

Advice to the Department of Justice regarding ‘A Strategy for Access to Justice’

Introduction

The office of the Northern Ireland Commissioner for Children and Young People (NICCY) was established under the Commissioner for Children and Young People (Northern Ireland) Order 2003. The principal aim of the Commissioner is to safeguard and promote the rights and best interests of children and young people. Under Articles 7(2) and (3) of the Order, NICCY has a duty to keep under review the adequacy and effectiveness of law, practice and services relating to rights and welfare of children and young people. As such this advice is limited to the proposals contained within the review which will impact upon children and young people and where it is appropriate for NICCY to comment.

NICCY welcomes this consultation on ‘A Strategy for Access to Justice’, particularly in light of the numerous recommendations which will have a significant impact upon children’s access to justice. NICCY previously engaged with the Minister of Justice regarding concerns about the implications of legal aid reforms on children’s access to justice. NICCY was assured that children’s rights in this respect would not be affected. As detailed below, NICCY is concerned by a number of proposals contained within this review, which if pursued will amount to a breach of children’s rights. Given the Minister’s previous assurances, NICCY expect that these proposals will not be taken forward.

In considering whether to take forward recommendations made in the review, we would remind the Department of their obligations under the United Nations Convention on the Rights of the Child (UNCRC). Of particular relevance are the following articles:

Article 3:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 4:

“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”

Article 12:

“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

The UN Committee on the Rights of the Child expanded upon Article 12 in its General Comment No.12 ‘The Right of the Child to be Heard’¹. The Committee emphasised that Article 12 applies to *“all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies. Typical administrative proceedings include, for example, decisions about children’s education, health, environment, living conditions, or protection. Both kinds of proceedings may involve alternative dispute mechanisms such as mediation and arbitration.”*²

It is these principles above which must underpin any reform of the current legal aid scheme in Northern Ireland to ensure that the most vulnerable members of society are protected and have equal access to justice.

Along with the other UK Children’s Commissioners, NICCY raised concerns about children’s access to justice in our joint report to the UN Committee on the Rights of the Child.³ The Committee have now expressed their own concerns on this issue by asking the State for more information on the measures taken to ensure children’s access to justice and representation of children in civil and criminal proceedings in the context of cuts in the provision of free legal aid.⁴ The Department should be cognisant of the

¹ CRC/C/GC/12, July 2009

² Para 32

³ Report of the UK Children’s Commissioners, UN Committee on the Rights of the Child, Examination of the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, July 2015

⁴ ‘List of issues in relation to the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland’, UN Committee on the Rights of the Child, CRC/C/GBR/Q/5, 29 October 2015

Committee's concerns in determining what further changes to make to the current legal aid scheme.

Following on from legal aid reforms in England, The Office of the Children's Commissioner for England produced a Child's Rights Impact Assessment.⁵ The report gives much cause for concern with research finding that "*interviewees reported negative impacts that were directly associated with the issue for which they required support, as well as secondary impact that arose as a result of these issues. Impact included: homelessness and destitution, lack of education, family breakdown, reduced emotional and mental wellbeing and reduced safety.*"⁶

It would be helpful for the Department to consider this report to ensure that children in Northern Ireland do not suffer the same consequences as those in England due to legal aid reforms.

General Comments

NICCY was pleased to note that the Terms of Reference required this review to "*safeguard the interests of the vulnerable*".⁷ However, upon consideration of the full report and the recommendations contained within, the Commissioner is gravely concerned that not only has this not been complied with but that in some regards, the interests of children and their access to justice will be severely diluted with the implementation of the review's recommendations.

It is NICCY's view that legal aid should not be seen simply as a cost but rather it should be recognised as an invaluable means for ensuring access to justice and the realisation of rights. This is particularly the case where the matter involves children, who without legal aid, will likely have no means through which to challenge breaches of their rights. As noted in the review, "*for many vulnerable clients, legal aid may be the only practical means of enforcing basic legal rights.*"⁸ It was therefore with great disappointment that we note some of the proposals which are commented upon in more below.

⁵ 'Legal Aid changes since April 2013 – Child Rights Impact Assessment', September 2014, Office of the Children's Commissioner, England

⁶ Page 29

⁷ Page 6, 'A Strategy for Access to Justice', September 2015

⁸ Page 10

NICCY would stress at the outset the need for full consultation and equality impact assessment of any of the recommendations which the Department intends to take forward. Legal aid reforms will have a significant adverse impact upon children given their age, capacity and lack of understanding. In many cases, the child will not be a party to the proceedings but their rights will be impacted by the outcome. With respect to those recommendations which will impact upon children, NICCY would wish to engage with the Department at the earliest opportunity.

Comments on ‘A Strategy for Access to Justice’

Priorities for Access to Justice

NICCY notes with concern the suggested priorities for access to justice⁹ and does not agree with the suggested priorities. For example, NICCY does not consider that Police Station advice can be categorised as a ‘high priority’, in NICCY’s view this is clearly a ‘top priority’. Furthermore, ‘other criminal advice’ and ‘advice on diversion’ cannot be categorised as a ‘medium priority’. All matters relating to criminal proceedings must be considered a ‘top priority’ given the far reaching detrimental effects such matters can have upon the lives of children, not least in respect to their ability to access education, training and employment opportunities. The flaws in the current criminal records disclosure regime reinforce the absolute need for such matters to be considered ‘top priority’.

In addition to the concerns outlined above, NICCY is also troubled by the categorisation of private law children disputes, Judicial Review and Public Authority Claims as ‘high priorities’ for access to justice rather than ‘top priorities’. Public Authority Claims are defined in the review as “allegations against public authorities of serious wrongdoing, abuse of power or significant breach of human rights”¹⁰. NICCY is therefore at a loss as to how such matters can be categorised as merely a second level priority for access to justice.

Given the troubling suggested priorities for access to justice, NICCY would wish to engage with the Minister should he intend to issue a statement of priorities as recommended in the report.¹¹

⁹ Table 2, Page 29

¹⁰ Para 2.35

¹¹ Para 2.38

Criminal Advice Services

In considering any criminal law reforms, the Department must ensure compliance with the aims of the youth justice system, in particular the requirement to have “the bests interest of children as a primary consideration.”¹² The Department must also be sure to fulfil it’s obligations under Articles 37 and 40 of the UNCRC.

With respect to the Law Society’s work on the development of a duty solicitor rota and the related review recommendation, NICCY would hope that the opportunity is taken to ensure that those representing children at a police station and advising them subsequently on criminal matters, are subject to appropriate training and accreditation.

The Department is of course aware of recommendation 5(ii) of the Youth Justice Review¹³ which stated that all professionals, including defence solicitors, should receive appropriate training to reflect the new aim of the youth justice system. NICCY notes that the recent Criminal Justice Inspection Northern Ireland report¹⁴ recorded this recommendation as ‘achieved’ citing that the recommendation was outside the control of the Department and noting it’s efforts. NICCY does not consider that this recommendation has been achieved as training in youth justice work has not been made mandatory for defence solicitors practising in this area. This of course impacts on the ability to deliver upon the aim of the youth justice system in Northern Ireland. NICCY would urge the relevant parties to reconsider the issue at this opportune time and establish a system of training and accreditation for legal practitioners within the youth justice system.

Regarding the availability of legal aid for advice on youth diversion, NICCY considers this to be essential and as such should not be subject to any qualification, criteria or test. Youth diversionary options and their consequences, not least the minefield that is disclosure, are highly complex and confusing for young people and so they must be able to access legal advice and assistance on these matters. Rather than reducing the support available to young people, NICCY agrees with NIACRO in that a model akin to the Guardian ad Litem should be available, however NICCY would suggest such a model should be accessible to a child throughout their entire journey through the criminal justice system.

¹² S.53 Justice (Northern Ireland) Act 2002 (as amended)

¹³ ‘A Review of the Youth Justice System in Northern Ireland’, 2011

¹⁴ ‘Monitoring of Progress on Implementation of the Youth Justice Review Recommendation’, December 2015

NICCY welcomes the review's observation that more should be done to ensure legal advice is available at youth engagement clinics. Since the scheme was first proposed we have consistently raised concerns about the availability of same and would once again urge the Department to revisit this issue and ensure that all steps possible are taken to ensure legal advice and representation at the clinics is available to young people.

With respect to the proposal that all criminal advice and assistance, other than advice at the police station or at a youth engagement clinic, is subject to a merits criteria NICCY strongly disagree where same relates to a young person. In order to ensure compliance with the statutory aim of the youth justice system, young people must be able to access legal advice and assistance. As already stated, criminal law matters are often extremely confusing for young people and it is not possible for them to navigate their way through the youth justice system or understand the consequences of their involvement in it without legal advice and assistance.

Civil Legal Aid – Family Law

At the outset, NICCY would remind the Department of it's obligations under Article 9(2) UNCRC which states – *“in any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.”*

The Commissioner strongly opposes any attempt to dilute children's access to justice in public law proceedings through the suggestions (though not recommendations) made in the review.

NICCY was extremely alarmed by the suggestion that the tandem model should be removed and that it should be for the Guardian ad Litem Agency to decide on a case by case basis whether legal representation is required. NICCY is **firmly** of the view that all children involved in public law proceedings must have both legal representation and a Guardian to ensure their access to justice and the realisation of their rights.

It is NICCY's view is that, the voice of the child and their best interests need to be separated. When the child's need for legal advice and specialist representation in public law proceedings is added to this, the conclusion has to be that any suggestion to reduce the current provisions for children in public law proceedings to one person who is not

legally qualified may be considered to be negligent.

NICCY was further deeply troubled by the suggestion that the funding of representation for the child on article 6 grounds, where there is an irreconcilable conflict between the Guardian and the child, “*must not be allowed to become anything other than highly exceptional.*”¹⁵ No further information is given as to what would be considered “highly exceptional.” NICCY is firmly of the view that were the views of the child and Guardian differ significantly or there is an irreconcilable conflict, the child must be able to secure their own legal representation. Anything less would amount to a breach of the child’s right under Article 12 UNCRC and Article 6 ECHR. We were surprised that the review considered the State’s obligations under Article 12 but nevertheless saw fit to make these two suggestions.

NICCY would again draw the Department’s attention to General Comment No.12. In discussing the child’s representative, the Committee states “*...it must be stressed that in many cases (civil, penal or administrative), there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child’s views are transmitted correctly to the decision maker by the representative. The method chosen should be determined by the child (or by the appropriate authority as necessary) according to her or his particular situation. Representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.*

The representative must be aware that she or he represents exclusively the interests of the child”¹⁶

NICCY believes that if the Department pursued these suggestions it would amount to a breach of the child’s rights under Article 12 UNCRC. Furthermore, these suggestions are not in compliance with the Terms of Reference in that they fail to “safeguard the interests of the vulnerable.” They are also at odds with the author’s comment that “*it is right to point out that nothing should be a higher priority than protecting the interests of vulnerable children who are the subject to care proceedings.*”¹⁷

¹⁵ Para 15.24

¹⁶ Paras36 and 37, CRC/C/GC/12, July 2009

¹⁷ Para 15.25

As noted, the removal of the tandem model and the “highly exceptional” funding of representation for the child on article 6 grounds are suggestions rather than proposals. However, should the Department consider either option as a consequence to the proposal regarding the future funding of representation for children in public law proceedings, NICCY would expect the Department to seek our advice and guidance at the earliest opportunity.

NICCY considered the information in the review outlining the Children’s Hearing system in Scotland. While the information provided was limited, we consider the any feasibility study commissioned must consider not only how such a system would work in Northern Ireland but also whether such reform would be in the best interests of children. Again, NICCY would expect that our advice is sought at the earliest stage in any further work in this area.

With respect to the remaining recommendations related to family law proceedings, NICCY would expect that ensuring children’s access to justice and realising their best interests of children is of paramount importance to the Department. As the review itself notes “*family legal aid provides help for children and vulnerable adults who are likely to have no other effective means of securing access to justice.*” All aspects of family law proceedings will have a significant impact on the lives of children involved, determining who they will live with and how they will have contact with their parents or wider family. As such their views must be heard and their rights and best interests must be protected. The Department will be aware of the UN Committee on the Rights of the Child’s recommendation in it’s 2008 Concluding Observations that the state should “*facilitate the initiation of contact proceedings for all children separated from their parents and siblings, including those in long term residential care.*”¹⁸

Civil Legal Aid – Non family

Alternatives to Civil Litigation

NICCY believes that complaint and Ombudsman schemes can provide redress sought in an effective and timely manner. However, a resolution through such schemes is not always possible. With regards to children, we would be concerned that in many instances they will not know of such schemes, how to access them and may not be able to go through the process. Legal advice and assistance would be required for children to be able to access justice through such methods.

¹⁸ CRC/C/GBR/CO/4, 20 October 2008

Furthermore, such mechanisms are under increasing financial pressure and some have had to reduce the service offered as a result. NICCY would therefore be concerned that they would not have the capacity to deal with a substantial increase in demand for their services. The Department must ensure that the ‘advice deserts’ which were created in England as a result of legal aid reforms are not replicated in Northern Ireland.

Judicial Review

As stated above, the Commissioner does not agree with suggested classification of Judicial Review as a second level priority in access to justice. As Judicial Reviews are the mechanism through which the decisions and actions of public authorities may be challenged, they are essential for access to justice. Their importance is set out succinctly by Lord Neuberger in the review report and he also highlights that “*the fact that members of the executive know that they are subject to judicial review helps to ensure that they carry out their job properly.*”¹⁹ The Department must therefore be alert to the risk that a limitation on the ability to challenge the decision of a public authority could in fact lead to a failure to carry out their job properly.

NICCY would be very concerned by any attempt to introduce a “no leave, no fee” regime in Northern Ireland and note that while the review considered this, it is not proposed.

Should the Department wish to pursue any of the review’s numerous recommendations regarding Judicial Reviews, there must be full public consultation including with children and young people and detailed analysis to ensure that these will not act as a deterrent to legal professionals in bringing Judicial Review proceedings necessary to ensure children’s access to justice.

NICCY were pleased to note that the review recognised the contribution independent bodies can make to public interest litigation. NICCY would support the wider use of protective cost orders so that bodies with expertise in specific areas are able to seek to assist the court through interventions, without a fear of costs orders.

We note with concern the recommendation that all Judicial Review certificates should be subject to further assessment by the Legal Services Agency once the Respondent has

¹⁹ Para 21.12

served their evidence.²⁰ NICCY does not support the implementation of any proposals which would result in a delay in proceedings. NICCY would refer the Department to *MP's (a minor) Application*²¹ where the child was detained in the Juvenile Justice Centre pending the outcome of the Judicial Review. Any additional step in proceedings which could lead to a delay cannot be accepted.

The Scope of Civil Legal Aid

NICCY was disappointed that Special Educational Needs and Disability Tribunals matters were not included with the proposed civil legal aid categories. Such matters are of vital importance to children and key to the realisation of their rights to education²² and non-discrimination²³. NICCY would again draw the Department's attention to the Child's Rights Impact Assessment carried out in England where one young person who appeared at an education hearing stated *"it felt really intimidating cause you know they are all sitting there facing me and I didn't really say much and I cried"*.²⁴

NICCY note that exceptional funding may be available, however this measure is not sufficient to allay concerns. NICCY have very real concerns as to how children could access such funding and furthermore that such decisions have no formal right of appeal. In this respect, NICCY consider that the review has failed to adhere to the terms of reference by safeguarding the interests of the vulnerable.

With respect to suggested amendments to the scope, NICCY would remind the Department that in many cases, for example debt matters, the child may not be a party to the proceedings but their rights will be impacted by the outcome.

Conclusion

As noted above, NICCY is concerned that the rights of children and their access to justice will be severely diluted with the implementation of some the review's recommendations. NICCY understand that the Department is under financial pressure, however efforts to

²⁰ Para 21.23

²¹ 2014 NIQB 52

²² Article 28 and 29 UNCRC and Article 2, Protocol 1 ECHR

²³ Article 23 UNCRC and Article 14 ECHR

²⁴ Page 8, Legal Aid changes since April 2013 – Child Rights Impact Assessment', September 2014, Office of the Children's Commissioner, England

address the legal aid deficit cannot impact upon the rights of children or their ability to ensure access to justice.

NICCY consider that should the Department wish to implement the recommendations made in the review; full public consultations and equality impact assessments will be required. Indeed, the review itself recognised the need for further consultation prior to the implementation of recommendations. The Department should also engage with NICCY at the earliest opportunity in respect of any recommendation which will impact upon children's access to justice.