EDITORIAL

Another special issue appears within these pages. The theme is *Access to Justice and Legal Aid Reform*. Two broad and interrelated subjects are dealt with. First, is the Civil Justice Review, discussed in the first two articles of this collection. Secondly, there is the reform of Legal Aid, discussed in the remaining four articles. It should not be assumed that Legal Aid reform is a more important topic. The preponderance of articles dealing with that topic mainly reflects the fact that more is currently happening in that field with the recent publication of the draft Access to Justice (Northern Ireland) Order 2002.

The two reports of the *Civil Justice Reform Group*[1]advised against the adoption of *Woolf* style judicial case management in Northern Ireland. This was essentially because it was felt that this would increase costs by "front loading" cases with unnecessary interlocutory proceedings. There was no need to do this because most cases settled anyway and there existed in the County Courts a satisfactory "light touch" form of judicial case management through the Certificate of Readiness. The two articles on the Civil Justice Review offer different perspectives on the theme of judicial case management. The first article, by Brian Sherrard, explains why *Woolf* style judicial case management was rejected for the High Court in particular, and the second, by His Honour Judge Hart QC, describes, *inter alia*, the unique contribution which the County Courts in Northern Ireland have made to case management.

Then the action moves to Legal Aid. The first two articles, by David Capper and Richard Moorhead, were written before publication of the draft Access to Justice Order. The former considers the two principal suggested substitutes for Civil Legal Aid in personal injury cases, namely conditional fee agreements (CFAs) and the Contingency Legal Aid Fund (CLAF), and makes the case for the retention and expansion of the Legal Aid Scheme, albeit managed by a different entity than currently. The latter is a broad critique of CFAs as they have operated in England and Wales. It provides some context in which the current debate on financing personal injury litigation may be set.

As a result of the draft Access to Justice Order it is not likely that any kind of CLAF will be introduced in Northern Ireland. Articles 41-42 allow for the establishment of private "litigation funding agreements", under which an individual or body could fund advocacy services for the benefit of others. So one of the crucial recommendations of the Legal Aid Advisory Committee, that a CLAF be launched with a significant sum of public "seed money", has been rejected. This does not of itself mean that "litigation funding agreements" would fail but the rejection of two other Legal Aid Advisory Committee recommendations almost certainly will. The first of these was

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[1] The interim report was discussed in D Capper, "Keeping Woolf from the Door – the Reform of Civil Procedure in Northern Ireland" (1999) 50 *NILQ* 434; the final report in D Capper, "Final Report of the Civil Justice Reform Group – Still Keeping Woolf from the Door" (2000) 51 *NILQ* 619.

that CLAF would need to operate by way of an accretion to costs paid by losing defendants, instead of a deduction from damages paid by winning plaintiffs. The Committee's concern here was that "adverse selection" would kill CLAF because litigants with good cases would take the risk of losing, CLAF would end up supporting weaker cases, and that greater deductions would have to be made from damages to maintain solvency. Together with the rejection of the other recommendation, that the costs of winning defendants be paid from the Fund only exceptionally, these proposals would probably guarantee CLAF's demise within a relatively short timescale.

This comprehensive rejection of CLAF, while still paying lip service to it, probably represents a strong steer towards CFAs. An enabling power to introduce CFAs is included in articles 39-40 of the draft Order but the Government may well hesitate before it tries to make CFAs the standard way of financing personal injury litigation in Northern Ireland. There is widespread opposition to CFAs in this jurisdiction and an ad hoc committee of the Northern Ireland Assembly investigating the matter may express negative views. The Northern Ireland Affairs Select Committee, while not currently examining Legal Aid in Northern Ireland, produced an interesting report on the subject last year and may not need much encouragement to rekindle its interest. In this context it is worth pointing out that the Scottish Parliament, which unlike the Northern Ireland Assembly has power to legislate in this area, appears to have set its face firmly against the adoption of CFAs.

If CLAF is rejected and CFAs are not introduced the only way forward may be to use the powers contained in articles 10-20 of the draft Order to make better provision for personal injury cases through Legal Aid. Hence the *Funding Code* may have to provide for standard personal injury cases, unlike the equivalent code in England and Wales. One argument for doing this, which does not come from the "no alternative" perspective, is that Legal Aid has been so badly managed in Northern Ireland that its potential may be unknown. Should the Legal Services Commission prove to be the strong managerial body almost everyone hopes it will be, it might be able to manage the current Legal Aid Scheme and provide a service superior to anything CFAs or CLAF could offer.

An issue which does not loom large in the succeeding pages, and which has played only a small part in the Legal Aid reform debate, is the effect of the Human Rights Act 1998 and the European Convention. At the time of writing the decision of Kerr J in *In the matter of an application by Jacqueline Lynch for judicial review*[2] is hot off the press. In that case the applicant sought judicial review of a decision not to grant her Legal Aid for defamation proceedings she was taking against a newspaper and a monthly magazine. In denying the application Kerr J examined Strasbourg judgments indicating that Article 6 access to justice rights were far from absolute. He dismissed the application largely because he believed that the particular libel case the applicant wanted to bring was not one she needed legal representation to present effectively. He acknowledged the difficulty but believed that the assistance of the court would be sufficient for the issues in dispute. Interestingly his lordship's judgment relied rather less on

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[2] High Court, judgment delivered 18th June 2002.

Strasbourg decisions which suggested that a state had a very wide discretion in setting public expenditure priorities. These authorities suggested that a blanket denial of Legal Aid for defamation cases was a legitimate step for the state to take but Kerr J did not go this far in his judgment. This might suggest that the blanket exclusions of Legal Aid from certain categories of civil cases may need to be re-examined. Given the likely introduction of a *Funding Code* encompassing a broader range of considerations relevant to the grant of Legal Aid a better way of proceeding might be to allow a discretion to grant Legal Aid for currently excluded case categories, albeit affording those categories relatively low priority in the fixed budget governed by the *Code*.

But Civil Legal Aid is about much more than just money recovery damages claims. There is a wide range of tribunals, still not expressly brought within the Legal Aid Scheme despite the power contained in article 12(6) to add to the areas covered. Linked to this area is social security and the other areas of work currently undertaken by the voluntary advice sector. The article by Les Allamby considers what implications current reform proposals might have for this sector.

Finally the article by Judge David Smyth QC considers the potential future for Criminal Legal Aid. The draft Order does not say much, apart from the abolition of the "Appropriate Authority" and the standardisation of fees, but there are a few hints as to more radical reforms for the future. So this article goes on to consider the experience in Edinburgh and the West Midlands with Public Defender schemes.

Not much has happened to implement the reforms proposed by the *Civil Justice Reform Group*, apart from increases in the monetary limits of the Small Claims Court and the District Judges' civil bill list. The most noticeable feature of the draft Access to Justice Order is how many decisions are left to delegated legislation. The devil is in the detail and many issues remain unresolved. It is hoped that this collection of articles makes a real contribution to debate in these areas.

David Capper