from a plaintiff's damages, rather than the losing defendant, is an idea that many lawyers find repugnant. The potential for satellite litigation which success fees may generate is also worrying given a likely increase in the number of disputes.

- A new rule to be introduced to mirror, where appropriate, the English Civil Proceedings Rule 44 dealing with issue based and proportional costs orders. [CJ18]

58. The Bar is not in favour of this approach being adopted in Northern Ireland given that it has caused significant administrative difficulties in England. Order 62 under the Rules of the Court of Judicature (Northern Ireland) 1980 provides the courts with sufficient flexibility in this area and judges are already using their discretion to make costs orders that reflect the conduct of the parties or the issues raised. Consequently, we see no need for the introduction of a rule to mirror the English Civil Proceedings Rule 44 dealing with issue based and proportional costs orders.

Chapter 7: The Overriding Objective and Efficient and Timely Process

- A comprehensive comparison of our High Court and County Court rules with those in England and Wales be carried out by a body appointed by the Lord Chief Justice as a matter of urgency. [CJ19]

59. The Bar has no difficulty with this recommendation. We accept that the Rules of the Court of Judicature (Northern Ireland) 1980 could benefit from being revised and updated to allow for reform in some areas. However, we would point to the remark in the report at paragraph 7.1 that "*many of the English rules add to costs and do not fit in Northern Ireland*". Consequently, any comparison exercise will be an intensive task as careful consideration and cost requirements will be necessary to ensure that any changes identified are appropriate for the courts in Northern Ireland. The Bar would welcome further detail on the composition of a separate body appointed by the Lord Chief Justice to examine this issue alongside the opportunity to contribute to its work in due course.

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- New pre-action protocols incorporating the best features of England and Wale's pre-action protocols and our own pre-action protocols be drawn up. [CJ20]

60. The Bar has no difficulty with this recommendation. We believe that the pre-action protocols presently in place allow for early engagement between the parties, enabling costs to be kept proportionate to the nature of the claim in many cases. The suggestions at paragraph 7.12 for new pre-action protocols in respect of personal injury claims with a detailed letter of claim accompanied by a police/health and safety report, disclosure of any medical reports, disclosure of relevant medical notes and disclosure of any vouching documents of financial loss appear to be worth consideration in facilitating early settlement.

61. Beyond these suggestions, further careful consideration and investment will be required in identifying the "*best features*" of the system in England and Wales. For example, we would query the value of "*encouragement towards Alternative Dispute Resolution*" referenced at paragraph 7.7. The pre-action protocols presently in place in NI already operate as an effective mechanism in ensuring that applications are not brought before the court until all other attempts at resolution have been tried and failed thus ensuring that cases are resolved before the need for litigation, where possible. ADR in personal injury cases could result in time delays for serious cases which should legitimately be pursued. In moving forward, the Personal Injury Bar Association would welcome the opportunity to contribute to the development of any new pre-action protocols.

- Reviews of cases to be initiated nine months after issue of the writ. [CJ21]

62. The Bar would query whether this recommendation should instead read "*reviews of cases to be initiated nine months after service of the writ*", rather than the issue of the writ. We would also welcome an explanation of the rationale, given that there appears to be no inclusion in the relevant discussion section.

- There be one case management hearing (CMH) in most cases to take place within a specified timescale from entry of appearance, organised by the court at the very outset of any proceedings with such subsequent case management

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reviews as may be deemed necessary, and a pre-trial review (PTR) if required. [CJ22]

63. The Bar has no difficulty with the idea of case management hearings as outlined in paragraph 7.15. We are content that such an approach may assist in enhancing the number of cases capable of early resolution whilst also ensuring that those cases which do not settle are dealt with as efficiently, fairly and quickly as possible.

- Failure to observe the time limits set out in the directions at CMH, unless leave is given prior to the time limit expiring, should usually result in heavy cost penalties. [CJ23]

64. The Bar would request further detail around the description of these cost penalties as "*heavy*" and what this might entail. We would also point to the case of *Caldwell & Anor (Practising as Caldwell Warner Solicitors) v Morgan Walker Solicitors Llp* [2010] NIQB 115 in which the report author, Gillen J as he was then, commented on the need to distinguish between court orders and directions:

> *"In the course of case management however, it is important to recognise that the courts remain constrained by both statutory and regulatory rules. A distinction must be made between directions on the one hand and orders, decisions or judgments on the other. The role of directions is to oil the wheels of case management. As such they can be and are often varied or revoked where it is just and reasonable to do so. On appropriate occasions this could be done administratively by way of letter of consent of the parties with the approval of the court or alternatively before the court without the necessity for pleadings. They do not bear the seal of court orders, decisions or judgments but are nonetheless an integral part of the case management system".*[9]

65. Directions as part of case management hearings are used to encourage the parties to deal with relevant aspects of a case and this judgment recognises that they need to be flexible. Therefore the suggestion that "*heavy*" cost penalties should be associated with failure to adhere to time limits set out in directions is concerning. It runs contrary to the view expressed by the author in the judgement that such directions risk introducing into case management a "*climate*

[9] *Caldwell & Anor (Practising as Caldwell Warner Solicitors) v Morgan Walker Solicitors Llp* [2010] NIQB 115 at para 22

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of unhelpful shortcuts or relaxations of rules and orders which would be anathema to the concept of a fair trial and the administration of justice. Case management must not be used as a tool to dilute the effect of statutes and rules of the Court of Judicature".[10]

- No statutory or regulatory changes be put in place to implement CJ22. Implementation be speedily introduced through the exercise of the Court's existing case management powers under Order 1 rule 1A of the Rules of the Court of Judicature 1980 and the inherent jurisdiction of the court. [CJ24]

66. Whilst the implementation of recommendation CJ22 is not a matter for the Bar to action, it will require a degree of planning and coordination across the NICTS, the judiciary and the professions before being introduced. The Personal Injury Bar Association would be best placed to issue appropriate communication to counsel in relation to any outworkings of a fresh emphasis on case management.

- Order 14A be introduced into our Rules. [CJ25]

67. The Bar understands that this recommendation would effectively allow for a party to apply to the court for a final determination on a point of law at any stage of the proceedings, thus putting an end to the litigation. We acknowledge that Order 33 of the Rules of the Court of Judicature 1981 is similar in that it already allows for the court to hear a preliminary issue on a question of law that could lead to a final judgment. The Bar has no difficulty with the existence of such a power under a new procedure given that it could provide practitioners with more than one route to ensuring the expeditious disposal of disputes in certain circumstances.

- A composite register of all the Practice Directions be drawn up by the Office of the LCJ. [CJ26]
- Any Practice Direction issued by a Judge or Master to require the *imprimatur* of the Lord Chief Justice. [CJ27]

68. This is a matter for the Office of the Lord Chief Justice. The Bar has no issue with the LCJ ensuring a greater level of strategic oversight across the court

[10] Ibid at 34

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divisions through the adoption of a consistent approach towards Practice Directions.

- An express requirement that leave is necessary in relation to interlocutory orders appealed from the County Court to be determined on paper save where the court hearing the appeal accedes to a request for an oral hearing or determines that such a hearing is necessary. [CJ28]

69. The Bar takes the view that leave should not be a requirement in order to appeal an interlocutory order from the County Court. However, if such a requirement is to be introduced then further consideration would need to be given to the standard that would need to be met in order to allow an appeal. The report makes no mention of this at present in paragraph 7.34.

- Courts to encourage of the use of witness statements and the use of The Civil Evidence (Northern Ireland) Order 1997 at case management hearings. [CJ29]
- The Rules be amended to provide courts with the power to order the use of witness statements. [CJ30]

70. The Civil Evidence (Northern Ireland) Order 1997 is already used effectively in the County Court. The Bar has no difficulty with the use of witness statements being encouraged and made more widespread in the High Court. However, we do not agree that the courts should have the power to order the use of witness statements. An amendment to the Rules on this matter is unnecessary given that it would only risk increasing the cost of proceedings for the parties involved.

- The Rules be amended to provide for a plaintiff to make an offer of settlement within the same timescale as our present lodgement system. In the plaintiff equals or exceeds that offer, that plaintiff to receive, interest on his award at judgment rate and /or indemnity costs from the date of his offer. [CJ31]

71. The Bar has no issue with this recommendation. However, we would query the matter of prescribed penalties as per the lodgement rules to ensure clarity for all parties. This could potentially mean the development of a separate regime of costs penalties between the High Court and County Court.

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- The Rules be amended to include a provision on the court's duty to manage cases mirroring CPR rule 1.4(2) in England and Wales. [CJ32]

72. The Bar has no difficulty in principle with the amendment of the rules to include provision for the court's renewed emphasis on case management, reflecting rule 1.4(2) of the Civil Procedure Rules in England and Wales.

Chapter 8: Modernising the Court Procedures

- Listing information to be added to the Twitter page recently set up to provide for the Northern Ireland judiciary to publish summaries of cases and judgments emanating from the Northern Ireland Court of Appeal. [CJ33]

73. This is a matter for the judiciary to action under its @JudiciaryNI twitter handle. The Bar has no objection to listing information being added to the Northern Ireland judiciary's twitter feed and will promote on social media via the Bar's account.

- NICTS to use YouTube as a means of outreach to personal litigants with explanatory videos. [CJ34]

- NICTS to consult with the judiciary, the Office of the Lord Chief Justice and other stakeholders in considering the future development of a social media strategy. [CJ35]

74. The Bar welcomes the useful innovations which have already taken place in recent years, particularly the provision of online seven day court listings, court rules and practice notes and the summaries of key judgments supplied by the Office of the Lord Chief Justice. We also recognise the potential for social media to further improve court communication channels.

75. Whilst the Bar acknowledges the usefulness of social media, we are mindful of the issues referenced at paragraph 8.25 which reflect many of our own concerns. This includes the potential for juror misuse, dissemination of confidential information, intimidation of court users and the potential misrepresentation of the court procedure. The Bar of Northern Ireland has included a social media policy within the current Code of Conduct. The approach taken in relation to social media must therefore be carefully thought through to ensure minimal

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disruption to court proceedings whilst increasing the provision of information to the public.

76. Ultimately these recommendations are a matter for the NICTS to action. However, as far as the Bar is aware the NICTS has no social media presence as yet. The development of an overarching strategy to inform this work will be vital before any steps should be taken towards the use of YouTube for providing explanatory videos to personal litigants. This will require time and investment to ensure that a strategic approach to communications is achieved. In addition, the Bar believes that the NICTS should also invest in significant improvements to its website to ensure that it is fit for purpose which will serve to complement future social media activity.

- Courts to insist on electronic transfers of damages wherever possible. [CJ36]
- A rule to be introduced to the effect that the period of a stay would ordinarily be a matter of days. [CJ37]

77. The Bar is content with recommendation CJ36. We recognise that electronic banking now allows for faster digital transfers than the traditional methods. However, even in the modern banking era, it can still take time to transfer large sums and we would be keen to guard against the period of stay being reduced too greatly. Consequently, the Bar believes that this should be longer than the "*matter of days*" envisaged in recommendation CJ38.

- Children not to be referred to in the rules as "under a disability". They are children or young persons. [CJ38]

78. This recommendation is not applicable to the Bar.

- Persons with mental illness to be referred to as "protected persons". [CJ39]

79. This recommendation is not applicable to the Bar.

- The growing presence of personal litigants in the system be a consideration in the mind of all judgment givers. [CJ40]

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80. The Bar would query the exact meaning of this recommendation. We are unclear as to whether it relates to the section on shorter judgments which makes reference to Lord Neuberger's comments around improving clarity in this area at paragraph 8.61. We note that no recommendation is made in this area given that it is for each judge when writing a judgment to decide on its content and length. The present position is one which we are content to support.

- DJOs/Case Officers to be introduced. [CJ41]

81. The Bar is concerned that the proposal for the introduction of Case Officers has the potential to mark a significant departure from the judicial role in our adversarial system. The concept of a Case Officer appears to involve a quasi-judicial role and could signal the beginning of a shift to a career judiciary with a very different character to that which presently commands public confidence. Looking to the longer term, there is also an associated reputational risk for the jurisdiction flowing from the reduced status and independence of the judiciary.

82. The Bar would query how it would be possible to draw a line between Case Officers dealing with purely procedural matters, as noted at paragraph 8.70, and more substantive issues requiring judicial expertise and authority. This could merely add another layer of decision making and delay into routine case management with officers dealing with matters which potentially give rise to issues across wide areas of the civil law. We note that the report states these Case Officers should be adequately trained and appointed from a "*reasonably high level*" within the Civil Service. However, we would query whether it is envisaged that they would require any legal qualifications or experience.

83. The idea that "*much of the work performed… could be online*" is also concerning given that this is only likely to consolidate the creation of a two-tier justice system. As we outlined in response to recommendation CJ10, those who can afford to will still engage lawyers to deal with their litigation and pursue court hearings when appropriate. Meanwhile there is a risk that the difficulties of those who are unable to obtain funding for advice or representation will be further compounded by a lack of proper judicial intervention in the determination of a dispute.

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84. Whilst we would not suggest that it is impossible to produce a system in which judges have a greater degree of administrative support, the Bar's reservations centre on the proposition that judicial case management is capable of being easily unbundled into matters which are purely procedural or routine and those which have a distinct "judicial" component. We are concerned that challenges to Case Officer decisions could end up as an area of satellite litigation, resulting in additional time and expense for the court. The Bar would request evidence to demonstrate that this recommendation will improve both access to justice and the administration of justice.

Chapter 9: Alternative Dispute Resolution and Mediation

- The Law Society, Bar Council, judiciary and all groups providing legal training, including the Institute for Professional Legal Studies in this jurisdiction to co-operate to provide better education for aspiring lawyers, practising lawyers and all the public on the benefits of mediation, and the flexibility available in terms of the appropriate mediation model and mediator. [CJ42]

85. The Bar will cooperate with others to provide education for practitioners around the benefits of mediation. Our specialist Bar Associations already support the delivery of a variety of CPD events, information and training and would be best placed to ensure that members are kept abreast of developments in this area.

- Compulsory mediation to be introduced and limited to a pilot scheme in low value cases up to £5,000 initially. [CJ43]
- Otherwise mediation to remain optional. [CJ44]

86. The Bar is not in favour of a compulsory mediation pilot scheme being introduced in low value cases up to £5,000 initially with the possibility of expansion to £10,000. We are also unclear as to the categories of case which would be covered by such a scheme. For example, the report notes at paragraph 9.11 that mediation is rarely used in personal injury cases in the High Court in this jurisdiction and experience suggests it has proved unnecessary to consider it, as the vast majority of these cases settle without the need for formal mediation due to well established practice of joint consultations at appropriate stages. Meanwhile experience in the County Court shows that the vast majority of cases can be dealt with efficiently and inexpensively due to the operation of scale costs. However, there is no mention of these personal injury cases being excluded from any compulsory mediation pilot scheme.

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87. In addition, recommendation CJ43 appears to be contradictory to the comment at paragraph 9.57 that it is "*not considered that there should be any general requirement for compulsory mediation in the civil courts in this jurisdiction*" before going on to list a range of reasons for this. As the report observes at paragraph 9.62, mediation should instead be optional and maintained as a "*valuable voluntary supplement to the court system*" rather than parties being pressured to pursue this route. The long term success of mediation agreements across the various court tiers ultimately depend on the willingness of the parties to compromise, the intensity of the dispute, the parties motivation to settle and the conduct of the mediator. This must be entered into voluntarily and at the appropriate point in the court process in order to increase the likelihood of agreement being reached.

88. It would undoubtedly be beneficial for the financial outlay to be considered further by the Department before any action is taken in relation to how a pilot scheme might work. No funding source is identified for a pilot scheme in the report with only a reference to members of the legal profession potentially being willing to act on a voluntary basis at paragraph 9.65. We do not believe that such an approach would be advisable or sustainable. The report also highlights that there would be a need for a funding regime to be established to support such a scheme in the longer term if it was to be taken forward. We would point to possible difficulties around this given the constrained financial climate and stress the potential risk of court staff, rather than accredited mediators, being involved in any scheme for low value cases given the difficulties in training individuals to a sufficient standard to provide an effective service.

- Courts to retain the right to impose costs sanctions where a party refuses to consider or participate in mediation without adequate explanation. [CJ45]

89. The Bar would request further detail on any possible costs sanctions. We believe that mediation should always remain optional and voluntary. We are disinclined to agree with an approach which includes a punitive measure, as this would effectively create mandatory mediation.

- Rules, similar to the Civil Procedure Rule requiring the court to consider at every stage in proceedings whether an Alternative Dispute Resolution is appropriate, to be introduced. [CJ46]

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90. The Bar has no difficulty with this recommendation in principle. We would expect to be consulted on the detail of any rules, should this be taken forward.

- All barristers and solicitors undertaking mediation to be advised to undergo a form of training which incorporates the core skills of mediation. This is not obligatory. [CJ47]

91. The Bar has no issue with the recommendation. The Barrister Mediation Service already provides a pool of experienced independent barristers who are fully trained and accredited as well as regulated by the Bar Council of Northern Ireland and subject to the Code of Conduct for Mediators.

- A Northern Ireland body, along the lines of the UK Civil Mediation Council or the Scottish Mediation Network, to provide accreditation for suitable forms of training for mediators. [CJ48]

- A Code of Conduct, similar to that introduced by the UK Civil Mediation Council, to be introduced by the equivalent body in this jurisdiction. [CJ49]

- Barristers and solicitors acting as mediators to be required to adhere to this Code of Conduct, although responsibility for breaches of such a Code to be regarded as matters for discipline within the existing disciplinary procedures for each branch of the profession. [CJ50]

92. The Bar would welcome steps being taken to address our concerns that mediation is currently a largely unregulated profession. We have no difficulty with the suggestion in principle of a Northern Ireland Mediation Council providing accreditation for training courses. However, we would require further detail on what the accreditation process might entail and any sanctions for providers not achieving a recognised training course. We would also query whether such a body would have any other wider role in terms of providing guidance on appropriate standards for mediation and how its operation would be funded.

93. The Bar is content with the recommendation for a Code of Conduct and would direct the Review Group to the Code of Conduct for mediators devised by the Bar of Northern Ireland. We also agree that breaches of such a Code by

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barristers or solicitors should be dealt with under the existing disciplinary procedures for each branch of the profession.

- A pro bono mediation service to be set up for those unable to afford mediators. [CJ51]

94. The Bar notes that the relevant section of the report on pro bono mediation at paragraph 9.72 appears to be largely based on the experience of the CEDR accredited mediator Ms Shaw Brown from England. We would welcome the provision of further evidence or research to show that there is a demand for a pro bono mediation service in Northern Ireland.

95. We would also query how it is envisaged that such a service might operate, particularly given the mention at paragraph 9.74 of a role for the voluntary sector through Citizen's Advice, Advice NI and Law Centres. Consideration would need to be given to the impact of this on service providers in having to train volunteers to be aware of mediation services which may be difficult given the financial pressures already being experienced by many frontline advice organisations.

- Legislation to require solicitors and barristers to advise any person intending to commence legal proceedings to give consideration to using mediation as an alternative means of resolving disputes. [CJ52]

96. The Bar has concerns around the suggestion of legislation to require solicitors and barristers to advise any person intent on pursuing legal action to consider mediation as an alternative. We would point out that mediation represents an important diversionary measure when made available to parties at the right stage during proceedings. Barristers are adept at introducing the idea of mediation to the parties involved in a case at the point when it is most likely to be effective. However, the idea that legal representatives should be subject to an onus to explain mediation in all cases prior to the commencement of legal proceedings could prove problematic in practice.

97. The experience of counsel often shows the issue of proceedings and the first appearance before a court can in fact motivate clients to consider the potential of mediation. Unfortunately the idea of a legislative requirement for legal representatives to explain the potential use of mediation at the very outset is likely to reduce it to a tick box exercise for the parties involved in a case. This

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will also be entirely self-defeating for the court system resulting in the increased likelihood of added delays and costs with parties unable to see the potential value of mediation at a later point in the court process after ruling it out before the issue of proceedings. Solicitors and counsel should be able to initiate the idea of mediation in the right circumstances and at the appropriate point in the court process which will inevitably differ from case to case.

- The inclusion of the promotion of ADR within the overriding objective at Order 1 of our current rules. [CJ53]

98. The Bar assumes that this recommendation relates to the introduction of the section of CPR rule 1.4 from England and Wales on the court's duty to manage cases as outlined at paragraph 9.78. This states that active case management includes "*encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure*". We have no difficulty with this in principle and would expect to be consulted further on any amendment to the overriding objective in the current rules if this recommendation is taken forward.

- "Jackson ADR Handbook" be made available in Northern Ireland by the NICTS to all judges dealing with civil work. [CJ54]

99. This recommendation is not applicable to the Bar.

Chapter 10: Disclosure

- Order 24 of the Rules of the Court of Judicature to be amended to introduce a system of disclosure based upon CPR 31.7(1) and the principles of "standard disclosure" and "reasonable search" in place of the Peruvian Guano test based on relevance, whereby the disclosing party would consider each document to see whether it supports his case, adversely affects his own or another party's case or supports another party's case. [CJ55]
- Specific provision to be made so as to enable the Court in an appropriate case to order specific discovery of documentation by reference to the Peruvian Guano test in circumstances where standard disclosure is inadequate or that the case is one where something more than standard disclosure is called for. [CJ56]

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100. The Bar does not agree that the Peruvian Guano test of relevance should be replaced by a system of disclosure based upon CPR 31.7(1) and the principles of standard disclosure and reasonable search. In addition, we note that England has made subsequent changes to allow for the court to make an order for specific disclosure. This has also been supplemented by a Practice Direction reintroducing the Peruvian Guano test in certain circumstances as referenced in paragraph 10.34.

101. The Bar is concerned that such a change would ultimately dilute the obligation to provide discovery in a range of cases. It appears that the Peruvian Guano test was replaced only to later be reintroduced in England due to the potential for incomplete disclosure leading to injustice. We would query why Northern Ireland's court system would seek to follow such an example. Whilst we acknowledge that the amount of disclosure required in particular cases will vary widely, we are concerned that such a move could see the application of different standards for disclosure in different types of cases which could be dealt with instead by more robust case management. Consequently, the Bar does not believe that the system of disclosure should be altered across the various court divisions in Northern Ireland.

102. In relation to personal injury cases, we would point out that a "*cards on the table*" approach is very much already recognised as the benchmark for litigation. The pre-action protocols in both the High Court and the County Court enshrine this and a failure to comply can already result in costs being awarded against the non-complainant party.[11] The Bar has no objection in principle of a court having the power to award costs against a party in default of the pre-action protocols around discovery where appropriate.

- Order 24 of the Rules of the Court of Judicature to be amended to provide for automatic pre-proceedings disclosure of relevant documents, upon production by the plaintiff of a letter of claim of sufficient particularity as to enable the defendant to ascertain the nature of the case being made. [CJ57]

103. The Bar is content with this recommendation and has no objection to a greater emphasis on pre-proceedings disclosure of relevant documents.

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[11] *Monaghan v Trustees of Milltown Cemetery* [2013] NIQB 53 as per Stephens J at para 19

- Such amendment to the Rules to be supplemented, if necessary, by a protocol or practice direction. [CJ58]

104. The Bar has no difficulty with this suggestion. We would expect to be consulted in relation to the development of any protocol or draft practice guidance.

- Amendment to be made to s. 31 of The Administration of Justice Act 1970 (c41) to remove the current limitation of pre-action disclosure to cases of personal injuries or death. [CJ59]

105. The Bar has no objection to this recommendation in principle. We would expect the Department to consult further on any legislative amendment should this recommendation be taken forward.

Chapter 11: Experts

- Only those experts who can prove that they have been properly trained and thus achieved an acceptable accreditation to be given permission to offer expert testimony. [CJ60]

106. The Bar acknowledges the important role that expert witnesses play in ensuring that the court can reach a fully informed decision. We are content with the recommendation for experts to undergo a training and accreditation process before being able to offer evidence to the court. However, further information would be useful on which professional body referenced at paragraph 11.11 would be responsible for education and training.

107. We also note that the Department of Justice was supportive of such an approach in the consultation '*Examining the use of Expert Witnesses appearing in the Courts in Northern Ireland*' which was conducted from November 2014 until February 2015. We are disappointed that no reform has been made in relation to expert witnesses since this despite a range of welcome suggestions being made around the appointment of experts, training programmes and a framework of fixed fees.[12]

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[12] Department of Justice, *'Examining the use of Expert Witnesses appearing in the Courts in Northern Ireland: Post Consultation Report'*, (February 2016) at https://www.justice-ni.gov.uk/sites/default/files/publications/doj/expert-witnesses-summary-of-responses.pdf (last accessed 17 November 2016)

- The judge (or Master) to determine at the first case management review (CMR) the necessity for any expert evidence. [CJ61]

108. The Bar takes the view that the necessity of expert evidence is a matter for the parties to make a decision on. Those intending to instruct an expert to give or prepare evidence for the purpose of the proceedings should always notify this to the court at the earliest possible opportunity. However, we believe that it would be difficult for a judge or Master to make an assessment on this until the hearing of the case. Instead any party that unnecessarily calls an expert witness should be held liable for costs on the decision of the judge or Master.

- If expert evidence is necessary, the court to be empowered to set a budget taking into account the issues involved and the amount at stake. [CJ62]

109. The Bar agrees with the recommendation that the court should be empowered to direct a party instructing an expert to produce a projected costs budget for approval. This should detail the projected costs of engaging the expert to produce a report and to attend as a witness in the proceedings. We note that such provision already exists in Practice Direction 1 of 2015 relating to proceedings undertaken in the Commercial Division of the High Court. The Bar expects to be consulted further if such an approach is also to be incorporated into any future Practice Direction for personal injury litigation.

- Courts, in appropriate cases, to encourage use of selection of joint experts.

110. The Bar has no objection to the courts encouraging the use of selection of joint experts. The process outlined in the Pre-action Protocol for Personal Injury Claims in England at paragraph 11.21 appears acceptable given that it allows for elimination of experts objectionable to one party with a focus on mutual agreement for joint selection. The Bar would expect to be consulted further on the inclusion of this approach in the Personal Injuries Pre-Action Protocol if this recommendation is taken forward.

- The extended use of concurrent evidence. [CJ63]

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111. The Bar has concerns around the extended use of concurrent evidence or 'hot-tubbing'. We would draw the Review Group's attention to a recently published report by the Civil Justice Council in England entitled 'Concurrent Expert Evidence and 'Hot-tubbing' in English Litigation since the Jackson Reforms'.[13] This report canvassed the views of the judiciary, legal representatives and expert witnesses involved in concurrent expert evidence with some very informative conclusions.

112. The report highlighted that there were significant concerns regarding the role of counsel 'in the hot-tub' which primarily revolved around the need to ensure that the parties have a sufficient opportunity to test the experts' views where a hot-tub is used. The report makes it clear that there is a potential danger to the administration of justice for either party if counsel is not given sufficient opportunity to test the opposing expert's view, especially if the court considers that a point has been agreed between the experts in the joint report, whereas it truly has not been; or if an expert's view has been expressed without sufficient regard to particular factors that might be brought out through questioning. The report indicates a clear issue around procedural fairness given that legal representatives may feel inhibited from challenging the views of experts where hot-tubbing has occurred.

113. Whilst we acknowledge that concurrent evidence is already provided for in Practice Direction 1 of 2015 relating to proceedings undertaken in the Commercial Division of the High Court, we do not believe that this should be extended beyond this to personal injury litigation at present.

- Greater use at the case management stage of the power to appoint a court assessor or court appointed expert in dealing with highly technical issues. [CJ64]

114. The Bar is content with the recommendation for a judge conducting a case management review to use the power to appoint a court assessor or court appointed expert in dealing with highly technical issues where appropriate.

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[13] Civil Justice Council, *'Concurrent Expert Evidence and 'Hot-tubbing' in English Litigation since the Jackson Reforms: A Legal and Empirical Study'*, (July 2016) at https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-civil-litigation-review-hot-tubbing-report-20160801.pdf (last accessed 17 November 2016)

- Increased use of disciplinary measures against any errant expert. [CJ65]

115. The Bar has no difficulty with the increase use of disciplinary measures against any errant expert. This use of personal costs orders, the disallowing of fees and reporting to a professional body as outlined at paragraph 11.33 should suffice as adequate sanctions for experts in this area. However, we note that these are already included in Practice Direction 1 of 2015 relating to proceedings undertaken in the Commercial Division of the High Court.

- A rule to provide for written questions to experts. [CJ66]

116. The Bar notes that the introduction of a rule to provide for written questions to experts could be useful in obtaining clarification of an expert report in certain cases provided that a response time is fixed and adhered to. However, we would point out that standard practice in most personal injury cases is that expert reports on liability issues are not disclosed with only those concerning quantum matters being released. Consequently, it could be difficult to put this recommendation into practice.

Chapter 12: Personal Litigants

- Courts to invoke early case management hearings in all cases involving personal litigants (PLs). [CJ67]

117. The Bar acknowledges that practitioners in the civil courts have encountered increasing numbers of personal litigants in recent years. We note the suggestion that courts should invoke early cases management hearings in all cases involving personal litigants, including the list of actions which the judge should undertake at paragraph 12.45. Judges are already required to take extra care and considerably more time to explain how practice, procedure, the law, rules and regulations pertain to any particular case.

118. Whilst the courts may wish to consider early case management hearings as outlined in the recommendation to deal with personal litigants, we would query whether this will add to the potential cost of proceedings in terms of delays to other cases and the extra judicial time this will require. We would also caution that the actions outlined at paragraph 12.45 aimed at facilitating access to justice for personal litigants will need careful scrutiny to ensure that they do not place

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represented opponents at a disadvantage; adherence to the Rules of Court and clearly accessible Practice Directions must not be side-lined to the detriment of the court system.

- All judges to be familiar with and guided by the current Equal Treatment Bench Book with reference to PLs under a disability. [CJ68]

119. This recommendation is not applicable to the Bar.

- A specific power to be introduced into the Rules of the Court of Judicature Northern Ireland 1980 to allow the court to direct that, where at least one party is a litigant in person, the proceedings be conducted by way of an inquisitorial form of process. [CJ69]

120. The Bar would require further information on the meaning of the application of the "*inquisitorial form of process*" before being able to comment in full. We would also request evidence or research to show how it is envisaged that this might improve proceedings for personal litigants. The example of the approach taken in libel action of Mole v Hunter [2014] at paragraph 12.49 does not suffice to recommend its application across the civil courts. We also note that the mention of the recommendation of the Judicial Working Group on Litigants in Person at 12.49 incorrectly references CPR 2.1 when instead it should read CPR Rule 3.1. This has only been adopted since 01 October 2015 so it remains unclear as whether it has improved the administration of justice and the experience of personal litigants in the courts.

121. We also have a number of additional issues that would need to be clarified given that such an approach is "*foreign to our common law adversarial approach*" as highlighted at paragraph 12.50. The new CPR Rule 3.1A introduced in England appears to provide the judiciary with the discretion to deal with any case in a way that they consider would best serve the interests of justice and the furtherance of the overriding objective.

122. However, we are concerned in particular at the potential application of CPR 3.1A(5) if it is adopted in Northern Ireland. This appears to provide the judiciary with the additional ability to ascertain the matters upon which a personal litigant would wish to cross-examine their opposition and put, or cause to be put, questions which appropriately probe them in the manner in which that litigant would have done, had they possessed sufficient ability. Whilst we do not doubt

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the ability of the judiciary to be non-partisan, we would query the threshold at which a judge should intervene and utilise this discretionary power. This is not set out anywhere and there is a risk that this rule could be over used to reduce the likelihood of proceedings being subject to appeal.

- Where at least one party is unrepresented, counsel or solicitor to develop a practice (if necessary subsequently enforced by a rule change) of:
  - Identifying themselves by name when announcing their appearance before the court.
  - Requiring the represented party to send to any litigant in person legal authorities which are adverse to the represented party's case.
  - Requiring the represented party to send to any litigant in person the form to be filled in to apply to be assisted by a McKenzie Friend, together with the practice note in relation to McKenzie friends and any associated documents. [CJ70]

123. The Bar agrees with the suggestion of counsel identifying themselves by name when announcing their appearance before the court. This will assist the court in ensuring that the counsel appearing hold a valid practising certificate for this jurisdiction as the Bar of Northern Ireland publishes a list on its website for easy reference. However, we point out that an obligation already exists for the Bar to provide legal authorities adverse to the represented party's case to the other party and to the court. Therefore this part of the recommendation would not have any impact on the approach already taken by counsel.

- Invocation of the Australian model of an "unrepresented co-ordinator" with the appointment of a lawyer by the Northern Ireland Courts & Tribunals Service (NICTS) whose sole function is provide paperwork and logistical assistance to PLs. [CJ71]
- The unrepresented co-ordinator to co-ordinate an online advice line and to provide accessible and easy to understand guidance for personal litigants in the county court and the High Court. [CJ72]

124. The Bar has a range of issues in relation to the suggestion of an "*unrepresented coordinator*" and the suggestion that this individual should be a lawyer "*whose sole function is to provide paper work and logistical assistance to PLs*" at paragraph 12.62. We are concerned about the type of advice that personal

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litigants might expect to receive and potential difficulties in drawing a boundary between a purely advisory role and an adjudicatory one.

125. The Bar would also request research or evidence to demonstrate that this model is effective in addressing the needs of personal litigants. We would also query how such a role would fit in with the suggestion in the Family Justice Report at FJ153 of an information hub located in Laganside Court which would be run by NICTS staff to assist personal litigants. Furthermore, the cost associated with such a resource would also require detailed consideration by the NICTS especially given the mention of the possibility of "*one or more co-ordinators*" or the suggestion of the contracting out of this service to the voluntary sector at paragraph 12.64.

126. The suggestion of an unrepresented co-ordinator running an online advice line for personal litigants is a matter for the NICTS to develop further. However, the Bar believes that all members of the public should have access to relevant and easily understandable information in relation to County Court and High Court proceedings. The current NICTS website is not fit for purpose and we believe that time and money should be invested in order to make it more accessible for court users as a starting point.

- The Legal Services Agency to introduce a similar "face to face" service for limited assistance as presently exists in England. [CJ73]

127. The Bar considers that this recommendation would represent an overextension of pro bono provision thereby constituting an undue burden on the professions.

- Strong encouragement and assistance to be given by the Law Society to projects such as that implemented by Ulster University to assist personal litigants. [CJ74]
- NICTS to build on the research currently being carried out into PLs and to obtain accurate background statistical evidence on PLs in our civil justice system. [CJ75]

128. The Bar welcomes the research currently conducted by the Human Rights Commission and Ulster University Law School in relation to personal litigants in the family courts and bankruptcy proceedings as outlined as paragraph 12.31. However, we would query how this research project will ensure that the cases

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selected are representative of the issues being experienced in relation to litigants in person. For example, some practitioners have expressed doubts as to whether bankruptcy cases are appropriate examples of the involvement of personal litigants across the court system given that they can typically engage more easily in this type of court procedure than in others. This work appears to be focusing purely on the volumes of case type rather than properly investigating the issues most commonly faced by personal litigants across the courts which may impact on the ability of the NICTS to build on this more widely in the future.

- Rigorous data recording practices to be established across each tier of the civil court system and in each geographical division. [CJ76]

129. The Bar welcomes the recommendation for data recording procedures to be established across the civil court system to allow for analysis of the numbers and experiences of personal litigants. This would ultimately be a matter for the NICTS to take forward. However, we would suggest that more rigorous data and evidence is absolutely imperative in determining the support needs of personal litigants. We consider that the development of this evidence base is vital before any steps are taken towards addressing the other recommendations around personal litigants in this chapter.

- Provision of feedback from PLs in a formal questionnaire issued at all tiers to measure their experience and suggested improvements. [CJ77]

130. Whilst this would be a matter for the NICTS, the Bar has concerns around the practicalities associated with the issue of a formal questionnaire to personal litigants. This approach would present clear limitations given that the satisfaction of a personal litigant is likely to be directly linked to the outcome of their case. We would require additional information on the detail of any questionnaire before being able to comment further on the contents. We would also query what any feedback or suggested improvements from personal litigants would be used for. As outlined in response to recommendation 76, it would be more useful to establish rigorous data recording practices which allow for an analysis of the reasons why an individual has become a personal litigant.

- NICTS to revisit its current website to establish a single authoritative website providing an online objective information hub in civil law cases with an added

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emphasis on plain and simple language and support given to vulnerable people. [CJ78]

131. The Bar agrees that the NICTS should invest in significant improvements to its website to ensure that it is fit for purpose. Members of the public should have access to relevant and easily understandable information in civil cases.

- Paperwork and processes to be designed with the layperson in mind. NICTS to conduct a review of current forms to ensure they are appropriately plain and comprehensive for all court users. [CJ79]

132. The Bar has no issue with the NICTS conducting a review of current forms to ensure that they are plain and comprehensive for all court users.

- Vulnerable groups, such as people with mental health problems, to be signposted to appropriate services. [CJ80]

133. The Bar agrees with this recommendation.

- The current High Court Guidance to Personal Litigants to be redrafted in a format and language that are more readily understood by PLs. A similar document should be provided for the county court. [CJ81]

134. The Bar has no issue with the NICTS redrafting the current High Court Guidance to Personal Litigants and developing a similar document for the County Court. The NICTS publication from 2014 which is currently available online entitled 'A guide to proceedings in the High Court for people without a legal representative' is over 40 pages long which some personal litigants find difficult to understand and intimidating. However, we would query the potential cost associated with developing any new guides and whether the voluntary sector might have a role in this.

- A move away from the conventional printed fact sheets provided by NICTS and a more interactive approach to be adopted. [CJ82]

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135. The adoption of a "*more interactive approach*" will be a matter for the NICTS to action. It is vital that members of the public have easy access to helpful and practical information in civil cases. We consider that the most appropriate way in which the NICTS could action this recommendation would be to invest in improvements to its website in order to assist court users.

- The civil courts in Northern Ireland to have powers similar to those in England and Wales in relation to civil restraint orders. [CJ83]

136. The Bar has no difficulty in principle with the suggestion of developing the available sanctions in Northern Ireland against a litigant who makes multiple applications to the court that are "*totally without merit*". We would expect to be consulted further on any rule changes to allow for civil restraint orders should this recommendation be taken forward.

- The abatement of court fees for all litigants to be reconsidered at least on the basis that fees for appeals be not waived. [CJ84]

137. The Bar agrees that the abatement of court fees for any litigant, whether represented or not, should be reconsidered with a view to abolition in civil proceedings (with the exception of family cases) and a modest charge being imposed for each proceeding issued. We concur with the comments at paragraph 12.80 that the current abatement system encourages vexatious litigation and is potentially discriminatory of represented litigants in similar financial circumstances to personal litigants. The Bar acknowledges the comments at paragraph 12.83 that it might prove challenging to enact legislation to secure such a change. Consequently, we are content with the suggestion that appeals should be subjected to an abolition of waiver of fees at the very least.

- Steps to be taken by NICTS to publicise the availability of pro bono assistance and alternative remedies for resolution of disputes, including mediation or negotiation. [CJ85]

138. This recommendation is a matter for the NICTS to consider taking forward. However, we would request further information on how exactly it is envisaged that greater publicity might be sought and any costs associated with this.

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- A panel of court appointed mediators to be drawn up to assist where PLs are involved. [CJ86]

139. The Bar has a number of concerns in relation to this recommendation. We would request research or evidence to demonstrate that such an approach is effective in resolving disputes involving personal litigants. There is also a question around the feasibility of establishing such a service in the courts in Northern Ireland given the financial implications. The costs associated with mediation are not insignificant and it seems unlikely that a personal litigant would be in a position pay for this if they cannot afford legal representation. It would be entirely unfair for a represented party to be expected to meet this cost alone. We would query whether the report's solution to this issue at paragraph 12.65 that "*pro bono mediators would provide this service*" is in any way a realistic prospect.

140. Furthermore, at present mediation is a largely unregulated industry in Northern Ireland and the suggestion at paragraph 12.65 that court appointed mediators would "*not be limited to professionally qualified lawyers… other disciplines whose experience is germane to a particular issue could be used*". We would query whether it is envisaged that any particular qualifications and training would be required in order to be appointed to this panel.

- Both the Bar and the Law Society to draw up a joint protocol governing the approach to be adopted to personal litigants, ensuring that best practice for working with lay people is provided consistently. [CJ87]

141. The Bar is content to work in partnership with the Law Society to draw up a joint protocol governing the approach to be adopted to personal litigants. However, we note the suggestion at paragraph 12.51 that the Law Society and the Bar should pursue the idea of jointly agreeing to provide a pro bono service "*similar to that afforded by many legal firms in London*". This suggests the introduction of an appointment system organised by the court offices, involving two afternoons per week in the local courts to assist with the preparation of cases for personal litigants. The Bar does not agree that such an approach is appropriate given that we already operate a dedicated Pro Bono Unit.

- Implementation in Northern Ireland of the equivalent to s. 194 of The Legal Services Act 2007 permitting pro bono cost orders to be made where a client represented pro bono wins their case. [CJ88]

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142. The Bar welcomes this recommendation. As chapter 12 highlights, our Pro Bono Unit has been established to provide free legal advice and representation in deserving cases for those who cannot afford the legal help which they need, and who cannot obtain assistance from any other source. We welcome the report's proposal to allow for pro bono costs orders to be made in Northern Ireland and this is something which we would be keen to engage with the Department on taking forward.

- Court staff, lawyers and judges to receive regular training for dealing with problems with PLs. NICTS to consider training and delegating one staff member in each civil court office to deal with such issues. [CJ89]

143. The Bar would be content to discuss any issue identified as a training need that can be delivered within the current training programmes of our specialist Bar Associations. However, we would query the considerable financial outlay associated with this recommendation and whether any money allocated to this might be better spent elsewhere. We are concerned that this approach appears to focus on treating the problem of personal litigants rather than properly resolving it.

- The results of the current research being undertaken in Northern Ireland on PLs to be specifically considered by the Civil Justice Council and further recommendations made. [CJ90]

144. The Bar acknowledges that the proposed Civil Justice Council would be ideally placed to consider the research conducted by the Human Rights Commission and Ulster University Law School in due course. However, we do have some concerns around the research as outlined in paragraph 12.32 of the report with reference to the running of a legal clinic providing signposting and process advice on how the courts work. The proposed Civil Justice Council would need to carefully scrutinise the running cost of any clinic and ascertain where funding would be obtained for it. Whilst we understand that this project will not include representation for these individuals within the courts, there are concerns within the Bar that over time this will become an alternative route for personal litigants to obtain legal advice which neither addresses difficulties around access to legal aid nor benefits the legal professions.

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Chapter 13: McKenzie Friends

- The principles underlying the right to reasonable assistance, the conduct of litigation and the grant of rights of audience to remain unchanged. [CJ91]

- These principles and the appropriate procedure to be codified in an amendment to court rules. [CJ92]

145. The Bar is content that the principles underlying the right to reasonable assistance, the conduct of litigation and the grant of rights of audience should remain unchanged. We have no difficulty with the principles and procedures governing McKenzie Friends being codified in an amendment to court rules. We welcome the report's recognition at paragraph 13.17 that the view contained in the Access to Justice 2 Review is inappropriate given that it conflates the reasonable assistance role with that of a lay advocate.

146. The Review called for a "*more flexible approach to their discretion to authorise a McKenzie Friend*" and the recommendation that "*the Court's powers should be liberalised*". The clarification at 13.18 that there is "*no discretion in relation to reasonable assistance*" is also welcome as this highlights that this is the right of a personal litigant. This distinguishes the different considerations at play in considering the grant of the right of audience or the right to conduct litigation which are the preserve of properly qualified, regulated and insured professionals.

- A Code of Conduct for McKenzie friends to be drawn up. [CJ93]

147. Whilst it is important that personal litigants are provided with the necessary information to understand the scope and limits of the role of a McKenzie Friend, we have concerns that the development of a Code of Conduct is a step on the road to McKenzie Friends seeking to portray themselves as part of a regulated profession. We would query whether it is necessary to do more than highlight that a McKenzie Friend must comply with the Court's rules and procedure in the same way as if this individual were the litigant. Alternatively a Practice Direction could be developed to address this which thereby preserving the flexibility to make necessary changes where appropriate.

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- McKenzie Friends to be required to complete standard form notices in the case of reasonable assistance, including acknowledgement of not having received remuneration for services, confidentiality and agreement to a Code of Conduct. [CJ94]

148. The Bar agrees that the provision of a standard form notice would help to ensure that a standard approach is adopted across the civil courts towards McKenzie Friends. It might also be beneficial to require both the McKenzie Friend and the personal litigant to sign and verify this form to ensure that sufficient information is provided to the parties involved and the court. This could help to reduce any confusion and uncertainty around the scope and restrictions to the role of a McKenzie Friend. See our response to recommendation CJ93 in relation to a Code of Conduct.

- An application for rights of audience or the right to conduct litigation to be made formally to the court and supported by evidence. [CJ95]

149. The Bar takes the view that if rights of audience or the right to conduct litigation are sought then an application must be made formally to the court and supported by evidence of exceptional circumstances. However, such applications should not be entertained by the court on a regular basis. We also believe that the terms "*right to conduct litigation*" and "*rights of audience*" are rather arcane given that they will have to be understood by non-lawyers. Some consideration might be given to the development of guidance on the meaning of these expressions, potentially within a Practice Direction.

- The 2014 Practice Direction to be altered and a prohibition on remuneration of/payment of fees to McKenzie Friends, regardless of the extent of the role being played, save for the payment of necessary expenses such as travel costs. [CJ96]

150. The Bar welcomes the recommendation for a prohibition on remuneration of payment of fees to McKenzie Friends regardless of the extent of the role being played. We would highlight the concerning trends which have emerged in England and Wales around the risks that unqualified, unregulated and uninsured McKenzie Friends pose to the administration of justice. A 2015 report from the House of Commons Justice Committee entitled 1mpact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012' stated: *"We are concerned that encouraging the use of McKenzie friends*

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may in some circumstances amount to a counsel of despair: individuals who cannot afford properly regulated legal advice and feel unable to adequately put their own case could find themselves disadvantaged if relying inappropriately on people without legal qualifications".[14]

151. The Ministry of Justice commissioned research contained in the Trinder Report in 2014 also highlighted no desire to *"advocate more widespread use of paid McKenzie Friends acting as quasi-legal advisors without qualifications, regulation or insurance".*[15] The Bar notes that the judiciary in England recently took steps in this area by launching a consultation in February 2016.[16] We welcome the report's conclusion that Northern Ireland should also seek to follow this example by taking steps to prohibit the remuneration of McKenzie Friends.

- The nomenclature of the McKenzie Friend to remain unchanged. [CJ97]

152. The Bar accepts this recommendation.

Chapter 14: Disability in the Civil Courts

- Prescribed forms in civil and family proceedings to be used to identify if a party to proceedings requires adjustments to be made to facilitate their participation in proceedings and attendance at court. [CJ98]
- The Department of Justice (DoJ) and the Northern Ireland Courts & Tribunals Service (NICTS) to develop systems to capture information on the number of disabled persons in the justice system to inform policy development and support best practice. [CJ99]

[14] House of Commons Justice Committee, *'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012'* (published 04 March 2015) at http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf (last accessed 18 November 2016)

[15] Ministry of Justice: Trinder L, Hunter R, Hitchings E, Miles J, Moorhead R, Smith L, Sefton M, Hinchly V, Bader K and Pearce J, *'Litigants in Person in Private Family Law Cases'*, (published 2014) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf (last accessed 18 November 2016)

[16] Lord Chief Justice of England and Wales, *'Reforming the courts' approach to McKenzie Friends: A Consultation'* (February 2016) at https://www.judiciary.gov.uk/wp-content/uploads/2016/02/mf-consultation-paper-feb2016-1.pdf (last accessed 18 November 2016)

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- NICTS to take immediate steps to complete the programme of DDA works to the Royal Courts of Justice and also carry out a disability access audit at Laganside Courts and any other court locations not previously included in the disability access audit. [CJ100]

153. These recommendations are not applicable to the Bar.

- NICTS and DoJ to carry out a comprehensive review of web-based information and guidance to identify and implement all changes necessary to ensure full compliance with accessibility guidelines/standards. [CJ101]

154. Whilst this is a matter for the NICTS and DOJ to action, the Bar would welcome any improvements to the provision of web-based guidance to ensure compliance with accessibility guidelines.

- NICTS to upgrade its website to include links to various disability support organisations. The Northern Ireland Law Commission recommendations to be adopted and the relevant department(s) to expedite implementation of the Civil Evidence Bill. [CJ102]
- The use of intermediaries to be extended to support those with communication difficulties in the civil and family courts. [CJ103]

155. The Bar notes the report of the Northern Ireland Law Commission published in 2011 entitled '*Vulnerable Witnesses in Civil Proceedings*'. We have no difficulty with the implementation of the recommendations outlined at paragraphs 14.35 and 14.36, including special measures such as the use of intermediaries for those with communication difficulties in the civil and family courts. However, the swift implementation of these measures under a Civil Evidence Bill would be subject to the Department's legislative timetable for this mandate.

- The principles set out in Galo v Bombardier to be applied in all cases involving those with a disability. [CJ104]

156. The Bar accepts this recommendation, including the invocation of an early "*ground rules hearing*" to ensure that the court proceedings are tailored to the disability in question.

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- Closer liaison voluntary support organisations in the provision of training to judges, the legal profession and all frontline staff who are dealing with physically disabled and hearing and visually impaired people attending court. [CJ105]

157. The Bar would welcome the opportunity to liaise with voluntary support organisations in relation to the provision of training for counsel. Our specialist Bar Associations deliver a range of training to practitioners working in the civil courts and could work in partnership with these organisations to develop a relevant programme of work in due course.

- NICTS to consider hosting the Royal College of Speech and Language Therapies "My Journey My Voice" Exhibition at a public event organised by NICTS to promote and heighten awareness of communication difficulties. [CJ106]

158. This recommendation is not applicable to the Bar.

- The Law Society to arrange training for solicitors in physical disability, hearing and visual awareness problems and that a list of solicitors who have undergone such training be made available so that those who are physically, hearing and/or visually impaired can make an informed choice regarding legal representation. [CJ107]

159. This recommendation is not applicable to the Bar.

- NICTS to liaise with professional technical officers in RNIB, SENSE and RNID when considering technology requirements to support visually impaired and deaf persons to participate fully in court proceedings. [CJ108]

160. This recommendation is not applicable to the Bar.

- Judicial Studies Board, Bar Council, Law Society and NICTS to have readily and easily available for consultation relevant literature on the disabled. [CJ109]

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161. The Bar is content to accept this recommendation. It is worth noting the value which counsel derive from their membership of the Bar of Northern Ireland in being able to access the latest research, literature, legislation and legal journals through the Library and Information Service. If this recommendation is pursued then our library is well placed to collate relevant literature on the disabled for consultation by practitioners.

- The Bar Council and Law Society to follow example of the judiciary and appoint a member in charge of disability issues. [CJ110]

162. The Bar accepts this recommendation and would welcome the opportunity to explore it further.

Chapter 15: Court of Appeal

- Leave to appeal to be required in every appeal to the Court of Appeal. [CJ111]
- Application for leave to appeal to be made in writing and determined by a single judge. The decision may be to grant leave on some or all grounds or to refuse leave. [CJ112]
- A party who has been refused leave to appeal by a single judge on a written application to be able to proceed to an oral hearing before a single judge for leave to appeal. [CJ113]
- There to be no right of appeal against a grant or refusal of leave by the single Judge. [CJ114]

163. The Bar has no difficulty in principle with the suggestion in recommendation CJ111 to help ensure that there is greater scrutiny of the appeals which enter the lists for hearing in the Court of Appeal. We are also content to accept recommendation CJ112 under which an application for leave to appeal should be made in writing and determined by a single judge with the decision either to grant leave on some or all grounds or to refuse leave. We also believe that a party who has refused leave on a written application should be able to proceed to an oral hearing before a single judge for leave to appeal as outlined in recommendation CJ113. The suggestion that there should be no right of appeal against a grant or refusal of leave by a single Judge presents no issue for the Bar given that adequate safeguards are in place throughout the process.

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- The higher threshold adopted for Upper Tribunal appeals to extend to all second appeals and to all tribunal appeals to the Court of Appeal. [CJ115]

- If CJ115 is not implemented as a universal threshold based on that presently applied to Upper Tribunal appeals, the Order 60B alternative to Case Stated to be available for all appeals from tribunals and the magistrates' court and county court on points of law to the Court of Appeal. [CJ116]

164. The Bar has no particular issue with these recommendations.

- Appeals from the High Court on interlocutory matters as well as substantive appeals by way of "re-hearing" not only to require leave in all cases under the leave to appeal process outlined above but there to be a raised threshold for appeal to "a real prospect of success" or "some other compelling reason" for the Court of Appeal to hear the appeal. [CJ117]

165. The Bar has no difficulty with this recommendation in principle.

- Applications to appeal out of time to be in writing before a single judge determining the application for leave to appeal with the same right to an oral hearing before a single judge in the event of refusal. Cases where the appeal otherwise appears to have merit and matters turns on delay should be permitted access to the full court for a determination. [CJ118]

- Where the single judge finds that there are no grounds to extend time but leave would otherwise be granted, the application should proceed to the full court. [CJ119]

166. The Bar has no difficulty with these recommendations given that the principle of fairness is preserved by allowing applications with merit to proceed to the full court when necessary.

- There to be a system of early case management hearings by a single judge of all cases where leave has been granted. [CJ120]

- Time slots to be allocated for case management hearings at which all parties attend. Directions will be issued by the single judge as to the conduct of the appeal. The same single judge should, as far as is practicable, engage in the case management of any particular case. [CJ121]

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- The single judge to fix not only the time allotted to the hearing of the appeal but also the periods within the allotted time that each party has to make submissions and replies so that a hearing timetable is produced in every case. Case management hearings involving personal litigants to be given longer time slots and more case management hearings. [CJ122]

167. The Bar has no objection to the concept of early case management by a single judge of all cases where leave has been granted. We would welcome the opportunity to further explore the potential use of time slots and hearing timetables in the Court of Appeal.

- The prospects of mediation to be a consideration on any leave being granted to appeal. [CJ123]

168. The Bar has no difficulty with the prospects of mediation to be considered on any leave being granted to appeal. We note the mention of the successfully mediated outcome at the appeal stage of the dispute in respect of the Department's proposed cuts to remuneration for legal representatives under the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015 at paragraph 15.47. However, the opportunities for mediation at the appeal stage may be limited given that is likely to have been considered at first instance in most cases. The outcome of this may have been that mediation was rejected as unsuitable or alternatively was unsuccessful. Consequently, there may be cases in which mediation offers the potential to advance matters but this is likely to be limited to a very small number.

- The identity of the necessary documents relied on by all parties and the collation of all those documents to be an essential task in the case management process. [CJ124]

169. The Bar has no difficulty with this being part of the case management process.

- A practice direction to spell out that non-compliance with directions by a party or by solicitors may result in costs being ordered against the party in default or against the solicitor if the fault lies on their part or of their counsel or of their expert witnesses. Default costs may be required to be paid within a stated time in advance of the substantive hearing and confirmed by receipt from the receiving solicitor. [CJ125]

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170. The Bar has no difficulty with the recommendation in principle for costs sanctions for non-compliance with directions. However, we would require more detailed information on how this might operate in practice given the mention at paragraph 15.50 that this might "*involve a calculation of the court costs wasted*". We believe that it could be difficult in some cases to conclude whether a party, solicitor, counsel or expert witness is responsible for the non-compliance and therefore this could lead to disputes around costs and delay. The Bar would welcome the opportunity to contribute to any consultation on the drafting of a Practice Direction if any element of this recommendation is taken forward.

- Removal of the protection of the legally aided party responsible for wasted costs. [CJ126]
- Extension of personal liability for wasted costs to counsel. [CJ127]
- Extension of the penalty in costs where oral evidence was not reasonably necessary under Order 64 Rule 10A to those cases where it was not reasonably necessary to give any evidence orally. [CJ128]

171. The Bar would query the evidence base for these recommendations. We would specifically request information on the number of wasted costs orders that have been made against solicitors under Order 62 Rule 11 of the Rules of the Court of Judicature (Northern Ireland) 1980 in order to demonstrate that further reform is necessary in this area through the extension of personal liability to counsel. We would also question whether recommendation CJ128 is necessary given that oral evidence seldom takes places in the Court of Appeal. In addition, we believe that the references at paragraph 15.51 to Order 64 on costs should instead read Order 62 of the Rules.

- A Practice Direction to state that the single judge may consider the costs that have been incurred in the dispute and the costs that are likely to be incurred on any appeal in making case management decisions and for that purpose may require the parties to furnish such costs or estimated costs. [CJ129]

172. The Bar would query whether it is necessary for the development of a Practice Direction to empower a judge to consider the costs that have been incurred in the dispute and the costs that are likely to be incurred on any appeal in making case management decisions. We would request evidence to show that that costs are currently presenting an issue in the Court of Appeal.

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- Applications for leave to appeal to the UK Supreme Court (UKSC) to be made in writing and the grant or refusal of leave be made by the issue of an order, with the Court of Appeal convening an oral hearing only where it is considered necessary to do so. [CJ130]

- The grant of leave to appeal to the UKSC to be granted where the application, in the opinion of the Appeal Panel, raises an arguable point of law of general public importance which ought to be considered by the UKSC Court at that time. [CJ131]

173. The Bar has no difficulty with these recommendations in relation to applications for leave to appeal to the UK Supreme Court. We would welcome the opportunity to contribute to the development of a Practice Direction reflecting the content of recommendation CJ131 if this approach is to be taken forward.

- A Lord Justice to be given overall management of all the areas of civil work. That Lord Justice shall serve on the Civil Justice Council. [CJ132]

174. This recommendation is not applicable to the Bar.

- Development of the process of electronic service of all documentation. [CJ133]

175. Whilst this recommendation will be for the NICTS to implement, the Bar has no difficulty with a move towards the electronic service of all documentation in the Court of Appeal. We note that there is already provision for electronic service of skeleton arguments and authorities therefore the extension of this to other forms of documentation in the Court of Appeal is acceptable subject to the continuation of hard copy core bundles.

Chapter 16: The County Court, District Courts and Small Claims Court

- Not less than three Civil (and Family) Centres to be set up given over exclusively to the hearing of civil bill and equity cases provided sufficient judges are made available. [CJ134]

- Not fewer than five county court judges to be assigned for three year periods to deal exclusively with civil and equity matters in these Centres. [CJ135]

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- Provided CJ134 and CJ135 are implemented, the county court civil jurisdiction to be raised to £75,000, subject to CJ137 below. [CJ136]

176. The Bar is open to the creation of three Civil (and Family) Centres across Northern Ireland in considering recommendations CJ134 and CJ135 from a civil perspective. We note the recognition of problems in relation to mixed lists of criminal, family and civil cases at paragraph 16.38; practitioners have expressed significant concern about the priority assigned to civil cases given that they are often not reached or adjourned for several weeks, particularly in the County Courts outside Belfast. A further issue has been expressed by members in relation to the unsuitability of civil clients being "fitted in" between other matters. One example of this involves minor's settlements being dealt with between criminal arraignments, pleas, sentencing and other short matters. The creation of Civil (and Family) centres could help to address these listing problems. However, we are mindful that this may not work as well for family practitioners given the concerns outlined in response to the Preliminary Family Justice Report.

177. Detailed further consideration would need to be given to the location of these centres in order to ensure access to justice if this recommendation is to be taken forward. Court users across the civil and family justice system must not be disadvantaged because they live in rural areas or cannot easily access public transport. These new centres would also require significant investment from the NICTS and we would query the likelihood of the implementation of this recommendation given the current financial climate.

178. Furthermore, the Bar acknowledges the recommendation of a "*civil cadre*" of five/six judges at paragraph 16.46. The report suggests that three judges would be permanently based in Belfast whilst the other judges "*would ideally sit in two/three judge venues dealing with business in a fortnightly pattern in three outlying centres*". Further consideration would need to be given to the allocation of these judges across the three Civil (and Family) centres based on evidence showing the number of cases arising in certain areas. However, we are content that this recommendation could be beneficial in addressing the current problem of mixed lists and the perception that civil matters are being demoted below other elements of County Court work as a priority.

179. The Bar takes the view that the suggested increase of the County Court civil jurisdiction to £75,000, effectively representing a rise of 150 per cent, is wholly unrealistic. The recent change to implement the £30,000 limit under the County

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Courts (Financial Limits) Order (Northern Ireland) 2013 is still bedding in and has made significant changes to the profiles of cases passing through the system. It is worth highlighting that one of the recognised benefits of the County Court is the straightforward and uncomplicated procedure employed; it is easily accessible, inexpensive and does not require detailed pleadings. This system is specifically designed to deal with smaller value proceedings and cannot presently accommodate lengthy cases, complex pleadings and the use of expert evidence.

180. Consequently, we believe that any increase to the jurisdiction should not even be contemplated without a guarantee of the reforms outlined in CJ134 and CJ135 being provided first which will require significant investment and structural changes to facilitate more complex County Court hearings. This would also necessitate a specific effort to address adequate provision for the increased duration of trials, the approach to pleading and the greater usage of expert evidence before the County Court.

181. Furthermore, we consider that it would be beneficial to undertake a statistical analysis in relation to how the County Court is functioning under its current workload in order to assist in determining the additional pressure which an increase in jurisdiction would place on the system. This work could be used to demonstrate trends in personal injury claims and the variance in the level of damages awarded between the High Court and County Court. The Bar takes the view that damages awarded should remain consistent across the court tiers and we are concerned that there is the potential for a diminution in the damages awarded in the County Court if the jurisdiction is increased to £75,000. Additional research exploring these matters is essential to demonstrate an adequate evidential basis for any steps being taken to raise the County Court civil jurisdiction.

182. The Bar would also make a wider point around the need to ascertain the impact of such a significant structural change on the public and consumers. Whilst we acknowledge that the implementation of recommendation CJ136 would impact on the work of the profession, it is vitally important that it is assessed in terms of any benefits or drawbacks which it could bring to the public. We consider that further work must be undertaken in order to clearly quantify the possible impacts which will ultimately be experienced by court users seeking access to justice; the potential for lower awards of damages and proceedings being delayed are just two pitfalls which the Bar believes require further exploration in the context of the County Court. Restraints placed on the legal aid fund have already had a negative effect in terms of access to the civil courts and it is vital

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that the review is mindful of the need to ensure that the proposed recommendations do not result in any further damaging impacts for the public.

- The county court jurisdiction not to include defamation cases over the value of £10,000, judicial review cases, most clinical negligence cases and other cases which are certified by the county court judge or Master of the High Court as of particular importance or of exceptional complexity. [CJ137]

183. The Bar acknowledges that if recommendation CJ136 is to be pursued then the County Court jurisdiction should not include defamation cases over the value of £10,000, judicial review cases, clinical negligence cases and other cases which are certified by the County Court judge or Master of the High Court as being of particular importance or of exceptional complexity. It is likely that cases of a high value or multi-party actions would fall within this too.

- A radical uplift in the level of the equity jurisdiction. [CJ138]

184. The Bar notes the comments at paragraph 16.25 on the number of equity cases being lodged in the County Court with 404 remaining outstanding as of December 2015. The level of equity business disposed of in the County Court is described as being "*disappointingly low*" at 16.27. The experience of the profession has been that it is often difficult to obtain adequate time to allow for equity matters to be dealt with in the County Court with particular problems in obtaining a special day or consecutive days in which cases can be heard. This problem only becomes more apparent in cases involving more complicated equity matters which are instead more likely to be dealt with in the Chancery Division, particularly in relation to land disputes.

185. These issues could certainly be alleviated by the allocation of specialised judicial resources to manage equity business consistently across the court divisions. However, the Bar remains to be convinced as to the need for a "*radical*" uplift in the level of the equity jurisdiction as we do not believe that this will provide a solution to the low disposal rate in the County Court. The focus should instead be on securing the extra judicial resources mentioned in paragraph 16.55 before consideration is given to increasing the jurisdiction otherwise there is a danger that the delays will be exacerbated with more cases being added to list of those remaining outstanding.

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- The power of removal from the county court and district court to the High Court to be vested in county court and district judges. Remittal from the High Court to remain with the Master. Appeals on these matters to be paper exercises before a High Court Judge with a discretion to order an oral hearing on request. [CJ139]

186. The Bar does not believe that any issue exists with the present system in this area. Practitioners have not indicated that there is any particular problem with a disproportionate number of cases being litigated in the High Court or the system being overburdened with incorrect allocations. Practitioners have indicated that the review system of both the Queen's Bench Master and Commercial Master already assist effectively in preventing certain cases being placed in the wrong jurisdiction.

187. We note the recommendation for the power of removal from the County Court and District Court to the High Court to be vested in County Court and District judges. Whilst such a system could be plausible, questions remain as to whether the evidence exists to show it is necessary at the present time. In addition, appeals from decisions by the Master are generally issued within seven days and heard within a matter of weeks at present. Therefore we would query whether the new appeal process outlined at paragraph 16.52 with a paper exercise before a High Court Judge and possible oral hearing for both remittal and removal actions could result in delays.

- Power to order relief under The Administration of Justice Acts 1970 and 1974 to be extended to county court judges. [CJ140]

188. The Bar notes the comments contained in paragraph 16.53 and the associated recommendation for a "*radical increase*" in the County Court's financial jurisdiction in equity matters. We have already queried the rationale for this in response to recommendation CJ138 given that it seems unlikely that this will provide a solution to the low disposal rate in the County Court. In addition, we are unclear as to the need for the proposal that "*relief under The Administration of Justice Acts 1970 and 1974 should not be exercisable by a judge or Master sitting in the High Court but should be extended to county court judges*". Further clarification on this would be welcome.

- Defendants to be required to answer a questionnaire setting out the defence before the Certificate of Readiness is granted. [CJ141]

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189. Practitioners have indicated that in the County Court at present it is a common occurrence that a plaintiff's solicitors do not receive a Notice for Particulars of Defence or the information provided is too vague, creating confusion in relation to the exact nature of a defence prior to the hearing of a case. We are content that the provision of a questionnaire in "*a simple form*" required under the pre-action protocol might go some way to addressing this issue but further consideration would need to be given to the design.

190. The Bar also notes the comment at paragraph 16.40 that the question of adequate Notice of Defences must be addressed if the jurisdiction of the County Court is to be increased. However, we believe that this matter should be addressed regardless of whether recommendation CJ136 is implemented. We would suggest that further consideration could be given to the provision of a pleaded document providing a statement of defence in these cases. A timeframe would also need to be attached to this in order to provide the clarity which is required for practitioners.

- The pre-action protocol to be amended as follows:
  - paragraph 4 to state that a letter of claim should "contain details of financial loss incurred, even where such details are necessarily provisional".
  - paragraph 9 to provide for the plaintiff to issue applications for pre-action disclosure where there is no reply from the defendant within 21 days. [CJ142]
  - paragraph 9 of the protocol to be amended so that "the plaintiff is entitled to proceed to issue court proceedings", paragraph 12 to provide that if the defendant denies liability or alleges contributory negligence, they must enclose with the letter of reply all (rather than the current wording of any) documents in their possession. [CJ143]
  - A requirement for a non-exhaustive list of disclosure documents be annexed to the protocol. Where such documents do not exist, the defendant should complete a form for standard disclosure. [CJ144]
  - paragraph 10 to be amended to state that: "The defendant's solicitor/insurer to have a maximum of 3 months from the date of acknowledgement of the letter of claim to investigate without leave of the court for an extension in exceptional circumstances." [CJ145]

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- The defendant's insurer/solicitors to reply within three months stating whether liability is admitted, addressing causation and The Limitation Act 1980 if relevant. If liability is denied, the defendant's solicitor/insurers to state with clarity the defendant's case. [CJ146]
- Insertion of an objective to include the promotion of rehabilitation treatment for best litigation practice. [CJ147]

191. The Bar has no difficulty with these particular amendments to the pre-action protocol for personal injury litigation. The Personal Injury Bar Association would welcome the opportunity to comment further on these changes as part of a consultation process should this recommendation be taken forward.

- Greater use to be made of online technology, email or telephone conferences for straightforward reviews, adjournment applications and date fixing subject to the right of the judge to direct or the parties to request an oral hearing where appropriate. [CJ148]

192. The Bar accepts that there is a greater role for online technology and email being further integrated into the court process for straightforward reviews, adjournments applications and date fixing. Practitioners indicate that parties already often engage in telephone and email discussions to seek an agreed way forward wherever possible. We believe that even greater use of this modern technology in the circumstances outlined could help to improve efficiency and further reduce the waiting times experienced by practitioners and parties at court for short hearings. Consequently, the Bar has no difficulty with this recommendation subject to the right of parties to request an oral hearing or the judge to direct such a hearing when appropriate.

- A single tier of 'civil judges' of the county court exercising the full civil jurisdiction of the county court. [CJ149]
- If CJ149 above is not implemented, an increase to the district judge's jurisdiction to £25,000. [CJ150]
- An increase in the small claims court jurisdiction to £5,000, with personal injury and road traffic cases excluded. [CJ151]

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193. The Bar does not agree with the creation of a single tier of 'civil judges' in the County Court to include District Judges who also sit as Deputy County Court Judges. This recommendation presupposes that the County Court jurisdiction will increase to £75,000 which the Bar does not accept. Consequently, we also do not agree with a pro rata increase to the District Judge's jurisdiction to £25,000. Practitioners indicate that the present limit of £10,000 implemented in 2013 operates reasonably well and therefore we would query the necessity for any change. We are concerned by the report's conclusion at paragraph 16.68 that an increase is "*logical*" simply because an increase is proposed in the County Court given that no evidence is presented in support of this recommendation.

194. We believe that the tiers of the judiciary are just as important as the existing court tiers. There is no pressing need identified in the report to warrant this jurisdictional increase alongside a change to the roles and responsibilities for District Court Judges.

195. Paragraph 16.69 also identifies that this may also require a salary change which seems unnecessary given that no issues have been pointed out under the current system. This idea of a single tier of 'civil judges' will only create a confusing structure with judges holding varying levels of power which the report even acknowledges by highlighting that the role of District Judges in this would still remain "*wholly distinct*" from County Court Judges. We believe that this should instead be dealt with by way of specialised judicial resources dedicated to dealing with civil matters in the County Court.

196. In addition, the Bar notes the recommendation for an increase in the jurisdiction of the Small Claims Court to £5,000. We are concerned that such an increase in the financial jurisdiction may result in more lawyers being instructed for the 'non–consumer' party, risking inequality of arms for those consumers who are not legally represented. We believe that more research and evidence to support an increase is required which the report even acknowledges at paragraph 16.71 before going on to explicitly link the change to the voluntary pilot scheme for online dispute resolution for money damages cases under £5,000 as proposed in chapter 4. Our difficulties around the proposed pilot project have already been well documented earlier in this response. Whilst the Bar welcomes the recommended exclusion of personal injury and road traffic cases from any increased jurisdiction in the Small Claims Court, we remain concerned by the lack of an evidence base for this proposal.

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Chapter 17: A Business Hub for Chancery, Commercial and Judicial Review

- A new business hub comprising suitable cases in the Commercial, Chancery and Judicial Review courts to be set up, serviced by four or five designated High Court Judges with a senior judge having overall responsibility for listing and designation. [CJ152]

- Such claims to be allocated to a designated judge at the time of the first CMC or earlier if necessary. [CJ153]

197. The Bar welcomes the recommendation for the creation of a business hub comprising suitable cases in the Commercial, Chancery and Judicial Review Courts. It is vital that such a hub is properly resourced and the idea that this should be serviced by four or five designated judges must be adopted if this recommendation is to be pursued. We believe that the proposed flexible approach to this hub will allow for judges to take over cases from any of these three business areas where appropriate. It will also be important that relevant cases are identified early and assigned to a designated judge at the time of a first case management hearing or before if possible as highlighted in recommendation CJ153.

198. We note the possible new approaches within the business hub, including the references to Shorter Trial Scheme and the Flexible Trial Scheme pilot schemes in operation in the Rolls Building in London at 17.12. Whilst the details provided around these two schemes are informative, we believe that further research and consultation would be required in order to identify the most appropriate efficiency measures for Northern Ireland. Paragraph 17.26 highlights the views of a former very experienced Commercial Judge in NI around the potential for a scheme to fast track or prioritise cases within the hub "*in a manner and with a speed far in excess of even the English STC*". Further exploration around the opportunities to develop such a scheme would be required, particularly in relation to how this might assist the business community whilst preserving the administration of justice.

199. The Bar believes that such a hub has the potential to help to allow for the more timely, efficient and cost saving disposal of cases. However, we would caution that this model appears to presuppose an increase in the jurisdiction of the County Court at 17.5 which the Bar addressed in response to Chapter 16. It also assumes that there will be an unspecified increase in the County Court equity jurisdiction at paragraph 17.8. Both of these reforms are intended to ultimately "*free up*" Queen's Bench and Chancery judges to deal with cases in the hub.

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Instead a more appropriate approach would involve the appointment of additional judicial resources dedicated to working in this hub.

- Judicial Review cases in appropriate instances to be assigned to specialist judges. [CJ154]

200. The Bar accepts that it is appropriate for judicial review cases to be appointed to specialist judges. The comments at paragraph 17.7 highlight the intention to lighten the "*current over burdensome load*" on the Judicial Review Judge. The potential that exists to widen the breadth of experience and expertise across the whole concept of judicial review could also be useful in this area. We note the comments at paragraph 17.6 around the potential assignment of judicial review cases both within and beyond the business hub. We would welcome such an approach and believe there is the potential for it to be readily implemented.

- A Practice Direction to be drawn up by the Commercial, Chancery and Judicial Review Judges outlining, in a simple procedure, that:
  - Priority will be given to exceptional cases which are prepared to adhere to limited disclosure, pleadings, interlocutories, etc. with the aim of full disposal within days or at most weeks of the issue of proceedings.
  - Special measures will be adopted for cases calculated to last over five days to reduce where possible the hearing time. [CJ155]

201. The Bar is very much in favour of the efficient disposal of cases. However, this alone cannot be the object of the business hub given the need to ensure the administration of justice. Therefore we are concerned by the suggestion that priority should be given to cases prepared to adhere to limited disclosure with the aim of disposal within days or weeks. Practitioners have indicated that an established provision already exists under Order 29 of The Rules of the Court of Judicature (NI) 1980 to allow for the court to order an early trial in appropriate cases.

202. We also observe that at present it is often challenging to secure a slot for a case likely to last for a hearing time of five days therefore we would request further information on the special measures envisaged under the second strand of this recommendation. The Bar would welcome the opportunity to contribute

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further to a consultation on any proposed Practice Direction in the event of the business hub concept be implemented.

Chapter 18: The Chancery Court

- The county court to have a designated equity judge to manage and hear all equity business in Northern Ireland. [CJ156]

203. The Bar recognises the issue which this recommendation is aimed at addressing. Practitioners report significant difficulties in progressing equity cases through the County Court and often choose to take forward in the Chancery Court. There is a need to improve the disposal rate and manage the current backlog. There are a number of contributing factors such as mixed lists, reluctance to hear equity cases and the additional court time required for equity cases. We would query whether there is a sufficient caseload for a designated judge and would suggest that a return to the previous practice of 'equity days' may be a sufficient remedy.

- Power to be given to refer matters of disputed valuation to Lands Tribunal, and Lands Tribunal to be given the necessary jurisdiction to determine such references. [CJ157]

204. The Bar would highlight that the Lands Tribunal has certain statutory jurisdiction at present to facilitate this recommendation. However, practitioners would not recommend this course of action as it duplicates the process presently operated in the Chancery Court.

- The Master to be given power to hear applications for delivery of a solicitor's file where there are no points of legal principle (a role similar to rule 4.1(m) of the Civil Procedures Rules which empowers the court 'to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective'). [CJ158]

205. This represents a commonly understood solution. The Bar is content to accept this recommendation, assuming that the only outstanding issue is cost.

- The case management process to be streamlined to have one early, detailed review to manage all issues to trial of the action. [CJ159]

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206. We welcome attempts to streamline case management processes. Practitioners would highlight the effective operation of the Chancery Court and would question the need for such reform. Reviews in the Chancery Court are effective and not abused. Therefore, we would have reservations that one early review would be sufficient or acceptable. In many cases, all issues in an action do not present at an early stage. The present timings work well in affording both parties time to review their case before setting down and triggering a review.

- Courts to strongly encourage the merits of early resolution through mediation and early neutral evaluation. [CJ160]

207. The Bar would agree that early resolution is to be strongly encouraged and practitioners actively pursue a variety of alternatives to proceeding with a hearing. Mediation is accepted and can be effective in certain cases. However, practitioners would highlight the greater success of joint consultations between the parties in terms of securing a suitable outcome and a more efficient use of resources and costs.

- A process similar to Order 14A to be introduced for determination of points of law. [CJ161]

208. The Bar has already commented on a similar recommendation in response to CJ25.

- Discovery to be limited in cases where there is a limited factual dispute. [CJ162]

209. The Bar does not agree with the recommendation and believes it is important to better understand the underlying mischief, rather than introduce steps to limit such a fundamental obligation. Unnecessary paperwork must not be allowed to undermine and should remain distinct from proper disclosure. Often, there is a tendency to underestimate the value of discovery and in many cases, it is the basis of success in the case. Parties have wide existing powers to seek and resist discovery, including the ability to apply for restriction of discovery. With proper application of the current rules and consideration of available cost penalties, this should not represent such a difficulty as to warrant the proposed limitation.

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- Increased judicial management of the discovery process, to consider whether discovery should be limited to certain issues, or to ensure that discovery is in fact necessary. [CJ163]

210. Following on from our comments above, we do not believe there is a necessity for increased judicial management of discovery. The current rules make adequate provision for effective management by practitioners. Our reservation to this recommendation relates to the added burden placed upon the client in terms of costs, with added judicial management, there would be an increase in reviews and a subsequent increase in costs.

- A presumption that there be no general discovery in originating summons cases. [CJ164]

211. The Bar would contend that this is a statement of the law as it presently stands.

- Introduction in the Chancery Court of scale costs with four levels depending on complexity of claim, with scope for exceptionality. The case would be assigned to one of the four levels at the initial review, with scope for revision later, and scope for taxation within the bands and scope for taxation in exceptional cases. [CJ165]

212. The Bar is prepared to consider the introduction of scale costs within the High Court. However, it will be vitally important that any such scale is suitable for application across each distinct division. We do not believe the system as outlined with bands or judicial management is appropriate. Concerns in relation to such a proposed system and the involvement of the judiciary in the determination of costs relates to the current system in operation in England and Wales where costs litigation is now given priority before the substantive case has commenced.

- Increased use to be made of immediately measured and payable costs for interlocutory proceedings. [CJ166]

213. Whilst we can certainly see the merit of cost for interlocutory proceedings being immediately payable in long running cases, especially in respect of younger practitioners who are assisting in these matters, our concern relates to the

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potential for abuse. Such increased use could create a perverse incentive to run up significant cost on interlocutory, creating a funding of litigation issue and therefore, prevent a less financially resourced client from pursuing their case. By insisting on costs at every stage, there is a considerable risk of preventing the case from moving forward.

- If scales and bands are not implemented, the Court to consider the parties' costs estimates as part of case management, to ensure that directions concerning the scope of discovery, expert evidence and trial management are proportionate to the value of the case. [CJ167]

214. The Bar does not agree with this recommendation. We do not concur that costs should not be determined by the Judge with responsibility for managing and determining the case.

- The Office of the Lord Chief Justice to use Twitter to advise of judgments and to provide a synopsis and link to each judgment given to complement the existing practice of publishing judgments on line and providing judgment summaries in appropriate cases of public interest in the Chancery Division. [CJ168]

215. The Bar has no difficultly with this recommendation. We believe it will assist greatly with highlighting the very important issues which are handled by the Chancery Division and assist in improving openness and transparency across the court system.

Chapter 19: The Commercial Division

- Each case in the commercial list to be subject to:
  - An initial directions hearing shortly after entry into the List;
  - A case management conference after the completion of pleadings;
  - A pre-trial review around four weeks before hearing. [CJ169]

216. The Bar notes that this suggested structure of three main review hearings for cases entered into the commercial list is modelled on Order 67A in the Republic of Ireland. We have no difficulty with the idea of an initial directions hearing in principle. However, we would point out that once an action is accepted for inclusion in the Commercial List a list of directions is issued by the Commercial

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Judge dealing with a range of issues, including the timetabling of pleadings. We would query whether it is envisaged that this standard directions document will still be issued by the judge if an initial directions hearing is introduced shortly after entry into the list. Practitioners have highlighted that this list of directions is particularly useful and would query whether an initial directions hearing will replace this. We would welcome clarification around this point.

217. The Bar would query whether a case management conference is necessary after the completion of pleadings. We accept that this might be beneficial in terms of providing a judge with greater oversight of the case. However, we remain to be convinced of the necessity of bringing the parties together for this hearing given the cost that could be incurred in doing so. It is also likely that directions will need to be agreed in advance by the parties in order to maximise the opportunities presented by this conference and narrow the issues in dispute, particularly given the comment at paragraph 19.45 that these may be 30 minutes in length. In addition, the Commercial Judge already acts to progress the case management of litigation at regular intervals which helps to streamline actions and avoid unnecessary delay. Therefore we would query whether a case management conference will actually add to the process.

218. The Bar accepts the suggestion of a pre-trial review. The Commercial Judge already conducts a final review in most cases and therefore this move to formally build a substantive review into the process appears to be sensible. We welcome the clarification at paragraph 19.47 that this model does not prevent parties from making interlocutory applications or seeking a review if an issue arises at any stage.

219. Furthermore, the Bar would also suggest that another aspect could be built into this case three stage management process aimed at addressing costs which practitioners have indicated is an issue in the commercial division. A Practice Direction could be drafted to place a duty on legal representatives to advise the client of the costs associated with pursuing litigation in the court by the time of the case management conference stage if this recommendation is to be pursued in its current form. There is the potential that such a move could help to encourage parties towards settlement, negotiation or mediation which is to be welcomed in commercial disputes.

- A requirement for parties to exchange letters setting out their proposals/objections to mediation. [CJ170]

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220. The Bar notes that the pre-action protocol for commercial actions already makes provision for alternative dispute resolution. The pre-action meeting outlined in the protocol is a point at which the parties should consider whether some form of alternative dispute resolution would be more suitable than litigation. In addition, the protocol highlights that a pre action meeting shall be treated as 'without prejudice' save that a party attending may be required to disclose to the court when and where a meeting took place and the identity of those attending, the identity of any party who refused to attend and the grounds for refusal, the terms of any agreement between the parties and the consideration given to alternative dispute resolution. Meanwhile if a pre action meeting did not take place a party may be required to disclose to the court the reason a meeting did not take place.

221. The protocol highlights that a failure to comply may be taken into account by the court when considering the question of costs in any legal proceedings. However, we would query whether this area could be enhanced in the context of the ADR to encourage parties to consider mediation as a form of ADR in commercial disputes. Commercial cases between the value of £50,000 and £100,000 represent a particular area in which the value of mediation can be recognised as the costs involved in litigation tend to outweigh those in dispute.

222. In addition, recommendation CJ170 as it currently stands only requires the parties to exchange letters setting out their proposals or objections to mediation but there is nothing to address parties who unreasonably refuse it even for the purpose of narrowing the issues in a complex case. We would point to the courts in England which are increasingly highlighting that all proposals of alternative dispute resolution must be taken seriously by the parties or they may risk being penalised with costs sanctions. For example, in the cases of *Reid v Buckinghamshire Healthcare NHS Trust* [2015] EWHC B21 and *Bristow v The Princess Alexander Hospital NHS Trust and others* [2015] EWHC B22 (Costs) the judges held that costs sanctions for unreasonably refusing to mediate can apply equally to the unsuccessful party if that party unreasonably refuses to mediate.

223. The following extract from the Reid judgment serves as a warning to parties of the risks of refusing an offer to mediate: "*If the party unwilling to mediate is the losing party, the normal sanction is an order to pay the winner's costs on the indemnity basis, and that means that they will have to pay their opponent's cost, even if those costs are not proportionate to what was at stake. This penalty is imposed because a court wants to show its disapproval of their conduct*". Whilst these two cases involved medical negligence claims, we would

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question whether such an approach could be considered in Northern Ireland's commercial court in an effort to do discourage unreasonable conduct by parties pursuing litigation.

- Fast tracking of short uncomplicated net issue cases. [CJ171]

224. The Bar has no difficulty with the fast tracking of short uncomplicated net issue cases. However, we would query at what point it would be decided that such a case could be fast tracked. It would be helpful to know whether it is envisaged that such a decision would be taken during one of the three main review hearings outlined in recommendation CJ169, such as the case management conference. In addition, further consideration should also be given to the parties being required by the court to consider fast tracking in advance of the relevant hearing.

- Fast tracking of cases where mediation has failed. [CJ172]

225. The Bar has no issue with the fast tracking of cases where mediation has failed in order to resolve a dispute in court. However, we would query how this would operate in practice given that mediation often takes place at present once a case is at an advanced stage. It might also present a difficulty for court listing arrangements in terms of slots being secured for these cases.

- More frequent use of Early Neutral Evaluation. [CJ173]

226. The Bar notes the merits of Early Neutral Evaluation and the potential that it could offer within the context of the business hub for commercial cases. We acknowledge the comment at paragraph 19.57 that ENE was recently invoked in a highly complex case by the Commercial Judge with the help of another High Court Judge. Whilst judicially conducted ENE can be very useful in providing a non-binding evaluation of the respective parties' cases, we would caution that this could present a resource issue if widespread adoption takes place in NI given that when ENE fails the same judge cannot be further involved in the proceedings.

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227. The development of guidance in relation to this ENE might be beneficial. The Commercial Bar Association would welcome the opportunity to contribute further to this if recommendation CJ173 is to be taken forward.

- The use of automated search technology in complex disclosure issues. [CJ174]

228. The Bar acknowledges that disclosure can be a major exercise in cases in the commercial division which generates significant costs. In the case of paper disclosure, the parties usually know what paper they have and the issue is merely locating it physically and producing the documents required. However, practitioners have indicated that the problem with electronic information is that parties often do not know how much they have or even the location of all the places where it might be found.

229. We note the references to the potential for automated search technology, including keyword and concept searches, which can aid electronic disclosure. However, the risks associated with simple keyword searches in failing to find important documents is acknowledged at paragraph 19.62. One example of technology which is increasingly an option in England is predictive coding that allows computers to predict particular document classifications based on coding decisions made the lawyers running the claims in question. Whilst this potentially brings costs savings, it does have limitations in very complex multi-issue cases where no one seed set will cover all the issues in dispute. The recent case of *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 saw the English courts approve the use of predictive coding for the first time.

230. We also note the reference at paragraph 19.64 to the approach taken in the Singapore High Court with the Global Yellow Pages and the brief mention of Boolean operators. The future development of such approaches in England and elsewhere should be monitored. However, we would query how these might work in practice in the NI context and any upfront costs for the parties involved that would be associated with the greater use of this technology. Further evidence would also be required to show the number of complex cases in the commercial division which would benefit from this new approach.

231. Ultimately efforts to make greater use of automated search technology will require consideration of which method of disclosure is right for any particular case. Relevant factors will include complexity and the number of issues in dispute, the number of documents involved, the value of the dispute and the

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willingness of each party to use new technologies. This area is likely to continue to evolve in the future and the Bar takes the view that a programme of effective training in e-disclosure for judges, legal representatives and other relevant stakeholders will be necessary before further steps towards the use of automated search technology can be taken in NI.

- Parties to be encouraged to closely co-operate during the early stages of the disclosure process. [CJ175]

232. The Bar takes the view that close co-operation already takes place during the early stages of the disclosure process. Therefore we would request clarification on the exact meaning of this recommendation.

- Implementation of the concept of a disclosure plan at the outset of the disclosure process. [CJ176]
- Implementation of the concept of a written statement of issues by any party seeking disclosure. [CJ177]

233. The Bar has no difficulty in principle with the concept of a disclosure plan. We note the reference to the process in many courts in Australia which have developed discovery by way of categories of documents with parties expected to develop a plan encompassing the number, nature and significance of the documents which might be discoverable. We believe that this may be a useful approach if the parties are in a position to identify the issues early on in a case. However, this may prove more difficult if the issues are not clear from the outset and could result in bland categories of document being created which does not help to advance the case.

234. We have no objection to the idea of a written statement of issues outlined at paragraph 9.69. We would query how this differs from the schedule of documents provided in a standard disclosure request.

- Amendment of Commercial Practice Note 01/03 to provide for Scott Schedules in suitable interlocutory applications. [CJ178]

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235. The Bar accepts this recommendation. Practitioners have indicated that Scott Schedules already help to synthesis the issues in a commercial case and the extension of this to interlocutory applications.

- The commencement of the Online Dispute Resolution Advisory Services in low value claims. [CJ179]

236. Please review the Bar's comments on Online Dispute Resolution in response to chapter 4.

Chapter 20: Judicial Review

- Judicial review applications which have as their subject matter issues which are within the jurisdiction of more specialist courts to be transferred to those courts for hearing. [CJ180]
- Such transfer to occur at an early stage for case management in that court. [CJ181]

237. The Bar has no difficulty in principle with these recommendations. We agree with the suggestion at paragraph 20.17 that the decision to transfer should be taken by the Judicial Review Judge. However, we would query the suggestion around the timing of transfer at an "*early stage*". We note that paragraph 20.18 deals with this yet there is no expansion on the exact meaning of transfer at an "*early stage*". It is unclear as to whether this will take place before or after leave is granted to apply for judicial review. The Bar would welcome clarification on this point.

238. We would also question whether the implementation of this recommendation could also lead to difficulties for practitioners around the scheduling of hearings with the potential for several courts dealing with judicial reviews to be running at the same time. Further information on any action that will be taken to prevent timing conflicts across the courts would be useful for practitioners.

- The criminal/civil causes distinction in judicial review to be abolished by a statutory amendment to The Judicature (Northern Ireland) Act 1978. [CJ182]

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239. The Bar has no issue in principle with this recommendation. However, we would expect to be consulted further should any statutory amendment to The Judicature (Northern Ireland) Act 1978 be taken forward.

- The judicial review pre-action protocol to be revised. [CJ183]

240. Practitioners have indicated that the pre-action protocol for judicial review is already operating satisfactorily at present. According to the NICTS website this was last revised on 10 October 2013 rather than 2014 as the report states at paragraph 20.21. We would request further information on any possible amendments to the protocol before being able to comment further.

- Leave to apply for judicial review to be granted on the papers with an oral hearing arranged only if the judge is minded to refuse leave. There should not be a facility to refuse leave on the papers. [CJ184]
- A greater emphasis on compliance with the pre-action protocol and costs penalties where it is not adhered to. [CJ185]

241. The Bar is content to accept this recommendation. We welcome the recognition that there should not be a facility to refuse leave on the papers because of the need for a process that is compatible with Article Six of the European Convention on Human Rights. There could be merit in further exploring the suggestion at paragraph 20.26 of a system whereby reasons are given for a "*minded to refuse*" indication on the grant of leave which would allow any subsequent oral hearing to focus on the issues which are of concern to the court.

242. In addition, we would request further information on the suggestion at paragraph 20.27 that there should be greater emphasis on compliance with the pre-action protocol and costs penalties where it is not adhered to. We would request evidence to demonstrate that the protocol is not working effectively and that sanctions are necessary as practitioners have indicated that the present system is already working well. Further information is also required on the costs penalties envisaged as this is unclear at present.

243. We also note the mention of Order 54 Rule 4 at paragraph 20.22 which we believe is incorrectly referenced; applications for Judicial Review are dealt with under Order 53.

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- Unless a special request for more time is sought and granted, leave hearings not to last beyond 11 o'clock on any morning. [CJ186]
- A practice of not listing more than two leave hearings on a day to be instituted. [CJ187]

244. The Bar would query whether the implementation of these recommendations is feasible. Practitioners have indicated that the court typically begins at 10am which would require two leave hearings to be heard within an hour before 11am. This could create difficulties and delays in practice for practitioners and the court in adhering to such a short window of time for these hearings.

- The "promptness" requirement for judicial review proceedings to be abolished. [CJ188]

245. The Bar has no difficulty with this recommendation. We submitted a response to the Department of Justice's consultation on 'Time Limits in Judicial Review' in September 2015. This response highlighted that the time limits required in judicial reviews that raise domestic grounds of challenge currently differ from those that raise EU grounds thereby creating a 'two-track system' which is difficult to interpret consistently, creates unnecessary uncertainty for potential applicants and could impede access to justice.

246. Consequently, the Bar accepted the Department's 2015 proposal to abolish the promptness requirement for all proceedings with these instead to be brought inside three months of the date of the reviewed decision. We are content that the implementation of such a change will provide the judicial review process with a greater degree of transparency and ensure continued compliance with obligations arising under EU law.

- Special day(s) to be set aside for reviews and hearings of cases involving personal litigants. [CJ189]
- The production by the Northern Ireland Courts & Tribunals Service of a guide for personal litigants and others who may use the Judicial Review Court. [CJ190]

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247. The Bar has no difficulty with this recommendation in principle. However, we would query how often it is envisaged that it would be necessary for a "*special day*" to be set aside to deal with personal litigants in the Judicial Review Court. We believe that it would only be necessary for these take place on a fairly infrequent basis if this recommendation is taken forward.

248. We note that paragraph 20.37 recommends that the NICTS should produce a guide similar to the 'The Administrative Court: Judicial Review Guide 2016' developed by HM Courts and Tribunals Service in England[17]. Whilst this is a matter for the NICTS to action, the English guide runs to 152 pages in length and therefore we would query the usefulness of this for assisting personal litigants who are likely to still find such a document difficult to understand and intimidating. It is likely that a shorter version would be more helpful in assisting personal litigants.

- Greater judicial encouragement of alternative dispute resolution in appropriate judicial review cases. [CJ191]

249. The Bar believes that the alternative dispute resolution is best considered on a case by case basis in the area of judicial review. The question in judicial review proceedings will often be whether a public law decision was lawful or not; this is an area which cannot always be resolved by ADR. However, we accept that there may be a limited number of appropriate cases or types of case which could benefit from greater consideration being given to ADR. It is also vital that any decision to commence ADR, including mediation, does not lead to delays for cases in the area of judicial review.

250. We note that a brief reference is already made to mediation and ADR in the pre-action protocol for judicial review. The Bar would expect to be consulted further on the detail of any potential amendments to the pre-action protocol in this area if greater judicial encouragement is to take place.

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[17] HM Courts & Tribunals Service, *'The Administrative Court: Judicial Review Guide 2016'*, (published July 2016) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/540607/administrative-court-judicial-review-guide.pdf (last accessed 28 November 2016)

Chapter 21: Defamation

- Reviews (other than the first review and case management hearings), where appropriate, to be conducted by video link or Skype, telephone or email. Court hearings for further reviews should be reserved for exceptional circumstances. Parties, upon agreement and with the approval of the judge, may proceed to pre-trial case management through agreed Order for Directions. [CJ192]

- Consideration to be regularly given to the disposal of generic, straightforward Queen's Bench interlocutory applications through online determination with a right of an oral hearing on request by either party. [CJ193]

251. The Bar is open to the suggestions outlined in recommendations CJ192 given that parties living outside of Belfast may be able to save time and expense by proceeding in this manner provided that all those involved in the case are amenable to it. However, the number of "*generic, straightforward*" interlocutory applications in defamation cases as outlined in CJ193 is likely to be minimal and therefore the potential impact of these recommendations will be limited. We would not wish to preclude the option of the parties being able to deal with straightforward applications in this way but further consideration should be given to the level of administration inherent in this for a relatively small number of applications.

252. In addition, it is difficulty to rationalise recommendation CJ193 with the substantive discussion contained in the report. The comments contained at paragraph 21.29 highlight that interlocutory hearings "*create unique online problems*" in defamation cases. These pre-trial applications are described as complex and often involving "*the necessity of oral evidence to assist parties and the court in finding a conclusion*" at 21.30. This goes on to state that these applications are "*invariably matters of fact and not of law and as such by their very nature often require witness evidence and cannot be determined by a documentary procedure*" at 21.31. We consider that recommendation CJ193 conflicts with the fundamental nature of interlocutory applications specific to defamation.

- The right to challenge jurors in civil proceedings save for cause to be removed. [CJ194]

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- Jury trials in defamation cases to be retained but the powers of the judge to be expanded to include a discretion to order trial without a jury in matters of complexity. [CJ195]

253. The Bar is content to accept recommendation CJ194. We agree that the removal of the right to challenge jurors in civil proceedings save for cause appears to be a reasonable suggestion.

254. The Bar has no difficulty with recommendation CJ195 in considering legislative change to give effect to expanding the powers of a judge in ordering a trial without a jury in matters of complexity. We note the comment at paragraph 21.44 that this should be a "*broad discretion*". However, we believe that it is important that the wording of any change under the Judicature Act provides a clear test as to the circumstances which would allow for a judge to order trial without a jury.

- The 2011 Pre-Action Protocol in Defamation to be amended:

  (a) to make clear that cost sanctions may be employed against those who refuse to consider participation in alternative dispute resolution (ADR) without adequate explanation or reason; and

  (b) to indicate that the Northern Ireland Law Society and the Bar Council have information on the pool of appropriately qualified mediators for defamation cases. [CJ196]

255. The Bar has no difficulty with recommendation CJ196 in principle. However, we would query the success rates of ADR in the defamation arena given that this is presently unclear. The report also acknowledges this in 21.59 given that the nature of the remedy sought by a claimant is typically "*vindication of reputation*". Therefore it remains to be seen whether there is a particular need for further provision for cost sanctions in respect of ADR in defamation proceedings. We would welcome opportunity to contribute to a further consultation on any amendments to the pre-action protocol should this recommendation be taken forward.

- Consideration to be given at the outset of a trial for the jury to determine simple matters which may permit the flow of the trial thereafter to be more focussed, less time consuming and, therefore, cheaper. [CJ197]

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256. The Bar notes that this recommendation relates to the approach taken by Mr Justice Stephens in *Stokes v Sunday Newspapers Limited (No 2)* [2016] NIQB 1 at paragraph 21.50. We accept the rationale behind the proposal to allow simple matters to be "*hived off and dealt with by a jury without inconvenience*". However, we note that this approach was taken "*without serious objection from the parties*". It would be necessary for any process allowing for simple matters to be determined at the outset of a trial to facilitate possible objections from either party.

- A more flexible approach to court rules, perhaps particularly with regard to such formal matters as pleadings, when personal litigants are involved. [CJ198]

257. The Bar agrees with the suggestion at paragraph 21.56 that further evidence is required demonstrating the number of personal litigants involved in defamation actions. At present this statistical information is not available which means that it is impossible to ascertain the number of proceedings involving personal litigants in defamation proceedings, the outcome of these actions and the reasons why an individual has become a personal litigant.

258. We note that this section of the report goes on to suggest a range of possible approaches to personal litigants at paragraph 21.59. We commented previously on the approach towards personal litigants in response to the recommendations in Chapter 12, highlighting that an evidence base must be established before any steps are taken towards determining the support needs of personal litigants across the civil courts. This will be a matter for the NICTS to action.

Chapter 22: Clinical Negligence

- Movement to a paperless Court concept, accompanied by the concept of "paperlight" provision, to be encouraged in clinical negligence cases. [CJ199]

259. The Bar has no difficulty with the concept of the paperless court in the context of the clinical negligence cases subject to the requirement of the use of a core bundle of materials. Practitioners have indicated that clinical negligence trials typically involve a high dependency on the disclosure of medical notes and records often received in hard copy format which could pose difficulties in some cases and will require further consideration. Consequently, we believe that a paper light court represents a reasonable interim stage which could be

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implemented before any transition to paperless courts in clinical negligence cases.

- Reviews (other than the first review and case management hearings) to be conducted by video, telephone or email, with court oral hearings reserved for exceptional circumstances. [CJ200]

260. The Bar has no difficulty with the recommendation in relation to the greater use of telephone, email and video in review hearings. Practitioners have highlighted that interlocutory hearings and reviews are often already being conducted by telephone and therefore we are content for this approach to be adopted more widely.

- Parties to be permitted, with the approval of the court, to agree to dispense with the requirement for an oral hearing and proceed by way of an agreed Order for Directions. [CJ201]

261. The Bar accepts this recommendation given that there is no need for an oral hearing if the parties are content to proceed by way of an agreed Order for Directions.

- Interlocutory hearings to be conducted by video, telephone or email in straightforward matters. Oral hearings with court attendance to be reserved for those cases where substantial issues arise. [CJ202]

262. The Bar is content to accept this recommendation.

- After the exchange of liability reports/financial loss information, parties to be encouraged to engage in settlement discussions at an early stage with emphasis on resolution rather than the form of the resolution. [CJ203]

- A period for negotiation/discussion/mediation to be provided, after close of pleadings, exchange of evidence and preparation of expert schedules some six-nine months prior to trial. [CJ204]

263. The Bar notes that recommendations CJ203 and CJ204 already take place in practice.

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- A system of accreditation for solicitors and junior counsel who wish to practise in the area of clinical negligence to be introduced. [CJ205]

264. The Bar is opposed to the proposals for a system of accreditation for junior counsel given that this will represent a significant hurdle to the development of younger members of the profession in this field of practice. We would request evidence to show that such an approach is merited as this is currently lacking in Chapter 22. The statement at paragraph 22.37 that "*no longer can we tolerate highly complex and high value cases being left in the hands of those who have not demonstrated an expertise in this specialised field*" is entirely unsubstantiated based on the information provided. It is entirely inappropriate to suggest that junior counsel should be subject to this system but not QCs simply because this is "*in itself a badge of excellence*". Any move to make such a distinction within the profession and create a compulsory accreditation scheme for the less experienced would be viewed as inherently unfair by members practicing in clinical negligence.

265. It also runs contrary to the Bar Library system by putting younger barristers at a disadvantage and would create difficulties under the Bar Council's own Professional Code of Conduct. Many members of the Review Group will be aware that barristers learn about skills and good judgement from sitting as a junior behind a senior counsel. Consequently, accreditation has the potential to undermine the opportunities that will be available for barristers to gain valuable learning experience. Any additional training or qualifications required under this scheme could risk deterring new junior counsel from gaining experience in clinical negligence and create a gap in experience once senior counsel eventually leave the Bar. This will ultimately impact on the quality of representation and access to justice for vulnerable members of society in the future.

- Consideration of the use of a single joint expert to be encouraged wherever possible. [CJ206]

266. The Bar has no objection to the use of selection of joint experts being encouraged where appropriate in clinical negligence cases. We welcome the recognition at paragraph 22.38 that such an approach may be difficult to apply in practice. Consequently, it is appropriate that the court should only be able to request that the parties consider using a single joint expert but should never be

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able to order this unless agreed by the parties. The Bar would expect to be consulted further on any possible inclusion of this approach in the Pre Action Protocol for Clinical Negligence Litigation if this recommendation is taken forward.

- Clinical negligence cases usually to be heard in the High Court. Only to be heard in the county court if sufficiently straightforward. [CJ207]

267. The Bar welcomes this recommendation.

- Courts to encourage the use of witness statements in appropriate uncontroversial instances and to have the power under the rules to order their use. [CJ208]

268. The Bar is content to accept this recommendation in cases where the evidence is uncontroversial. However, we would have reservations about the court having the power to order their use under the rules given that it is likely to lead to an increase of the cost of preparation for a hearing.

Chapter 23: Licensing

- In the district judges' courts, the required paperwork to be prepared and communicated electronically for renewals, protection orders and transfers applications. [CJ209]

269. The Bar has no difficulty with paperwork for renewals, protection orders and transfers applications being prepared and communicated electronically in the District Judges' Courts. We consider that this is in keeping with the increased use of technology across the court estate and the ultimate aspiration of paperless courts as outlined in Chapter 3.

- Records (including plans and statutory requirements) to be retained electronically and thus securely without the need for cumbersome paper records being retained at various court offices. [CJ210]

- A system to be developed (for a suitable administration fee) allowing interested parties to access the materials online. [CJ211]

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270. The Bar is content to accept recommendations CJ210 and CJ211. However, these will be matters for the NICTS to consider further from an operational standpoint. Further attention will also be required in relation to possible data security issues arising from the electronic retention of records.

- Greater encouragement to be given for additional use of the existing statutory regime for many applications to be processed "on paper" by the Clerk of Petty Sessions provided the statutory proofs are in order, particularly renewal applications. [CJ212]

271. The Bar recognises the comments at paragraph 23.36 that the existing statutory regime already provides for many applications to be processed "*on paper*" by the Clerk of Petty Sessions provided that the statutory proofs are in order, particularly in the instance of renewal applications. We have no difficulty with greater encouragement being given for the additional use of this system.

- Video conferencing to be encouraged where parties or witnesses reside outside the relevant division. [CJ213]

272. The Bar notes the comments paragraph 23.37 that there may be scope for uncontested applications (and particularly renewals) to be dealt with in "*virtual reality district judges' courts by video conferencing*". However, most applications for a license are made by persons in the court division where the premises are located meaning that video conferencing is likely to be seldom employed. We are not convinced that there is a pressing need for the adoption of this recommendation in these cases at District Court level.

273. We would also point out that a broad interpretation of this recommendation could conflict with a different part of the substantive discussion at paragraph 23.44 which states that "*the collective experience of the licensing sub-group was that it is not appropriate, even for uncontested licensing applications, in the county court to be heard in virtual reality courts*". Further clarity around this recommendation and the meaning of the virtual reality court in the context of licensing cases would be helpful.

- Experts to be directed to exchange reports and attend a minuted experts meeting pre-trial. [CJ214]

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274. Practitioners have expressed concerns around social control and the scrutiny of applications as outlined at paragraph 23.41 with the risk that applicants and objectors could find themselves disadvantaged by the removal of the ability for parties to use discretion as to when they should exchange expert reports or furnish these to the court. However, we note that the "*cards of the table*" approach to justice means that the early exchange of expert reports in contested licensing cases will ultimately play a greater role in case management. We would query who would be responsible for providing evidence of a minuted experts meeting pre-trial.

- Licensing days to be more often and spread out over the year. [CJ215]

275. The Bar agrees with this recommendation.

- Courts to insist that objections are substantively pleaded and substantiated as soon as possible. [CJ216]

276. The Bar agrees with this recommendation.

Chapter 24: The Lands Tribunal

- Power to be given to refer matters of disputed valuation to the Lands Tribunal, and that the Lands Tribunal be given the necessary jurisdiction to determine such references. [CJ217]
- Jurisdiction to be conferred on the Lands Tribunal to determine questions of valuation referred to it by the High Court. [CJ218]

277. The Bar would query whether there is any need for the implementation of these recommendations. We consider that CJ217 which proposes that power be given to refer matters of disputed valuation to the Lands Tribunal would only result in delays and additional costs. Meanwhile recommendation CJ218 allowing for jurisdiction to be conferred on the Lands Tribunal to determine questions of valuation referred to it by the High Court would also create another hurdle for the parties and practitioners involved in these cases. The recommendations around the Lands Tribunal merely represent an additional layer of bureaucracy and we see no rationale for them contained within Chapter 24.

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278. We note the comment at paragraph 24.6 in relation to the Chancery Division where issues of valuation arise occasionally, particularly in repossession cases and bankruptcy cases. These issues *"frequently cause such cases to become protracted"* given that "*the determination of a question of valuation is one which does not fall as easily within the expertise of a legally-trained Master or judge than with one trained as a valuer*". However, there is no evidence supporting this comment to suggest that Masters or Judges in this division are not ruling on valuations in a fair manner or that this referral will lead to better and quicker outcomes. Consequently, we do not agree that the Lands Tribunal is the "*obvious choice for such matters*".

Chapter 25: Civil Justice Council

- A Civil Justice Council to be set up as a matter of high priority. [CJ219]

279. The Bar agrees with the report's observations at paragraph 25.1 that "*criminal justice has commanded by far the greater share of the attention of Ministers and legislators*" which is often due to its greater public profile. Meanwhile law reform in the field of civil justice has proceeded by way of "*sporadic changes*" in light of recommendations from disparate bodies, piecemeal provisions in the Law Reform (Miscellaneous Provisions) Acts and by the procedural reform recommended by the Rules Committee in the Court of Judicature. Therefore we are open to any efforts to increase public recognition of the workings of the civil courts in order to address the sense of "*civil apathy*" referenced.

280. The Bar believes that the further work must be undertaken to establish the added value which a Civil Justice Council would bring to the justice system. The rules committees already perform a valuable function and consideration must be given as to exactly how the proposed CJC would work alongside these. Paragraph 25.37 states that the CJC will "*identify areas in need of reform, including amendments to statutory provisions and rules*". Meanwhile 25.40 outlines that it will still require the presence of the rules committees to implement the changes required with the "*technical know-how and drafting skills to perfect this*". However, no appraisal is included in respect of the work already being carried out by these committees or any possible overlap in duties.

281. Furthermore, the general comments on the remit of the CJC outlined at paragraph 25.37 will require further detail. We note that such a body would have

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a role in carrying out detailed monitoring of the work of the courts, conducting or commissioning research and receiving regular statistical analysis. The Bar welcomes any efforts to ensure the provision of reliable statistical information in relation to the civil justice system. For example, the NICTS provides statistical bulletins in respect of the County Court and High Court on the throughput of cases in the civil courts which allows for monitoring of the system. More detail on the remit of the CJC is needed and the impact that it is envisaged this body would make by taking responsibility for these areas of work.

282. The Bar notes the proposal at 25.43 that the CJC should be created on a non-statutory basis in order to "*prove the worth of the concept*". We believe that consideration should be given to establishing the CJC on a statutory basis from the outset in order to ensure that it can wield sufficient influence in terms of promoting reform initiatives in this area. This would better allow stakeholders to have confidence in the CJC's remit and ability to effectively influence change across the civil justice system.

283. We also note the comment at 25.42 that "*a host of complicating and time consuming factors emerge with a statutory body. Regular filing of accounts and other processes, such as dealing with Freedom of Information requests and anything else that may come with legal status, take up valuable time and energy*". Whilst sharing the concern about the need for any governance regime to remain appropriate and avoid stifling the functions of the CJC, we note the potential benefits attached to the creation of a Civil Justice Council on a statutory basis. These include the potential to enjoy adequate funding and status to effectively drive civil policy reform across the courts in Northern Ireland.

Chapter 26: Non Ministerial Department

- The Department of Justice to bring forward legislation to re-constitute the Northern Ireland Courts & Tribunals Service as a non-ministerial department (NMD), with a view to having an NMD in place by the end of this Assembly mandate. [CJ220]
- In the interim, the judiciary to plan for the creation of an NMD, working closely with officials in the Department of Justice and the Northern Ireland Courts & Tribunals Service. [CJ221]

284. The Bar notes the recommendation for legislation to be brought forward by the DOJ to reconstitute the NICTS as a non-ministerial Department by the end of the current Assembly mandate. We recognise and strongly endorse the fundamental importance of an independent judiciary and consider this to be the

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foremost priority that must not be undermined in any debate about structural change. When considering proposed change it should not be the case, especially in light of the lead time that may be associated with creating an NMD, that the current structures become compromised or misinterpreted as lacking in judicial independence as the system will continue to rely on this defining characteristic remaining intact whilst structures remain in their current form.

285. The Bar acknowledges the preference for a NMD headed by a judicially led board at 26.11. Paragraph 26.16 acknowledges that the board heading the NMD would be responsible for publishing a strategic plan, a business plan and annual reports. The challenges helpfully outlined in Chapter 25 at paragraph 25.42 in relation to the governance arrangements for a statutory Civil Justice Council would need to be addressed before any planning for the creation of a NMD could be taken forward. In addition, it is worth noting that a NMD with budgetary independence would be subject to the vagaries of the public financing environment in the context of a difficult economic climate for the Executive.

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