Access to Justice Review Part II: Mr Colin Stutt

19 November 2015

Members present for all or part of the proceedings:
Mr Alastair Ross (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Stewart Dickson
Mr Seán Lynch
Mr Alban Maginness

Witnesses:
Mr Colin Stutt Review of Access to Justice

The Chairperson (Mr Ross): Colin Stutt has come to brief us. Colin, you will be aware that Hansard is recording the session and that it will be on the Committee website in due course. When you are ready, you can brief us, and then we will open up to questions.

Mr Colin Stutt: Thank you very much for inviting me back to talk to you again now that the report has been published. It was very good to see several members of the Committee at the access to justice conference that Ulster University organised a couple of weeks ago when I presented some of the main recommendations in the report. As you know, it is a very lengthy and wide-ranging report that has a raft of connections with the work of the Committee. I was interested to hear just now that Sir Brian Leveson is coming over next week. I looked at his report on improving criminal justice, which came out while I was starting my report. It seemed to me that almost everything he said about the potential for improvement in criminal justice in England and Wales had a degree of relevance in Northern Ireland, so I think that there is a lot of common ground in all these initiatives.

I am in your hands for today. Rather than summarise the executive summary or the 150 recommendations, which would be better left to a question-and-answer discussion of the topics that particularly interest you, I thought that I would say a word about the future plans and implementation, because the easy part of reform processes is coming up with ideas and proposals; the hard part is delivering them. There are some important challenges here, and there are, in my view, some lessons to be learned from the past. In Northern Ireland, quite a few reform initiatives, especially on legal aid, have been proposed over the years and a lot of work has been done. I am thinking of financial eligibility reform, alternatives to money damages cases, and the question of a funding code for Northern Ireland. All those projects were proposed, they generated a certain momentum and enthusiasm and progressed a certain distance, but then, for one reason or another, did not see the light of day. There is always the danger of good proposals ending up gathering dust on a shelf.

Having worked a lot in England and Wales on legal aid reform, it seemed to me that the implementation timetable is often different. Some reforms in England and Wales were introduced over a pretty tight timescale, even in controversial areas. Sometimes those reforms did not go very well,
but, broadly speaking, there is often a longer implementation time and a longer period of general engagement and consultation consensus-building in Northern Ireland, which is a good thing in principle, but it will not necessarily lead to a smooth implementation. For example, on the Crown Court remuneration changes there were two years of engagement, but, ultimately, there was a major judicial review, so sometimes one has to have a slightly more focused and driven timetable for reform.

One of the lessons learned after the first access to justice review was that it is easy to produce a long list of recommendations. The first report was excellent. It was very wide-ranging, and a raft of recommendations of different shapes and sizes was put on the Department's desk to deal with. However, it is hard to plan and manage that process as one exercise. In my report, particularly in the last two chapters and having gone through all the different areas and recommendations, I tried to say that, instead of treating this as one whole thing that has to be introduced in its entirety and needs to go on a particular track, let us divide up all the recommendations on each subject area, look at the legal aid changes and the justice changes, look at what can be introduced without legislation or new technology, look at what needs a longer timescale, and look at which things are solely the responsibility of the Committee and the Department and which cut across other Departments and need a broad consensus. I tried to order the changes and make some suggestions about the implementation approach.

Overall, it seems to me that there are three particularly big challenges that we need to think about on the way forward. Of course, everything that I say is predicated on whatever decisions are made following consultation. The Department is consulting on my report up to February. That would not be binding on anyone, and it remains to be seen what will be taken forward and what will not.

The first challenge is to make sure that the access to justice reform programme is a single coordinated and joined-up reform programme. As soon as the consultation on my report is finished, I hope that it will morph into a single coherent set of reforms. You have the recommendations in my report and other initiatives from the Department. It needs to be one coordinated joined-up plan for reform of legal aid and the courts rather than free-standing separate initiatives. The second major challenge is the budget. I make some comments in the report about the history of determining the budget for legal aid in Northern Ireland and how, in the past, there has been a tendency for rather unrealistic budgets to be set for legal aid that were never going to be achieved, and then for in-year adjustments to be made to balance the books year by year. Once you get into that cycle, it is very difficult to break. I hope that, once there is a view about the nature of the reform programme, there can be a clearer and more realistic process of finalising the budget for legal aid from 2016-17 onwards at a level that is reasonable and deliverable. Thirdly, the process of implementation needs to be more driven and with a stricter timetable than perhaps has sometimes been the case in the past. Once there is agreement about where we are heading and about the budget, the consultation, which is essential, can, if you do not want to do that proposal, concentrate on another way of making the same savings or reaching the same result, rather than what has tended to happen in the past when there have been reform proposals. They reach a point where there are difficulties and it is controversial and the reform runs into the sand. That more driven approach, once you have the building blocks of the budget and a clear, coordinated reform plan, is what would help.

The stakes are very high, because, if the reforms do not come about and things run into the sand, one of two things will happen. Either there will be some other political solution and money will be found from somewhere to keep the legal aid scheme going — that is always possible; you never know, but it is not something to rely on — or there will be a bit of a crisis about the funding position and then, further down the road, one might be faced with having to make urgent savings on the legal aid budget. Almost the only way to make fast savings on the legal aid budget is to make major cuts, and I do not think that any of us wants to see crude cuts to the scope of the scheme in the same areas as in England and Wales.

The positive side is that, if we get the implementation right and the reforms proceed effectively, we will have, in some cases, increased access to justice where it did not exist before. We will have a more efficient legal aid scheme, but we would still have a world-class, comprehensive legal aid scheme and good access to justice in Northern Ireland. That is the aim that we can all move towards.

**The Chairperson (Mr Ross):** Thank you very much. On the issue of legal aid, is that the area that you think is in most need of reform in the justice system in Northern Ireland?

**Mr Stutt:** No. The wider justice system is equally, if not more, important. You will see from my report that I spend as much time making suggestions on the justice system as a whole as I do on legal aid, but it is a question of different processes. Whereas, in the presentation a couple of weeks ago I
divided the report into a blueprint, on legal aid I can be specific, giving fairly detailed ideas about what you could do on civil legal aid, criminal legal aid and so on. When it comes to the broader strategic questions of justice reform, I referred to some of my recommendations as more of a smorgasbord of ideas that you can take out — more of a discussion of the general principles, like the move away from over-reliance on the adversarial dispute resolution model, which I see as feeding into initiatives like Lord Justice Girvan’s review of civil and family justice, rather than being an end in itself.

The Chairperson (Mr Ross): On the legal aid issue, before we move on to other areas, you said in the executive summary of your report, about remuneration levels, that:

“the objective should be to pay the lowest rates possible consistent with securing good access to high quality legal services from well run and efficiently structured providers.”

How far away are we from that, in your view?

Mr Stutt: That is about the general policy on remuneration. In my report I was not tasked with making recommendations about the reform of the legal profession, so I did not come up with a proposal for exactly what has to be done. It is not an easy question to answer. I wanted to start a debate about the principles of remuneration and to see whether there was agreement about the general approach, which is that, to some extent, it is for the legal profession to decide how it wants to organise itself. However, the state should not be paying more because the legal profession has chosen to organise itself in a particular way; the state should pay whatever is reasonable for an efficiently run profession. Exactly what that looks like is a question for others to answer.

The Chairperson (Mr Ross): What conversations did you have with the legal profession? One of the criticisms from the Law Society and the Bar Council was that perhaps they were not as involved in the review as they thought they might have been and were not able to interact with you during the drafting of the report.

Mr Stutt: I do not agree. We had a series of meetings. In fact, the Bar Council and the Law Society were extremely helpful and organised a series of meetings with practitioners. There was a high degree of engagement with barristers and solicitors through a series of discussions. I was very interested to talk to young lawyers about the issues that they faced, as well as to more experienced practitioners. There was a degree of engagement, and there were also detailed written responses from all the main stakeholders. I realise that some of the things that I have been saying are controversial and difficult messages, but I am trying to be as objective as I can, although I realise that they will not be to everyone’s liking.

The Chairperson (Mr Ross): We have just had our innovation seminar, which you sat in on, on digital solutions in justice. There are only one or two mentions in your report of online dispute resolution. You mentioned alternative dispute resolution, but there are only a couple of lines on the potential for online dispute resolution. Is that because you do not think that there is merit in looking towards online dispute resolution in Northern Ireland or because you think that it is too far away to be relevant over this period?

Mr Stutt: I have to start with the caveat that I am not an IT expert — ask my children; they will tell you. I am not the world's most technologically minded person. I certainly have nothing against online dispute resolution or digital technology. I would, however, sound one or two notes of caution. First — I think that this came up in the discussions at the seminar — the areas where legal aid is most active, particularly criminal and family justice, are not necessarily the areas where there is most potential to revolutionise the way justice works through digital systems. Digital systems around the world seem to concentrate on improving private law, such as low-level damages cases or certain types of matrimonial dispute. If the feeling is that with the digitalisation of justice all the problems of legal aid will go away, I would question whether that is a safe conclusion.

My overall feeling is that there is enormous potential for greater efficiency in the justice system. One of the ways of achieving that is much more digitalisation of how courts work, but that is not the only way. A lot of the suggestions that I make on listing and doing business by email and telephone rather than in oral hearings — that is, for litigants in person — can be progressed, and should be progressed, using existing technology, although these things may be helped by digitalisation, and if there is a business case for that, splendid. Doing business by email does not require a whole new computer system. It just means that where you can sort things out by an email exchange, do that, and do not bring everybody to court for every hearing. I suppose that I have an instinct for looking first at things
that can be done without major IT investment or primary legislation but with the tools that we have. I
would not want to delay those things, but there may be much more radical changes round the corner,
which I certainly would be all in favour of.

The Chairperson (Mr Ross): I hope that it would not be government IT investment, because when
government tries to run IT systems inevitably they are terrible.

Mr Dickson: Thank you. Essentially, what you are presenting to us on access to justice is an agenda
for change. Change in human relations is always very difficult for people to face up to, to cope with,
and to manage.

One of the routes that many organisations will go down when they embark on a major change
exercise like this is to appoint some form of change management team or organisation to overlook all
this. Maybe you do not accept at all that there would be a need for some form of change management
supervision. If there were to be some oversight of change management, should that come from
within the Department or should it be external with regard to encouragement and support but also driving
through the change?

I have a couple of other questions, but I just want to deal first of all with the aspect of this being seen
as a massive change and people’s difficulty in coping with change.

Mr Stutt: I can see that. That process, which is not one that I looked at in detail, is interesting. To be
honest, I suspect that the Committee would have a better idea than I would about what sorts of
agencies or external or internal people would be best able to oversee this type of reform programme.
I would perhaps like to duck the question about how it is structured. It is very much a question of how
things will work best on the ground here, which the Committee will probably have a much better
handle on.

It is important not to see the proposals, as I said, as one monolithic, massive change; you can have
policies and projects with different timescales and degrees of impact. Therefore, I would not want
everything to be delayed while you set up some change management process as a precondition of it
all.

Mr Dickson: Exactly. Therefore, I think that the point that I was going to propose, which I think you
actually suggested, is that you have to plot or map where all those changes are in the system; what
can go now, what will happen in the future, and what requires more discussion. That inevitably
requires someone to take the overview and then plot or map out where all those interactions will take
place.

Mr Stutt: Absolutely, yes.

Mr Dickson: I know that the Chair is very enthusiastic about online dispute resolution, but I think that
you have exercised a helpful note of caution with regard to it. Many people, when they agree to deal
with an issue, like to deal with a human face, whether that happens to be the human face of an
expensive lawyer or, alternatively, someone who is trained in the niche area that deals with a
particular concept. I come from an employment mediation background, or, to put it formally, a
conciliator in employment issues. There is merit in digitising and further enhancing the electronic side
of the justice system with regard to how documentation passes round the system, but, when looking at
alternative dispute resolution, should we look more at ensuring that those who deliver the dispute
resolution are best skilled to deliver it?

Mr Stutt: Yes: I would certainly agree with all that. I agree with the need for human interaction. That
is the strength of mediation as a tool: it is very much a way of having a forum in which the client can
express their legal problem but also the emotions underlying the problem. The mediator can help to
sort one out from the other and find common ground. I do not see the digital imperative as doing away
with such interactions.

Mr Dickson: It is, however, a very useful tool in preparing for a mediation meeting so that people can
set out their arguments and issues electronically if that is the way that the system is. Ultimately, those
issues have to brought in front of or with someone either separately or with everybody discussing
whatever the issue happens to be.
Mr Stutt: Yes. It is similar in the court system itself. I am not saying that you would do away with oral hearings; you would have them when you need them. If you need to cross-examine a witness and determine guilt or innocence or which expert to believe, you may have to have an oral hearing for that with all the human interaction that it requires. It is really in the build-up to that and a system that ensures that you do not bring everybody together unless you really need to where the most savings can be made.

Mr Dickson: That brings me back to the original question about change. All of that is change, and the people with whom you are talking about doing those things are probably some of the most resistant to change. Is there a need to educate and expand on the reasons behind what is going on so that people understand why they need to be engaged in this process to achieve better outcomes for individuals but also more effective and efficient outcomes?

Mr Stutt: I am sure that that is right.

Mr McCartney: It is challenging for any big organisation and its structure to undergo change or review. I was shocked to hear you, in your opening remarks, say that we have to be careful that good proposals do not become part of a process and begin to gather dust. Often in big reviews there are extra recommendations, but by the time they have filtered down through the organisation — in this instance legal services — some of the better recommendations are undermined or not serviced properly. What are the key recommendations that we should be mindful of that will not undermine the idea that access to justice has to be kept at a sustainable level?

Mr Stutt: That is an interesting one. Because I tried to cover as much ground as possible, it is difficult to say. There is an executive summary that tries to bring the main points together.

Certain things are particularly important. You can separate the justice reforms from the legal aid reforms in their timescale and significance. One of the most important things on the justice side is the overall strategic direction of travel. If a consensus develops that we need to move away from the pure adversarial model, setting that direction of travel is the most important thing for my report. How that will work in how the detailed rules of court should look and what guidance should change is better dealt with by Lord Justice Gillen or whichever process it may be. From the justice front, that strategic overview is at the heart of the thing.

For the legal aid reforms, clearly there is a lot of importance in, and some of the most radical proposals are on, civil legal aid, and a lot of that the Department is already taking forward in the consultation on money damages cases. That is an important area, but the family changes are at least as, if not more, important. Two really key proposals are on the public law side of family, which is care proceedings and so on.

Looking at the questions of the structure of hearings and the number of people represented at them, the tandem model has the lawyer and guardian always acting together. Some of the things that we take for granted as part of the adversarial system in public law proceedings need to be challenged. I just hope that there is a process that can ask, "Do we need to have these really important cases dealt with in quite this way?". I would hope to see that process started.

On private family law, two related issues are important. One is to bring mediation to the forefront of dispute resolution in family, not as the only game in town but as part of the mixed economy. We have had the catch-22 situation for years that there is not a fully developed mediation service because there are not mechanisms in the scheme to service it. We do not want to introduce mechanisms in the courts or legal aid until there is a developed service to provide it. More realistically, however, we can change the rules and set up a presumption that mediation will be provided unless there is a good reason. If there are no mediators available, that is a good reason not to proceed in that way.

Bringing mediation to the forefront is important as is changing the nature of family legal aid away from a service that funds representation in court processes towards a service that resolves disputes. If we can somehow repackage what we provide here, to say, "Your job as the family lawyer is to resolve this problem, whether it is through direct solicitor negotiation, mediation or early neutral evaluation", rather than, "We are funding you to take this dispute with the courts". I think that that would be a major sea change, which could really make a difference to the way that things are resolved for clients.

Mr McCartney: Where should the dynamic for that change come from? Is there a temptation that, by bringing in composite fees, you can force people into that, or should there be a dynamic from the
wider structure to see resolution of the dispute before it becomes a court matter? How do we create that dynamic?

**Mr Stutt:** You are right; there is a strong interface between that approach and the way services are remunerated. If you pay people for pursuing legal steps, it is not surprising that more and more legal steps are followed. If you have a standard or composite fee, there is an immediate incentive to resolve things at the earliest possible stage. Of course, there are dangers in that as well; we have to recognise that. I think that the work that is already going on to move towards standard fees in family law will push in the same direction. As long as we are aware of the risks, it will be a positive change.

**Mr McCartney:** Given the size and nature of the recommendations, to dumb it down to one or two recommendations is difficult. England and Wales went through a similar process of review, and there have been criticisms around access and the quality of the system. Do you have a clear view of what recommendations were not followed there that led to that impact?

**Mr Stutt:** A lot of things happened in England and Wales that I am not recommending here. Obviously, things went horribly wrong with the old-style conditional fee agreements in England and Wales. It is very good to not have them here, to be able to see what did not work and to know to avoid that. There are two big things in people's minds. The impact in England and Wales of the general withdrawal of legal aid from private law family cases has had an enormous impact on how the family courts work. There were enormous numbers of litigants in person muddling through without proper support. There is a good consensus here that, if we can avoid that happening in Northern Ireland, it will be a good thing. In family law, getting a bit of help early on to diagnose your problem, or the use of a triage service to, at least, point you in the right direction, is as important as anything. I think that that is a point of difference.

The other thing that is happening in England and Wales at the moment is that the tendering process is going on about crime. It is looking at reducing the number of providers, and it looks as though that will run into further litigation and create enormous problems. In my view, it is not a route that it is sensible to go down here, in a smaller jurisdiction.

**Mr McCartney:** When the Bill on the Legal Services Commission was going through the Assembly, one of the issues was about forecasting the budget. Are you satisfied that the new structure will ensure that the forecasting of budgets will be better?

**Mr Stutt:** Yes. The Department has been very strong on that. It was one of the recommendations of the first access to justice review, and I think that the forecasting systems, as far as I can tell, are in shape. Problems in the past with the budget have not been so much with forecasting but in the way that budgets are set. That is typical of government; it is very understandable that, when you set a budget for anything, you start with the baseline of the previous year and adjust it. So, I do not think that all the budget problems in the past have been down to poor forecasting, but I do think that the forecasting systems seem to have improved.

**Mr McCartney:** Thank you very much.

**Mr Lynch:** In your opening remarks, Colin, you said that, on the positive side of the report, we will get increased access to justice. You seem fairly confident of that.

**Mr Stutt:** There are many recommendations, and I acknowledge in the report that some will improve access to justice; some will maybe make savings while maintaining access to justice; and some will make savings with a loss of access to justice. Any time you change any rule, there will be some winners and losers. I am not saying that it is all win-win and that you save lots of money and get a better system; it is a balance. Having a sensibly structured regime of conditional fees would be a better system because it is then a system for the whole population of Northern Ireland, not just one that is accessible by the poorest and richest. There are areas like that where one can see positive improvements in access. There are also proposals like setting up a separate fund for innovation in access to justice out of the savings, where you could look at targeted initiatives on particular tribunals, client groups or types of dispute and use that money in a way that would not be done under the existing system. I hope that, overall, it is a balance, but it can only be a balance between competing demands for finances and maintaining access.
Mr A Maginness: Thank you, Colin, for your report. It is very interesting. Can I discuss money damages? You have come to your conclusion on conditional fees and self-funding in relation to a generality of claims that would be made in the court, particularly those that are not funded by legal aid or money damages that would not, in the future, be covered by legal aid. Is it your conclusion that this is probably the best system, despite all other systems that you have looked at?

Mr Stutt: Yes. I tried to go into some detail about the different options, including looking at what is happening in England, particularly about what not to do from the English experience, and to avoid looking at the future of money damages solely through the prism of legal aid and whether they should be taken out of scope. I believe that it should not be necessary for the state to subsidise money damages claims in generality. There are various ways in which you can achieve that. If I were looking at this 10 years ago, when the self-funding mechanism in legal aid was being explored in this jurisdiction, that might well have been the best way to go. If that had been done, we would know by now whether it works. However, given the experience we now have of what has happened in other jurisdictions — we have also seen that, in Scotland, they are going down a similar route to England and Wales — a convincing case has not really been made for why Northern Ireland should not have that form of dispute resolution funding available. In my judgement, that was the best way forward. Obviously, that is now part of a specific consultation by the Department to see whether there are other options or other ways of doing it. There are quite a few underlying policy issues as to how you structure conditional fees, such as whether you allow success fees for road traffic cases, what the maximum success fee should be and what the safeguards should be. That will all come out in the consultation.

Mr A Maginness: In my experience — I have put this point to you before — as far as legal aid is concerned for money damages cases, there is a call on the legal aid fund in only a very limited number of cases. I am wondering what the overall cost to the legal aid fund is as far as money damages cases are concerned.

Mr Stutt: I believe that the figure is just over £2 million a year. The detailed figures can be found in the Department's consultation. It is not a very large proportion of the budget, but it is a significant amount of money. If you look across the board at crime and family and civil non-family, and you look at what areas there are alternatives to legal aid in, you are driven to look at civil non-family and to say, "Well, actually, looking at access to justice in the round, it's civil non-family where you can find private funding mechanisms to preserve access to justice". When you look at crime, you cannot really find private mechanisms, so it has to be legal aid. Therefore, the priority should be keeping legal aid for the areas where there is no alternative and to let the private market cover the things that it can. All these things are the least worst or the best balance.

Mr A Maginness: As far as conditional fees are concerned, are you essentially talking about a "no win, no fee" model?

Mr Stutt: Yes, and one of the ironies is that, talking to practitioners, a large number of cases in Northern Ireland are brought on a "no win, no fee" basis, at least in a practical sense. In the minority of cases that are unsuccessful, most solicitors will not sue their clients for costs, and I presume that they will waive their fees, so that is already operating as a "no win, no fee" agreement. However, it perhaps needs a more definite legal framework; otherwise, under the existing system, that type of arrangement could be challenged as being champertous.

Mr A Maginness: The experience in England, as I understand it and correct me if I am wrong, has not been a particularly happy one as far as "no win, no fee" is concerned, particularly with the level of success fees arising from those cases.

Mr Stutt: That would be an understatement in terms of the England and Wales system as it operated before the Jackson reforms. That is because, under that system, the client had no interest in the level of fees incurred and so it was allowed to run wild and you had this costs war of insurers challenging all the principles of all these additional costs being added on top. I am not proposing that that model should be adopted in Northern Ireland. I am proposing the post-Jackson model but with some specific safeguards and modifications to fit the situation in this jurisdiction.

Mr A Maginness: Are you proposing, as well, the cost shifting in relation to the outcome of the case, where an unsuccessful claimant brings a claim that there is no call on them by the defendant?
Mr Stutt: Yes. That is the system that is often referred to as qualified one-way cost shifting (QOCS). That is an essential part of the package. We may have had this discussion at the previous meeting. From an access to justice point of view, if you take a client with a difficult case, typically clinical negligence, and the case turns on the expert evidence both ways, for that client, pursuing a claim in good faith, to face ruinous costs — let us assume that they have not got legal aid and cannot get private insurance — is unjust. That is a vast barrier to proper access to justice. So, I think that interfering with the cost-shifting rule, in a measured way and making sure that fraudulent claims are still penalised, which is the solution that Rupert Jackson came up with, as did Lord Justice Taylor in Scotland, would be the right solution in this jurisdiction and an essential part of the package.

Mr A Maginness: You would exempt road traffic cases from success fees. What is the rationale for that?

Mr Stutt: That is obviously a proposal that will be looked at in consultation, so it is by no means —

Mr A Maginness: I appreciate that, but what is your rationale for that exemption?

Mr Stutt: The reason for introducing conditional fees is to ensure that there are no gaps in access to justice for people who cannot bring meritorious claims. Road traffic is the highest volume area. It is also, in general, one of the most straightforward areas of personal injury. In very many cases, liability is not an issue and solicitors will recover their costs anyway. We have also seen some cases in England where, if you make success fees possible in that category, lawyers will claim them to some extent. Even if you say that the success fee cannot be more than whatever percentage you specify, there will be a tendency to claim that success fee in most cases. There is a balance to be struck there, but the consultation needs to question whether there is an access to justice problem in road traffic cases at the moment; in which case, do you need success fees? If you do, then yes, of course —

Mr A Maginness: Is that because of the insurance market? A number of premiums have an element of legal costs. Is that your reasoning?

Mr Stutt: The general aim of what I propose is not to require legal expenses insurance for the claims. One of the Jackson objectives was to remove the number of middlemen involved in the process. Similarly, these reforms are not predicated on an insurance industry moving in to help manage this. If you have protection from costs orders, you then largely do away with the need for insurance.

Mr A Maginness: You were talking about the merits test in relation to legal aid and, in particular, in relation to public law. You said that as far as the merits test is concerned, it should be at the level of 50% before legal aid could be granted for a public law certificate in a public law case.

Mr Stutt: Are you talking about judicial reviews or family?

Mr A Maginness: No, family. That was my understanding of what you were saying in your recommendation.

Mr Stutt: No. I am sorry if that was not as clear as it could be. I have made quite a few recommendations about merits criteria. I am saying that one should try to move away from the historical system of having overall reasonable grounds criteria across the board and have criteria that are case-specific. The criteria that you apply in funding a judicial review are not the same criteria necessarily as those for funding a private family dispute or a public law family dispute. I am saying that it is horses for courses. For high-priority areas like, for example, getting a domestic violence injunction, you do not have to have a minimum of a 50% prospect of success. If it is for a damages claim that remains in scope, then you normally would expect at least a 50% prospect of success. I am saying that it is horses for courses there.

Mr A Maginness: You are not putting any limitation on public law cases as far as family is concerned. You are not suggesting that they should be outside the scope of legal aid; that is the point that I am trying to get at.

Mr Stutt: I am saying that public law family cases should remain within the scope of legal aid but also that, whereas at the moment the main participants have no merits test, there might be scope for having a merits test, though that would affect only a minority of cases. If a client is having their
children taken away by the state, clearly they must be represented under the current system. I would not want to affect that. At the moment, however, all parents have an automatic right to representation in these cases, and I would question whether there are some situations where not every party needs to be separately represented. I would want a residual power for those cases that you do not currently have. I would not want to change the way in which the great majority of those cases operate.

**Mr McCartney:** In part E of your report, you list some schemes that should stay within the legal aid system and some that should sit without: do you build exceptionality into any of these? I am looking at one example in particular, where you say:

"Contested and uncontested divorce proceedings should be removed from the scope of civil legal aid".

Would you not recommend an exception clause in any circumstance?

**Mr Stutt:** For all cases outside the scope of civil legal aid, there should be the power to apply on an exceptional basis. You have to have that as a safeguard to make sure that you are complying with human rights law. You cannot really have an absolute bar in any category. There is litigation on this in England and Wales at the moment; it is still pending in the Court of Appeal. The way that the exceptional funding system will have to work may be influenced by whatever the Court of Appeal says there. The matter of principle is that you have to have that exceptionality power.

**Mr McCartney:** I notice that some of the changes have to come through an Assembly affirmative procedure. We might need something to assist us in the future. I will pick one at random. The report says:

"Most injunction cases should be removed from scope".

Will there be a clear definition of what "most" means? Will there be categories of injunction?

**Mr Stutt:** Yes, my summary might not be helpfully expressed. I tried to make it clear in the rest of that chapter that, for civil non-family cases, in future, it would be more sensible to define what is in scope rather than what is excluded. You would not define injunction cases. It would be quite difficult to give a legal definition of that. You would define the high-priority areas that are within scope. I do not think that you would specify injunction cases, as a category, as a high-priority area. For anything that is not specified, you could still rely on exceptional funding.

**Mr McCartney:** So it will be clear what it is.

**Mr Stutt:** Yes.

**The Chairperson (Mr Ross):** Colin, thank you very much. I appreciate that.